

Plan Administration

Locating Missing Participants for Terminated Plan Distributions

The DOL provides specific search requirements and recommended distribution options to missing participants in terminated defined contribution plans.

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The administrator or other fiduciary of a terminated defined contribution plan may encounter problems locating some participants so that their plan benefits may be distributed. The U.S. Department of Labor (DOL) updated its guidance as to the ERISA fiduciary responsibilities of persons performing these tasks. The new guidance, Field Assistance Bulletin 2014-01 (FAB), outlines the mandatory minimum steps that must be taken to locate missing participants and provides a hierarchy of preferred approaches for distributing plan benefits when participants cannot be found. This article summarizes the FAB. As used herein, the term “participants” includes beneficiaries of deceased participants who are entitled to benefits and alternate payees under qualified domestic relations orders.

Background

The inability to locate and make distributions to participants under a terminated retirement plan can present several problems:

- It can delay the filing of a final Form 5500 annual report because all plan assets must be distributed from the plan’s trust before such a filing can be made.
- It can cause a favorable determination letter, issued by the Internal Revenue Service (IRS) as to the plan’s termination, to cease to be effective, because reliance on the letter is gen-

erally conditioned on final distributions being made within a reasonable time following termination.

In an effort to address these and related concerns, the DOL published guidance in 2004 to assist plan administrators and other fiduciaries in fulfilling their ERISA responsibilities as to locating, and distributing benefits to, missing participants in terminated defined contribution plans. That guidance relied heavily on the availability of IRS and Social Security Administration letter-forwarding programs that were then in effect. In the past several years, however, both programs have been discontinued.

In 2006, the DOL issued regulations providing “safe-harbor” procedures for fiduciaries of terminated defined contribution plans to make distributions to participants who do not affirmatively request a distribution. The regulations contain specific requirements concerning the content and manner of providing notice to participants, as well as various alternatives for distributing a non-responding participant’s account balance. The distribution alternatives are to transfer the account balance to an interest-bearing bank account, to an individual retirement account (IRA) in the participant’s name, or to the unclaimed property fund for the state in which the participant was last known to reside.

With the issuance of the FAB, DOL has now provided additional, updated guidance on ERISA fiduciary responsibilities in connection with locating

missing plan participants of terminated defined contribution plans and distributing their benefits. The FAB, which replaces the 2004 guidance, requires plan fiduciaries to take certain steps to locate missing participants in a terminated defined contribution plan and outlines certain additional steps that, in the DOL’s view, must be considered to adequately satisfy their fiduciary duties under ERISA.

The FAB reiterates the DOL’s statements in the prior guidance that, consistent with their obligations of prudence and loyalty, plan administrators and other fiduciaries of a terminated plan must take reasonable steps to locate missing participants so the participants can make distribution elections as to their plan benefits. If a participant cannot be located, then the plan administrator or other fiduciary may still distribute the benefit if certain conditions are met.

Search Requirements

The FAB describes four specific actions that must be taken by fiduciaries to locate missing participants:

- **Send Notice by Certified Mail.** Fiduciaries are required to send notices to missing participants by certified mail to their last-known addresses.
- **Review Records of the Employer and Related Plans.** Fiduciaries must investigate whether information about a missing participant can be

obtained from other employer records or from other plans that the employer maintains, such as a group health plan.

- **Contact Designated Plan Beneficiaries.** Fiduciaries must contact persons whom the missing participant has designated as beneficiaries of his or her plan benefit.
- **Use Free Electronic Search Tools.** Fiduciaries must also “make reasonable use” of no-cost Internet search tools, such as search engines, public record databases, obituaries, and social media.

The FAB indicates that these actions are not required to be followed in any particular order. In addition, to address privacy concerns, the DOL suggests that when requesting information from employers, administrators of other plans of the employer or designated beneficiaries, a plan fiduciary may ask the requested party to contact, or forward information, to the missing participant on the fiduciary’s behalf instead of asking that the missing participant’s contact information be provided to the fiduciary.

However, a fiduciary who exhausts these steps without locating a missing participant cannot stop there. The FAB further requires that the fiduciary consider if there are any other search steps that may be appropriate. This analysis should consider the size of the participant’s account balance and the relative costs of pursuing additional search options and, presumably, the expected efficacy of those options. Additional options include fee-based Internet search tools, commercial locator services, credit reporting agencies, information brokers, investigation databases, and similar services for which there is a fee or other cost.

Distribution Options for Participants Who Cannot Be Located

The FAB also establishes a range of potential options for distributing benefits to participants who cannot be located, despite the search efforts

described above. The FAB creates a hierarchy in this regard: a preferred method and two alternative methods that can be considered if the preferred approach is unavailable. These methods are also available under the safe harbor regulation.

The preferred approach for distributing the benefit of a missing participant is to roll over the benefit to an IRA established in the participant’s name. In order for there to be such a direct rollover, the benefit must be an “eligible rollover distribution,” which will be the case if the benefit is payable as a lump sum. This approach is desirable because it avoids immediate taxation of the benefit and, in the DOL’s view, it is more likely to preserve the benefit. Because the selection of an IRA provider and the manner in which the benefit will be invested in the IRA are fiduciary actions, plan fiduciaries should consider relying on the DOL’s 2006 safe-harbor regulation for automatic rollovers to IRAs.

The two alternatives are:


- Transferring the benefit to an interest-bearing account in a federally insured bank in the name of the missing participant. However, a plan fiduciary may have difficulty opening a bank account in the participant’s name without the participant’s signature.
- Transferring the benefit to a state unclaimed property fund. State laws vary as to whether and when such funds can accept transfers. Even if applicable state law permits such a fund to accept a transfer of a benefit from a retirement plan, there may be a “dormancy period” during which the benefit is not yet considered abandoned and therefore cannot yet be accepted by the fund.

However, before either of these steps can be taken, the plan fiduciary must conclude that using these methods is appropriate despite the adverse tax consequences to the participant in comparison to a tax-free rollover to an IRA.

Consistent with the position the DOL took in the 2004 guidance, the FAB reiterates that withholding 100 percent of a missing participant’s benefit as income tax and remitting that amount to the IRS is not an acceptable method of distributing the benefit.

Scope of FAB

The scope of the FAB is limited to terminated *defined contribution plans*. It has no application to terminated *defined benefit plans*. Fiduciaries of the latter plans have available to them a missing participant locator program sponsored by the Pension Benefit Guaranty Corporation (PBGC). In response to a directive from Congress, the PBGC has been considering expanding its program to include distributions from terminated defined contribution plans. The FAB notes that the DOL will reconsider the FAB after the PBGC implements final rules expanding its missing participant program.

The guidance in the FAB is specifically applicable to *terminated* defined contribution plans. Yet, the issue of locating missing participants also frequently arises in connection with the administration of an ongoing plan. Administrators of ongoing plans may want to consider periodically utilizing one or more of the search methods described in the FAB to update plan records and attempt to solicit distribution elections from missing distribution-eligible participants. However, distributing a missing participant’s benefit from an ongoing plan in the absence of an election by him or her generally would not be advisable unless the distributable benefit were \$5,000 or less, and thus eligible for transfer to an IRA under the DOL’s safe-harbor regulation for automatic rollover distributions. 

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