Ferraiuoli LLC
Looking Forward

Employee Benefits Working Group
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Notice to Clients and Friends

DOL'S MISSING PARTICIPANT GUIDANCE

On January 12, 2021 the United States Department of Labor's (**DOL**) Employee Benefits Security Administration (**EBSA**) issued three guidance documents outlining steps plan fiduciaries should take to meet their obligations under Title I of the Employee Retirement Income Security Act (**ERISA**) to locate and distribute retirement benefits to missing or nonresponsive participants. The guidance includes "best practices" for retirement plan fiduciaries, compliance assistance to EBSA Regional Offices under the Terminated Vested Participants Project (**TVPP**), and a temporary fiduciary safe harbor in the context of terminating defined contribution plans. It should be noted, however, that the guidance documents do not have the force and effect of law.

Missing Participants – Best Practices for Pension Plans

The "Best Practices" guidance, applicable to both defined benefit plans and defined contribution plans, outlines best practices that fiduciaries can follow to ensure that plan participants and beneficiaries receive promised benefits when they reach retirement age. In this respect, DOL notes that the following "red flags" are often warnings or indicators of a problem with missing or nonresponsive participants:

- More than a small number of missing or nonresponsive participants.
- More than a small number of terminated vested participants (**TVPs**) 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- Missing, inaccurate, or incomplete contact information, census data, or both (e.g., incorrect or out-of-date mail, email, and other contact information, partial social security numbers, missing birthdates, missing spousal information, or placeholder entries).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.
- 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).

How can fiduciaries reduce missing participant issues and ensure that plan participants receive promised benefits?

DOL lists various best practices fiduciaries could take to achieve this, however, it highlights that not every practice listed is necessarily appropriate for every plan; thus, plan fiduciaries should consider what practices will yield the best results in a cost-effective manner for their plan's particular participant population. In addition, DOL advices plan fiduciaries to consider the size of a participant's accrued benefit and account balance as well as the cost of search efforts. In short, all specific steps taken to locate a missing participant, or to obtain instructions from a nonresponsive participant, will depend on the facts and circumstances particular to a plan and a participant.

The examples of best practices recommended by DOL fall under the following four categories, each of which includes a list of detailed practices to be considered:

1. Maintaining accurate census information for the plan's participant population
2. Implementing effective communication strategies
3. Missing participant searches
4. Documenting procedures and actions

Compliance Assistance Release No. 2021-01 ("CAR No. 2021-01")

The CAR No. 2021-01, outlines the general investigative approach that will guide all EBSA's Regional Offices under the TVPP audits and facilitate voluntary compliance efforts by plan fiduciaries. The guidance provides insight into what information DOL investigators examine in a defined benefit plan audit concerning TVPs and highlights the red flags that it looks for.

- *What triggers an audit?* DOL may initiate an audit or investigation when a plan appears to have systemic issues with plan administration, particularly issues related to keeping track of TVPs and beneficiaries, and timely distributing benefits. Some triggers include when there are a large number of TVPs reported on a plan's Form 5500 filings; when the plan sponsor is facing bankruptcy or has been involved in a merger or acquisition; or when DOL is contacted by participants seeking assistance when they have not been afforded the opportunity to claim their benefits.

- *What information will be requested?* During the audit, DOL investigators will request copies of plan documents (including summary plan descriptions) and relevant amendments to understand distribution rules and determine compliance with ERISA. DOL will also require census records and actuarial reports and review the procedures for communicating with terminated vested participants or beneficiaries and for addressing missing participant situations.

- *What errors will DOL look for?* DOL will review for 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 required minimum distributions; and inadequate procedures for addressing uncashed distribution checks.

- *How are cases closed?* After receiving all the requested information, investigators will inform findings to the responsible fiduciaries, invite them to discuss how they can remedy the identified problems and ask the plan to take appropriate corrective actions with respect to their policies and practices regarding missing participants. DOL will also issue a Voluntary Compliance letter addressing potential ERISA violations and give plan fiduciaries a reasonable amount of time to respond to the same and discuss the appropriate corrections. Lastly, DOL will generally cite any corrective actions that the fiduciaries have taken when closing out the case.

Field Assistance Bulletin No. 2021-01 ("FAB No. 2021-01")

Finally, the FAB No. 2021-01 provides a temporary enforcement policy under which DOL will not pursue a fiduciary breach claim against plan fiduciaries or Qualified Termination Administrators (**QTAs**) of abandoned plans that transfer the accounts of missing participants in terminating defined contribution plans to the Pension Benefit Guaranty Corporation (**PBGC**) as part of the PBGC's Missing Participant Program, rather than to an IRA, certain bank accounts, or to a state unclaimed property fund. To benefit from the temporary enforcement polity, plan fiduciaries or QTAs must comply with the requirements of the safe harbor regulation for distributions from terminated individual account plans, modifying the notice to participants and beneficiaries to reflect the transfer to the PBGC, and act with a good faith, reasonable interpretation of ERISA §404. However, this temporary enforcement policy does not preclude DOL from pursuing violations under other provisions of ERISA such as for a failure to diligently search for participants and beneficiaries prior to the transfer of their account balances to the PBGC. Despite the foregoing, it should be noted that, since Puerto Rico-only qualified plans are not qualified in the United States, they are ineligible for the PBGC's Missing Participant Program, therefore, they may not benefit from this release.

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