

Dealing With Missing Participants

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Retirement plan sponsors should be aware of the costs associated with missing participants: (1) time and expenses involved in searching for them, (2) additional administrative costs when billed on a per participant basis, and (3) additional costs based on surpassing participant limits for, among other things, annual plan audits. However, there may also be associated legal perils.

An October 2, 2017 letter, from the American Benefits Counsel (“ABC”) to Tim Hauser at the Department of Labor (“DOL”), outlines the aggressive legal positions recently taken by DOL investigators with respect to missing participants:

- Failure to locate a missing participant may result in a breach of fiduciary by the plan administrator duty, even if the plan’s procedures have been followed.
- The forfeiture of retirement plan benefits owed to unresponsive or missing participants may result in a prohibited transaction, even if the plan provides for reinstatement of the benefit following a participant’s subsequent claim for benefits.
- Plan administrators should perform an annual search for missing participants, using a different search method each year and may be obligated to use methods such as contacting current and former employees who worked at the same time as the missing participant to assist in this process.
- Plan administrators should keep searching for the same missing participant indefinitely, even though performing unlimited searches for the same participant is not an efficient use of plan resources.

The second position - that forfeiture of unclaimed retirement benefits may be a prohibited transaction has been pursued even when the plan document provides for the forfeiture and restoration and received a favorable determination letter from the Internal Revenue Service. Because prohibited transaction issues are within the purview of the DOL, plan sponsors are insulated from potential DOL liability. In addition, the DOL has indicated that relying on a third party administrator or record-keeper’s routine process for locating missing participants may not be sufficient if the plan administrator fails to appropriately monitor the service provider.

The ABC letter requests that the DOL engage in a rule-making process to issue comprehensive guidance on plan fiduciary responsibilities with respect to unresponsive and missing participants and cease taking ad hoc enforcement positions until the DOL provides actual guidance.

Plan administrators should review their administrative procedures for locating missing participants to determine if additional procedural safeguards are necessary. As noted above, even if this responsibility has been delegated to a third-party service provider, it may be necessary to review the provider's processes and determine whether they are adequate. Plan administrators should also examine their plan documents and participant communications, such as summary plan descriptions, to determine how the plan treats the benefits of missing or unresponsive participants and assess whether modifications are warranted.