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Digest

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How to locate missing participants

The DOL provides guidance to defined contribution plan administrators on locating missing participants of plans that are being terminated.

In 2004, the Department of Labor (DOL) issued guidance (FAB 2004-02) on locating missing participants in terminating defined contribution (DC) plans. One of the steps called for using a federal letter-forwarding program. At the time, both the IRS and the Social Security Administration offered letter-forwarding services, but those programs are since discontinued.

Following this, the DOL issued new guidance (FAB 2014-01) on locating missing participants of terminating DC plans. This article is a discussion of the guidance.

Search steps

When a retirement plan is terminated, a plan administrator must generally distribute all plan assets within one year of the plan's termination date. Prior to making distributions, the plan administrator must contact plan participants (and beneficiaries) to explain the process involved in distributing their account balances. The DOL provides a model notice at www.law.cornell.edu/cfr/text/29/2550.404a-3.

Administrators often have difficulty locating some former employees. Under FAB 2014-01, the required steps for locating missing participants are to:

1. **Use certified mail.** This is an easy and often inexpensive way to determine if a participant can be located.
2. **Check related plan and employer records.** Other employer plans, such as a group health plan, may have more up-to-date information. If there are privacy concerns, a fiduciary can simply ask a provider to forward a letter to the missing participant.
3. **Check beneficiary records.** Contact the individuals the missing participant named on his or her beneficiary form to obtain updated contact information.
4. **Use free electronic search tools.** This step replaces the letter-forwarding requirement. Plan fiduciaries must make reasonable use of free Internet search tools, such as search engines, public record databases (e.g., those with licenses, mortgages and real estate taxes), obituaries and social media.

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Additional search methods

Other search methods may involve using credit reporting agencies, investigation databases, and commercial locator services. However, fiduciaries must consider the size of a participant's account balance and the cost of additional search methods. A plan fiduciary is permitted to charge a missing participant's account reasonable expenses related to efforts to locate the participant (consistent with the terms of the plan).

Next steps for plan fiduciaries

If a participant cannot be located, the plan fiduciary is responsible for deciding where to put the missing participant's assets and is charged with choosing the most prudent investment vehicle. Section 404(a) of ERISA requires plan fiduciaries to consider individual retirement accounts or individual retirement annuities that preserve assets for retirement.

- **IRA safe harbor** — A regulation published by the DOL in 2006 (Section 2550.404a-3) included a fiduciary safe harbor covering participant distributions from a terminated DC plan for assets moved into an IRA. The safe harbor requires that the plan fiduciary ensure the investment product is designed to preserve principal and that fees and expenses are not excessive.
- **Other distribution options** — If a fiduciary is unable to find a provider that will accept a rollover distribution (which is very unlikely) or determines that a rollover distribution is not appropriate based on facts and circumstances, there are two additional options:
  - Open an interest-bearing, federally insured bank account in the name of the missing participant, or
  - Transfer the assets to a state unclaimed property fund, subject to the applicable state's escheat laws.

However, these options subject the participant's assets to tax, withholding, and possibly a 10% early distribution tax. By choosing one, a fiduciary might well be violating ERISA's prudence and loyalty requirements. The DOL has confirmed that another alternative, a distribution of 100% income tax withholding (essentially transferring the account balance to the IRS), is not an acceptable way to distribute a missing participant's benefits.

CIP issues

Fiduciaries may have concerns about legal issues that might prevent them from establishing IRAs or bank accounts for missing participants. The DOL states that banks and other financial institutions will not be required to comply with customer identification and verification provisions (CIP) when an employee benefit plan establishes an account and transfers the funds for the missing participant. CIP programs will apply when a former participant or beneficiary first contacts the institution.

SECURE Act 2.0 coming soon?

Retirement plan reform is on the agenda for 2022. Legislators have been building on the momentum of the SECURE Act of 2019 and continue to explore ways to encourage employers to offer workplace retirement plans and to enhance retirement savings opportunities for workers. Years of proposals and discussions have resulted in three separate but similar retirement plan reform bills.

The House passed the Securing a Strong Retirement Act in March, then handed this "SECURE Act 2.0" bill to the Senate for consideration. In the meantime, two key Senate committees were drafting similar legislation. The Senate Health, Education, Labor, and Pensions (HELP) Committee passed the Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg (RISE & SHINE) Act on June 14 for consideration by the full Senate. And just over a week later, on June 22, the Senate Finance Committee passed the Enhancing American Retirement Now (EARN) Act.

All three bills contain many of the same provisions; the differences are in the details. The Senate will likely consolidate its RISE & SHINE Act and EARN Act into one bill. Then, the two Senate and House bills would need to be reconciled and passed before this legislation would become law.

Some of the provisions that already appear in the House bill and at least one if not both Senate bills are more likely to stick in final legislation, even if a few details need to be reconciled:

- Decrease eligibility requirement for long-term, part-time employees from three years to two years with 500 hours of service
- Increase the age for beginning required minimum distributions (RMDs)
- Treat student loan payments as elective deferrals for purposes of matching contributions
- Increase catch-up limits for participants of certain ages (60–63 or 62–64)
- Require catch-up contributions to be designated Roth contributions
- Permit employees to designate employer contributions as designated Roth contributions
- Permit employees to self-certify that deemed hardship distribution conditions are met
- Allow employers to provide small financial incentives to employees who defer into the plan
- Increase the involuntary cashout threshold (from $5,000 to $6,000 or $7,000)
- Create a retirement savings lost and found database
- Make it easier for plan sponsors to correct certain compliance mistakes under the IRS Employee Plans Compliance Resolution System (EPCRS)
- Disregard community property laws for purposes of determining ownership of a business
- Allow employers to exclude unenrolled employees from receiving plan notices and disclosures
- Limit repayment of childbirth or adoption distributions to three years
- Permit workers to take penalty-free withdrawals in the case of domestic abuse

Some provisions are unique to one bill, but address concepts included in the other bills. For example, the EARN Act would create a new "Starter 401(k) deferral-only plan" and establish a new automatic enrollment safe harbor feature, while the RISE & SHINE Act would require safe harbor automatic enrollment plans to conduct a re-enrollment every three years, and the House SECURE 2.0 would require automatic enrollment and automatic escalation for all new plans (with a few exceptions).

With bipartisan and bicameral support for enhancing retirement savings, industry experts are projecting passage of a final version of SECURE 2.0 legislation by or near year end 2022.

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