



Missing participants and fiduciary responsibility

Missing participants are a pain point for plan sponsors as they create a long-term liability for the plan, add to costs and incur fiduciary risk. The Department of Labor (DOL) is aggressively investigating the practices and procedures of plan sponsors for locating and distributing benefits to missing participants. In some cases, the DOL has asserted breaches of fiduciary duty for failure to perform regular searches for missing and unresponsive participants. In January 2021, the DOL at long last posted best practices for finding those missing participants, and how to document the necessary steps taken.

Missing participants can be defined as:

- Participants and beneficiaries for whom the plan administrator does not have a valid address or contact information.
- Individuals for whom the plan administrator has a valid address, but refuse to accept, or are otherwise unresponsive to communications and/or distributions from the plan.

Sponsors of qualified retirement plans often need to locate missing or unresponsive participants or beneficiaries. A plan fiduciary's choice of a distribution option for a missing participant's account is a fiduciary decision subject to the general fiduciary responsibility provisions of ERISA. Based on the DOL guidance on this subject, following is a discussion of what are considered to be best practices for locating missing participants. The DOL applies the list of best practices to both defined contribution plans and defined benefit plans.

DOL Policy

The DOL's guidance gives four types of best practices designed to mitigate the problem of missing participants. The guidance intends to help plan administrators with (1) maintaining accurate census information, (2) implementing effective communication strategies, (3) searching for missing participants and (4) documenting procedures and actions. In each area, the DOL gives specific steps that plan sponsors should consider. Not every practice is necessarily appropriate for every plan, so the DOL does not require all plans to take each step they list. Fiduciaries should consider the size of a participant's accrued benefit or account balance as well as the cost of any search efforts when determining which steps are needed.

Maintaining Accurate Census Information

- Contact current and retired participants on a periodic basis to confirm or update their contact information, including home and business addresses, telephone numbers (including cell phone numbers), social media contact information, and next of kin/emergency contact information.
- Include contact information change requests in plan communications along with a reminder to advise the plan of any changes.
- Flag undeliverable mail/email and uncashed checks for follow-up.

- Maintain and monitor an online platform that participants can use to update contact information.
- Provide prompts for participants to confirm contact information upon login to online platforms.
- Regularly request updates to contact information for beneficiaries.
- Regularly audit census information and correct data errors.
- In the case of a change in record keepers or a business merger or acquisition by the plan sponsor, address the transfer of plan information (including participant and beneficiary contact information) and relevant employment records (e.g. next of kin information and emergency contacts).

Implementing Effective Communication Strategies

- Use plain language and offer non-English language assistance when appropriate.
- State up front and prominently what the communication is about.
- Encourage contact through websites and toll free numbers.
- Build steps into the employment onboarding and plan enrollment processes, and exit processes, to confirm or update contact information, and advise employees of the importance of ensuring that the plan has accurate contact information going forward.
- Communicate information about how the plan can help consolidate accounts from other plans and IRAs.
- When the name of the plan or plan sponsor has changed (for example, due to a merger or acquisition), clearly mark envelopes and correspondence with the original name of the plan or plan sponsor.

Searching for Missing Participants

- Check related plan and employer records (e.g., payroll records or records maintained by another of the company's plans).
- Check with designated plan beneficiaries (e.g., spouse and children) and emergency contact information.
- Use free online search engines, public record databases, obituaries and social media to locate participants.
- Use a commercial locator service, a credit reporting agency or a proprietary internet search tool.
- Use USPS certified mail or a private delivery service with tracking features.
- Use email, telephone, text numbers and social media.
- Use death searches (e.g. Social Security Death Index).
- Reach out to colleagues of the missing participant (e.g., employees who worked in the same office).
- Reach out to the participant's union.

- Use public and private pension registries (e.g., National Registry of Unclaimed Retirement Benefits).

Documenting Procedures and Actions

- Reduce the plan's policies and procedures to writing to ensure they are clear and result in consistent practices.
- Document key decisions and the steps and actions taken to implement the policies.
- Ensure your recordkeeper is performing agreed upon services with respect to lost participants, and working with the recordkeeper to identify and correct shortcomings, including establishing procedures for obtaining relevant information you may hold as plan sponsor regarding those missing participants.

In the event of a DOL audit, the subject of procedures around missing participants is likely to receive some real scrutiny. As a result, plan sponsors should strongly consider reviewing these best practice lists, and determining which steps should be taken and documented. The plan administrator may be able use plan assets for any expenses relating to the refinement of those procedures, and to charge reasonable search expenses for any specific missing participant to that participant's account.

Distribution Options

If a missing participant is not found after following those best practices, the plan fiduciary will need to select a distribution option.

- Rollover to an IRA (DOL preferred method, because it continues to maintain the tax deferred status of the funds).
- Distribution to the Pension Benefit Guarantee Corporation's Missing Participants Program (terminated plans only).

Alternative distribution options (if above not available)

- Opening an interest-bearing federally insured bank account in the name of the missing participant or beneficiary.
- Escheat to an unclaimed property program.

In the case of escheatment, the IRS has made clear that income tax withholding will still apply, and the plan must still issue a Form 1099-R to the participant for the escheated amount. Note that 100% income tax withholding is NOT an option.

Once a plan fiduciary properly distributes the entire benefit to which a missing participant is entitled, the distribution ends the individual's status as a participant covered under the plan and the distributed assets are no longer plan assets under ERISA.

Uncashed Checks

There is a hidden danger in uncashed checks. Uncashed checks are plan assets. According to DOL FAB 2002-03, “Until the instrument (check) is negotiated and ‘constructive receipt’ is made by the participant, beneficiary or rollover IRA...the DOL considers uncashed checks plan assets.”

When a participant is forced out in cash, the consequences are additional work for the plan sponsor as searches are required for participants with uncashed checks. When the DOL overhauled the Form 5500 in 2016, they required the reporting and number of uncashed checks and procedures for handling uncashed check management. To help avoid uncashed checks, plan sponsors should make sure that the rollover process is easy and well communicated.

Required Minimum Distributions (RMDs)

The Internal Revenue Service (IRS) has a “non-enforcement policy” concerning missing participants who are required to start receiving required minimum distributions. In an October 2017 memorandum, the IRS directed its auditors to not challenge a qualified plan for failure to make RMDs to missing participants, but only if certain conditions are satisfied. The IRS memorandum requires that fiduciaries perform at least three steps:

1. Search related plan, company, and publicly available records for alternative contact information.
2. Use one or more of these search methods: a commercial locator service; a credit reporting agency; or a proprietary internet search tool for locating participants.
3. Attempt to contact the participants through the United States Postal Service (USPS) certified mail to the last known mailing address and attempt to contact the missing participants through appropriate means for any other address or contact information (including email addresses and telephone numbers).

If a plan takes those steps, the IRS will not attempt to disqualify the plan for failure to make RMDs. The failure to take those steps—and, therefore, the failure to obtain the relief afforded by the IRS guidance, may result in a sanction under the IRS’ Audit CAP – the IRS’s Closing Agreement Program – in order to avoid disqualification.

What Should Plan Sponsors Do?

Plan administrators should review their procedures for maintaining contact information for current and former participants and beneficiaries. Fiduciaries should carefully consider any adjustments to those procedures based on the best practices issued by the DOL. The DOL has made clear that the best practices they have listed do not have the force and effect of law, and are not meant to bind plan fiduciaries in any way. Nevertheless, in the event of a DOL audit, the auditor will be measuring to see how well those best practices are applied by the plan administrator. Plan administrators should identify and act on any issues, such as when a communication is returned or a check is uncashed.

They should review their plan document and attempt to rollover all accounts under \$5,000 (not just those with account balances over \$1,000) into an IRA and transfer uncashed checks using one



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of the distribution options listed above. Many recordkeepers offer automatic rollover features and third party firms can also be employed.

The plan administrator should, at a minimum, adopt and consistently employ missing participant procedures that are designed to show a reasonable effort to satisfy the best practices outlined by both the IRS and DOL.

This material was created to provide accurate and reliable information on the subjects covered, but should not be regarded as a complete analysis of these subjects. It is not intended to provide specific legal, tax or other professional advice. The services of an appropriate professional should be sought regarding your individual situation.

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