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EMPLOYEE BENEFITS UPDATE

April 17, 2018

The Elusive Search: Considerations for Locating Missing Retirement Plan Participants

Executive Summary

- Government agencies have increased audit activity pertaining to required minimum distributions (RMDs) that tax-qualified retirement plans must make to participants upon their attainment of age 70 ½, and the separate requirement that terminating plans distribute all plan assets within 12 months from the plan's termination. In light of this increased attention by government auditors, employers sponsoring 401(k), 403(b) plans and defined benefit plans need to have processes in place to locate missing plan participants to whom distributions are required to be made.
- The Internal Revenue Service (IRS) recently issued internal directives that provide useful guidance on the procedures that plan administrators should follow in order to avoid the assessment of penalties for failing to make RMDs to missing participants.
- The Pension Benefit Guaranty Corporation (PBGC) issued final regulations that provide employers with an additional option for addressing distributions to missing plan participants when terminating a retirement plan.

What You Should Do

- Work with your recordkeeper or other third–party administrator to review your administrative procedures for locating missing plan participants, especially for participants who are nearing their RMD dates. Although some of the guidance focuses on terminating plans, you should consider incorporating the steps outlined in the guidance into your processes for locating missing plan participants in all situations.
- Work with your recordkeeper to assess each year who will soon be entitled to RMDs. Similarly, routinely determine whether there are missing or non-responsive participants or beneficiaries and attempt to locate them, especially if a plan termination is contemplated (as may be the case with an anticipated corporate transaction).
- Record and document steps taken to locate missing participants and beneficiaries as proof of compliance with your fiduciary duties in the event of an audit.

Retirement plan sponsors have long had to grapple with problems relating to missing plan participants, but recent government focus and audit activity on the failure of retirement plans to make required distributions such as RMDs increases the risk of IRS penalties and excise taxes, and of claims that a breach of fiduciary duty may have occurred. In response to these developments, plan administrators should take a fresh look at the processes they have in place for locating missing or nonresponsive plan participants. Fortunately, previously-issued DOL guidance has been supplemented with more recent guidance and developments from the IRS and PBGC, which can help inform the procedures that plan administrators may wish to implement for both ongoing and terminating plans.

DOL Sets Standards for Locating Missing Plan Participants

In Field Assistance Bulletin (FAB) 2014-01, the DOL provided guidance for locating missing plan participants in connection with the termination of a defined contribution plan, noting that plan fiduciaries in this situation should, at a minimum, take the following actions:

- Send a notice to participants using certified mail;
- Check the employer's records and records of any related plans the employer maintains;
- Check with the missing participant's designated beneficiary;
- Use free electronic search tools such as internet search engines, public records, and social media; and
- If none of the foregoing search methods is successful, consider the account balance involved and the cost of additional search methods, such as commercial locator services, credit reporting agencies, investigation databases, internet search tools, information brokers, and other services and tools that may incur a cost.

IRS Outlines Procedures for Locating Missing Plan Participants

In a positive development, on October 19, 2017, the IRS issued an internal directive to its field auditors, stating that when conducting a retirement plan audit, the IRS will not challenge a plan's failure to commence RMDs to missing participants or beneficiaries if the plan administrator has:

- Searched all plan and related plan, sponsor, and publicly available records or directories for alternative information;
- Used any of the following search methods:
  - A commercial locator service;
  - A credit reporting agency; or
  - A proprietary internet search tool for locating individuals; and
- Attempted contact through U.S. Postal Service certified mail to the last known mailing address and through appropriate means for any address or contact information (including email addresses and telephone numbers).

These guidelines apply to IRS audits opened on or after October 19, 2017 and expire on October 19, 2019. On February 23, 2018, the IRS issued a similar internal directive to its field auditors with identical safe harbor steps to locate missing participants who are due RMDs from a 403(b) plan, which applies to IRS audits opened on or after February 23, 2018 and expires on February 23, 2020.

PBGC Expands Missing Participant Program

In addition to the methods set forth in the DOL and IRS guidance, effective January 1, 2018, certain defined contribution plans can take advantage of the PBGC's Missing Participant Program, as long as the plan is being terminated. Previously, this program was limited to certain defined benefit plans.

Under the PBGC's voluntary program, a plan may elect to be a "transferring plan" or a "notifying plan." A "transferring plan" transfers the amount of the benefits due to missing participants and beneficiaries to the PBGC so that the PBGC will distribute the benefit once the missing individual is located. A "notifying plan" transmits to the PBGC certain information, such as the name of the financial institution where an IRA has been established on behalf of the individual, so that when the participant or beneficiary is located, the PBGC will share that information with the participant or beneficiary.

To utilize the program as a "transferring plan" or a "notifying plan," the plan must file a Form MP-200 and related schedules with the PBGC. In addition, "transferring plans" must pay a one-time fee of $35 per missing participant for accounts in excess of $250, which can be paid from participant accounts and/or the plan's forfeiture account. "Notifying plans" do not have any administrative fees. While the expansion of this program is welcome news, because this program is available only to terminating plans, it will be of limited use to plan administrators dealing with RMD issues or missing participants in ongoing plans.

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In light of the increasing focus on RMDs and other required plan distributions, plan administrators should be proactive and consider implementing procedures that, at a minimum, follow the steps outlined by the IRS and DOL guidance, and determine whether the PBGC program is an appropriate alternative in the context of a plan termination. Plan administrators should also document the adoption or amendment of missing participant procedures, as well as any efforts to locate individual participants, in order to provide an "audit trail" in the event of a DOL or IRS audit.

If you would like to discuss how these developments impact the administration of your retirement plans, or if you'd like to discuss your employee benefit plans generally, please feel free to contact the members of our Employee Benefits group below.

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