Bloomberg Tax

Tax Management
Compensation Planning Journal™

DOL Issues Missing Participant Guidance After Years-Long Enforcement Initiative

By David Block, David Levine, and Kevin Walsh[*]
Groom Law Group
Washington D.C.

INTRODUCTION

On January 12, 2021, the Department of Labor (DOL) issued sub-regulatory guidance detailing what steps plan sponsors should take to locate and distribute retirement benefits to missing or nonresponsive participants (missing participants).

While this guidance has been a priority request for retirement plan sponsors, service providers, and trade associations, there are mixed opinions as to its impact. Some sponsors may take comfort in having guidance to look to when addressing missing participants in their plans. However, the guidance does not create any clear, bright-line rules that many stakeholders had requested, and certain activities labeled ''best practices'' highlighted by DOL are costly, of potentially limited practicality, and could instead turn into mandatory demands from DOL in investigations.

Importantly, the guidance does not have the force and effect of law, and does not bind the regulated community. As such, it may be too soon to tell whether this non-binding guidance is helpful or adds increasing burdens to plan sponsors.

SUMMARY OF DOL GUIDANCE

The DOL guidance comprised three distinct pieces concerning missing participants: (1) a ''best practices'' document,[1] (2) Compliance Assistance Release 2021-01,[2] and (3) Field Assistance Bulletin (FAB) 2021-01.[3] Each of these three documents are briefly summarized below. No notice and comment rulemaking with stakeholder input was involved because the guidance is non-binding, informal guidance.

''Best Practices'' Document

DOL ''best practices'' document provides guidance to fiduciaries of retirement plans for, among other things, addressing DOL's enforcement position on their fiduciary obligations with respect to missing participants. The document highlights certain ''red flags'' that may be warnings or indicators of missing participant problems. Further, the document outlines practices that DOL believes are indicative of well-run plans.

Some of the ''red flags'' that DOL indicated could suggest the plan has a missing participant problem include the prevalence of more than a small number of missing or nonresponsive participants, more than a small number of terminated vested participants

---

[*] David Block advises clients on a wide range of federal tax and ERISA matters regarding employee benefits and executive compensation. His practice encompasses qualified retirement plans, executive compensation, federal income and employment taxes, and health and welfare arrangements.

David Levine is co-chair of the Groom Law Group's employer-focused practice. He advises plan sponsors, advisors, and other service providers on a wide range of employee benefits matters, from retirement and executive compensation to health and welfare plan matters.

Kevin L. Walsh advises clients on a wide range of fiduciary matters and other issues involving benefit plans. His practice encompasses helping plan service providers comply with the Department of Labor's fiduciary rules, working with them as they develop processes for and make investments, and helping them navigate the impact of Commodity Futures Trading Commission (CFTC), Office of Foreign Assets Control (OFAC), and SEC regulations.

[1] Missing Participants – Best Practices for Pension Plans, U.S. Department of Labor (Jan. 12. 2021).

[2] Compliance Assistance Release No. 2021-01.

[3] Field Assistance Bulletin No. 2021-01.

(TVPs) who have reached retirement age but have yet to receive benefits, missing, inaccurate, or incomplete census data, and the absence of sound policies for handling returned mail and uncashed checks.

Further, the document highlights four key practices that DOL believes are indicative of a well-run plan that is minimizing and mitigating missing participant issues: (1) maintaining accurate census information for the plan's participant population, (2) implementing effective communication strategies, (3) conducting missing participant searches, and (4) documenting procedures and actions. The document notes that not every practice outlined and addressed is appropriate for every plan, and that plan fiduciaries should consider what practices will yield the best results in a cost-effective manner. Further, the document highlights that each plan's appropriate procedures will ultimately be determined by the ''facts and circumstances.''

One area of particular interest in the document are the ''best practices'' for conducting missing participant searches. These examples ranged from the routine (such as checking plan and employer records for contact information), to the unexpected (publishing a list of missing participants on a company's intranet, reaching out to colleagues of missing participants, and using social media to find missing participants). Given DOL's current focus on plan security practices, some have found a number of the ''unexpected'' examples to be troubling in their suggested activities. Further, the burden of missing participant searches appears, in many instances, to be placed on the employer with little responsibility left on a participant or beneficiary.

Compliance Assistance Release 2021-01

CAR 2021-01 describes the approach that DOL regional offices in investigations should take under the TVP enforcement project. This memorandum provides insight into what factors DOL investigators examine in a defined benefit plan audit concerning TVPs. Perhaps most useful to plan fiduciaries, the memorandum outlines how DOL will determine whether a plan takes sufficient steps to address missing participant situations as they occur. Such steps include examining internal procedures and practices for reaching out to or searching for unresponsive TVPs, along with examining contracts and experience with third-parties who perform recordkeeping and missing participant search functions for the plan.

FAB 2021-01

FAB 2021-01 states that DOL will not pursue fiduciary breach claims against plan fiduciaries or Qualified Termination Administrators of abandoned plans transferring missing participant accounts to the Pension Benefit Guaranty Corporation's Missing Participants Program for terminating defined contribution plans, provided certain conditions are met. This guidance is temporary, and is only an enforcement policy. However, it may provide some comfort to fiduciaries that elect to use the program.

PRACTICAL CONSIDERATIONS

Although plan fiduciaries may appreciate this effort to provide guidance in an opaque area of DOL enforcement, close inspection suggests that the guidance may have placed onerous requirements on fiduciaries, as well as raised certain practical concerns. For veterans of long-term DOL missing participant investigations, this guidance may very well be seen as a double-edged sword.

For example, DOL-represented ''best practices'' for conducting missing participant searches include searches through social media or contacting work colleagues, which may needlessly raise security concerns for missing participants or even disquieting for corporate cultures which have, for both legal and cultural reasons, built significant frameworks for not overly sharing employee data within a company.

Similarly, ''best practices'' such as registering missing participants on public and private pension registries, and then publicizing the registries through emails, newsletters, and other communications may invite potential fraud and litigation, as does publishing lists of missing participants on a company's intranet page.

Further, it appears that some of the search guidance is duplicative and overlapping, and it is unclear precisely how this overlapping guidance will apply to plan fiduciaries in DOL investigations. If DOL applies the guidance in a reasonable and practical manner, this guidance holds the potential to more efficient investigations. Only time will tell.

CONCLUSION

DOL's recent missing participant guidance is a helpful addition to the regulatory, as fiduciaries now have concrete, written guidance to rely upon, even if it is not formally binding guidance. However, close inspection suggests that DOL places a heavy burden on employers to minimize the number of missing participants. Further, certain suggested ''best practices'' may invite fraud and litigation. Fiduciaries would be wise to discuss this newly released guidance with counsel, so as to implement procedures that meet DOL expectations without raising unnecessary plan risks.

ISSN 0747-8607