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DOL issues guidance on missing participants

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In this article

In light of the ongoing COVID-19 pandemic, the Department of Labor (DOL) has issued a temporary enforcement policy encouraging use of the Pension Benefit Guaranty Corporation's (PBGC) missing participant program for terminated defined contribution (DC) plans. Under Field Assistance Bulletin (FAB) 2021-01, DOL won't pursue violations against fiduciaries of terminating DC plans or qualified termination administrators (QTAs) of abandoned individual account plans who transfer account balances to PBGC. At the same time, DOL also released best practices to help defined benefit (DB) and DC plan sponsors deal with the thorny issues of missing participants, along with a compliance assistance release regarding the agency's audit program for terminated participants in DB plans.

Missing participants in DC plans

DC plans must distribute all plan assets to participants and beneficiaries as soon as administratively feasible after plan termination. When participants fail to make an election or otherwise can't be found, DOL regulations provide a safe harbor under which distributions must generally be rolled over to an individual retirement account (IRA). Fiduciaries and QTAs who meet the conditions of the safe harbor are deemed to meet their fiduciary duties of prudence and loyalty in connection with distributing the funds, selecting an IRA and investing the distributed funds.

PBGC missing participant program

In late 2017, PBGC overhauled its missing participant program — which previously covered only defined benefit (DB) plans — to let certain terminating DC plans participate for the first time. Participating plans can either transfer all missing participants' accounts to PBGC or none of them. Plans that transfer balances must pay a one-time program fee. Alternatively, plans that don't transfer balances can participate in the program for free as "notifying plans." Notifying plans report information to PBGC on some or all missing participants and the institutions holding those benefits. In either case, PBGC will attempt to locate the missing participants, and participation is voluntary.

New FAB gives limited fiduciary protection for balance transfers

DOL believes use of the PBGC program will help counteract the pandemic's disruption of recordkeeping and search activities, which may increase the number of participants losing track of their benefits. Although DOL consulted with PBGC as it developed the expanded missing participant program, DOL's safe harbor rules don't yet cover participation in the program. Now, FAB 2021-01 provides that until DOL updates its safe harbor rules, the agency won't pursue fiduciary violations against DC plan fiduciaries and QTAs who transfer missing participants' balances to PBGC instead of IRAs. However, the FAB doesn't provide blanket protection against enforcement. Fiduciaries and QTAs must comply in good faith with all other aspects of the DOL safe harbor, and DOL may still pursue violations for failure to diligently search for participants before transferring balances or failure to maintain plan and employer records.

Program can be used for uncashed checks. The missing participant program accepts transfers for participants and beneficiaries who fail to cash their distribution checks by the "cash-by" date (or if none, the check's stale date). The FAB confirms that fiduciaries and QTAs can transfer to PBGC the account balances for these individuals, as well as the account balances of unlocatable participants.

Fees can be paid from participants' accounts. The FAB clarifies that the PBGC's fee can be paid from the transferred accounts, even under an abandoned plan whose document technically requires the employer to pay such expenses.

Missing participant best practices

DOL issued the FAB along with best practices for DB and DC retirement plan fiduciaries handling missing participants. The document reflects the experience of DOL's Employee Benefits Security Administration (EBSA), which has undertaken a nationwide compliance initiative to help retirement plans ensure that participants receive their promised benefits upon retirement.

In addition to identifying several red flags that might indicate a problem with missing participants, the document lists four best practices that some plans use "as part of their ongoing culture of fiduciary compliance." The document lists many examples for each best practice, but they are not prescriptive steps each fiduciary must take. EBSA explains that not every action will be appropriate for every sponsor or every circumstance, and the specific steps to take will depend on facts and circumstances.

The four best practices EBSA has found effective are:

- **Maintaining accurate census information for plan participants.** Plans should consider contacting participants periodically to confirm or update contact information, following up on undeliverable mail or uncashed checks, regularly auditing census information, and correcting data errors.
- **Implementing effective communication strategies.** Recommendations include using plain language and offering non-English assistance when appropriate, encouraging contact through plan or plan sponsor websites, and building steps into onboarding and exit processes to confirm or update contact information.
- **Searching for missing participants.** Common steps include checking related plan and employer records for participant, beneficiary or other contact information; using free online search engines or commercial locator services; and using certified mail or a private delivery service with similar tracking features.
- **Documenting procedures and actions.** Fiduciaries should maintain the plan's policies and procedures in writing, document key decisions, and work with recordkeepers to identify and correct shortcomings in the plan's practices.

Other missing participant guidance

DOL's compliance assistance release instructs its regional directors on handling audits of DB plans that have difficulty tracking terminated vested participants. The document aims to ensure consistent investigative processes for audits under EBSA's long-standing Terminated Vested Participants Project (TVPP) and to facilitate plan fiduciaries' compliance efforts. TVPP is an initiative to ensure terminated participants get their benefits no later than their required beginning date (age 72 starting in 2022 under the Setting Every Community Up for Retirement Enhancement (SECURE) Act). Although the release focuses only on DB plan audits, it's further evidence of DOL's continued focus on ensuring retirement plan participants get the benefits to which they're entitled.

Related resources

- FAB 2021-01 (DOL, Jan. 12, 2021)
- Missing participants — best practices for pension plans (DOL, Jan. 12, 2021)
- Compliance Assistance Release 2021-01 (DOL, Jan. 12, 2021)