

## DOL Issues Missing Participants Guidance

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On January 12, 2021, the Department of Labor (the “DOL”) issued three pieces of guidance detailing the DOL’s view of what steps plan fiduciaries should take to locate and distribute retirement benefits to missing or nonresponsive participants (“missing participants”). The guidance is largely consistent with positions taken by DOL in investigations. The guidance provides DOL’s views on what is “best practices” in searching for missing participants and a glimpse into DOL’s enforcement process under its missing participant initiative. However, the guidance does not establish the type of clear, bright-line rules many plan sponsors and services providers were asking for. Importantly, as noted in the guidance, this guidance does not have force and effect of law. As such, while moving the ball forward, whether the guidance helps to create a more efficient path through missing participant investigations will have to be seen.

### I. Background

For a number of years, DOL investigators have focused on whether employers and plan service providers have established procedures to search for, and locate, deferred vested missing participants. The DOL’s focus on missing participants began in DOL’s Philadelphia Regional Office during the Obama Administration. However, it quickly spread to other regional offices. And last year, the Acting Assistant Secretary acknowledged that it has become a national enforcement initiative.

A number of retirement system stakeholders raised concerns about the DOL’s missing participant investigations. Concerns included, among other things, the lack of uniformity across the various field offices, positions taken in enforcement without formally issued legally-binding guidance, and the length and cost of investigations. In fact, many stakeholders filed numerous requests over the years asking the DOL to issue guidance articulating the

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DOL's legal positions and providing more clarity as to how fiduciaries can meet their ERISA obligations. The missing participant guidance appears to be an attempt to partially respond to those requests.

As the missing participant guidance was issued in the waning days of the Trump Administration, the Biden administration will likely carefully review the guidance. It is not uncommon for guidance to be delayed, revised, and/or rescinded as part of the review process, but the missing participant guidance may be more likely to survive intact given that it is largely consistent with legal positions taken, and policy decision made, by both the Obama and Trump Administrations.

The Department issued three distinct pieces of guidance on missing participants:

- A "Best Practices" document, which appears to be aimed at describing practices plan fiduciaries should consider;
- Compliance Assistance Release 2021-01, which describes the approach to be taken by regional offices in investigations under the terminated vested participants ("TVP") enforcement project; and
- Field Assistance Bulletin 2021-01, outlining the enforcement policy authorizing use of the PBGC missing participant program for missing and nonresponsive participants.

## II. Best Practices Guidance Regarding Missing Participants

The "best practices" document may be helpful to plan fiduciaries as they consider their fiduciary obligations with respect to missing participants. The DOL notes that its guidance is based on general ERISA fiduciary principles that are equally applicable to defined benefit plans and defined contribution plans (such as 401(k) plans). However, given the aggressive DOL positions taken in some investigations, there is the risk that the DOL's "best practices" examples could be used as prescriptive remedies, which could be viewed as contrary to ERISA's flexible fiduciary standard of care that looks to the particular facts and circumstances surrounding each plan.

### *Missing Participant "Red Flags"*

The guidance focuses on "red flags" and "best practices." The DOL notes that, from its perspective, one or more of the following "red flags" indicate a possible missing participants problem for a plan:

- 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 started receiving their pension benefits.
- Missing, inaccurate, or incomplete contact information, census data, or both (e.g., incorrect or out-of-date mail, email, and other contact information, partial social security numbers, missing birthdates, missing spousal information, or placeholder entries).
- Absence of sound policies and procedures for handling mail returned marked "return to sender," "wrong address," "addressee unknown," or otherwise, and undeliverable email.

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- Absence of sound policies and procedures for handling uncashed checks (as reflected for example, by the absence of an accounting journal or similar record of uncashed checks, a substantial number of stale uncashed distribution checks, or failure to reclaim stale uncashed check funds in distribution accounts).

## *Missing Participant Best Practices*

The DOL states that plan fiduciaries should determine what missing participant practices “will yield the best results in a cost effective manner for their plan’s particular population.” This requirement – which references plan-specific facts and circumstances – is consistent with ERISA’s duty of prudence that requires plan fiduciaries to act as a prudent person would act “under the circumstances . . . in a like capacity.” ERISA § 404(a)(1)(B).

However, the DOL goes on to include a long list of “best practices,” some of which raise potential concerns. For example, the DOL notes that a “best practice” is for a plan fiduciary to actively publicize a list of missing participants to its workforce and retirees. Plan fiduciaries could reasonably be concerned about potential plan security implications with taking such steps given the DOL’s other efforts at securing plan benefits from fraudsters. Another “best practice” is collecting “social media contact information.” As the norms surrounding social media are still developing, and there are numerous social media platforms, some plan fiduciaries might not be comfortable with collecting this information.

Further, some of the other best practices appear duplicative. For example, the DOL states that a “best practice” is to use “free online search engines, public record databases (such as those for licenses, mortgages and real estate taxes), obituaries, and social media to locate individuals.” But the DOL also lists the use of a “commercial locator services” as a “best practice.” When faced with these “best practices,” would plan fiduciaries have a duty to supplement the work of a commercial locator service if the service, for example, does not use social media to locate individuals?

The DOL no doubt intended these practices to be helpful, but some plan fiduciaries may have concerns about the extensive list of “best practices,” especially given that this guidance is not formal guidance binding on plan fiduciaries.

Other “best practices” include the following –

Maintaining accurate census information for the plan’s participant population

- Contacting participants, both current and retired, and beneficiaries on a periodic basis to confirm or update their contact information. Relevant contact information could include home and business addresses, telephone numbers (including cell phone numbers), social media contact information, and next of kin/emergency contact information.
- Including contact information change requests in plan communications.
- Flagging undeliverable mail/email and uncashed checks for follow-up.

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- Maintaining and monitoring an online platform for the plan that participants can use to update contact information for themselves.
- Providing prompts for participants and beneficiaries to confirm contact information upon login to online platforms.
- Regularly requesting updates to contact information for beneficiaries, if any.
- Regularly auditing census information and correcting data errors.
- In the case of a change in record keepers or a business merger or acquisition by the plan sponsor, addressing the transfer of appropriate plan information (including participant and beneficiary contact information) and relevant employment records (e.g. next of kin information and emergency contacts). Using plain language and offering non-English language assistance.
- Encouraging contact through plan/plan sponsor websites and toll free numbers.
- Building steps into the employer and plan onboarding and enrollment processes for new employees, and exit processes for separating or retiring employees (to verify contact information, request any other necessary information, and advise of the benefits owed to the participant).
- Communicating information about how the plan can help eligible employees consolidate accounts from prior employer plans or rollover IRAs.
- Clearly marking envelopes and correspondence with the original plan or sponsor name for participants who separated before the plan or sponsor name changed.

## Missing participant searches

- Checking related plan and employer records for participant, beneficiary and next of kin/emergency contact information.
- Checking with designated plan beneficiaries (e.g., spouse, children) and the employee's emergency contacts (in the employer's records) for updated contact information.
- Using free online search engines, public record databases (such as those for licenses, mortgages and real estate taxes), obituaries, and social media to locate individuals.
- Using a commercial locator service, a credit-reporting agency, or a proprietary internet search tool to locate individuals.
- Attempting contact via United States Postal Service ("USPS") certified mail, or private delivery service with similar tracking features if less expensive.
- Attempting contact via other available means such as email addresses, telephone and text numbers, and social media.
- If participants are nonresponsive over a period of time, using death searches (e.g., Social Security Death Index).
- Reaching out to the colleagues of missing participants by, for example, contacting employees who worked in the same office (e.g., a small employer with one or two locations) or by publishing a list of "missing" participants on the company's intranet, in email notices to existing employees, or in communications with other retirees who are already receiving benefits.

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Similarly, for unionized employees, using union member communications to find missing retirees.

- 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.
- Searching regularly using some or all of the above steps.

#### Documenting procedures and actions

- Reducing the plan's policies and procedures to writing.
- Documenting key decisions and the steps and actions taken to implement the policies.
- Working with the plan record keeper to identify and correct shortcomings in the plan's recordkeeping and communication practices, including establishing procedures for obtaining relevant information held by the employer.

### III. Terminated Vested Participants in Defined Benefit Plan

The DOL also published an internal DOL memorandum concerning its terminated vested participants ("TVP") enforcement project. By sharing the memorandum with the public, the DOL provides insight into what factors the DOL investigators examine in a defined benefit plan audit concerning TVPs. The DOL states that an audit could begin based on its review of a plan's Form 5500. The DOL noted that a Form 5500 reporting a large number of retired or terminated vested participants who are entitled to future benefits might indicate that the plan has a systemic issue with its administration. The DOL also noted that plan sponsor bankruptcies or mergers or acquisitions might indicate a higher risk of missing TVPs. This suggests that diligence performed by plan sponsors in connection with corporate restructurings should involve a careful review of plan participant demographics and available data.

#### *DOL's Objectives in Terminated Vested Participant Audits*

The DOL notes that its investigations have three key objectives:

- Ensuring that the plan maintains adequate census and other records necessary to identify TVPs owed benefits, the benefit amounts, and when the benefits become payable.
- Ensuring that the plan has adequate procedures for communicating to TVPs about their benefit eligibility, including when the benefits become payable and the date they must commence required minimum distributions ("RMDs") to avoid a tax penalty.
- Ensuring that the plan has implemented appropriate procedures to search for missing TVPs.

As to the procedures for searching for missing TVPs, the DOL's best practices for missing participants (discussed above) would be relevant.

#### *Typical Terminated Vested Participant Audit*

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The DOL describes how a DOL investigation would proceed beginning with a request for relevant documents, such as the following –

- The plan document(s) (including summary plan descriptions) and any relevant amendments.
- Participant census records, noting the employment status of each participant and their contact information.
- Actuarial reports or other reports prepared by the plan's actuary.
- Documents describing the plan's procedures for communicating with TVPs, spouses and other designated beneficiaries.
- Documents describing the plan's procedures for addressing missing TVPs.

The DOL then states that it would examine the relevant documents and other information to identify compliance shortfalls, such as the following:

- Systemic errors in plan recordkeeping and administration that create a risk of TVPs failing to enter pay status.
- Inadequate procedures for identifying and locating missing TVPs or their beneficiaries.
- Inadequate procedures for contacting TVPs nearing normal retirement age to inform them of their right to commence benefit payments.
- Inadequate procedures for contacting TVPs who are not in pay status at or near the date that they must commence RMDs.
- Inadequate procedures for addressing uncashed distribution checks.

The DOL notes that it has encountered obvious “red flags” such as census data indicating a TVP was born on “1/1/1900” or names being listed as “John Does.” The DOL also notes other problems that it has encountered, such as a plan continuing to send communications to “known” bad addresses, failing to communicate in plain English, and failing to send out communications in the name of the company that the TVP had worked for (in the case of a corporate merger or acquisition).

DOL states that its preference is to engage in a constructive dialogue with plan fiduciaries and seek voluntary compliance. DOL explains that its aim is to help plan fiduciaries “find as many adversely affected participants and beneficiaries as possible and help the plan fashion an appropriate remedy for each affected individual.” DOL notes that requested remedial measures could include plan fiduciaries (i) correcting their policies and practices regarding missing participants, (ii) seeking a waiver of excise taxes from the Internal Revenue Service with respect to a TVP who failed to commence RMDs, or (iii) reimbursing a TVP for any such excise taxes.

The DOL's decision to publish the memorandum describing its enforcement audits at the same time it is publishing the guidance on “best practices” for missing participants appears intended to add some force to its “best practices” guidance. However, given the guidance's own disclaimer of being “new” guidance or having the force or effect of law, the DOL may be limited in its ability to enforce these positions.

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## IV. PBGC's Missing Participants Program

In addition to the guidance documents discussed above, the DOL issued FAB 2021-01 putting in place a temporary enforcement policy related to the use of PBGC's Missing Participants Program (the "Program") for terminating defined contribution plans. The guidance may provide a degree of comfort to plan fiduciaries and Qualified Termination Administrators of abandoned plans ("QTAs") using the Program.

PBGC established the Program many years ago to hold participants' benefits when a single-employer defined benefit plan terminates and certain participants cannot be located, and the agency expanded the Program in 2017 to apply to defined contribution plans. A fiduciary or QTA for a terminating defined contribution plan can now transfer missing participants' accounts to PBGC after conducting a "diligent search." There is a one-time administrative fee of \$35 for accounts of more than \$250. Once the assets are transferred, PBGC will include the participants' information in a searchable database and take certain steps to locate the participants. Fiduciaries and QTAs that do not want to transfer the accounts to PBGC have the option of simply notifying PBGC of the disposition of the account.

In FAB 2021-01, the DOL states that the agency will not pursue fiduciary breach claims against plan fiduciaries or QTAs transferring missing participants' accounts to the Program rather than using other available mechanisms (*e.g.*, safe harbor IRAs, escheatment) provided certain conditions are met and the fiduciary or QTA complies with FAB 2021-01 and acts in good faith on a reasonable interpretation of the law. When transferring the account, the fiduciary or QTA must follow the Program's rules – including performing a diligent search – and the rules in DOL's regulation related to distributions from terminated individual account plans (29 CFR § 2550.404a-3). The DOL also stated that (i) the Program fee may be paid from plan assets provided the plan does not prohibit such payments and (ii) a QTA will not be viewed as violating the duty to follow plan terms if the QTA disregards a plan term requiring an employer to pay plan expenses if that employer is no longer available. The DOL encouraged fiduciaries and QTA electing not to transfer accounts to the Program to notify PBGC of the disposition of the account.

FAB 2021-01 is temporary guidance, and it will only remain in place until the Department provides further guidance. It also does not supersede other available distribution options for QTAs and plans when transferring assets from a terminating plan. It is also only an enforcement policy, so it does not provide fiduciaries or QTAs with protection from claims by private plaintiffs. However, it may still provide some level of comfort to fiduciaries and QTAs that elect to use the Program.

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As described above, the new DOL guidance on missing participants provide helpful insight into how the DOL views plan fiduciaries' obligations and options with respect to missing participants. Some plan fiduciaries may find the DOL's best practice suggestions helpful, but others may be concerned that

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the DOL will assert that they must comply with the “best practices” standard contained in the guidance even if it is not a legally binding DOL guidance.

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