

Compliance

“Missing” Inaction?

What steps should plan sponsors take when a terminated vested employee is unreachable?

By Jeff Atwell, Thomas E. Clark Jr., Kimberly Shaw Elliott, and Michael Kirschman

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The Department of Labor (DOL) failed to provide strict requirements in January 2021 with its release of a three-part package that included “Missing Participants – Best Practices for Pension Plans,” Field Assistance Bulletin No. 2021-01, and Compliance Assistance Release No. 2021-01. Despite this, how plans attempt to locate missing participants remains a focus of increased DOL investigations.

Why It Matters

At the core of all fiduciary duties is the obligation to act for the exclusive purpose of providing benefits to participants and their beneficiaries while defraying all but reasonable expenses of administering the plan. That primary function is defeated when any person entitled to a benefit cannot be found. Similarly, relying upon procedures to maintain census information that are unreliable or prohibitively expensive is not prudent.

Compliance Assistance Release No. 2021-01 announced EBSA’s launch of the Regional Offices conducting Terminated Vested Participants Project (TVPP) audits, designed to facilitate voluntary compliance efforts by plan fiduciaries. Every examination now includes a request for “Participant census records, noting the employment status of each participant and their contact information, [to] help us to understand whether a plan has demographic and contact information sufficient to

determine when benefits are due and to communicate with TVPs in a timely fashion,” as well as the plan’s procedures for communicating with TVPs, spouses and their beneficiaries, and information about whether the plan takes sufficient steps to address missing participant situations when they occur.

What’s Expected

The DOL’s best practices guidelines outline critical areas of concern while allowing the plan to determine its own implementation process. The plan must:

1. Maintain accurate census data for plan participants.
2. Implement effective communication strategies.
3. Conduct missing participant searches.
4. Document procedures and actions proving proper participant communication.

Outlining these expectations clarifies the plan administrator’s responsibilities but executing these obligations requires a detailed system and active management of the processes.

The Challenge(s)

The concept and principles behind keeping track of participants is straightforward enough – but effectively implementing the procedures to accomplish that objective can be daunting when those individuals do

not update their contact information. Among those challenges is defining who is a missing employee.

Historically, if a communication was sent and return mail was received back as undeliverable, a participant was considered “lost” and a location process would begin. There are no clear rules, however, for participants who have moved, and for whom, after a period of time, the U.S. Postal Service no longer forwards mail. Also unaddressed is the common practice where companies do not terminate email addresses for employees who leave, but instead forward the original employee’s emails to a new employee. If the original employee utilized this work email address as their primary form of retirement plan electronic communication, a bounce-back message that the notice was not delivered to the participant will not occur.

Similar issues arise from individuals who maintain a number of external email accounts that, while active, aren’t monitored. Indeed, the expanded reliance on text messaging suggests that more people are abandoning email as their primary form of electronic communication in favor of text messaging or social media platforms. Most plans find that even with multiple outreaches, only a tiny percentage of participants review what they are sent. The participation rate is even lower for terminated employees with a balance in the retirement plan.

Action Steps

In order to overcome these challenges, and to comply with each DOL principle with a process that is both executable and documentable, a sound policy should address the following key areas.

1. Protocols to Distribute Notices, Disclosures, and Plan Communications

Define how required notices and plan communications will be disseminated to all plan participants, both active and terminated. The policy should detail a multi-tier approach utilizing electronic and physical mail, complying with the DOL safe harbor regulations, and specifying when and how often each delivery method is used.

2. Verify Contact Information

It has been found that because most employees receive their paychecks via direct deposit, they do not feel a need to update their contact information when they change addresses because their check still makes it to the bank account. Active outreach by the benefits team reminds retirement plan participants that current contact information is required to ensure timely plan communication.

3. Utilize Many Channels of Communication

Different plan participants have different communication preferences. The plan should not only communicate via the standard methods of the U.S. Postal Service mail and email, but should also utilize updated methods, like SMS/ Text messaging or phone calls. The primary vehicle for communication has moved from computers to phone or handheld devices, so the more touch points of communication the plan offers, the higher the chance of reaching the participant.

4. Verify Distribution and Delivery

To prove execution of the plan's communication policy, the plan

should both confirm the notice was timely circulated and that the intended person received the information. The plan administrator is not relieved of their responsibility by simply sending to the last known address if the address is no longer accurate for the participant.

5. Define “Missing Participant” and Steps to Locate

First, the plan should clarify when a participant is defined as “missing.” By using a system to verify the completion of delivery, the plan should be able to specify how many communication attempts are reasonable before identifying the participant as “lost.” The designation of “missing participant” must be clearly defined for consistent execution by the responsible parties. Then, after identifying a participant as “missing,” a procedure detailing the steps and resources the plan will utilize to locate these participants should then be executed. Using the DOL's outlined escalation steps for finding lost participants is the best place to start.

6. Documentation

Efforts to reach participants are only as good as the proof you can show of your work. Each attempt to contact should be logged with proof of work. This documentation proves you have fulfilled your obligations regarding reasonable communication in the case of investigation or litigation.

7. Educating Participants

Encouraging participants to open, read and question all information distributed by the plan generates genuine plan engagement and helps to keep participant contact information current by verifying that the correspondence was received. This process requires active outreach from the plan and those responsible for plan education, regularly providing participants with con-

tact information regarding who to contact with questions, and overall creating a safe place for participants to obtain information. In addition, information should be in plain language and a format the employee will understand, and not be written with industry jargon.

8. Controlling Costs

New providers are entering the marketplace that specialize in developing and maintaining the proper procedures while deploying expert staff and technology that can implement the processes. These unified services might provide better results and be more cost-effective than what employers engaged in other businesses might produce on their own. Just as is true for any activity that is appropriate for the administration of the plan, reasonable expenses incurred in the effort to locate a missing participant may be charged against all plan assets or allocated to that individual participant's account under the plan.

Conclusion

In January 2021, the DOL provided an overview, but not a procedure. Those responsible for fulfilling those fiduciary responsibilities must read and understand the DOL's best practices and convert them into an executable policy addressing the DOL's outlined expectations. Processes developed to meet these goals will significantly reduce the number of missing participants within the retirement plan and meet best practice compliance responsibilities.

Jeff Atwell is the President of TRG Fiduciary Services.

Thomas E. Clark Jr. is a Partner with Wagner Law Group.

Kimberly Shaw Elliott is a Partner with Wagner Law Group.

Michael Kirschman is the Chief Executive Officer for Plan Notice.