EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

FINDING AND PAYING YOUR RETIREMENT PLAN PARTICIPANTS

The Department of Labor ("Department") and IRS are devoting increasing enforcement attention to insisting that employers and plan fiduciaries be proactive about meeting retirement plan payment deadlines. Form 5500 requires disclosure of payments that were not made on time (excluding payments not made because the plan could not locate the individual despite diligent effort). IRS auditors are examining plans to determine whether the plans have met the legal deadlines for commencement of required minimum distributions, and over the last several years, Department auditors have made a special point of seeking information about the payment outreach and missing participant search process for plans under their review. In January 2021, the Department issued Compliance Assistance Release 2021-01 (https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance/compliance-assistance-release-2021-01.pdf), laying out expectations for missing participant reviews conducted under its Terminated Vested Project for defined benefit pension plans. At the same time, the Department released a list of "best practices" (https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance/best-practices-for-pension-plans.pdf) to provide general guidance to plan fiduciaries for ongoing[1] retirement plans.

Payment Deadlines

Tax-qualified retirement plans, 403(b) plans, and 457(b) plans must begin paying participants no later than the April 1st after the year in which the participant turns 72 (70½, for participants who had already turned 70½ by the end of 2019) or the year in which the participant's employment terminates, whichever is later. In the case of individuals owning more than five percent of the plan sponsor, and all IRA owners, the deadline is always April 1st after the year in which the individual attains age 72 (70½, in the case of an individual who had already turned 70½ by the end of 2019). Some plans (particularly defined benefit pension plans) require payment to commence earlier, when the participant reaches normal retirement age, and some plans may be planning to continue enforcing an age 70½ deadline rather than increasing the maximum age to 72 as permitted by 2019's SECURE Act. Conversely, many defined contribution plans may have extended the deadline in 2020 and/or 2021, as permitted by the CARES Act. Each plan's fiduciary will need to review the plan document to determine the deadline applicable to its participants.

[1] For terminated defined benefit plans, the PBGC maintains a mandatory program for missing participants' benefits, and now offers a program for terminated defined contribution plans as well. The Department has also issued guidance allowing for automatic rollovers of missing participants' account balances from terminated plans.

Beneficiaries of deceased participants are also subject to payment deadlines, with the actual deadline varying depending on a number of factors.

Small benefits of $5,000 or less ($1,000 or less, for plans not including an automatic rollover provision) may be subject to automatic payment promptly following termination of employment.

IRS and DOL Expectations

The IRS issued a memorandum on October 19, 2017, (https://benefitslink.com/src/irs/tege-04-1017-0033.pdf) to instruct auditors not to assert that a plan has violated the required minimum distribution rules if a plan has searched its records, the plan sponsor's records and publicly available records or directories, used a commercial locator service, credit reporting agency or a proprietary internet search tool, and attempted contact via certified mail to the last known mailing address and through "appropriate means" for other contact information (such as e-mail and telephone). A plan that has not taken these steps and fails to make a required minimum distribution may be cited for violation of the required minimum distribution rules.

The IRS's approach is consistent with but less comprehensive than the position of the Department of Labor. In Compliance Assistance Release 2021-01, the Department outlined its objectives and examination criteria with respect to its Terminated Vested Participants Project for defined benefit plans, and the "best practices" publication provided additional details about the Department's expectations. The new guidance acknowledged that not all search methods and recordkeeping practices will be appropriate for all plans, and also conceded that privacy concerns may curtail use of some of the suggested methods. The Department also recognized that fiduciaries can and should weigh the costs of search efforts against the amount of the benefit. Since employers who have been through a Terminated Vested Participants Program audit have frequently reported difficulties in getting investigating agents to understand these concerns and forego insisting on the use of all possible search methodologies, these explicit concessions are a positive development. However, the retirement industry has continued to express concerns that the Department has given insufficient weight to privacy and fraud prevention worries. Ultimately, fiduciaries should bear in mind that this is an area of intense regulatory scrutiny, and should review their existing missing-participant populations and procedures to be sure they are in line with regulatory expectations and well-designed to minimize the occurrence of missing participant situations.

This brings up the first point - namely, that the Department has said that plan fiduciaries should maintain *written* procedures for enforcing payment deadlines and locating missing participants, and should document their efforts in this regard. Plan fiduciaries should make sure that they establish and follow appropriate processes for ongoing routine communications and for payment outreach, are proactive about keeping in touch with participants, and keep records of the steps they have taken to keep in touch with participants and locate those with whom they have lost contact. The Department's 2021 guidance emphasizes that even if a participant has not reached a payment deadline, fiduciaries should follow up promptly on returned mail or other information indicating a bad address, a deceased participant or other potential issues that indicate that the plan may encounter difficulties contacting the participant.

According to the Department, the following "red flags" are indications that a plan's processes are problematic:

- More than a small number of missing or non-responsive participants.
- More than a small number of terminated vested participants who have reached normal retirement age but have not started their pension benefits (for plans that routinely see participants preferring to defer payment until the age 72/70½ deadline, records of timely outreach in advance of normal retirement age and/or ongoing outreach to participants about their access to plan benefits will be particularly important to counter this "red flag").
- Missing, inaccurate or incomplete contact information, census data, or both, including records with a large number of "placeholder" entries such as obviously incorrect names or dates of birth.
- Absence of appropriate policies for handling returned mail and undeliverable e-mails.
- Absence of appropriate policies for handling uncashed checks (including, but not limited to, the absence of an accounting journal or similar record of stale uncashed checks, or failure to reclaim the funds underlying stale uncashed checks).

The Department's Terminated Vested Participants program targets plans that are likely to demonstrate systemic problems. The Department may open an investigation due to a large number of terminated participants reported on Form 5500, or an employer bankruptcy, or as a result of a participant claim. Well-run outreach and search processes will reduce the risk of "red flags" that may trigger an audit and protect plan fiduciaries if an audit does occur. The Department has emphasized an intention to work cooperatively with fiduciaries to resolve identified issues and contact missing participants rather than to pursue enforcement action against individual fiduciaries. However, fiduciaries still can be held personally liable for losses incurred by the plan or participants due to fiduciary breaches.[2] In any event, it will be both easier and more cost-effective for plan fiduciaries to maintain robust processes in the first place than to hunt for participants *en masse* in the context of an audit.

Missing Participant Search Procedures

In brief, the Department's best practices guidance states that plans should have written policies and procedures, should make ongoing efforts to keep plan address records up to date, and should maintain records of search efforts. Fiduciaries without clear written procedures, or who have been relying on their recordkeepers to maintain procedures, should cooperate with their recordkeepers to document their plans' actual practices, and make sure those practices are legally adequate. Fiduciaries who already have written procedures in place should revisit those procedures to determine whether updates are advisable to align with the Department's recent guidance. While the Department's guidance acknowledges that not every suggested "best practice" will be appropriate for every plan or situation, fiduciaries should still engage with the suggestions and make considered decisions about what to include in their processes. If the plan is audited by the Department, having documented procedures that meet ERISA's fiduciary standards along with records demonstrating the proper operation of those procedures will be essential.

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2 For example, the Department's Compliance Assistance Release notes that the Department may require fiduciaries to obtain excise tax waivers for participants who incur excise taxes due to late required minimum distributions, or reimburse participants for excise taxes if the delay in payment was attributable to a fiduciary breach.

Suggested practices from the Department's recent guidance and general industry practice include:

- Fiduciaries should make sure the procedures identify the party responsible for tracking and initiating required distributions. If a fiduciary expects the recordkeeper to perform this function, the recordkeeping contract should expressly impose this obligation, and the recordkeeper must be provided with appropriate access to information in the employer's possession. The fiduciary should also remember that it has an obligation to monitor the recordkeeper's performance, and ensure that the recordkeeper maintains legally compliant procedures and adheres to appropriate standards of due diligence.
- Plans should stay in touch with participants on an ongoing basis, rather than waiting until a payment deadline approaches. Plan communications should remind participants regularly to keep their contact information and the contact information for their beneficiaries up to date, and plan fiduciaries should take prompt action when contact information proves to be outdated.
  - Employers and fiduciaries should look for opportunities to communicate payment deadlines and remind participants of the importance of keeping address information up to date. If possible, these warnings should be included in the summary plan description. Reminders can also be included with regular mailings, such as benefit statements and annual investment or funding notices. When employees first terminate employment, outreach about distribution rights should include a reminder of participants' obligation to stay in contact if they choose not to take payment. However, the Department has emphasized that the ultimate responsibility to maintain records and arrange for timely payment of benefits remains on the plan and its fiduciaries.
  - The plan should have a process for searching for participants and beneficiaries as soon as the plan learns of a bad address. For example, if a routine benefit statement comes back as undeliverable, an address search should be conducted at that time. Waiting until the payment deadline approaches increases the odds that the plan will not be able to find the person, or that the plan will not have timely notice of a death and associated payment requirements. In addition, the plan has an ongoing obligation to provide required communications to the participant or beneficiary; it cannot simply ignore a bad address.
  - The plan should maintain multiple types of contact information, when available. The Department suggests that plans request participants to provide home and business addresses, phone numbers, and e-mail addresses rather than just mailing addresses. Although the Department also suggested requesting next-of-kin and social media contact information, fiduciaries will need to weigh privacy concerns and employees' likely reactions when deciding on the utility of requesting and retaining this information for individuals who are not themselves participants or beneficiaries.
  - There should be a convenient way for participants to update their contact information. The Department suggested an online platform, which is available for most 401(k) plan participants through professional recordkeepers but is less common for pension plans. Even if a plan has an online platform, fiduciaries should bear in mind that older or less-well-off participants may be less likely to use this method of communication, and make toll-free phone numbers and physical addresses available as well.

  - Fiduciaries should make sure the plan uses effective communication strategies. Communications should be straightforward, should clearly identify the reason for the communication and information needed, should provide instructions to participants on how to update their contact information, and should be packaged in a way likely to notify participants that the communications involve their benefits. Plans and employers that have gone through name changes and acquisitions will need to be thoughtful when reaching out to participants who may not recognize the new name. The Department suggests using envelopes printed with the old name so that participants can identify the communication as legitimate. The Department also noted that communications should offer English-language assistance if the employer has a workforce likely to need that assistance.
  - Fiduciaries should contact participants nearing normal retirement age and the age for commencement of required minimum distributions to remind them of payment options and deadlines. Since most 401(k) plans allow payment at any time and are in regular contact with participants, the required minimum distribution deadline is likely to be more relevant for them. Plans that restrict payment prior to an early or normal retirement date should have processes in place to be sure participants are alerted when their benefits become available.
- The plan should have a process for keeping its records up to date.
  - Updated information received from participants should be entered into the plan's information system on a timely basis.
  - Fiduciaries should regularly audit and correct census information.
  - Fiduciaries should revisit the "bad address" list periodically, to conduct updated searches for individuals who could not be located through the plan's original efforts. The Department has noted that even participants whose benefits have been forfeited pending location of the participant remain entitled to those benefits once they are in fact located, and should not have their records purged. In comments at a February 2021 webinar, a Department representative characterized a purge of this type as a clear legal violation. The Department representative also noted that a plan cannot provide that participants who fail to respond to contact update requests permanently forfeit benefits.
  - In the event of a recordkeeper transition or business acquisition, fiduciaries should take special care to be sure plan information is retained and participants are appropriately alerted to the change. The Department stated that plans should conduct missing participant searches in advance of these types of changes.
  - Fiduciaries should have a process for conducting death searches, particularly if a plan is not in regular contact with a participant via ongoing benefit statements or other regular mailings. A participant's death may accelerate the time at which payments must begin, or mean that payments need to stop, be reduced, or be redirected. Beneficiaries may not know of a participant's retirement benefits, particularly if the participant had not yet commenced payment, so the plan should not assume it will receive timely notification from the next of kin. These searches are often conducted using the Social Security death master file.
- Plan procedures should detail the timing for initial and follow-up outreach to initiate payment, and rules for how to handle non-responsive participants and beneficiaries.

- The plan's cash-out provisions should be enforced in a timely fashion for individuals whose benefits are subject to automatic payment.
- Plan procedures should detail the logistics for the search process. The Department recommends the following:
  - Checking related plan and employer records for participant, beneficiary, and next of kin/emergency contact information. The Department acknowledged that privacy concerns may be an issue and suggested having the other plan or employer forward an inquiry. However, this solution addresses objections that a next-of-kin or other contact may have to sharing the participant's information; it does not address the privacy and fraud concerns associated with having a plan provide even high-level benefit information to a third party. A Department representative at a February 2021 webinar indicated that the Department understands this concern but believes that protection against fraud would come in the processes around disbursement of the money. Each employer will need to work with its counsel and loss prevention staff to assess the extent to which it is comfortable with this view, based on the information available to it for eventual authentication purposes, and the nature of the third party's relationship to the plan. (For example, a beneficiary has a claim to the benefit if the participant has died, and hence outreach to a beneficiary may be more appropriate than outreach to a non-beneficiary emergency contact.) Of course, in most cases, the odds of another plan or an employer having more current records than a retirement plan will be small to nonexistent if a participant is no longer actively employed, making it less likely that the potential for success would justify these risks. This is an avenue that large employers with multiple retirement and retiree welfare programs may be able to explore, and may also work for small employers whose management may know former employees personally, but is less likely to be realistic in other scenarios.
  - Checking with designated plan beneficiaries (e.g., spouse, children), employee's emergency contacts (in the employer's records), current and former co-workers, unions, and other potential sources for updated contact information. Again, the Department suggests asking the individuals to forward a letter to alleviate privacy concerns. However, as discussed in the prior bullet, this suggestion does not address the risk to the missing participant's privacy and the risk of fraud if the individual is known to be missing and entitled to plan benefits. A Department representative at a February 2021 webinar analogized contacting co-workers in this regard to sending out a solicitation seeking former employees to invite to a retirement party, but even if the employer has a practice of this sort of outreach, that situation is not the same as informing an individual's former co-workers that the individual has an unclaimed retirement benefit. Employers will need to consider the extent to which appropriate fraud protections can be applied if the information about the unclaimed benefit is disseminated, as well as the likely reaction of missing participants to the sharing with their former co-workers and other contacts of the information that their former employer or plan is looking for them (regardless of whether the reason for the search is revealed), and discuss their situations with their counsel. Employers and recordkeepers may not be comfortable providing any sort of benefit information to a third party, particularly when authenticating the third party is difficult in itself, and may not even be comfortable advertising a list of "missing" former employees to their current workforces. Again, this avenue may be helpful for some small employers with personal connections

to former employees' friends and families, and/or in the case of outreach to a beneficiary who will receive the account if the participant has died, but may be problematic in other circumstances.

- Using search services, including free online search engines, public record databases (such as those for licenses, mortgages, and real estate taxes), obituaries, and social media, as well as commercial locator services, credit-reporting agencies, or proprietary search engines. Many plans hire commercial locator services, either directly or through their recordkeepers.
- Attempting contact via USPS certified mail, or via a private delivery service with similar tracking features if less expensive than USPS certified mail, to the last known mailing address, as well as attempting contact via such other channels as email addresses, telephone and text numbers, and social media. Generally, the plan will need to limit the information provided until it can verify its contact information is indeed for the proper person.
- Conducting a death search if participants are nonresponsive over a period of time, and redirecting communications to beneficiaries if the participant is confirmed to be deceased.
- 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. Again, employers may have privacy and fraud concerns regarding publication of a list of missing participants to their workforce, and they should discuss their specific situations with their counsel.

While modern information technology and search services make it far easier than it once was to locate missing participants, privacy and fraud concerns may pose greater obstacles than the Department's suggestions acknowledge. And while a number of search steps can be taken on a very cost-effective basis, particularly when bundled through a plan's recordkeeper or other vendor, search costs can still become prohibitive, especially for small benefits.[3] Accordingly, this is definitely an area of plan administration where prevention is preferable to a cure.

Education regarding the importance of keeping contact information up to date through a participant's period of active employment and at the time of termination, a regular cadence of plan communications, and prompt responses to returned mail and other indications that a plan has lost touch with a participant, or is at risk of doing so, can minimize the need for expensive and time-consuming searches. Likewise, regular oversight of the plan's ongoing communications and proper enforcement of the plan's payment deadlines will minimize the risk of violation of plan payment rules, protecting the plan's tax qualification and minimizing the risk of the adverse tax consequences for participants that can arise from late payment. In the case of defined benefit plans, timely payment also reduces the plan's risk of potentially expensive actuarial adjustments or interest on delayed payments. A well-run payment outreach and missing participant search

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[3] A Department representation at a February 2021 webinar agreed that defined contribution plans can charge search expenses to participants, as long as the plan so permits and the expenses meet ERISA's usual requirements (e.g., prudence, reasonableness, and not involving plan sponsor overhead costs). However, the representative noted that charging the participant's account may not be appropriate if the plan had failed to maintain prudent processes for maintaining contact with and searching for participants in the first place.

process will help prevent the development of the sort of "red flags" that can lead to enforcement action in connection with Department or IRS audits. And of course, even leaving all other considerations aside, timely payment serves the employer's fundamental purpose in establishing and maintaining the plan - namely, the provision of retirement benefits to former employees.

As always, please feel free to contact a member of the Employee Benefits and Executive Compensation group for more information about the items discussed in this newsletter, or for assistance in other matters at 585.232.6500 or 716.853.1616, or visit www.hselaw.com.