

Locke Lord QuickStudy: Helpful New Guidance on Locating Missing and Nonresponsive Retirement Plan Participants

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It is important to note that, since this guidance was issued in the late days of the Trump administration, the Biden administration will likely review this guidance. It is not uncommon for guidance to be delayed, revised, and/or rescinded as part of the review process.

On January 12, 2021, the U.S. Department of Labor (“DOL”) issued new guidance on how employee benefit plans can connect with missing plan participants and retirees. This new guidance was released in three parts: a list of best practices for locating and tracking missing participants; a compliance assistance document describing the DOL’s missing-participant investigations; and a field assistance bulletin temporarily easing enforcement activities relating to ERISA violations relating to missing participants.

The DOL focuses much attention on missing participants because, “when plan participants and beneficiaries are ‘missing’ or unresponsive to plan communications...their benefits and retirement security are at risk.” This concern should be shared by plan fiduciaries since, if plans are unable to communicate with terminated participants or their beneficiaries, the DOL asserts that this can be the result of lack of prudent practices, including inadequate recordkeeping, ineffective communication, and faulty procedures for searching for participants and beneficiaries. The failure to maintain prudent plan administrative practices such as these is a common target for plan investigations and can result in fiduciary liability.

The COVID-19 emergency may exacerbate the situation and result in disruption of recordkeeping and search activities of employers, plan fiduciaries, and service providers who closed their offices, operate under social distancing, or work remotely. Accordingly, the DOL expects that the economic disruption caused by the pandemic could result in large numbers of workers losing contact with their employers and plans.

Identify “Red Flags”

The DOL has advised plan sponsors and fiduciaries that the following “red flags” are often warning signs or indicators of a problem with missing or nonresponsive participants:

- More than isolated incidents of missing or nonresponsive participants or terminated vested participants who have reached normal retirement age but have not started receiving their benefits;

- Missing, inaccurate, or incomplete contact information, census data, or both;
- No policies and procedures for handling returned or undeliverable mail or uncashed checks;
- Confusing or unclear participant communication, not written in “plain English”;
- Continued delivery of communications to known “bad addresses” without taking steps to verify the correct address and failing to use simple methods and resources to find replacement addresses; and
- Communications that fail to include predecessor employer or plan names (e.g., after mergers or acquisitions).

Adopt “Best Practices”

During the 2020 fiscal year, the DOL closed over 1,100 civil investigations of plans, which has allowed it to observe the processes and practices of many poorly run, as well as many well-run, plans. Based on this vast experience that spans plans of all sizes and industries, the DOL released a list of practices that have proven effective at minimizing and mitigating the problem of missing or nonresponsive participants.

It is important to note that not all of these practices will be appropriate for every plan. Fiduciaries should assess what practices offer the best results in a cost effective manner for plan participants. Additionally, not all best practices are necessarily appropriate for every missing or nonresponsive participant; the specific steps taken to locate a missing participant, or to obtain instructions from a nonresponsive participant, will depend on facts and circumstances particular to a plan and participant.

For plans that use third party record keepers to maintain plan records and handle participant communications, it is crucial that plan fiduciaries ensure the record keeper performs agreed upon services, and work with the record keeper to identify and correct shortcomings in the plan’s recordkeeping and communication practices.

Maintain Accurate Census Information

- Regularly audit census information and correct errors.
- Contact participants, both current and retired, and beneficiaries on a periodic basis to confirm or update their contact information.
- Include contact information change requests in plan communications along with reminders to advise the plan of any changes in contact information.
- Flag undeliverable mail/email and uncashed checks for follow-up.
- Maintain an online platform that participants can use to update contact information for themselves and their spouses/beneficiaries, and incorporate updates into the plan’s census information.
- Provide prompts for participants and beneficiaries to confirm contact information upon login to online platforms.
- Regularly request updates to contact information for beneficiaries.
- In the case of a change in record keepers or a business merger or acquisition by the plan sponsor, address the transfer of plan information and relevant employment records.

Implement Effective Communication Strategies

- Use plain language and offer non-English language assistance when and where appropriate.

- State upfront and prominently what the communication is about.
- Encourage contact through plan/plan sponsor websites and toll free numbers.
- Build steps into the employer and plan onboarding and enrollment processes for new employees, and exit processes for separating or retiring employees, to confirm or update contact information, confirm information needed to determine when benefits are due, correctly calculate the amount of benefits owed, and advise employees of the importance of ensuring that the plan has accurate contact information at all times.
- Communicate information about how the plan can help eligible employees consolidate accounts from prior employer plans or rollover IRAs.
- Clearly mark envelopes and correspondence with the original plan or sponsor name for participants who separated before a plan or sponsor name change.

Search for Missing Participants

- Search for missing participants regularly.
- Check related plan and employer records for participant, beneficiary, and next of kin/emergency contact information.
- Check with designated plan beneficiaries and the employee's emergency contacts for updated contact information.
- Use free online search engines, public record databases, obituaries, and social media to locate individuals.
- Use a commercial locator service, a credit-reporting agency, or a proprietary internet search tool to locate individuals.
- Attempt contact via United States Postal Service certified mail, or private delivery service with similar tracking features if less expensive, to the last known mailing address.
- Attempt contact via other available means such as email addresses or telephone and text numbers.
- If participants are nonresponsive over a period of time, use death searches (e.g., Social Security Death Index) as a check and, to the extent such search confirms a participant's death, redirect communications to beneficiaries.
- Reach out to the colleagues of missing participants or, for unionized employees, reach out to the union's local offices and through union member communications to find missing retirees.
- Register missing participants on public and private pension registries with privacy and cyber security protections (e.g., National Registry of Unclaimed Retirement Benefits).

Documenting Procedures and Actions

- Maintain the plan's policies and procedures to writing to ensure they are clear and result in consistent practices.
- Document key decisions and the steps and actions taken to implement the policies.

New Guidance on Plan Investigations Involving Missing Participants

As part of the guidance, the DOL issued Compliance Assistance Release No. 2021-01 (the "Release"), which outlines the investigative process and case-closing practices for regional offices of the Employee Benefits Security Administration under its Terminated Vested Participants Project ("TVPP"). The Release is intended to

standardize the investigative process relating specifically to missing participants in defined benefit plans and to facilitate voluntary compliance efforts by plan fiduciaries.

Investigations

DOL investigations focus on plans with systematic issues with plan administration, particularly issues related to keeping track of terminated vested participants (“TVPs”), and timely distributing benefits. The DOL may initiate an audit or investigation if a large number of TVPs entitled to future benefits are reported on a plan’s Form 5500, when a plan sponsor faces bankruptcy or is involved in a merger or acquisition, or when the DOL is contacted by participants who believe they are entitled to benefits but have not been provided the opportunity to claim their benefits.

Information Requested

When an investigation is opened, the DOL will request copies of the plan documents and any relevant amendments to determine the plan’s distribution rules, as well as census records and actuarial reports to understand the plan’s demographics. Investigators will examine the plan’s procedures for communicating with TVPs, spouses and other designated beneficiaries and will examine internal procedures and practices to determine whether the plan has taken sufficient steps to address missing participant situations.

Errors Identified

During the audit/investigation, the DOL will review the plan’s records and procedures to look for systemic issues in administering benefits of TVPs, such as errors in record-keeping and administration, and inadequate procedures for contacting TVPs nearing normal retirement age or when required minimum distributions are required to commence, for identifying and locating missing TVPs, and for addressing uncashed distribution checks.

Closing the Investigation

After reviewing the information received, the DOL will advise the responsible fiduciary of its findings and discuss appropriate remedies to the identified problems. Absent substantial errors or widespread fiduciary breaches, the DOL will issue a Voluntary Compliance (VC) letter and will give plan fiduciaries a reasonable amount of time to respond to the VC letter. If the plan fiduciaries provide appropriate remedies for affected participants and correct flaws in their recordkeeping, communication and missing participant procedures, the DOL will generally recite the corrective steps in closing documents and will not cite individual plan fiduciaries for specific ERISA violations.

Temporary Enforcement Policy Regarding the Participation of Terminating Defined Contribution Plans

The third, and final, piece of DOL guidance relating to missing and nonresponsive plan participants was a memorandum announcing a temporary enforcement policy relating to the use by terminating defined contribution plans (e.g., 401(k) plans) of the Pension Benefit Guaranty Corporation’s (“PBGC”) Missing Participants Program (the “Program”).

DOL regulations under ERISA provide a safe harbor for distributions from terminated individual account plans and abandoned plans on behalf of participants and beneficiaries who fail to make an election regarding a form of benefit distribution. This safe harbor generally requires that distributions be rolled over to an individual retirement account or annuity, although, in limited circumstances, fiduciaries may make distributions to certain bank accounts or to a state unclaimed property fund.

In 2017, the PBGC established the Program to hold retirement benefits for missing participants and beneficiaries in most terminated defined contribution plans and to help those participants and beneficiaries find and receive those benefits. In creating the Program, the PBGC cited multiple benefits, including:

- Benefits of any size can be transferred to the PBGC;
- Periodic active searches by the PBGC increases the likelihood of connecting missing participants with their benefits;
- Benefits are not diminished by ongoing maintenance fees or distribution charges;
- Transferred amounts grow with interest (at the applicable Federal mid-term rate); and
- Lifetime income options are available for balance transfers over \$5,000.

The Enforcement Policy

Pending future guidance, the DOL will not pursue violations under ERISA against either responsible plan fiduciaries of terminating defined contribution plans or administrators of abandoned plans in connection with the good faith transfer of a missing or non-responsive participant's or beneficiary's account balance to the PBGC in accordance with the Program rather than to an IRA or state unclaimed property fund. The temporary enforcement policy, however, does not prevent the DOL from pursuing violations under ERISA for failures to diligently search for participants and beneficiaries prior to the transfer of their account balances under the Program or for the failure to maintain plan and employer records.

- A plan fiduciary who chooses to participate in the Program must otherwise comply with the requirements of the aforementioned safe harbor, except that applicable notice to participants and beneficiaries must be modified to reflect the transfer to the PBGC, rather than to an IRA, bank or savings account, or state unclaimed property fund.
- Notices to participants and beneficiaries must state clearly that their account balances are being transferred to the "Pension Benefit Guaranty Corporation's Defined Contribution Missing Participants Program," and include the PBGC's website address and customer contact number.
- A plan fiduciary may also transfer to the PBGC the account balances of participants and beneficiaries who elected a lump sum distribution if that distribution was paid by check and the check remains uncashed after: (1) the "cash-by" date prescribed on the check that is at least 45 days after the check's issuance, or (2) the check's stale date if no "cash by" date is prescribed.
- A plan fiduciary may pay the PBGC's fee under the Program from the transferred account unless the plan terms prohibit such payment.
- Under the Program, a plan that does not elect to transfer the account balances of all missing participants to the PBGC may choose to notify the PBGC about the disposition of the account balances of all or some missing participants.

For assistance with reviewing your plan policies and fiduciary practices relating to missing and non-responsive

participants, please reach out to any member of our team.

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