

TYPES NOT MAPPED YET March 11, 2021 | TTR not mapped yet | Lori W. Jones

# New DOL guidance on missing participants: What employers should know

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On January 12, 2021, the Department of Labor (DOL) issued long-awaited guidance to assist employers and plan administrators in dealing with the issue of missing participants under retirement plans subject to ERISA. The guidance is comprised of three documents; a list of “best practices” for retirement plans, a description of the DOL’s Terminated Vested Participants Project for defined benefit plans, and a Temporary Enforcement Policy with respect to missing participants of terminating defined contribution plans.

### Best practices for missing participants

The document, titled “Best Practices for Pension Plans,” lists the following “red flags” that suggest to the DOL that an employer may have a problem with missing participants:

- More than a small number of missing or nonresponsive participants;
- More than a small number of terminated vested participants who have reached normal retirement age but have not yet started their benefits;
- Incomplete or inaccurate contact information or census data;
- Lack of policies and procedures for dealing with returned or undeliverable mail;
- Lack of policies and procedures for dealing with uncashed checks. <sup>1</sup>

According to the DOL, a common characteristic of compliant employers is a commitment to ensure that plan records are complete. Such employers do not rely on a one-time or sporadic fixes of plan records but instead foster a culture of consistent compliance through some or all of the following best practices:

#### Accurate census information

- Periodically contacting participants (current and retired) and beneficiaries to confirm their contact information, including home and business addresses, telephone numbers (including cell phones), social media contact information and emergency contact information;
- Reminding participants and beneficiaries to update contact information in plan communications;
- Following up on undeliverable mail and uncashed checks;
- Maintaining and monitoring an online platform that participants can use to update contact information;
- Integrating changes in contact information into the plan census data;
- Including prompts for participants and beneficiaries to confirm contact information upon login to an online platform;
- Regularly requesting updated contact information for beneficiaries;

- Regularly auditing plan records and correcting errors;
- Including missing participant searches as part of the process of transferring of plan information in connection with a change in recordkeepers or a merger or acquisition.<sup>2</sup>

#### **Effective communication strategies**

- Using plain language (and non-English language if appropriate);
- Prominently stating a request for updated contact information;
- Facilitating contact through plan or employer websites and toll-free telephone numbers;
- Including in enrollment and separation procedures steps to update contact information and other information needed to determine the amount and timing of benefits, and instructing participants of the importance of keeping the plan informed of changes in contact information;
- Communicating the method for consolidating accounts from prior employer plans or rolling over individual retirement accounts (IRAs); and
- Using the original plan and/or sponsor name in communications to participants who terminated employment before the plan or employer name changed (e.g., due to merger or acquisition) and noting that the communication relates to pension benefits.<sup>3</sup>

#### **Missing participant searches**

- Checking payroll records and records maintained for other employer plans for contact information;
- Checking with designated beneficiaries and emergency contacts for contact information for the participant;
- Using free online search engines, public data bases, obituaries and social media to contact participants and beneficiaries;
- Using a commercial locator service, credit-reporting agency or a proprietary internet search tool;
- Using the United States Postal Service certified mail (or a private delivery service with similar tracking features if less costly) using the last known mailing address;
- Using email addresses, telephone and text numbers, or social media;
- Using death searches for participants who have been unresponsive for a period of time (e.g., Social Security Death Index);
- Contacting work colleagues of missing participants or local union offices (if applicable), or posting a request for assistance in locating missing participants on the employer's intranet; and
- Registering missing participants on public and private pension registries with privacy and cybersecurity protections, such as the National Registry of Unclaimed Retirement Benefits.

#### **Documenting procedures and actions**

- Adopting policies and procedures relating to the maintenance of the plan census and plan records and documenting decisions and actions implementing the policies and procedures; and
- Monitoring third party service providers engaged to assist in maintaining the plan census and plan records to identify and correct any failures.

The DOL acknowledges that some of the best practices may not be appropriate for all employers.

### **Compliance Assistance Release No. 2021-01**

The Terminated Vested Participants Project (TVPP) is a program designed to (i) determine whether a defined benefit plan is maintaining adequate records to locate eligible participants and timely pay benefits due under the plan, (ii) ensure that the plan is advising participants of their eligibility to apply for benefits as they near normal retirement age and the mandatory commencement of their benefits under the required minimum distribution (RMD) rules, and (iii) ensure the plan is searching for terminated participants and beneficiaries for whom it has insufficient contact information.

Compliance Assistance Release No. 2021-01 (Release) is intended to ensure consistent processes and case-closing practices by the Employee Benefit Security Administration (EBSA) in conducting investigations under the

TVPP. The Release also provides valuable information to employers and plan fiduciaries regarding how plans are selected for TVPP investigations and how such an investigation will proceed.<sup>4</sup>

The Release indicates that information on the Form 5500 may lead to a TVPP investigation. For example, if a plan reports a large number of retired or terminated vested participants who are entitled to future benefits, the EBSA may open a TVPP investigation. Alternatively, if an employer is facing bankruptcy or has undergone a merger or acquisition, the EBSA may open an investigation because of the increased risk that a loss of participant data may prevent participants and beneficiaries from receiving plan benefits. A TVPP investigation may also be opened as a result of an inquiry by a plan participant or beneficiary.

The EBSA will open a TVPP investigation by sending a letter to the employer or plan administrator. Once a TVPP investigation is opened, the EBSA will request the following documents, records, and information:

- Plan documents and amendments thereto;
- Summary plan description and summaries of material modifications thereto;
- Participant census (including employment status and contact information);
- Actuarial reports;
- Plan communications to terminated vested participants, spouses and other designated beneficiaries;
- Internal procedures and practices for dealing with missing participants and beneficiaries;
- Contracts with third parties who perform recordkeeping for the plan and missing participants search functions, as well as information relating to the implementation of these functions; and
- Interviews with relevant parties.<sup>5</sup>

Additional documents and information may be requested depending on the circumstances.

The Release indicates that the EBSA will provide a reasonable opportunity for an employer or plan administrator to raise concerns about the costs associated with complying with an information request and will consider reasonable alternatives for providing the requested information. The EBSA will also grant reasonable requests for an extension of the due date for providing requested information. The EBSA will issue subpoenas to compel production of the requested information if necessary.

The investigation will focus on determining the possible existence of:

- Systemic errors in recordkeeping and administration that could lead to the untimely payment of benefits or the imposition of excise taxes for failure to satisfy the RMD requirements;
- Inadequate procedures for identifying and locating missing participants and beneficiaries;
- Inadequate procedures for communicating with term vested participants who are nearing normal retirement age;
- Inadequate procedures for contacting term vested participants or beneficiaries of term vested participants regarding the RMD rules and the actions necessary to avoid excise taxes for violations of the RMD rules;
- Inadequate procedures for dealing with uncashed distribution check.<sup>6</sup>

The Release identifies “red flags” discovered in investigations that are similar to the red flags listed above under “Best Practices.”

After reviewing requested documents and information, the EBSA will inform an employer and plan administrator of its findings. If there are systemic errors in plan records, the EBSA will help the plan locate as many missing participants and beneficiaries as possible and implement appropriate remedies for each affected participant and beneficiary. The EBSA will also request that the plan revise policies and procedures regarding missing participants. The EBSA will issue a voluntary compliance letter addressing potential ERISA violations and provide a period of time to address the violations. The Release notes that, absent substantial errors or widespread fiduciary breaches, the EBSA will not cite individual plan fiduciaries with ERISA violations.<sup>7</sup>

### Temporary Enforcement Policy regarding terminating defined contribution plans under the PBGC Missing Participants Program

DOL regulations set forth a safe harbor whereby plan fiduciaries of a terminating defined contribution plan are deemed to have met their fiduciary duties if benefits of a missing participant or beneficiary are rolled over to an individual retirement account or annuity.<sup>8</sup> In certain circumstances, the safe harbor permits the transfer of such benefits to a bank account or state unclaimed property fund.

The Temporary Enforcement Policy states that, pending further guidance, the DOL will not assert violations under ERISA §404(a) against plan fiduciaries of a terminating defined contribution plan in connection with the transfer of the accounts of a missing participant or beneficiary to the PBGC Defined Contribution Missing Participants Program. <sup>9</sup> <sup>10</sup> The DOL notes that the Temporary Enforcement Policy does not preclude the DOL from pursuing violations under (i) ERISA Sections 404 or 406 for a failure to diligently search for participants and beneficiaries prior to the transfer of accounts to the PBGC, and (ii) ERISA Sections 107, 209 or 404 for failure to maintain plan and employer records. The DOL also notes that a plan fiduciary must continue to satisfy the notice requirements of the safe harbor with modifications to reflect the transfer of accounts to the PBGC.

## Conclusion

The above documents issued by the DOL provide welcome guidance to employers and plan administrators in dealing with the difficult issue of missing participants and beneficiaries. Employers should review and revise plan policies and procedures regarding missing participants and beneficiaries in light of these pronouncements.

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1. <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance> ↵

2. Id. ↵

3. Id. ↵

4. <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement> ↵

5. Id. ↵

6. Id. ↵

7. Id. ↵

8. 29 CFR §2550.404a-3. Although not discussed in this article, the safe harbor and the temporary enforcement policy also apply to qualified termination administrators of abandoned defined contribution plans. ↵

9. <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins> ↵

10. The PBGC Defined Contribution Missing Participants Program was adopted by the PBGC on December 22, 2017. 29 CFR 2060.201-207. ↵

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