



ERISA Group Benefits Newsletter September 2018

In Search of the Elusive Missing Participant

The search procedures a plan sponsor takes to locate missing participants and beneficiaries entitled to a benefit under a qualified plan has become a frequent topic of inquiry during plan audits with the Internal Revenue Service (IRS) and Department of Labor (DOL). Earlier this year, the IRS issued a field directive to IRS examination agents that outlined certain steps for searching for missing participants and beneficiaries who were to begin required minimum distributions ("RMDs") and directed examiners not to challenge a qualified plan for its failure to commence RMDs to such missing participants if the plan took those certain steps. The recommended steps included:

- Searching the qualified plan, the plan sponsor, any related plan, and publicly-available records or directories, for alternative contact information for the missing individual.
- Using any of the following search methods: a commercial locator service; a credit reporting agency; or a proprietary internet search tool for locating individuals.
- Attempting contact via U.S. Postal Service certified mail to the last known mailing address and through appropriate means for any address or contact information (including email addresses and telephone numbers).

The steps under the directive follow a 2014 DOL field assistance bulletin regarding steps for searching for missing individuals in a defined contribution plan termination. The steps under the DOL bulletin and the IRS directive largely mirror one another. However, the DOL guidance also recommends:

- Identifying and contacting any individual that the missing participant has designated as a beneficiary to find updated contact information for the missing participant.
- Making reasonable use of free internet search tools, including internet search engines, public record databases (such as those for licenses, mortgage, and real estate taxes), obituaries and social media.

The DOL bulletin also emphasized that additional steps may need to be considered depending on the facts and circumstances of the particular missing participant or beneficiary.

Because neither the IRS nor the DOL have issued guidance regarding locating missing participants other than the guidance referenced above from the IRS for RMDs and from the DOL for terminating defined contribution plans, the IRS RMD guidance and the DOL plan termination guidance is commonly viewed as best practice for searching for participants in ongoing qualified retirement plans. However, commentators have reported on a number of recent DOL audits where the examiner has penalized a plan sponsor for not taking additional steps, such as performing searches for any missing participants year-to-year and varying the search methods used in each year. While we, and other practitioners, believe this to be an aggressive stance, a plan sponsor should be aware that they may receive push back on audit if they only take the steps outlined above.

Regardless of the steps taken, records and evidence should be kept of the search procedures utilized in case of an audit. A plan sponsor should also formalize procedures for locating missing participants or beneficiaries in the form of a standard procedures document.

What to do about Uncashed Checks

Often going hand-in-hand with the issue of missing participants are uncashed checks for amounts distributed to a participant or beneficiary. Neither the IRS nor the DOL have issued guidance regarding how a plan sponsor should deal with uncashed checks. Further, lack of communication between a plan sponsor and its third party administrators may result in checks that remain uncashed for extended periods of time and raise questions of what to do with the earnings and

interest (or "float") that accrues on the underlying amounts while the check remains uncashed. Amounts relating to uncashed checks are generally viewed by the DOL as continuing to be plan assets. Therefore, in order to comply with its fiduciary obligations, a plan sponsor should have formalized procedures in place, either individually or with their third party administrator(s), as to how to address uncashed checks. When the participant or beneficiary that is owed the check appears to be missing, steps consistent with the missing participant discussion above should be utilized to locate the individual.

With respect to float, a plan fiduciary or service provider is generally prohibited from handling such amounts in a way that benefits itself, as doing so results in a self-dealing transaction. However, the DOL has indicated that if a service provider has openly and prudently negotiated with a plan fiduciary to retain float attributable to outstanding benefits checks as part of its overall compensation, the provider's retention of the float would not be self-dealing. In addition to prudently negotiating the arrangement with the service provider, a plan sponsor also has an on-going obligation to monitor the service provider's practices and service agreements regarding float retention and to periodically review comparable providers and their service arrangements. Additionally, the plan sponsor should review the float as part of the total compensation paid for the services rendered under the agreement and evaluate the reasonableness of the compensation.

A Reminder on the Importance of Fiduciary Training

With respect to any ERISA-governed benefit plan, it is important that employees of the sponsoring employer know whether they are a plan fiduciary and what obligations come with that designation. A failure of an employee to realize the importance of their role as plan fiduciary and to fulfill their duties with respect to a plan can result in costly plan corrections or litigation. Therefore, it is recommended that employers regularly conduct fiduciary training for employees who administer their plans.

Hill Ward Henderson offers fiduciary training sessions, which can be customized to meet the needs of your organization, through webcast or in-person presentation. Please contact us for more information or to schedule a fiduciary training presentation.

If you have questions or would like additional information, please contact a member of our Employee Benefits and Executive Compensation Practice.



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