

## **MISSING PLAN PARTICIPANTS: WHAT'S THE PROBLEM?**

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### **I. WHO ARE MISSING PLAN PARTICIPANTS?**

- A. Generally, a missing plan participant is a former employee who has a right to retirement benefits, but has failed to keep their contact information current.
- B. How do you know if a plan participant is missing?
  - 1. Returned mail
  - 2. Returned emails
  - 3. Uncashed distribution checks
  - 4. For directed investment account plans, no web activity
- C. Deceased plan participants with no beneficiary designation forms on file are a special category of a missing plan participant.
- D. Another type of plan participant which is often associated with missing plan participants is one for whom the plan may have good contact information, yet are simply unresponsive (such as failing to cash distribution checks).

### **II. WHAT IS THE MAGNITUDE OF THE MISSING PLAN PARTICIPANT PROBLEM?**

- A. A March 2018 survey by Boston Research Technologies estimated that 11% of separated plan participants have stale addresses on file with the plan.
- B. One out of every 5 relocations results in a missing plan participant.
- C. A recent study by the Employee Benefit Research Institute estimates that defined contribution plan participants will hold an average of 9.9 jobs over a 45 year career.
- D. There are more than 3 million missing plan participants.

E. The number of missing plan participants will continue to grow.

III. WHAT PROBLEMS CAN BE CREATED BY MISSING OR UNRESPONSIVE PLAN PARTICIPANTS?

A. Increased plan costs for unnecessarily maintaining the plan participants' accounts.

B. Possible plan qualification issues due to the failure to follow plan provisions.

1. IRC §401(a)(9) mandates required minimum distributions ("RMDs") at certain ages or circumstances.

2. IRS §401(a)(14) mandates that the distribution of benefits must begin no later than 60 days following the close of the latest plan year in which the plan participant:

a. Turns age 65 (or the plan's normal retirement age, if earlier)

b. Completes 10 years of plan participation

c. Terminates service with the employer

C. The Department of Labor's ("DOL") fiduciary obligations extend to the requirement that plan fiduciaries make reasonable efforts to locate missing plan participants or beneficiaries.

1. ERISA §404(a)(1)(A) provides that a fiduciary must act prudently and solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses in administering the plan.

2. ERISA §404(a)(1)(D) provides that fiduciaries are required to act in accordance with plan documents.

3. Fiduciary breaches can subject plan fiduciaries to the imposition of damages and penalties.

- D. The IRS' plan correction programs (the Employee Plans Compliance Resolution System or "EPCRS") will often require complete correction of a plan failure which necessitates the location of missing plan participants.
- E. Plan sponsors and practitioners have noticed inconsistent enforcement actions during audits because of the dearth of guidance by the different government agencies.
  - 1. The IRS and DOL appear to be taking different positions on the responsibility to make RMDs if the participant is missing.
  - 2. It appears that even within the DOL itself, different investigators are taking different positions on the plan's responsibilities and potential penalties being asserted against fiduciaries.
- F. For plan participants not having a current address on file could mean a variety of things:
  - 1. Being unaware of investment changes
  - 2. Being unaware of changes in plan provisions
  - 3. Missed distributions
  - 4. Forgetting about their benefits altogether

#### IV. GUIDANCE CONCERNING MISSING PLAN PARTICIPANTS

- A. DOL Field Assistance Bulletin No. 2014-01
  - 1. This guidance addressed the issue of how fiduciaries of terminated defined contribution plans call fulfill their obligations under ERISA to locate missing plan participants and properly distribute account balances.
  - 2. At a minimum these are required search steps:
    - a. Use certified mail when attempting to locate the participant.

- b. Check other plan and employer records that may have more up-to-date information.
  - c. Check with designated plan beneficiaries if they have current contact information.
  - d. Use Internet search tools that are available without cost.
  - e. If it is prudent and depending on the amount involved, commercial locator services, investigation databases, investigators, etc. may be appropriate.
3. If the participant still cannot be located what distribution options should be utilized?
- a. The DOL's preferred method is for the funds to be rolled into an IRA because this alternative is most likely to preserve the funds for retirement.
  - b. A second option that should be utilized if the fiduciary is unable to locate an IRA provider to accept the funds, is to move them to a federally insured bank account in the participant's name. This will, however, subject the distribution to income tax and excise tax on a premature distribution.
  - c. The third and least favored option is to transfer the funds to a state's unclaimed property fund.
  - d. An unacceptable distribution option is using 100% income tax withholding for the funds. This will likely be deemed a breach of fiduciary duty by the DOL.
4. Unfortunately, the DOL has neither failed to provide guidance , nor has it extended this guidance to "active plans."

B. IRS Website

1. For many years the IRS maintained a program where they forwarded letters to help locate missing plan participants or beneficiaries.
2. In Rev. Proc. 2012-35, the IRS indicated that they would no longer process requests to locate missing plan participants or beneficiaries.
3. Plan sponsors and plan administrators are now directed to use:
  - a. Commercial locator services
  - b. Credit reporting agencies
  - c. Internet search tools
4. Unfortunately, the IRS has failed to clarify if these are the only actions that must be taken.

C. Section 6.02(5)(d) of Rev. Proc. 2018-52

1. This Section of the Revenue Procedure describes the steps to be taken under the IRS' retirement plan correction program when current or former plan participants and beneficiaries have additional benefits but cannot be located.
2. It provides that if no response is generated by regular mail, then:
  - a. Try certified mail.
  - b. If that fails, use a commercial locator service, credit reporting agency or Internet search tool.
  - c. Depending on the circumstances (probably based upon the amount of benefits) the use of more than one of the methods may be warranted.
3. A plan sponsor will not be considered to have failed to correct if reasonable actions were taken to locate the lost participant.

- D. The PBGC's Missing Participant Program ("MPP")
1. MPP was expanded effective January 1, 2018 to cover terminating defined contribution plans and certain defined benefit plans not subject to PBGC jurisdiction.
  2. The plan's coverage by the MPP now includes the following types of terminating plans:
    - a. PBGC insured single employer plans
    - b. Defined contribution plans
    - c. Small professional service defined benefit plans
    - d. PBGC insured multiemployer plans
  3. The two ways to use the program are:
    - a. Transfer to the PBGC funds sufficient to pay the missing participant's benefits when the participant is located in which case the PBGC will pay the benefits.
    - b. Send the PBGC information about the missing participant and their benefits and the PBGC will share that information with the participant when found.
- E. An October Memorandum 2017 from the IRS to its field agents addressed the failure to satisfy RMD requirements for missing plan participants.
1. It indicates that agents should not challenge a plan's qualification for the failure to make RMDs if certain steps are taken.
  2. Generally, the steps are those contained in FAB 2014-01.

F. Revenue Ruling 2019-19 dealing with the failure to cash distribution checks.

1. Strangely, the IRS published this Revenue Ruling on a set of facts where the results are patently clear.
2. In this case, the plan made an RMD to a participant, withheld the appropriate amount of taxes as required by IRC § 3405(e)(1) and issued a 1099-R to the participants required by IRC § 6047(d). The net check was not cashed by the participant during the year in question.
3. The IRS' ruling held:
  - a. The failure to cash the check does not permit the participant to exclude the distribution from gross income.
  - b. The failure to cash the check does not alter the employer's obligation to issue a 1099-R.
  - c. The failure to cash the check does not alter the employer's obligation to withhold taxes under IRC § 3405.

V. HOW DO PLAN "CASH OUT" RULES WORK?

- A. Qualified plans may establish rules allowing for the mandatory distribution of "small balances" to plan participants.
- B. The threshold chosen by a plan can be as high as \$5,000. Lower thresholds are permitted but are rarely selected.
- C. Under the "cash out" rules, plan participants who fail to select an immediate distribution on a distributable event (i.e., termination of employment) will have their benefits rolled automatically into an IRA.
- D. Plans are also permitted to provide that account balances of \$1,000 or less can be cashed out by simply forwarding a check (net of withholding) to the participant.

- E. Utilizing cash-out provisions are one of the most effective means of minimizing the missing participant problem.

## VI. BEST PRACTICES FOR DEALING WITH MISSING PLAN PARTICIPANTS

- A. First and foremost, a written policy should be adopted and followed.
- B. Plan sponsors should be diligent in maintaining contact information for plan participants and their beneficiaries during their period of active participation.
- C. At the time a participant terminates employment:
  - 1. They should be reminded of their benefits.
  - 2. They should be informed of when benefits are available and how to apply for them.
  - 3. Update contact information for the participant and beneficiaries.
- D. Contact information should be monitored on a regular basis.
  - 1. Each year plan participants should receive benefit statements, summary annual reports and other notices.
  - 2. If any of these items are returned, immediate efforts should be made to locate them.
- E. If a required distributable event occurs under the plan and a participant cannot be located, or is unresponsive:
  - 1. First, these steps should be taken:
    - a. Use certified mail.
    - b. Check other plan and employer records that may have up-to-date information.



- c. Check with designated beneficiaries to determine if they have up-to-date information.
  - d. Use Internet search tools that are available without cost. The National Registry at [www.unclaimedretirementbenefits.com](http://www.unclaimedretirementbenefits.com) is a source that is often utilized.
- 2. Next, the size/amount of the account/benefit may warrant additional costs of utilizing commercial locator services, credit reporting agencies, investigation data bases and private investigators. For example, Retirement Clearinghouse at [www.rch1.com](http://www.rch1.com) provides locator services in addition to other services relating to terminated plan participants.
- 3. Finally, if the participant still cannot be located, the following steps should be followed:
  - a. Roll the account/benefit into an IRA.
  - b. If an IRA is not available, the funds (net of taxes) should be moved to a federally insured bank account.
  - c. If all else fails, the account/benefit should be paid to the state's unclaimed property fund.