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Untying the Knot: Making Sense of Guidance on Missing and Nonresponsive Participant (Part 1)

Background and DOL Guidance

February 18, 2021 – CLIENT ALERT

Missing and nonresponsive participants are the bane of every retirement plan administrator's existence. Mailings come back undelivered, forms are not returned, and checks go uncashed. Benefits earned by participants remain undistributed, potentially leading to compliance issues and additional administrative expenses.

The DOL and IRS have been aware of these issues and have issued guidance on missing and nonresponsive participant issues under ERISA and the Internal Revenue Code for many years. The most recent DOL guidance, in the form of three items published on January 12, 2021, includes its most comprehensive and practical guidance to date for preventing and resolving missing participant problems. While questions remain and we do have some concerns, overall these are positive developments.

This Client Alert will first provide context and then turn to the most wide-ranging and practical of the DOL's recent items – its guidance on "Missing Participants – Best Practices for Pension Plans."

Context

A "missing participant" is a participant, beneficiary, or alternate payee who is entitled to a benefit but who cannot be located, *e.g.*, where the address on file with the plan is known to be incorrect. A "nonresponsive participant" is a participant, beneficiary, or alternate payee who has not elected a distribution in response to a plan notice or who is sent a lump-sum check but does not cash the check before it becomes stale-dated.

The compliance issues differ depending on whether the plan is ongoing or terminating. With a terminating plan, the plan administrator has a legal obligation to distribute all benefits owed in a timely manner and failure to do so could result in the plan being deemed to be ongoing (almost certainly resulting in numerous compliance issues). The administrator of an ongoing plan has a fiduciary duty to distribute benefits when due, whether by operation of law, by plan terms, or pursuant to a participant's election. There is not, however, the same urgency as in a terminated plan, as undistributed benefits in an ongoing plan can be maintained, or can be conditionally forfeited subject to reinstatement.

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The Pension Benefit Guaranty Corporation (PBGC) has long maintained a missing participant program under which it accepts transfers of benefits, or obtains information about purchases of irrevocable commitments, for missing participants in terminating defined benefit (DB) plans. Effective January 1, 2018, PBGC expanded this program, making it available for certain nonresponsive participants and establishing, among other things, a new missing and nonresponsive participant program for terminating defined contribution (DC) plans.

Given that PBGC's program for missing participants has long been available to terminating DB plans, it makes sense that the DOL's guidance has, to date, focused on terminating DC plans. The key items from the DOL prior to the recent guidance have been:

- **Field Assistance Bulletin 2004-02:** This FAB gave the DOL's view of prudence in relation to distributing benefits to missing participants in terminating DC plans. The DOL listed what it considered to be the essential elements of a prudent search and distribution options for account balances of missing participants, such as transfer to an individual retirement account (rollover IRA) or to state unclaimed property funds.
- **Safe Harbor for Distributions for Terminated Individual Account Plans:** Several years after issuance of FAB 2004-02, the DOL finalized a regulation creating a fiduciary safe harbor for distributing plan accounts of missing and nonresponsive participants in terminating DC plans. In general, the safe harbor method is to transfer such unclaimed accounts to a rollover IRA established by the plan in the participant's name (subject to additional safeguards).
- **Field Assistance Bulletin 2014-01:** This FAB reflected technological and legal changes since the 2004 FAB. Thus, a prudent search no longer includes the discontinued government letter forwarding programs, but would include the use of free electronic search tools and consideration of commercial locator services and other third-party online services. The 2014 FAB made it clear that distribution, consistent with the above safe harbor regulation, to a rollover IRA was the DOL's preferred distribution option. Importantly, the DOL also stated that 100% income tax withholding (a practice used by some recordkeepers) was an unacceptable option for distributing unclaimed accounts. Also, the 2014 FAB noted that, notwithstanding ERISA preemption, ERISA would not prevent a fiduciary "from voluntarily deciding to escheat missing participants' account balances" so as to complete a plan termination.

A final important piece of context is that, starting in 2016 and 2017, some DOL regions placed significantly greater emphasis on missing and nonresponsive participants when conducting investigations of ongoing DB plans. This eventually became the DOL's Terminated Vested Participant Project (TVPP). Anecdotes began circulating among practitioners of DOL agents asking for voluminous and detailed documentation of search efforts, insisting on search activities far beyond the steps stated in either FAB, and conducting their own searches and outreach to missing participants.

Although these investigations may be difficult for employers to get through, they provided the DOL significant insight into administrative practices and distributed billions of dollars of benefits of missing and nonresponsive participants ([nearly \\$1.5 billion in fiscal year 2019](#)).

Recent DOL Guidance

As indicated above, the latest DOL guidance, published on January 12, 2021, consists of three items:

- **Missing Participants – Best Practices for Pension Plans**: This is an informal listing of what the DOL considers to be administrative “best practices” for minimizing and mitigating the problem of missing and nonresponsive participants.
- **Compliance Assistance Release 2021-01**: This provides guidance to EBSA Regional Offices on opening, conducting, and closing TVPP audits.
- **Field Assistance Bulletin 2021-01**: This provides a temporary enforcement policy relating to the fiduciary safe harbor regulation (referenced above) and the use of the still relatively new PBGC DC plan missing participant program.

As indicated above, this Client Alert will address only the first item, “Missing Participants – Best Practices for Pension Plans.”

Missing Participants – Best Practices for Pension Plans

The “best practices” are based on what the DOL learned from its investigations and reflect what the DOL believes will minimize and mitigate the problem of missing and nonresponsive participants in DB and DC plans.

“Red Flags” in Data Indicating Potential Problems

Before providing its “best practices,” the DOL identified the following “red flags” that indicate the likely existence of problems:

- More than a small number of missing or nonresponsive participants
- More than a small number of terminated vested participants have reached normal retirement age but have not started receiving their pension benefits
- Missing, inaccurate, or incomplete contact information, census data, or both, or placeholder entries (e.g., “1/1/1900” for a date of birth or “John/Jane Doe” for beneficiary)
- The absence of sound policies and procedures for handling mail returned marked “return to sender,” “wrong address,” “addressee unknown,” or otherwise, and undeliverable email
- The absence of sound policies and procedures for handling uncashed checks

Best Practices

The best practices focus on four areas: (1) maintaining accurate census data for all participants, (2) effective communication with participants, (3) search procedures for missing participants, and (4) documenting procedures and actions taken.

Many of the practices are, in our experience, already widespread. The listing also includes some that seem duplicative or overlapping, raising a question as to whether the DOL meant them to be different (or used differently). This is, however, a relatively minor issue.

We do have one significant concern about the best practices listings. By definition, ERISA fiduciaries have discretion to determine what would be prudent conduct based on all the facts and circumstances. Conduct that fiduciaries of one plan determine to be prudent could be deemed imprudent by fiduciaries of another plan due to a wide range of circumstances. Fiduciary discretion has always empowered fiduciaries to establish and implement procedures tailored to the particular needs and circumstances of their plan participants. Thus, our concern is that the lists of best practices will come to be viewed by recordkeepers and DOL agents as required for all plans. This would not only deprive fiduciaries of the flexibility to design procedures tailored for their participant population, but likely would lead to additional, arguably unwarranted, costs and exposure.

“Hopefully, DOL agents will keep in mind that fiduciary discretion in relation to a plan’s administrative policies and procedures is and has always been central to ERISA fiduciary duties.”

Fortunately, this release expressly states that “[n]ot every practice below is necessarily appropriate for every plan . . . fiduciaries should consider what practices will yield the best results in a cost effective manner,” and that the specific steps taken “will depend on facts and circumstances.” Hopefully, DOL agents will keep in mind that fiduciary discretion in relation to a plan’s administrative policies and procedures is and has always been central to ERISA fiduciary duties.

The best practices include – *but are not limited to* – the following:

Maintaining Accurate Census Information and Effective Communication

- Contacting participants on a periodic basis to confirm or update their contact information
- Including contact information change requests in plan communications along with a reminder to advise the plan of any changes in contact information
- Maintaining and monitoring an online platform that may be used to update contact information
- Providing prompts for participants and beneficiaries to confirm contact information upon login to online platforms
- Regularly auditing census information and correcting data errors
- When changing recordkeepers or in connection with a business merger or acquisition, ensuring the transfer of relevant plan and employment records

- Encouraging contact through plan/plan sponsor websites and toll-free numbers
- Building steps into the employer and plan onboarding, enrollment, and exit processes to confirm or update contact information and plan data, and to advise employees of the importance of ensuring that the plan has accurate contact information at all times
- Communicating information about how the plan can help eligible employees consolidate accounts from prior employer plans or rollover IRAs
- Clearly marking envelopes and correspondence with the original plan or sponsor name for participants who separated before the plan or sponsor name changed

Comment: *Most, if not all, of the foregoing practices require the efforts and involvement of the plan recordkeeper, and some may not be doable on a one-off basis, e.g., developing a prompt to confirm/update contact information upon login to an online system. Other practices seem eminently doable but may entail additional fees. Recordkeeping agreements should thus be reviewed when discussing changes with recordkeepers.*

Missing Participant Searches

- Checking related plan and employer records for participant, beneficiary, and next of kin/emergency contact information, and checking with designated plan beneficiaries and the employee's emergency contacts for updated participant contact information
- To address privacy concerns, the plan can ask the other plan, employer, designated beneficiary, or emergency contact to forward a letter to the missing participant or beneficiary
- Using free online search engines, public record databases, obituaries, and social media to locate individuals
- Using a commercial locator service, a credit-reporting agency, or a proprietary internet search tool to locate individuals
- Attempting contact via United States Postal Service certified mail, or private delivery service with similar tracking features, to the last known mailing address
- Attempting contact via other available means such as email addresses, telephone and text numbers, and social media
- If participants are nonresponsive over a period of time, using death searches as a check and, if the search confirms a participant's death, redirecting communications to beneficiaries
- Reaching out to the colleagues of missing participants by, for example, contacting employees who worked in the same office or by publishing a list of "missing" participants on the company's intranet, in email notices to existing employees, or in communications with other retirees who are already receiving benefits

- Registering missing participants on public and private pension registries with privacy and cyber security protections (e.g., National Registry of Unclaimed Retirement Benefits), and publicizing the registry through emails, newsletters, and other communications to existing employees, union members, and retirees
- Searching regularly using some or all of the above steps

Comment: *Contacting former colleagues and/or publishing lists of missing participants – even if only on internal sources – may implicate privacy concerns. Thus, employers should confer with privacy counsel before implementing these actions.*

Documenting Procedures and Actions

- Reducing the plan's policies and procedures to writing to ensure they are clear and result in consistent practices
- Documenting key decisions and the steps and actions taken to implement the policies
- For plans that use third party recordkeepers to maintain plan records and handle participant communications, ensuring the recordkeeper is performing agreed upon services, and working with the recordkeeper to identify and correct shortcomings in the plan's recordkeeping and communication practices

Action Items

In light of the foregoing and our experience comparing actual plan operations to administrative policies and procedures, we suggest the following action items for employers and their plan administration staff:

- Review plan data to check if there are any data-based red flags
- Review internal and recordkeeper policies and procedures relating to (1) obtaining, maintaining, correcting, and updating census data/contact information, (2) missing participant searches, and (3) nonresponsive participants and uncashed checks
- Conduct a careful review of these policies and procedures in light of the DOL's best practices guidance
- Identify gaps and weaknesses in and assess effectiveness of current policies and procedures
- Discuss in detail with the plan's recordkeeper and internal stake holders possible process improvements, including best practices, all as prudent

Note: *As indicated above, fiduciaries should "consider what practices will yield the best results in a cost-effective manner [and] consider the size of a participant's accrued benefit and account balance as well as the cost of search efforts."*

- Prepare and adopt updated policies and procedures, as needed, and incorporate them into recordkeeping contracts along with updated reporting, audit, and performance standards

- Regularly monitor plan data to identify trends that might indicate an emerging issue and periodically audit recordkeeper operations for consistent application of policies and procedures

The best practices listing provides a standard against which employers can evaluate their own plan's policies and procedures and preserves the fiduciary discretion to adopt policies and procedures tailored to the needs of their plans and participant populations.

Please contact us if you have questions. We are happy to help evaluate issues and collaborate on projects to review your policies and procedures to help ensure they are reasonable under the circumstances and consistently implemented by service providers.

Keightley & Ashner LLP

One Metro Center,
700 12th Street, N.W., Suite 700,
Washington, D.C. 20005

Phone: (202) 558-5150

Fax: (202) 330-5490

Email: info@keightleyashner.com

Website: www.keightleyashner.com