



SLEVIN & HART, P.C.

Benefits Update

DOL Missing Participant Guidance

February 9, 2021

For several years, the Department of Labor (“DOL”) has been focused on the duty of plan fiduciaries to maintain current contact information for participants and to locate missing participants. On January 12, 2021, the DOL issued three new pieces of guidance regarding how plan fiduciaries should handle missing or nonresponsive participants (“missing participants”) situations:

- [Missing Participants – Best Practices for Pension Plans](#)
- [Compliance Assistance Release 2021-01](#)
- [Field Assistance Bulletin 2021-01](#)

Although this guidance does not have the force or effect of law, it provides useful insight on the DOL’s views on how plans should locate and distribute retirement benefits to missing participants.

Missing Participant “Red Flags” and “Best Practices”

The DOL guidance includes best practices for plan fiduciaries to follow with respect to missing participants. The guidance identifies four general categories of “best practices” that DOL views as effective at dealing with missing participants: (1) maintaining accurate census data; (2) implementing effective communication strategies; (3) using missing participant searches; and (4) documenting procedures and actions.

The DOL guidance also highlights certain “red flags” that indicate that a plan may have a problem related to missing or nonresponsive participants. These include a large number of missing participants, a large number of terminated vested participants who have reached their normal retirement age but are not receiving a benefit, incomplete or inaccurate participant census data, the absence of policies and procedures to contract missing or nonresponsive participants, and the absence of policies and procedures for uncashed checks.

Most of the best practices are common-sense measures that are consistent with prior DOL guidance regarding missing participant procedures, such as periodically contacting participants and beneficiaries to update their contact information. However, the list includes some new measures, such as attempting to contact missing participants through social media or reaching out to former colleagues of missing participants. The guidance is silent on whether the DOL would expect plan fiduciaries to exhaust all the suggested best practices before concluding that a participant or beneficiary is lost.

Compliance Assistance Release 2021-01

Compliance Assistance Release 2021-01 is an internal memo to EBSA Regional Directors that highlights the factors DOL auditors likely will focus on during an investigation regarding terminated vested and missing participants. The Release notes that the DOL generally looks for systemic errors in plan recordkeeping and administration that create a risk of terminated vested participants (“TVPs”) failing to enter pay status before death or excise taxes on required minimum distributions amounts, as well as inadequate procedures for identifying, locating, and contacting missing TVPs and their beneficiaries and for addressing uncashed distribution checks.

The DOL notes that an EBSA Voluntary Compliance letter issued upon completion of an audit will address potential ERISA violations, but will not cite individual plan fiduciaries with specific ERISA violations unless the DOL finds that there are substantial errors or widespread fiduciary breaches. The Release further notes that if a plan fiduciary corrects flaws in the plan’s policies and provides remedies for affected individuals, EBSA generally will close out the case without citing plan fiduciaries for specific ERISA violations.

Field Assistance Bulletin 2021-01

FAB 2021-01 describes the DOL’s temporary enforcement policy with respect to the transfer of missing participant account balances to the PBGC’s Missing Participants Program from terminating defined contribution plans or abandoned individual account plans. The FAB is intended to facilitate the transfer of missing participant account balances to the PBGC in order to increase the likelihood that missing participants can locate and access their benefits.

Pending further guidance, rather than using other safe harbor methods for distributions from a terminated individual account plan (e.g., distribution to a IRA or escheatment to a state unclaimed property fund) to satisfy fiduciary duties, FAB 2021-01 provides that the DOL will not pursue fiduciary breach claims against qualified termination administrators of abandoned plans or plan fiduciaries of terminating plans who transfer missing participants’ accounts to the PBGC. The DOL notes that this temporary enforcement policy does not preclude the DOL from pursuing fiduciary breach or prohibited transaction violations under ERISA for failure to search for missing participants prior to the transfer or for failing to adequately maintain plan records.

Please contact Slevin & Hart for more information about how this guidance may affect your plan.

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