

MEMO# 33043

January 14, 2021

DOL Issues New Guidance on Missing Participants of ERISA Plans

[33043]

January 14, 2021 TO: ICI Members
Bank, Trust and Retirement Advisory Committee
Pension Committee
Pension Operations Advisory Committee
TAAC Abandoned Property Task Force
Transfer Agent Advisory Committee SUBJECTS: Abandoned Property and Escheatment
Pension RE: DOL Issues New Guidance on Missing Participants of ERISA Plans

On January 12, 2021, the Department of Labor (DOL) issued three pieces of guidance designed to help plan fiduciaries meet their obligations under the Employee Retirement Income Security Act of 1974 (ERISA) to locate and distribute retirement benefits to missing or nonresponsive participants.[\[1\]](#) The guidance includes:

- A document describing best practices for retirement plans,[\[2\]](#) which covers a range of best practices that plan fiduciaries should consider taking to help reduce missing participant issues;
- Compliance Assistance Release 2021-01,[\[3\]](#) which outlines the general investigative approach that will guide all of EBSA's Regional Offices under its missing participant enforcement initiative and facilitate voluntary compliance efforts by plan fiduciaries; and
- Field Assistance Bulletin (FAB) 2021-01,[\[4\]](#) which authorizes, as a matter of enforcement policy, plan fiduciaries of terminating defined contribution (DC) plans to use the Pension Benefit Guaranty Corporation (PBGC) missing participant program for missing or nonresponsive participants' account balances.

Background

Prior to the new guidance, DOL's positions regarding the obligation of plan fiduciaries to locate missing DC plan participants and repatriate unclaimed accounts was limited to terminated DC plans and had not included guidance for ongoing plans.[\[5\]](#) ICI has long urged DOL to issue similar guidance that would apply to missing participants in ongoing retirement plans. Over recent years, ICI has engaged DOL on these issues jointly with a group of other retirement industry trade organizations ("joint trade group").

The issue has taken on greater importance in recent years as DOL began a major enforcement initiative examining whether plan officials are meeting their fiduciary obligations under ERISA to find missing participants and pay them their benefits.^[6] In a 2018 letter and, more recently, in a February 2020 meeting with DOL staff, the joint trade group explained to DOL that, not only is guidance needed to help fiduciaries understand what steps are expected of them, but also that more transparency and consistency in audit guidelines would help manage expectations and speed the regional offices' review of plan procedures.^[7]

Best Practices for Retirement Plan Fiduciaries

As expected, DOL provided a list of best practices, instead of guidance in the form of a safe harbor or a list of minimum steps that a plan fiduciary should take. The document outlines best practices that the fiduciaries of retirement plans (both defined benefit and defined contribution plans) can follow to ensure that plan participants and beneficiaries receive promised benefits when they reach retirement age. DOL developed the best practices, in part, based on its observations over the course of its investigations. DOL also received suggestions from the retirement community, such as from plan sponsors and recordkeepers.

The best practices are divided into four categories: (1) maintaining accurate census information for the plan's participant population; (2) implementing effective communication strategies; (3) missing participant searches; and (4) documenting procedures and actions. The specific steps a fiduciary should take will depend on the facts and circumstances particular to a plan and participant.

In describing the list of best practices, DOL explains that "[n]ot every practice below is necessarily appropriate for every plan" and that "plan fiduciaries should consider what practices will yield the best results in a cost effective manner for their plan's particular participant population...consider[ing] the size of a participant's accrued benefit and account balance as well as the cost of search efforts."

DOL stresses the importance of (1) staff that are proactive and committed to making sure that plan records are complete and up to date and (2) the ongoing use of best practices, rather than "one-time or sporadic 'fixes.'" The document also includes a list of "red flags" that can serve as warnings or indicators of a problem with missing or nonresponsive participants.

In a footnote, DOL cautions plans regarding the practice of conditionally forfeiting benefits of missing participants and reinstating the benefit if the participant later makes a claim for benefits.^[8] DOL explains that plan fiduciaries retain full responsibility under ERISA with respect to these participants; that "these participants and beneficiaries remain fully entitled to all their promised benefits; and the fiduciaries have an obligation to keep accurate records and take appropriate steps to ensure that the participants and beneficiaries are paid their full benefits when due."

Audit Guidelines for Regional Offices (Compliance Assistance Release 2021-01)

DOL also published a memo (the "Release") from the Director of Enforcement of the Employee Benefits Security Administration (EBSA) to the directors of EBSA's regional offices. The Release is designed to ensure consistent investigative processes and case-closing practices among the regional offices conducting audits under EBSA's missing

participant enforcement initiative and to facilitate voluntary compliance efforts by plan fiduciaries.

The Release includes a description of the enforcement initiative, referred to as the Terminated Vested Participants Project (TVPP), including listing the key objectives of TVPP. The Release describes the enforcement initiative as applying only to defined benefit pension plans.^[9] The Release includes a description of the opening of investigations, the information that will be requested,^[10] errors the investigators will look for, and how cases are closed.^[11]

Notably, the Release includes two footnotes in support of DOL's recent electronic delivery safe harbor.^[12] In the background section describing the need for the TVPP, DOL explains that "[p]lans may be unable to communicate with terminated participants who are owed benefits, or their designated beneficiaries, because of inadequate recordkeeping practices, *ineffective processes for communicating with terminated participants and beneficiaries*, and faulty procedures for searching for participants and beneficiaries for whom they have incorrect or incomplete contact information" [emphasis added]. In footnote 2, DOL notes that the new electronic delivery safe harbor "gives plans a new tool to communicate more effectively with terminated participants and beneficiaries." In footnote 3, DOL touts that plans that rely on the new safe harbor "should find a dramatic reduction in the scope of this problem."

Temporary Non-Enforcement Policy for DC Plan Use of PBGC Program (FAB 2021-01)

In December 2017, the PBGC issued final regulations to expand its existing program for missing participants (the "Program"), making it available to most terminated DC plans.^[13] Terminating DC plans may participate in the Program by electing to be either a "transferring plan," which would actually transfer benefit amounts to the PBGC, or a "notifying plan," which would send the PBGC information about the benefits of missing distributees.^[14]

DOL's current fiduciary safe harbor for making distributions to missing participants from terminated individual account plans and abandoned plans was drafted prior to 2017 and therefore does not reference PBGC's Program.^[15] The safe harbor generally requires that distributions be rolled over to an IRA, although in limited circumstances fiduciaries may make distributions to certain bank accounts or to a state unclaimed property fund.

In FAB 2021-02, DOL announces a temporary enforcement policy on DC plans' use of the Program, applicable to fiduciaries of terminating DC plans and qualified termination administrators (QTAs) of abandoned individual account plans.^[16]

The enforcement policy states that DOL will not pursue violations^[17] against either fiduciaries of terminating DC plans or QTAs of abandoned plans in connection with the transfer of a missing or non-responsive participant's or beneficiary's account balance to the PBGC in accordance with the PBGC's missing participant regulations, rather than to an IRA, certain bank accounts, or a state unclaimed property fund. Non-enforcement is dependent on the plan fiduciary or QTA complying with the guidance in the FAB^[18] and having acted in accordance with a good faith, reasonable interpretation of section 404 of ERISA with respect to matters not specifically addressed in the FAB. DOL cautions that the enforcement policy will not preclude DOL from pursuing ERISA violations related to a failure to diligently search for participants and beneficiaries prior to the transfer of their account balances to the PBGC or for a failure to maintain plan and employer records. The FAB also

clarifies that a plan fiduciary or QTA may also transfer amounts representing participants' uncashed checks to the PBGC.^[19]

Regarding PBGC's flat fee charged for the Program, DOL notes that a plan fiduciary may pay this fee from the transferred account unless the plan terms prohibit the payment. In the case of an abandoned plan, DOL will not treat a QTA as violating ERISA merely because the QTA disregards plan terms that require such expenses to be paid by an employer that is no longer available.

Similar to the language included in the best practices document described above, the FAB includes a footnote cautioning plan fiduciaries regarding the practice of conditionally forfeiting benefits, as described under Treasury regulations. With the exception of an abandoned plan, DOL clarifies that the temporary enforcement policy will not apply to a terminating individual account plan containing such a conditional forfeiture provision, unless the conditionally forfeited accounts of all missing participants and beneficiaries are fully restored and transferred to the PBGC.

The FAB seems to be prompted in part by the COVID-19 emergency. DOL notes the importance of facilitating DC plans' use of the PBGC Program, given the expected disruptions that may result from COVID-19.

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endnotes

[1] DOL's press release on the guidance is *available at* <https://www.dol.gov/newsroom/releases/ebsa/ebsa20210112>.

[2] Missing Participants – Best Practices for Pension Plans is *available at* <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-best-practices-for-pension-plans>.

[3] Compliance Assistance Release 2021-01 is *available at* <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/compliance-assistance-release-2021-01>.

[4] FAB 2021-01 is *available at* <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2021-01>.

[5] Field Assistance Bulletin (FAB) 2014-01 (Fiduciary Duties and Missing Participants in Defined Contribution Plans). For a description of FAB 2014-01, see ICI Memorandum No. 28318, dated August 18, 2014, *available at* https://www.ici.org/my_ici/memorandum/memo28318.

[6] In its news release linked in footnote 1 above, DOL notes that “[i]n fiscal year 2020 alone, EBSA's investigators helped missing and nonresponsive participants recover benefits with a present value in excess of \$1.4 billion.”

[7] See ICI Memorandum No. 31288, dated July 16, 2018, *available at* https://www.ici.org/my_ici/memorandum/memo31288.

[8] This practice is permitted under Treasury regulation section 1.411(a)-4(b)(6).

[9] While the focus of the initiative has been participants who have terminated employment with vested benefits in defined benefit plans, we understand from plan sponsors that audits have in some instances also covered DC plans.

[10] The Release states that, depending of the facts and circumstances in individual cases, EBSA may request other types of documents or information that are not included in this list.

[11] We understand that some plan sponsors have expressed concern regarding investigations that seem to continue indefinitely. The Release does not include a discussion of the length of investigations or the timing of investigation closings.

[12] For a description of the safe harbor, see ICI Memorandum No. 32478, dated May 21, 2020, *available at* https://www.ici.org/my_ici/memorandum/memo32478. The safe harbor includes special rules that apply to former employees. It also requires prompt action to address inaccurate electronic addresses.

[13] See ICI Memorandum No. 31026, dated January 16, 2018, *available at* https://www.ici.org/my_ici/memorandum/memo31026. ICI has supported this Program and urged PBGC to broaden the availability of the Program and extend its application to missing participants in active plans.

[14] While the FAB's focus is on transferring plans, DOL takes the opportunity in the FAB to encourage plan fiduciaries and qualified termination administrators (QTAs) who do not elect to transfer account balances to the PBGC to utilize the notifying plan option.

[15] 29 CFR §2550.404a-3 (Safe Harbor for Distributions from Terminated Individual Account Plans). In the preamble to the PBGC's final rule, the PBGC indicated that it had consulted with DOL and that DOL intends to look into what changes are needed to DOL's safe harbor regulation so that transfers to the PBGC by terminating individual account plans would be eligible for relief under the safe harbor. See 82 Fed. Reg. 60800, 60801 (December 22, 2017).

[16] 29 CFR §2578.1 (Termination of Abandoned Individual Account Plans). DOL's abandoned plan program provides a mechanism for service providers to voluntarily take over and terminate plans believed to be abandoned by the plan sponsor.

[17] Specifically, violations under ERISA section 404(a).

[18] The FAB specifies that, in complying with the safe harbor regulation at 29 CFR 2550.404a-3, the notice to participants and beneficiaries must be modified to reflect the transfer to the PBGC. The notice must state clearly that their account balances are being transferred to the "Pension Benefit Guaranty Corporation's Defined Contribution Missing Participants Program" and must include the PBGC's website address and customer contact number.

[19] According to the FAB, a plan fiduciary or QTA may transfer to the PBGC the account balances of participants and beneficiaries who elected a lump sum distribution of the entire account under the terms of the plan if that distribution was paid by check and the check

remains uncashed after: (1) the “cash-by” date prescribed on the check (or in an accompanying notice) 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.

Note that in the ERISA Advisory Council’s 2020 study of Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds, a number of witnesses discussed the use of PBGC’s Program for this purpose. The Council’s report is *available at* <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebesa/about-us/erisa-advisory-council/2019-eac-voluntary-transfers-to-state-programs.pdf>. Also see ICI Memorandum No. 32039, dated November 6, 2019, *available at* https://www.ici.org/my_ici/memorandum/memo32039.

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