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Publications

DOL Muddies the Water With Escheatment Guidance for Retirement Plans

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The U.S. Department of Labor ("DOL") recently issued Field Assistance Bulletin 2025-01 (the "FAB") to establish a temporary non-enforcement policy permitting plan fiduciaries to escheat small retirement benefit payments to state unclaimed property funds if the participants are missing. The FAB is notable in that it provides some insight into how DOL views the fiduciary decision to voluntarily escheat benefits, but the relief provided by the non-enforcement policy is very limited. Notably, the FAB states that the non-enforcement policy is temporary because DOL "intends to consider more formal guidance" related to escheatment in the future.

I. Background

The National Association of State Treasurers has urged DOL for years to issue guidance to facilitate the use of state unclaimed property programs for missing participants. Every state has an unclaimed property program, and state laws generally require certain unclaimed and abandoned accounts to be escheated to the state programs after a statutory dormancy period. State law escheatment requirements are typically preempted by ERISA, so plan fiduciaries are not required to escheat unclaimed benefits (*e.g.,* uncashed checks). However, most state laws permit plans to escheat unclaimed benefits on a voluntary basis.

A small percentage of plans and providers currently use escheatment as a tool to deal with small accounts for unresponsive terminated vested participants. However, it is more common for plans to rely on the involuntary distribution of small accounts to IRAs. A growing number of plans have also adopted automatic portability to facilitate account consolidation, locate participants, and preserve savings.

II. The FAB

On January 14, 2025, DOL issued the FAB to establish a non-enforcement policy for fiduciaries who use escheatment for certain retirement accounts. The FAB states DOL will not pursue fiduciaries for breaches of their duties if they decide to distribute benefit payments owed to missing participants to a state unclaimed property fund. The present value of the participant's non-forfeitable benefit must be $1,000 or less (disregarding outstanding loans but including certain rollover contributions), and the plan fiduciary must comply with the following conditions:

- The fiduciary must determine that the transfer to a state unclaimed property fund is a prudent destination for the participant's or beneficiary's retirement benefit payments.
- The plan fiduciary must fail to locate the participant or beneficiary after implementing a prudent program to find missing participants consistent with DOL's missing participant guidance (summary).
- The plan fiduciary must select the state unclaimed property fund in the state of the last known address of the participant or beneficiary.
- The plan's SPD must explain that missing participant benefit payments may be transferred to an "eligible state fund" and identify who to contact at the plan for more details.
- The state unclaimed property fund must meet nine conditions to be considered an "eligible state fund." Plan fiduciaries can rely on representations from the State Treasurer as to whether the conditions are met.

III. Observations

The FAB provides little, if any, actual relief to plan fiduciaries considering escheatment. It purports to direct investigators to not bring claims that fiduciaries breached their duties by voluntarily escheating certain benefits, but it conditions relief on a fiduciary satisfying those very duties. Thus, it is unclear whether the FAB reduces risk for fiduciaries by providing non-enforcement relief or whether it increases risk by articulating standards that will be difficult for fiduciaries to meet.

For those considering escheatment, the FAB includes conditions that will be difficult for many fiduciaries to satisfy. For example, the non-enforcement policy is only applicable where a fiduciary has prudently selected the unclaimed property program(s). However, in Field Assistance Bulletin 2014-01, DOL stated that, "in most cases, a fiduciary would violate ERISA section 404(a)'s obligations of prudence and loyalty" by triggering negative tax consequences by escheating a benefit rather than making a plan rollover distribution. That guidance further states that, before deciding to escheat benefits, a fiduciary must –

…prudently conclude that such a distribution is appropriate despite the potential considerable adverse tax consequences to the plan participant. Unlike tax-free rollovers into an individual retirement plan, the funds transferred to a… state unclaimed property fund generally are subject to income taxation, mandatory income tax withholding and a possible additional tax for premature distributions. Moreover, any interest that accrues after the transfer generally would be subject to income taxation upon accrual. These tax consequences reduce the amount of money available for retirement. A prudent and loyal fiduciary would not voluntarily subject a missing participant's funds to such negative consequences in the absence of compelling offsetting considerations.

The FAB also requires fiduciaries to comply with DOL's missing participants guidance, but that sub-regulatory guidance is a non-binding list of actions that may or may not be applicable depending on the facts and circumstances. Consequently, it may be difficult for most fiduciaries to know whether or not they have met the condition.

The FAB is not binding on plan fiduciaries as it is merely guidance for DOL investigators, and notably, the FAB does not provide any relief from claims by private plaintiffs. It remains to be seen what impact the temporary non-enforcement policy will have and whether DOL will move forward with plans to establish more formal, permanent rules.