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Untying the Knot: Making Sense of Guidance on Missing and Nonresponsive Participants (Part 2)

DOL Compliance and Enforcement Guidance

February 25, 2021 – CLIENT ALERT

Part 1 of this series focused on the most wide-ranging and practical of the three recent pieces of guidance published by DOL relating to missing and nonresponsive participants – its guidance on Missing Participants – Best Practices for Pension Plans. There, we expressed concern that adherence to the entire list of "best practices" may come to be viewed as normative and depriving fiduciaries of the discretion to tailor a solution to the particular needs, challenges, and constraints applicable to their own plan and its participant population. Nonetheless, we view the DOL's best practices publication as a welcome tool for fiduciaries to review and assess their own plan's policies and procedures.

This Client Alert will discuss the other two recent DOL items:

- **Compliance Assistance Release 2021-01:** This provides guidance to Employee Benefit Security Administration (EBSA) Regional Offices on opening, conducting, and closing Terminated Vested Participant Project (TVPP) audits.
- **Field Assistance Bulletin 2021-01:** This provides a temporary enforcement policy relating to the fiduciary safe harbor regulation and the use of the still relatively new Pension Benefit Guaranty Corporation (PBGC) defined contribution (DC) plan missing participant program.

Compliance Assistance Release 2021–01

In recent years, certain EBSA Regional Offices placed significantly greater emphasis than in the past on missing and nonresponsive participants when conducting investigations of ongoing defined benefit (DB) plans, focusing on what the plans did to minimize the occurrence of missing and nonresponsive participants and to search for and distribute benefits to them. These investigations evolved into what are now known as TVPP audits.

Compliance Assistance Release No. 2021–01 ("CAR 2021-01" or "the Release") is a memorandum from EBSA's Director of Enforcement to EBSA Regional Directors intended "to ensure consistent investigative processes." Although intended for EBSA investigative teams, CAR 2021-01 also provides a roadmap for fiduciaries to review their own plan operations, identify and resolve issues, and engage in process improvement.

Topics Covered by CAR 2021-01

The Release addresses the circumstances leading to a TVPP audit, the information DOL requests, and the errors it looks for in these audits.

Circumstances Leading to TVPP Audit

TVPP audits focus on DB plans that appear to have "systemic issues with plan administration," particularly as to "keeping track of terminated vested participants and beneficiaries, and timely distributing benefits." This may be identified based on reported plan data, such as a Form 5500 reporting a large number of terminated vested participants (TVPs) or their beneficiaries entitled to future benefits, or based on business circumstances, such as an employer filing bankruptcy or involved in a merger or acquisition (situations in which there is increased risk that census data will be lost).

"Fiduciaries should carefully monitor the performance of retained, third party search firms, and ensure that they are complying with any applicable contractual commitments regarding missing persons."

Information DOL Will Request

In addition to "off-the-shelf" items, such as plan documents, summary plan descriptions, and actuarial reports, the DOL will request the following classes of records and documents:

- Participant census records, noting the employment status of and contact information for each participant.
- The plan's procedures for communicating with TVPs, spouses, and other designated beneficiaries.
- Information to determine whether the plan takes sufficient steps to address missing participant situations when they occur, including "internal procedures and practices for reaching out to unresponsive TVPs or for searching for them," and "contracts and experience with third-parties who perform recordkeeping and missing participant search functions for the plan," all "combined with interviews of the relevant parties." (Emphasis added.)

Comment: *The DOL acknowledges that producing these materials can be very difficult, and states that it will "consider reasonable suggestions on alternative document productions . . . and grant reasonable requests to extend the response date." We note that prudent oversight of plan administration, however, would include periodic review of applicable policies and procedures for maintaining and accessing these materials; extraordinary difficulty producing these materials may be interpreted by the DOL as a "red flag" indicating a lack of prudent oversight.*

Errors DOL Looks For

In TVPP audits, the DOL generally looks for:

- Systemic errors in plan recordkeeping and administration that create a risk of loss associated with the failure of a TVP/beneficiary to enter pay status before death or the imposition of excise taxes on required minimum distribution (RMD) amounts.
- Inadequate procedures for identifying and locating missing participants and beneficiaries.
- Inadequate procedures for contacting TVPs nearing normal retirement age to inform them of their right to commence payment of their benefits.
- Inadequate procedures for contacting TVPs and the beneficiaries of deceased TVPs who are not in pay status at or near the date that they must commence RMDs to inform them of actions the plan will take and what they must do to enter pay status and avoid RMD excise taxes.
- Inadequate procedures for addressing uncashed distribution checks.

Comment: *Clearly, the focus is on the adequacy of procedures and consistency of application. Unavoidably, this will be colored by results – a large number of missing participants will create an impression that the procedures and/or their application are inadequate. Perhaps the most effective response to this would be documentation, such as meeting minutes, establishing that the fiduciaries have periodically reviewed their policies and procedures, and also periodically review results, monitor trends, and assess cost-effectiveness.*

"Periodically review the plan's missing participant search process, the effectiveness of searches, and potential process improvements."

"Red flags" leading the DOL to believe problems exist include:

- Missing and incomplete census data, including placeholder data (*e.g.*, "1/1/1900" for a date of birth or "John/Jane Doe" for beneficiary).
- More than a small number of TVPs who are eligible to claim benefits (*e.g.*, participants who have reached normal retirement age or the RMD), but have not done so.

Comment: *DOL has not provided any guidance as to what it considers a "large" or "small" number of eligible TVPs who have not yet claimed benefits. The best that can be said is that it will vary by plan and depend on the facts and circumstances. Further, having a large number of such TVPs is not inherently imprudent – there can be objective circumstances having nothing to do with plan administration that lead to a large number of such TVPs (for example, recent corporate actions). A prudent fiduciary will be able to provide the DOL with documentation demonstrating awareness of the situation and the reason for it.*

- Continuing to deliver communications to a known bad address.

Comment: *Not only would this show procedural weakness but also imprudent use of plan assets (to the extent plan assets are used to pay for these mailings).*

Further discussion in this portion of CAR 2021-01 highlights a number of practices to follow or to avoid, along with some circumstances that tend to lead to problems. In particular:

- Fiduciaries should carefully monitor the performance of retained, third party search firms, and ensure that they are complying with any applicable contractual commitments regarding missing persons.
- Problems can arise where letters to TVPs are not in "plain English" or where the plan covers populations of participants who are not fluent in English but fails to provide language assistance or notify them of the availability of such assistance.
- Benefit notices to TVPs/beneficiaries that do not clearly explain their right to pension benefits, the date of their right to benefits (especially if immediate), and the excise tax consequences of failing to start receiving minimum required distributions on time, serve to "contribute to a TVP problem."
- Where workers had participated in predecessor plans or worked for companies that had different names than the current plan or employer as a result of mergers or acquisitions, the failure of the successor plan's correspondence to include the name of the predecessor employer or plan may also "contribute to a TVP problem."
- Along similar lines, mergers, acquisitions, and company name changes commonly present risks that "participants will ignore mail addressed to them from a company from which they believe they never worked," and that "the records of predecessor plans will not be fully integrated into the successor plan's records."

Action Items

In addition to the Action Items outlined in Part 1 of this series, we suggest that employers take the following steps:

- Confirm that the plan staff and/or recordkeeper staff are familiar with and understand the applicable policies and procedures.
- Periodically review the applicable policies and procedures and the results achieved, and consider process improvements in light of that review.
- Periodically review the plan's missing participant search process, the effectiveness of searches, and potential process improvements. If missing participants are repeatedly included in the search process without locating them, investigate whether it makes sense to continue repeating existing processes without change (perhaps because the database is constantly developing) or instead revising existing processes or adding a different process for persistently missing participants.
- Review plan data at least annually to determine how many TVPs/beneficiaries are entitled to future benefits. If there is a large number of such TVPs/beneficiaries or there has been a recent and significant increase in that number, review the situation further to determine the reasons for the large number or the significant increase.

- Some recordkeepers have agreements with third-party search firms to provide search services for the plan clients of the recordkeeper. In this situation, where there is not a direct contractual relationship between the plan and the search firm, the plan administrator should ensure that the plan's contract with the recordkeeper has adequate provisions ensuring transparency into the search firm's process and results.
- Review plan-related standard communications, notices, and forms for ease of understanding (*e.g.*, "plain English" explanations) and the other communications-related pointes noted above.

Field Assistance Bulletin 2021–01

Field Assistance Bulletin 2021-01 ("FAB 2021-01" or the "Bulletin") is the latest Field Assistance Bulletin to address fiduciary duties in relation to terminating defined contribution (DC) plans. This Bulletin announces a "Temporary Enforcement Policy" that addresses distribution options for missing participants.

Background

As noted in Part 1 of this series, the DOL promulgated a regulation providing a fiduciary safe harbor for use in distributing DC plan accounts of missing and nonresponsive participants in terminating DC plans. In general, this regulation requires these accounts to be rolled over to an individual retirement account or annuity ("IRA") that the plan establishes in the participant's name pursuant to a standing agreement with the IRA provider.

Subsequent to this regulation, in December 2017, the Pension Benefit Guaranty Corporation (PBGC) established the PBGC Defined Contribution Missing Participants Program (the DC Plan Program). The DC Plan Program will hold DC plan accounts on behalf of missing participants and beneficiaries and help them find and receive those benefits. The Bulletin notes that "PBGC cites multiple benefits of the DC Plan Program, including:

- benefits of any size can be transferred to PBGC;
- periodic active searches by 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 Bulletin notes that the COVID-19 emergency may result in disruption of recordkeeping and search activities, and that the economic disruption caused by the pandemic "could result in large numbers of workers losing contact with their employers and plans." For these reasons, "it is even more important . . . to facilitate the transfer of missing participants' account balances to the PBGC . . . and, thereby, increase the likelihood that missing participants can locate and access their benefits."

Temporary Enforcement Policy

Given the foregoing, the DOL stated that it will not pursue violations of ERISA fiduciary duties where a terminating DC plan transfers account balances of missing or nonresponsive participants to PBGC's DC Plan Program in accordance with PBGC's regulations rather than to an entity specifically permitted by the fiduciary safe harbor regulation, provided, however, that the plan fiduciary complies with FAB 2021-01 and acts in accordance with a "good faith, reasonable interpretation" of ERISA Section 404 as to matters not addressed in the FAB. Thus, for example, the temporary enforcement policy would not prevent the DOL from pursuing violations alleging a failure to prudently search for missing participants.

There are some additional points to note for plans that want to take advantage of the temporary enforcement policy and use the PBGC's DC Plan Program:

- Under the DC Plan Program, a plan can be a "transferring plan" and transfer account balances to PBGC, or a "notifying plan" and notify PBGC where it distributed account balances for missing or nonresponsive participants, such as the IRA custodian. Importantly, to be a transferring plan, the plan must transfer all unclaimed account balances, i.e., it is "all or nothing."
- A transferring plan's notices would need to be revised to reflect the transfer to PBGC rather than, for example, the IRA custodian, and include PBGC's website and customer contact number.
- Account balances of participants and beneficiaries who elected a lump-sum distribution can be transferred to PBGC if the distribution was paid by a check that remains uncashed after: (1) the plan's "cash-by" date, provided it is at least 45 days after the date issued, or (2) the check's "stale date" if there is no "cash-by" date.
- PBGC's one-time flat-fee for transferred accounts over $250 can be paid from the transferred account unless prohibited by the terms of the plan document.

The temporary enforcement policy does seem like a nudge in the direction of using PBGC's DC Plan Program as the destination for unclaimed accounts. Note, however, that it is available only for terminating DC plans; ongoing DC plans must still look elsewhere.

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.

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