

## Lost Participants

It is sponsors' duty to locate their terminated 'missing persons'

By *David Kaleda*

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A challenge that all plan fiduciaries and their advisers face is how to deal with "lost" participants. When investigating a plan, the Department of Labor (DOL) will focus on how the plan addresses that. Indeed, the DOL recently challenged practices thought by plan fiduciaries and their advisers to be appropriate under the Employee Retirement Income Security Act (ERISA). Given this scrutiny, plan sponsors and their advisers should examine how their plan and service providers resolve the issues involved.

The first challenge that plan sponsors and their service providers face when dealing with lost participant issues is identifying who is lost. Plan fiduciaries generally find that participants fall into two categories: 1) participants to whom the plan sends a written communication and the communication is returned as undeliverable, and 2) participants to whom the plan sends a communication requiring an affirmative response or an action by the participant—e.g., to cash a benefit payment check—and no such response is received or action taken. In the case of the former, the plan knows it has a bad address and, thus, may characterize the participant as lost or missing.

However, in regard to the latter, the plan has no reason to believe it has a bad address or that the participant is otherwise lost. Such participants are better characterized as "unresponsive."

The second challenge that plans and their service providers face is how to handle benefit payments due to participants pursuant to the terms of the plan when the plan has a bad address or the person is unresponsive. In many cases, plans provide for the "cash-out" distributions of vested benefits that do not exceed certain dollar thresholds—e.g., \$1,000—established under Section 401(a) of the Internal Revenue Code (IRC). Additionally, the plan may be required to pay benefits under the IRC's

required minimum distribution rules after the participant reaches a certain age and then process such payments in accordance with the IRC and the plan's terms.

ERISA does not specifically impose a duty on plan fiduciaries to locate lost participants or resolve outstanding benefit payments. However, the DOL's Field Assistance Bulletin (FAB) 2014-01 and its predecessor clearly have established that the DOL believes such a duty exists. Importantly, however, the FAB addresses how to resolve these issues only in the context of a plan termination. Neither the FAB nor any other DOL guidance addresses the practical realities of resolving these issues in the context of an ongoing plan.

Many plan fiduciaries and plan service providers have implemented practices and procedures to address lost participants and resolve outstanding benefit payments in accordance with the FAB. Unfortunately, the DOL during its investigations often objects to some of these practices.

One major area of the DOL's focus has been pension plans. For example, many pension plans permit the payment of benefits upon the participant reaching his normal retirement date. However, the participant often may defer the receipt of benefits until his "required beginning date." The IRC permits these provisions, yet the DOL appears to question their validity in general. The DOL also appears to be requiring extraordinary steps to locate lost participants, particularly when, in its view, the vested accrued benefit is considered large.

Another example of the DOL's focus is the resolution of outstanding benefit payments to lost or unresponsive participants. In a defined contribution (DC) plan, plan fiduciaries, after providing notice to the participant, often return the payment to an unallocated account within the plan; the plan will pay such amount—unadjusted for earnings—to the participant if he later notifies the plan sponsor of his desire to receive the payment. The plan may use the returned amount for any purpose permitted under ERISA until paid to the participant. There is support under the IRC for this approach. Yet the DOL's investigators now appear to challenge this practice.

In light of the above, the big question is what plan fiduciaries and plan service providers should do. Ideally, the DOL will issue regulatory guidance—including a regulatory safe harbor—or subregulatory guidance that specifically applies to addressing lost participant and outstanding benefit payment issues involving ongoing defined contribution and defined benefit (DB) plans.

In the meantime, plan fiduciaries should consider what steps they might take to defend against an enforcement action by the DOL. First, a plan fiduciary should understand and document what procedures it has in place, either directly or through a plan service provider, to address these issues. Second, the fiduciary should review those procedures in light of the FAB and the DOL's enforcement efforts.

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