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Missing Participants: Updated DOL Guidance & Best Practices

The first step in **resolving** fiduciary problems is **knowing they exist.**

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By now many are aware that in mid-January 2021 the U.S. Dept. of Labor/Employee Benefits Security Administration (DOL) **updated** its **Missing Participant guidance ››**

Designed to help plan fiduciaries meet their obligations to locate and distribute retirement benefits to missing or nonresponsive participants, the guidance consists of **three separate but coordinated components**:

- Field Assistance Bulletin 2021-01
- Compliance Assistance Release 2021-01
- A document titled **"Missing Participants / Best Practices for Pension Plans"**

Field Assistance Bulletin 2021-01 ››

FAB 2021-01 is a temporary enforcement policy affecting defined contribution plans such as 401(k) and 403(b) plans.

It enables these plans to use the **Pension Benefit Guaranty Corporation's** (PBGC) expanded Missing Participant Program for the transfer of lost/missing/nonresponsive participant account balances from a terminating plan.

Prior DOL guidance (FAB 2014-01) listed the required search steps for missing participants. When participants can't be found or are otherwise nonresponsive, the guidance authorized transfer of their account balances to the preferred distribution option – a missing participant IRA established and maintained in accordance with 29 CFR §2550.404a-3.

It also gave plan fiduciaries the option of transferring the missing participant's account to a federally-insured (i.e., FDIC or FCUA) interest-bearing bank account or a state unclaimed property fund.

But as the Duke used to say, "Hold on there pilgrim!" There are **significant caveats** in using either a bank account or a state unclaimed property fund to move the participant's assets out of the plan.

The DOL points out the costly negative tax consequences to the participant:

- Transfer to a bank account or state unclaimed property fund destroys the tax-qualified status of the participant's account
- This change makes the participant's account subject to income taxation, mandatory income tax withholding, and possible additional penalty for premature distributions
- Any interest that accrues after the transfer would also be subject to income tax

All three of these consequences reduce the amount of money available for retirement, which is, of course, antithetical to ERISA's purpose.

But there's **another significant caveat**. In FAB 2014-1 (pp. 5 – 6) the DOL goes on to warn that, "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.

In fact, in most cases, a fiduciary would violate ERISA sections 404(a)'s obligations of prudence and loyalty by causing such negative consequences rather than making an individual retirement plan rollover distribution."

Fast forward to FAB 2021-01 and the DOL is adding the PBGC's Missing Participant Program as a permissible but not required option for transferring a missing participant account in a defined contribution plan.

One other important detail. FAB 2021-01 left the search requirements of FAB 2014-01 in place. The PBGC's Missing Participant Program does not include the required search component, **so it's not a turn-key solution**.

Compliance Assistance Release (CAR) 2021-01 ››

CAR 2021-01 provides guidance to its regional offices for the opening, investigative focus, and investigation closing of defined benefit plans that appear to have on-going issues related to plan administration, especially with terminated vested participants.

By extension, CAR 2021-01 also lets plan sponsors and their service providers know what to expect in such investigations – **a level of transparency I believe is good for all**.

- **Opening an Investigation.** DOL may open an investigation in situations including but not limited to (1) employer merger, acquisition or bankruptcy, (2) based on certain information in the plan's Form 5500, or (3) because Plan participants contacted the DOL after having difficulty claiming their benefits.
- **Investigation & Errors Focus.** As expected, the DOL will ask for plan documents, census records, actuarial reports, participant/beneficiary communication procedures, and missing participant procedures.

  It then looks for errors related to recordkeeping procedures (e.g., incomplete participant census data) that cause a risk of failure to allow the participant/beneficiary to enter pay status or claim their benefit.

  The DOL also looks for inadequate procedures that involve:

  - Identifying and locating missing participants and beneficiaries
  - Contacting terminated vested participants nearing normal retirement age to inform them of their right to enter pay status
  - Notifying participants that Required Minimum Distributions must begin and what must be done to avoid RMD penalties
  - Handling uncashed distribution checks (full disclosure – PenChecks has a service that addresses and resolves this issue)
- **Closing Investigations.** Investigators should promptly convene the exit meeting and plan fiduciaries should leave it with a clear understanding of the DOL's expectations. Fiduciaries should also understand the importance of responding to DOL recommendations in a timely manner.

Missing Participant Best Practices ››

While not formal guidance, and thus not carrying the force of law, best practices nonetheless tell us what the DOL is thinking and what they'd like to see with respect to plan administration and missing participants.

Accordingly, incorporating the best practices where applicable to your plan helps keep a corrective measures exit meeting from turning into an exit meeting with a citation for violations of ERISA, or worse, fiduciary breach.

What do the best practices involve?

The full list can be obtained on the **DOL website**, but the **highlights** are:

1) Maintain accurate census data
2) Implement effective communication strategies using plain language, toll-free numbers, and original plan sponsor/plan names so participants won't consider the communication to be junk mail
3) Check related plan records when searching for missing participants; however, health plans probably won't tell you anything due to HIPPA and privacy concerns. The DOL's best practices include using social media.

I would use social media with great caution, or not at all, as it could unintentionally lead to identity theft and fraud issues.

Due to advances in technology, online and commercial locator services are more accurate than ever ››

What is **NRURB** ››

4) The **National Registry of Unclaimed Retirement Benefits** (NRURB) is an online pension registry that allows Plan Sponsors or their service providers to add names and search for plan participants free of charge. The site is easy to use and incorporates privacy and data-security measures to protect confidential data.

Full Disclosure: The NRURB is powered by PenChecks. We are pleased to offer the listing and search for free, and proud that the DOL has recognized the site as an innovative tool that can help reunite participants with their unclaimed retirement accounts.

As the DOL aptly points out on its website, the first step in resolving fiduciary problems is knowing they exist.

Be sure to **visit this page** for a list of red flags that may signal problems with missing or nonresponsive participants.

About the Author ››

Mike McWherter, JD is Chief Compliance Officer for PenChecks, Inc. and PenChecks Trust Company of America, a leader in outsourced retirement plan distribution processing and Automatic Rollover/Missing Participant IRAs and related services.

With 30 years of combined legal, financial institution and ERISA plan provider compliance experience, he provides guidance and oversight for all compliance matters, supervises regulatory exams and audits, and coordinates between outside counsel, management and the board of directors.