VOLUME 79 ◆ NUMBER 9

Employee Benefit Plan Review

Lost and Not Yet Found: U.S. Retirement Plan Sponsors' Duties Regarding Missing or Unresponsive Plan Participants

By Mary C. Niehaus and Lindsay Fisher-McFarland

Each year, Americans place billions of dollars in retirement accounts in preparation for their retirement. Yet, when the time comes to receive those benefits, thousands of participants are nowhere to be found or do not cash checks that have been sent to them.

A missing or unresponsive plan participant typically has accrued benefits in their account, but their plan sponsor cannot locate the participant to distribute the benefits, even after reasonable search efforts, or does not receive responses to communications sent to them. In addition, correction of a plan failure under the Internal Revenue Service Employee Plans Compliance Resolution System may require payment of additional benefits to terminated participants. There is a variety of reasons that may lead to a participant's being deemed missing, such as a participant's failing to update contact information after moving, switching phone providers, changing their name due to a marriage or divorce, or passing away with their beneficiaries unaware of their benefits.

This article summarizes a plan sponsor's duties regarding missing or unresponsive plan participants and alternative methods for disposition of related plan amounts.

Steps a Plan Sponsor Should Take With Respect to Benefits Relating to Missing or Unresponsive Plan Participants

Conduct a Diligent Search

As fiduciaries, plan sponsors must exercise prudent and loyal judgment with respect to distributing retirement benefits. Plan sponsors, therefore, must make the following efforts to find a missing participant:

- Send a notice to the participant's last known address through certified mail;
- Research employer records;
- Use various locater services and electronic search tools; and
- Contact beneficiaries to obtain information.

Fiduciaries should record all search efforts to locate missing participants and include the specific methods used, dates, and results of each effort as the Department of Labor (DOL) frequently requests this information upon audit.

Roll Over Benefits into an Individual Retirement Account (IRA) Rollover or Deposit Account

If a missing participant's benefit is distributable without the consent of the missing participant (i.e., is in an amount that is at or below the plan's automatic cashout threshold or the participant has requested but not yet cashed a check from the plan), the plan sponsor may set up and pay the missing or unresponsive participant's benefit into an IRA at a qualified financial institution for their benefit if certain conditions are satisfied. For example, participants must be given information prior to this automatic rollover, in either a summary plan description or a summary of material modifications, describing the types of investments available under the IRA and how any IRA fees will be charged and allocated. The participants also must be informed of the person to contact for more information about the investment of the mandatory rollover, including specific IRA provider information. The rolled-over funds must be invested in an investment product designed to preserve principal and provide a reasonable rate of return while maintaining liquidity, and fees and expenses charged by the IRA provider may not exceed amounts charged by it for comparable IRAs.

If a plan fiduciary is unable to locate an IRA provider that is willing to accept a rollover distribution on behalf of a missing participant, the DOL has stated that plan fiduciaries may consider establishing an interest-bearing federally insured bank account in the name of a missing participant.

Transfer Small Benefits to State Unclaimed Property Funds

In January 2025, the DOL stated that until it issues formal guidance, it will take no action to claim a fiduciary breach if a plan sponsor transfers a missing participant's retirement benefits equal to $1,000 or less to a state unclaimed property fund. Unlike IRAs, state unclaimed property funds do not deduct fees from the funds that they hold.

To use this option, plan sponsors must ensure that the unclaimed property fund is a prudent destination for the benefit payments after the sponsor has been unsuccessful in locating the missing participant and send the benefits to the state fund based on the missing participant's last known address. A plan sponsor that relies on this temporary enforcement policy must include a description of the potential use of state unclaimed property funds and contact information for the eligible state funds in the plan's summary plan description. The state fund itself must also satisfy certain requirements, such as allowing people to make claims for their funds in perpetuity and conduct annual searches for property owners for funds greater than $50.

Pay the Amount to the Pension Benefit Guaranty Corporation (PBGC)

The PBGC maintains an optional missing participant program for terminating defined contribution plans where a missing or unresponsive distributee's benefit is to be paid in a lump sum without the distributee's consent and the distributee has not responded to a notice about the distribution of such payment. Participation in this program is "all or nothing" (i.e., a plan cannot choose to transfer some account balances for missing participants and not others). The PBGC charges a one-time $35 fee for transferred accounts with a value greater than $250, which the plan may deduct from the participant's account. The PBGC will not charge the participant's account ongoing administration fees, and the transferred amount will grow with interest at the federal midterm rate.

This alternative will be unappealing to plan sponsors that are looking to send uncashed checks to the PBGC because the PBGC requires that the full amount of the distribution be paid to the PBGC, including the amount of taxes and other withholding amounts that would have been deducted from the amounts reflected in an uncashed check and paid over to applicable to tax authorities.

Plan Sponsors Must Maintain Best Practices to Minimize the Number of Future Missing Participants

Retirement plan sponsors should continue to take steps to minimize the number of missing participants, including the following:

- Maintain accurate contact information for plan participants by periodically asking participants and beneficiaries to confirm or update the contact information on file;
- Promptly follow up on undeliverable mail, emails, and uncashed checks, such as by calling the last known phone number on file or by contacting through social media;
- Attach contact information change requests to other regular plan communications;
- Use locator services, online search tools, and public records to locate participants;
- Ensure that all plan policies related to missing plan participants are documented in writing;
- Maintain written records of attempts to locate or contact missing participants; and
- If the plan sponsor pays amounts to eligible state unclaimed property funds, ensure that the summary plan description is updated accordingly.

The authors, attorneys with Sidley Austin LLP, may be contacted at mniehaus@sidley.com and lindsay.fishermcfarland@sidley.com, respectively.