



A GUIDE FOR EMPLOYERS DEALING WITH MISSING PARTICIPANTS

A Guide for Employers Dealing with Missing Participants

Locating missing plan participants can be a headache for any employer, but simply ignoring them is not an effective solution. Regulatory agencies in previous years have published guidance on this topic relating to missing “retired” employees. With the increase in the number of “pre-retired” missing plan participants, governmental bodies are now taking additional measures to provide solid guidance and solutions to help streamline this arduous process for plan sponsors.

Plan sponsors must understand why locating missing plan participants is important. First, ERISA requires that plan fiduciaries (e.g., plan sponsors, employers) have a duty of prudence and loyalty to all plan participants and beneficiaries—regardless whether the participant is actively contributing. In 2014, the U.S. Department of Labor (DOL) published *Field Assistance Bulletin 2014-01* (FAB), which explained that these duties require plan fiduciaries of terminated plans defined contribution plans to make a reasonable effort to locate missing plan participants. Therefore, failure to make any efforts in locating missing plan participants is viewed as a breach of fiduciary responsibility.

Second, per Internal Revenue Code 401(a)(9), the entire plan could lose its tax-qualified status if a participant fails to take his/her required minimum distribution (RMD) (usually at age 70 ½). This scenario could likely happen: a retiree, who has money left in the plan, subsequently becomes “missing”, and the employer is unable to locate and deliver information on the retiree’s upcoming RMD.

Existing Guidance

While the 2014 FAB published DOL guidance, it only addresses locating missing participants for a terminated defined contribution plan (e.g., 401(k), profit sharing, money purchase pension). Despite this narrow application; one could opine that plan fiduciaries follow the same requirements as an on-going, active defined contribution plan.

The FAB lists minimum search actions to take when locating a missing participant:

- Send plan notices using certified mail to the participant's last known address to confirm correct address.
- Check other employer records or benefit plans for alternate addresses.
- Contact the designated plan beneficiary or employee's emergency contacts via phone or certified mail to see if they can assist with tracking down the participant.
- Use no-cost Internet tools, such as search engines, social media sites and online public record databases.

Timothy Hauser, acting director of the DOL's Employee Benefits Security Administration, at the August 24, 2017 ERISA Advisory Council in Washington, D.C. offered two additional no-cost search options:

- Place a phone call using the cell phone number on file, and
- Contact co-workers to see if they have current contact information.

These are the minimum, no-cost search actions that the DOL expects of plan sponsors. If still unsuccessful locating a missing participant, after considering the size of a participant's account balance and the cost of further search effort plan sponsors might consider using additional options that will incur fees, such as using commercial locator services or credit agencies.

Once all these options have been exhausted, the 2014 FAB allows plan sponsors to transfer a missing participant's account balance to a rollover IRA in the name of the participant. The challenge here is finding a financial institution that will establish an IRA in the participant's name, without the participant's affirmative consent or signature.

New Relief, Guidance and Resources

Regulators and lawmakers have recognized that more relief, guidance and resources are needed to help plan sponsors manage missing participants:

The **Pension Benefit Guarantee Corporation (PBGC)**, an agency that helps ensure solvency of retirement plan benefits accrued in a defined benefit plan, has expanded a program initially designed to only help missing participants of a terminated defined benefit plan. Plan sponsors who terminate a 401(k) or other defined contribution plan effective on or after January 1, 2018, may now transfer missing participant account balances to the PBGC instead of to an IRA. The PBGC maintains a central repository for these funds and will pay out benefits to participants once they have been located.¹

The **Internal Revenue Service (IRS)** has provided its own kind of relief. IRS memorandums from August 2017² and March 2018³ confirm that an RMD failure from a missing participant will not occur if the plan sponsor has engaged in the various search options similar to those prescribed by DOL.

¹[PBGC Expands Missing Participants Program to Terminated 401\(k\) and Other Plans Pension Benefit Guarantee Corp. December 21, 2017](#)

²[MEMORANDUM FOR EMPLOYEE PLANS \(EP\) EXAMINATIONS EMPLOYEES: Missing Participants and Beneficiaries and Required Minimum Distributions Internal Revenue Service. October 19, 2017](#)

The **U.S. Senate** has introduced the *Retirement Savings Lost and Found Act of 2018*, which would provide fiduciary relief and RMD safe harbor in regard to missing participants provided the plan sponsor adheres to a specific number of search options, borrowed from DOL's list and records of missing participant account balances in a newly-established national lost and found retirement account database.⁴

What to do now?

Until DOL provides formal guidance for locating and handling missing plan participants for an active, on-going plan, plan fiduciaries should consider utilizing the various search options outlined in the 2014 FAB. But merely performing these various search inquiries may not be enough. To protect oneself from a plan auditor inquiry, all search actions performed to locate a missing individual should be recorded along with supplemental documentation, such as returned, undeliverable certified mail, or printouts from an electronic database.

From a best fiduciary practice perspective, plan sponsors may wish to create missing plan participant procedures for the plan administrator to follow. This should help ensure a consistent process for locating every missing participant. The procedures should also list any final recourse of transferring participant's account balance from plan to an IRA or central repository for unclaimed monies.

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This information was developed as a general guide to educate plan sponsors and is not intended as authoritative guidance or tax/legal advice. Each plan has unique requirements, and you should consult your attorney or tax advisor for guidance on your specific situation.

³ [MEMORANDUM FOR EMPLOYEE PLANS \(EP\) EXAMINATIONS EMPLOYEE: Missing Participants and Beneficiaries and Required Minimum Distributions – 403\(b\) Plans Internal Revenue Service. February 23, 2018](#)

⁴ [Retirement Savings Lost and Found Act of 2018](#)