REGULATORY Update

Q2 2021

DOL Issues Missing Participant Guidance

The Department of Labor (DOL) has long cast a watchful eye toward retirement plan fiduciaries' treatment of "missing" plan participants (i.e., employees who have terminated employment and still have a balance in their former company's retirement plan but are not responsive or cannot be located). Yet, fiduciaries have often looked for more guidance in how to properly manage their obligations when dealing with cases of missing participants in their retirement plans.

In January 2021, the DOL's Employee Benefits Security Administration (EBSA) addressed fiduciaries' concerns by releasing three guidance documents that provide plan fiduciaries with a foundation for managing the process of locating missing plan participants. The documents draw on the EBSA's experience interacting with retirement plan sponsors during audits and investigations.

Summary of DOL Guidance for Fiduciaries

Best Practices for Pension Plans. This first document recommends a wide range of red flags and best practices plan that fiduciaries should consider to help reduce missing participant issues and ensure that former employees receive their retirement benefits. Below is a selection of the best practices the DOL suggests:

- Contacting participants, both current and retired, and beneficiaries periodically to confirm or update their contact information (including address, phone number, social media contact information, etc.)
- Flagging undeliverable mail and email and uncashed checks for follow-up
- Regularly auditing census information and correcting data errors
- Reviewing related plan and employer records for participant, beneficiary, and next of kin/emergency 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
- Checking with designated plan beneficiaries (e.g., spouse, children) and the employee's emergency contacts (in the employer's records) for updated contact information; if there are privacy concerns, asking the designated beneficiary or emergency contact to forward a letter to the missing participant or beneficiary
- Reaching out to the colleagues of missing participants by, for example, contacting employees who worked in the same office
- Using a commercial locator service, a credit-reporting agency, or a proprietary internet search tool to locate individuals

Visit the EBSA's Missing Participants—Best Practices for Pension Plans page to view the full list of practices and considerations.

Compliance Assistance Release 2021-01. The second document is an internal DOL memorandum that explains the terminated vested participants enforcement project. This inside look allows plan fiduciaries to gain insight into the information and practices of EBSA staff, what they request from plan sponsors, and the errors they look for. The information may be used to solidify fiduciaries' own processes when attempting to locate missing participants.

Field Assistance Bulletin 2021-01. The third document authorizes plan fiduciaries of terminating defined contribution plans to access the Missing Participant Program through the Pension Benefit Guaranty Corporation (PBGC), a federal agency created to protect pension benefits in private-sector defined benefit plans. The guidance describes how the program locates missing participants and pairs them with their benefits, particularly with the periodic active searches the PBGC utilizes.

Considerations for Plan Fiduciaries

If anything can be surmised by the DOL's recent guidance, it's that it expects retirement plan fiduciaries to handle cases of missing participants with the utmost attention and care. Fiduciaries must make diligent attempts to locate former employees and beneficiaries who still have assets in their retirement plan. Using the DOL's recommendations is a great place to begin, but plan fiduciaries who feel underequipped to locate missing plan participants should enlist the help of their plan's service providers, such as a third-party administrator or retirement plan consultant.

DOL: We Won't Enforce ESG or Proxy Voting Rules

On March 10, 2021, the DOL's EBSA announced that it would not enforce two rules that were finalized in late 2020 pertaining to qualified retirement plans:

1. The first rule addressed the use of environmental, social, and governance (ESG) investments within tax-favored qualified retirement plans, such as 401(k)s and 403(b)s. In last November's final rule, called "Financial Factors in Selecting Plan Investments," the DOL established clear regulatory guideposts for plan fiduciaries when considering ESG investments for their company's retirement plan.
2. The second rule, titled "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights," which was published last December, addressed obligations of plan fiduciaries under ERISA when voting by proxy and exercising other shareholder rights in connection with plan investments in shares of stock.

Statements from the EBSA

In March's announcement, EBSA Principal Deputy Assistant Secretary Ali Khawar explained the organization's new rationale in a press release, saying, "These rules have created a perception that fiduciaries are at risk if they include any environmental, social, and governance factors in the financial evaluation of plan investments and that they may need to have special justifications for even ordinary exercises of shareholder rights." Khawar continued, "We intend to conduct significantly more stakeholder outreach to determine how to craft rules that better recognize the important role that environmental, social, and governance integration can play in the evaluation and management of plan investments, while continuing to uphold fundamental fiduciary obligations."

The EBSA confirmed that it will not enforce either final rule or otherwise pursue enforcement actions against any plan fiduciaries based on a failure to comply with those final rules with respect to an investment (including a Qualified Default Investment Alternative) or investment course of action or with respect to an exercise of shareholder rights. It will publish further guidance and updates via the EBSA website as more information becomes available.

Single-Employer Pension Plan Provisions Included in American Rescue Plan Act

The American Rescue Plan Act of 2021 (ARPA)—the latest round of COVID-19 stimulus legislation, introduced on January 10, 2021—contains two nuanced provisions that will be of interest to single-employer defined benefit pension plan administrators.

1. **Extended amortization period.** As it relates to single-employer pension plans, beginning in 2022, the amortization period for underfunded plans is extended from the current 7-year period to a 15-year period. Plan sponsors may also retroactively make an election to amortize over the extended period for plans that began after December 31, 2018. The ARPA reduces amortization bases and shortfall amortization installments to zero, resulting in a lower annual required contribution for plan sponsors.
2. **Extended funding stabilization percentages and reduced interest rate corridors.** The ARPA extends the funding stabilization percentages that were scheduled to begin phasing out in 2021. It reduces the interest rate corridor from 10 percent to 5 percent for plan years beginning in 2020 through 2025. Further, the 5 percent per year expansion will be delayed to the 2026 plan year (and, accordingly, the 30 percent corridor is reached in the 2030 plan year), and a permanent 5 percent interest floor is established for the 25-year averages. The intended effect of these changes is to allow plan sponsors to calculate the present value of benefits using a higher interest rate, thus improving its funding status.

Plan sponsors who are responsible for administering their company's pension plan are advised to connect with their plan's third-party administrator or actuarial firm to determine if the funding relief provided by the ARPA should be explored.

We Can Help

We are ready to provide you with the ideas, guidance, and foresight to position your firm for success. If you would like to review how retirement plans are affected by the DOL, single-employer pension plan provisions, or any industry happenings that may affect your firm's benefit plan offerings, we're here to assist you.

Authored by the Retirement Consulting Services team at Commonwealth Financial Network.

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