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Finding Lost Participants: Best Practices from DOL Guidance

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The Department of Labor (DOL) released guidance August 2014, Field Advisory Bulletin 2014-1 (FAB 2014-1); directing terminating defined contribution plan sponsors on how to find lost participants. While this guidance is focused on terminating plans, it can be useful for ongoing plans as well. FAB 2014-1 replaces the outdated FAB 2004-2, issued 10 years ago, with little difference other than to recognize the elimination of the Internal Revenue Service (IRS) and Social Security Administration's (SSA) letter forwarding programs. According to the federal government, Internet search technologies have developed to the point where the IRS and SSA letter forwarding programs are no longer necessary. In FAB 2014-1, the DOL details the minimum steps a fiduciary *must take* to find lost participants, and the additional steps a fiduciary *must consider* if the lost participants are not found in the previous steps. The guidance also provides options for resolving the participants' accounts once the fiduciary has passed steps one and two.

A lesson in fiduciary responsibility

Under the requirement of the Employee Retirement Income Security Act (ERISA), a fiduciary must "act prudently and solely in the interest of the plan's participants and beneficiaries."¹ Abiding by this obligation of prudence and loyalty, plan fiduciaries must make reasonable efforts to locate missing participants in order to receive directions on making plan distributions to the participants or beneficiaries.

Required search protocols

The following four steps are the minimum a fiduciary must do in every situation. The plan fiduciary cannot abandon efforts to find a missing participant until all activities have been completed. Failure to follow these steps is a breach of fiduciary duty.

1. **Send a notice by Certified Mail.** Certified Mail, Offered by the United States Postal Service and other mail services, allows the sender proof of mailing via a mailing receipt and, upon request, electronic verification that an article was delivered.
2. **Check related plan and employer records.** Checking with related plan or employer records, such as a group health plan, may present some privacy or HIPPA violation fears; to avoid this, the plan fiduciary can request that the employer or the fiduciary of the related plan contact or forward a letter to the missing participant. This letter would request the missing participant contact the terminating plan's fiduciary.
3. **Check with the participant's named beneficiary.** If the participant has a named beneficiary on file, the fiduciary should contact him or her. If the beneficiary has a concern about the missing participant's privacy, the same principle as above is applied. The plan fiduciary may request the beneficiary forward a letter requesting the missing participant contact the plan.
4. **Use free Internet search tools.** These tools include search engines, public record databases, obituaries, and social media sites.

Best Practice Tip: To minimize litigation risk and maximize procedural due diligence, document all attempts to reach the participant.

Additional search protocols

If the fiduciary does not find the missing participant during the required search steps, the fiduciary must consider additional search methods that may involve fees, such as the following:

- Fee based Internet search services
- Commercial locator services
- Credit reporting agencies
- Information brokers
- Investigative services

The fiduciary is required to consider these steps using a cost benefit analysis. This means keeping adequate records demonstrating that a cost benefit analysis was performed and it was the basis for the decision to pursue or not pursue a particular approach. The costs associated with some of these methods, such as hiring a private investigator, would only be reasonable for large account balances, while the costs for others, such as fee based internet search services, are relatively low. The additional costs associated with these search methods (as well as the minimum required methods) can be charged to the lost participant's account.

Best Practice Tip: Establish, in advance, a written administrative policy for dealing with lost participants with various account sizes.

Distribution options

If the sponsor of a terminated plan cannot locate a missing participant, the fiduciary must select an appropriate distribution option. The DOL's preferred method is to rollover the benefit into an individual retirement account (IRA). It is preferred because it preserves the balance, allows the balance to continue to grow tax-free, and income taxes are not paid until funds are withdrawn. The choice

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of an IRA requires good fiduciary judgment; a fiduciary must choose a trustee as well as the initial investment. To protect fiduciaries, automatic rollover safe harbor rules apply. If a willing or suitable IRA provider cannot be located, one of the following two options should be considered:

1. establishing a federally insured interest bearing bank account in the participant's name;
2. transferring the benefit to a state unclaimed property fund.²

The bank account and unclaimed property fund options are secondary because they subject the missing participant's account balance to income taxes, mandatory withholding taxes, and possible early distribution taxes. Before making a decision, the fiduciary should weigh the impact of interest rates and bank fees as well as the possible taxation. The fiduciary should document that all of the negative consequences, including both the tax consequences and fees, were taken into account as part of the distribution decision.

Once the fiduciary properly distributes the entire benefit to which the missing participant is entitled, the individual is no longer a participant of the plan and the distributed assets are no longer covered by ERISA. However, if the distributed benefit is reduced due to a fiduciary breach, the participant would still have standing to sue the breaching fiduciary under ERISA.

In Perspective

The best practice for lost participants is to avoid having them. Plan sponsors and fiduciaries can help lessen the burden of finding lost participants by following these tips:

- Periodically scrub the data to identify potential terminations, update the database, and send out a distribution kit.
- Do searches immediately when mail is returned. The longer a participant is missing, the harder he or she will be to find.
- Maintain alternate points of contact, such as a home address, a business address, and an email address.
- Institute programs to encourage participants to update address information regularly.

¹ “Field Assistance Bulletin No. 2014-01.” U.S. Department of Labor. August 14, 2014. Access Jan. 14, 2015. <http://www.dol.gov/ebsa/regs/fab2014-1.html>

² Ibid.

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