

Legal Risks Associated With a Retirement Plan's "Missing Participants"

Administrators of qualified retirement plans have always had to deal with the problem of "missing participants" – that is, terminated vested participants for whom the administrator does not have a current mailing address or other contact information, and participants who refuse to respond to communications from the administrator. This problem frequently comes to light when a terminated participant nears retirement age or otherwise becomes entitled to receive a plan distribution, because at that time the administrator must contact the participant about distribution options, beneficiary designations, and other matters. And when a terminated participant approaches age 70 1/2, the necessity of locating him or her becomes more urgent, because plan distributions generally must begin shortly after that age is reached.

Besides being an administrative problem, the inability to locate terminated participants can represent legal risks. The U.S. Department of Labor (DOL) has asserted that a plan's inability to locate terminated participants can constitute a breach of duty on the part of the plan's fiduciaries, in violation of ERISA. Lost or missing participants can also lead to plan disqualification risks; for example, if "required minimum distributions," mandated under the Internal Revenue Code, cannot be made.

Breach of Fiduciary Duty Under ERISA

The DOL's stated position is that an administrator's failure or inability to locate terminated vested participants can constitute a breach of its fiduciary duties under ERISA. In a 2014 ["Field Assistance Bulletin"](#) to the DOL's Director of Enforcement, the agency's Director of Regulations and Interpretations addressed this issue in the context of terminated defined contribution plans. The Director opined that retirement plan fiduciaries must, "[c]onsistent with their [ERISA] obligations of prudence and loyalty... make reasonable efforts to locate missing participants in order to implement directions on plan distributions from the participants." The Bulletin lists the following search methods as the minimum steps that the plan fiduciary must take to try to locate a participant in these circumstances:

- Send a notice using certified mail;
- Check all plan records and records of any related plans of the employer (such as health plans);
- Send an inquiry to the designated beneficiary of the missing participant; and
- Use free electronic search tools.

The Bulletin further states that if these basic search steps are not successful, the plan administrator must determine whether additional search methods, such as commercial locator services, credit reporting agencies, information brokers, and investigation databases should be used. Factors to consider in making this determination include the size of a participant's account balance and the cost of additional search efforts.

Although the 2014 Bulletin was directed at terminating defined contribution plans, the analysis in the Bulletin of an administrator's fiduciary duties regarding missing participants would seem to apply equally to ongoing plans (including defined benefit plans) as well.

More recently, the DOL has reportedly gotten more aggressive in contesting administrators' actions with respect to missing participants. In a [2017 letter to the DOL](#), the American Benefits Council alleged (based on reports from plan sponsors) that DOL regional offices "have been taking aggressive positions regarding how plan sponsors deal with [missing participants]," including:

- asserting that a plan administrator's failure to locate a missing participant is a breach of fiduciary duty, even when the plan's procedures have been followed;
- asserting that it is a prohibited transaction for a plan to forfeit amounts owed to missing participants, even when forfeitures are specifically authorized in the plan document; and
- asserting that plan sponsors must perform a search for missing participants every year, use a different search method every year, or contact current and former employees who may have worked at the same time as a missing participant in an attempt to locate him or her.

Plan Disqualification

An administrator's inability to locate terminated vested participants can also lead to plan qualification risks. For example, if a plan cannot locate a participant who has reached age 70½, the plan may be unable to complete a "required minimum distribution" (RMD) to the participant, as mandated under Section 401(a)(9) of the Internal Revenue Code. Since the inability to locate a participant does not necessarily excuse a plan's failure to complete an RMD, the missing participant problem can endanger a plan's qualified status.

In October 2017, the Director of the IRS' Employee Plans Examinations office issued [guidance](#) which directed its examiners not to challenge the qualified status of a plan for violating the RMD requirements by reason of the plan's inability to locate a terminated participant, if the plan had taken the following steps to locate the missing participant:

- Searched plan records, records of other employer plans (such as health plans), and publicly-available records or directories for contact information;
- Used a commercial locator service, a credit reporting agency, or a propriety Internet search; and
- Attempted contact by certified mail to the participant's last known mailing address and through other appropriate means (including email addresses and telephone numbers).

Conversely, the guidance states that if a plan has not taken the prescribed actions, IRS examiners may challenge a plan's qualified status based on one or more RMD failures.

Given the recent DOL and IRS focus on enforcement of this issue, retirement plan administrators should review their systems and procedures for maintaining and correcting participant and beneficiary contact information, and determine if they are adequate. At minimum, retirement plans should adopt and employ systems and procedures designed to comply with the guidance issued by the two federal agencies, discussed above.

If you have any questions about this Information Memo, please contact [Robert W. Patterson](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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