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BENEFITS REPORT

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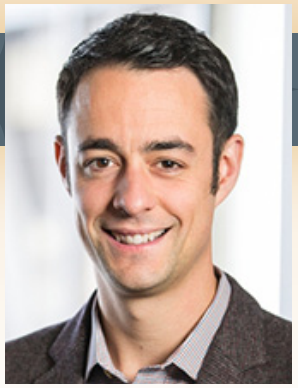
Missing Participants: Gone but Not Forgotten

SUSAN QUINTANAR
AND BENJAMIN F. SPATER

Plan administrators know all too well the practical challenges associated with the timely payment of benefits to plan participants, especially in those cases where individuals remain unresponsive to plan communications and are presumed missing. Last year, both the Department of Labor ("DOL") and the Internal Revenue Service ("IRS") showed an increased interest in this area. During the early part of 2016, the DOL stated that it would begin investigating large defined benefit pension plans to determine whether benefits were paid in a timely manner to terminated participants. Likewise, the IRS modified its instructions to Line 4l on the 2015 Form 5500 to address compliance issues regarding the timely payment of benefits. (Line 4l asks "Has the Plan failed to provide any benefit when due under the Plan?") For plan sponsors to be able to answer "no" to Line 4l, the IRS clarified that they needed to make a "reasonable effort" to find unresponsive participants who were entitled to receive minimum distributions under Code Section 401(a)(9). This issue was not previously raised in the instructions to prior Forms. Answering "yes" to Line 4l may result in a plan sponsor receiving a request for information from the IRS Employee Plans

IN THIS ISSUE...

Trucker ✦ Huss is pleased to announce...



Robert R. Gower became the newest Director of the Firm on January 1, 2017.

Congratulations to Robert!

Compliance Unit ("EPCU"). The EPCU has stated that one of its current projects focuses on whether plans may incur a "failure to provide a benefit."

The Pension Benefit Guaranty Corporation ("PBGC") currently administers a missing participants program to retain the retirement benefits for those participants and beneficiaries that are determined to be missing after a single-employer defined benefit pension plan has been terminated. The purpose of the program is to help such individuals locate and receive their benefits after all assets from the terminated plans have been distributed. In order to transfer these benefits to the PBGC, plan administrators must first conduct a diligent search for these individuals, which includes asking the missing participant's known beneficiaries (if any) for the participant's current address, and using a commercial locator service. The DOL has also issued guidance in its Field Assistance Bulletin 2014-1 ("FAB 2014-1") that addresses the fiduciary duties associated with ensuring that missing participants and beneficiaries retain the rights to their retirement benefits following the termination of a defined contribution plan.

Currently, the guidance regarding how to deal with missing participants extends only to terminated plans. While this issue is of vital importance for such plans since all assets must be liquidated, it also continues to be a concern for ongoing plans. Plan administrators have a fiduciary obligation to protect and preserve participants' rights to benefits to ensure they receive them in a timely manner. On September 20, 2016, the PBGC issued proposed regulations expanding its missing participants program to include terminated multiemployer plans (covered by Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA")), terminated professional service plans with 25 or fewer participants, and most terminated defined contribution plans. Participation is voluntary for the last two types of plans. Certain modifications made in the proposed PBGC regulations may help further guide plan sponsors of ongoing plans on how to deal with missing participants. Though the current and proposed guidance applies only to terminated plans, it would seem prudent from a fiduciary standpoint to rely on similar principles, where applicable, when faced with missing participants in ongoing plans.

Key Modifications to the PBGC Missing Participants Program

Diligent Search Procedures

More specificity has been added to the diligent search procedures in the proposed regulations. Under current guidance, a diligent search includes attempting to locate the lost individual by contacting the beneficiaries listed under the terminated plan. This procedure will be updated to require that such searches must also include any other plans maintained by the employer sponsoring the terminating plan (taking into account its health plans, if any). In addition to checking the participant information available

A message from the firm...

In keeping with our tradition, in lieu of sending holiday cards, Trucker ✦ Huss has sponsored the following organizations:

Edgewood Center for Children and Families (Edgewood) helps children, youth, and their families who are struggling with mental illness and debilitating behavioral issues. Edgewood provides treatment and prevention programs that help many children and families overcome these challenges and transform their lives. Edgewood supports youth and their families through life's challenges with a full continuum of behavioral health services.

Operation Rainbow. Over the past two decades Operation Rainbow surgical teams have transformed the lives of many indigent children in underprivileged countries by providing them free reconstructive surgery. Countless more have been healed through educational programs for healthcare professionals in rural areas.

Legal Aid Society – Employment Law Center (LAS–ELC) is a legal services nonprofit in the U.S. that uses all available legal tools to fight discrimination, harassment, wage theft, and other injustices in the workplace by advocating for policy change in collaboration with partners nationwide; by providing limited representation and conducting impact litigation; by offering information about worker's legal rights online and in person; and by serving thousands of clients directly each year for free in California.

The directors, attorneys, and staff of Trucker ✦ Huss wish all of our clients, colleagues and friends a safe and happy new year!

in each such plan, all beneficiaries listed under all other plans of that employer must also be checked to uncover any discrepancies in the reported information. Finally, the employer's records also must be reviewed to ensure that all such potential information sources have been uncovered.

Currently, the regulations require the use of a "commercial locator service" to search for lost participants. However, this term is not defined. The proposed regulations now clarify that "commercial locator service" is "a business that holds itself out as a finder of lost persons for compensation using information from a database maintained by a consumer reporting agency." For those lost participants with small plan benefits, the PBGC has contemplated that this definition may not be cost-effective and has included a waiver on this requirement in such instances. However, the amount deemed to be a "small" benefit has not yet been determined. Under current guidance (while this term remains undefined), plan administrators have the flexibility to use a commercial locator service that charges either minimal fees or no fees to complete such searches.

Another proposal is to require the use of a free internet search engine for purposes of making a diligent search for lost participants, regardless of the size of the participant's benefit. This could be used in such cases where the cost of employing a commercial locator service is a

significant deterrent, such as where there is a small plan benefit. Other search methods include examining a network database, a public record database (such as those available for licenses, mortgages, and real estate taxes) or a "social media" website.

According to the proposed guidance, all of the proposed search methods must be attempted in order to satisfy the "diligent search" requirement. In proposing these changes, the PBGC has stated that it hopes to ensure that an "appropriate level of effort" will go into locating lost participants. The PBGC has also said that the modifications are intended to make the diligent search procedures more consistent with the search guidance already provided in the current DOL FAB 2014-1 for terminated defined contribution plans. Based on these proposed modifications, it would seem that plan administrators for ongoing plans may have more assurance that reliance on the DOL guidance is appropriate and prudent in meeting the "diligent search" requirements when attempting to locate lost participants. It may also make sense to apply the definition of "commercial locator service" when selecting such providers, taking into account any waivers that may seem reasonable and cost-effective for small plan benefits. Note too that the IRS uses the same "commercial locator service" term in Revenue Procedure 2016-51 when recommending methods to locate lost participants under its Employee Plans Compliance Resolution System. It would seem reasonable to apply the definition proposed in the guidance in this instance as well.

Unified Nationwide Pension Search Database

Under the proposed regulations, a unified nationwide pension search database will be established to maintain information regarding missing participants' benefits. It will be designed and operated for the PBGC by a private-sector entity with expertise in this area. The database is intended to be easy-to-use, designed to allow members of the public to easily search its directory to obtain missing participant information. Although access will be available to the public, the proposed regulations promise that the privacy of such participants will remain protected. Since the database will be made available to the public, it may benefit plan administrators of ongoing plans by providing an effective and free search method to assist in locating lost participants.

Additional Proposed Modifications Addressed in the PBGC Regulations

The following is a list of some of the other major modifications addressed in the proposed regulations:

- The definition of "missing participants" under defined benefit pension plans now allows non-responsive distributees subject to the mandatory cash-out plan provisions to be treated as missing participants, rather than as merely non-responsive ones. In those cases where there is an involuntary cash-out distribution in excess of $1,000, the current program requires payment in the form of an automatic rollover to an IRA in the absence of an affirmative election by the participant or beneficiary under Code Section 401(a)(31)(B) and the PBGC instructions. Under the proposed regulations, this will no longer be the case. Defined benefit pension plans would be allowed to distribute the benefits of such participants to the PBGC rather than having to transfer them to an IRA.

- The PBGC will charge $35 per each missing participant, payable when the benefits are transferred to the PBGC. No fee will be charged for amounts paid to the PBGC of $250 or less (or for plans that only send information about missing participants' benefits to the PBGC). Also, the PBGC will not charge continuing "maintenance" fees or distribution fees once benefits have been transferred.

- PBGC will create a user-friendly spreadsheet so that calculations can be handled by plan administrators (as opposed to hiring an actuary).

- Participation is voluntary for plans not subject to Title IV of ERISA, *i.e.*, most terminated defined contribution plans and terminated small "professional service plans" (those private sector defined benefit plans maintained by "professional service employers" such as doctors, lawyers, accountants, actuaries, etc. with 25 or fewer participants). The intent is to provide plan administrators with another option for dealing with missing participants and beneficiaries when liquidating terminated plans. If such plans choose to participate, they could either elect to transfer the benefits to the PBGC or provide

information concerning the disposition of the missing participants' benefits, if, for example, the benefit was transferred to IRA. Selective use of the missing participants program is not allowed for plans that have elected to transfer benefits to the PBGC. The concern is that a plan administrator might choose to transfer only small benefits to the PBGC, while larger accounts that potentially generate higher fees will be transferred to commercial providers. Plan administrators who dispose of benefits other than through transfers to the PBGC could elect to provide the PBGC with distribution information for only some of the missing participants rather than all.

- For defined benefit plans, there are fewer benefit categories and sets of actuarial assumptions for determining the amount of the benefit to be transferred to the PBGC.

Recommendations for Plan Administrators

In light of the increased interest by both the DOL and the IRS in the timely payment of benefits, it is essential to have in place and follow plan procedures addressing how benefits will be distributed once participants become eligible for distributions, as well as the methods to be used in the event participants cannot be located or remain unresponsive. At a minimum, these procedures should include:

- a description of the timing and form of benefit distributions to be made to eligible participants;
- the frequency of plan communications to participants concerning their eligibility for distributions;
- when a diligent search is to be conducted in the case of lost and unresponsive participants (including those whose checks remain uncashed). For example, a search might be needed when participants are scheduled to begin receiving required minimum distributions ("RMDs") from the plan. The IRS has clarified on its website that a reasonable search, in the same manner as provided under the DOL FAB 2014-1 guidance, must be made to locate such participants when they are eligible to receive RMDs;
- the methods involved in satisfying the requirements of a diligent and reasonable search; and
- the manner in which benefits will be distributed once distribution must commence in the event lost or unresponsive participants are deemed to be missing participants following satisfaction of the diligent search procedures. Such options may include:
  - whether benefits will be forfeited (if the terms of the plan so provide, subject to reinstatement if a claim for benefits is later submitted to the plan);
  - whether benefits will be transferred to an IRA (or transferred to an insurance company that will issue an irrevocable commitment to pay benefits, in those cases where payments must be made in the form of an annuity);
  - whether it may be feasible and necessary to transfer the benefit to a Federally-insured deposit account or the state of the missing participant's last known residence or work location under the state's escheat rules for abandoned property. This may occur in those cases where the above methods are not feasible in actual practice, such as where the accrued benefit is less than $1,000.

It is also advisable to include a statement on all plan communications noting that it is the responsibility of plan participants to keep the plan informed of their current address. For this purpose, plan communications include summary plan descriptions, as well as applications for benefits.

Notifications

For those participants who fail to keep the plan informed of their current addresses, another consideration is how to craft plan notices and communications to these individuals. This issue is of special concern in those instances where there has been a significant lapse in contact with plan participants regarding their eligibility for benefits. In an ongoing plan, the plan's provisions and its administrative procedures will generally dictate how and when benefits are paid once participants terminate employment and become eligible for distributions. Sometimes, notification may not take place until a great deal of time has passed following the participant's active participation in the plan.

In a defined benefit plan, for instance, it is likely that notification will not occur until after the participant has reached his normal (or early, where applicable) retirement age, which may occur well after his termination of employment. Where a plan offers distributions following termination of employment, the plan procedures may leave it to the participant to make the initial contact concerning his benefit, waiting until the benefit is required to be distributed before notification from the plan is generated, except in those cases where the benefit must be distributed because it is a mandatory distribution.

Benefit payments may also be delayed where the plan administrator is not aware that a participant has died. In such cases, the plan administrator may only realize that the death has occurred after a claim for benefits has been submitted to the plan. Likewise, payments to alternate payees under a qualified domestic relations order may also be delayed where a plan administrator has not been informed of a divorce or settlement.

In such situations where a considerable length of time has passed, it is increasingly likely that plan records will include obsolete information. When attempting to make a "reasonable effort" to locate such participants and satisfy the "diligent search" requirements, it may be advisable to adapt any communications to include the following recommendations:[1]

- list any changes that may have occurred in the plan's name or sponsor since the individual participated in the plan to help prompt his recognition of the plan. This is especially important where the plan may have undergone name changes or plan mergers;
- include the length of the individual's plan participation to help reassure the participant that the communication is legitimate;
- keep participant information private by not including sensitive data (such as social security numbers) in the event the letter is opened by an unintended recipient;
- provide appropriate plan administrator/plan sponsor contact information so that the individual may write to or speak with a representative to discuss his benefit. Adding a web address is also recommended so that the participant may verify the validity of the communication, if he so desires, by checking the website; and
- include a self-addressed stamped envelope to make it easier for the individual to respond to the communication.

Such recommendations may help to encourage a response from such individuals, who may have either forgotten that they maintain a benefit under the plan or are suspicious that such correspondence may be from disreputable sources.

Summary

The proposed PBGC modifications may help provide further guidance for plan administrators of ongoing plans who still struggle with the administrative burden and fiduciary liabilities associated with dealing with missing participants' benefits. While the PBGC program considers only terminated plans, it is reasonable to assume that plan administrators could rely on the proposed guidance as a means of complying with their fiduciary requirements when conducting searches and attempting to locate lost participants, especially since the proposed regulations incorporate the current guidance provided under DOL FAB 2014-1. While the proposed regulations will not be finalized and in effect until 2018, reliance on the proposed modifications in the diligent search procedures may help fiduciaries further reduce their liability when attempting to locate lost individuals and distribute benefits to missing participants in a timely manner.

The establishment of a nationwide PBGC database may also provide another effective method for conducting searches since it will be made available to the public. Because no fee is associated with its use, it could be viewed as a prudent, cost-effective alternative for locating such participants. In addition, voluntary use of the missing participants program by terminated defined contribution plans (as well as small terminated professional service plans) may provide a more attractive method of dealing with missing participants by eliminating the need to transfer benefits to an IRA. By transferring the responsibility of missing participants' benefits directly to the PBGC, it may help ensure that missing participants are more likely to receive their benefits, rather than having them placed in IRAs that may be difficult to find years later.

In light of the more robust efforts being taken by the IRS and DOL in this area, it is best to craft or update procedures to help demonstrate compliance in locating lost participants and the timely payment of plan benefits. Having such procedures in place helps ensure that plan administrators are properly managing their fiduciary liability risk by taking reasonable and prudent steps to protect participants' and beneficiaries' rights to plan benefits.

DECEMBER 2016

[1] Lois Gleason. "9 Pointers for Contacting Missing Pension Participants," *Word on Benefits* (blog), International Foundation of Employee Benefit Plans, December 19, 2016, https://blog.ifebp.org/index.php/9-pointers-for-contacting-missing-pension-participants.

DOL Finalizes Disability Benefit Plan Claims Regulations

TIFFANY N. SANTOS

On December 19, 2016, the Department of Labor finalized the regulations governing disability benefit claims (see https://www.gpo.gov/fdsys/pkg/FR-2016-12-19/pdf/2016-30070.pdf). Intended "to promote fairness and accuracy in the claims review process and protect participants and beneficiaries in ERISA-covered disability plans," the regulations for the most part adopt the rules proposed in November 2015 that align the adjudication of disability benefit claims with the claims and appeals procedures that govern non-grandfathered health plans under the Affordable Care Act (see our article on the proposed disability benefit claims regulations).

As the regulations apply to all claims for disability benefits filed on or after January 1, 2018, plan sponsors and administrators should familiarize themselves with the new requirements and timely amend plan documents, summary plan descriptions, and related procedures accordingly.

The finalized regulations require:

- **Independence and Impartiality in Decision-making:** Plans must determine claims and appeals "in a manner designed to ensure independence and impartiality of the persons involved in making the benefit determination":
  - The regulations prohibit plans from "making decisions regarding hiring, compensation, termination, promotion, or other matters with respect to any individual (such as a claims adjudicator or medical or vocational expert)" based on the likelihood that the individual will support the denial of benefits *(note: the final regulations add vocational experts).*
- **Improved Disclosure:** To help ensure reasoned explanations of a denial, the regulations require all notices of adverse benefit determination (claim or appeal level), to discuss and explain the basis for disagreeing with or not following:
  - The views presented by the health care professionals who treated the claimant and the vocational professionals who evaluated the claimant;

- The views of medical and vocational experts whose advice was obtained on behalf of the plan without regard to whether the advice was relied upon in making the benefit determination;
- The claimant's disability determination by the Social Security Administration ("SSA"), if presented by the claimant.

Similar to the requirements applicable to adverse benefit determinations under non-grandfathered health plans, the regulations require disability benefit plans to include the following in adverse benefit determinations at the initial claim and appeal levels:

- An explanation of the scientific or clinical judgment for any adverse benefit determination that is based on a medical necessity or experimental treatment or similar exclusion or limit, applying the terms of the plan to the claimant's medical circumstances, or a statement that such explanation will be provided free of charge upon request;
- Either the specific internal rules, guidelines, protocols, standards or other similar criteria of the plan that were relied upon in making the adverse benefit determination, or a statement that such rules, guidelines, protocols, standards or other similar criteria of the plan do not exist; and
- A statement that the claimant is entitled to receive, upon request and free of charge, reasonable access to and copies of all documents, records, and other information relevant to the claim for benefits *(note: the regulations currently in effect do not require this statement in initial claim denial notices)*.

- **Rights to Review and Respond to New Information or New Rationale Before Final Decision:**
  - New Information: If a disability benefit plan, insurer or other person making the benefit determination considers, relies upon or generates new or additional evidence in connection with the review of a denied claim, the plan must provide the claimant, free of charge, with such new evidence as soon as possible and sufficiently in advance of the date on which the notice of adverse benefit determination is required to be provided to give the claimant a reasonable opportunity to respond prior to that date;
  - New or Different Rationale: If a disability benefit plan intends to issue an adverse benefit determination at the appeal level that is based on a new or additional rationale, the plan must provide the claimant, free of charge, with the rationale as soon as possible and sufficiently in advance of the date on which the notice of adverse benefit determination is required to give the claimant a reasonable opportunity to respond prior to that date.
- **Disclosure of Any Contractual Limitations Period in Denial Notices:** Existing claims regulations require denial notices to include a statement of the claimant's right to bring a civil action under ERISA Section 502(a) following an adverse benefit determination on review. To ensure that this statement is complete and not misleading, the regulations now require such denial notices to include a description of any applicable contractual limitations period and its expiration period, if any (for example, 1-year limitations period measured from the date of the adverse benefit determination on appeal that expires on January 4, 2018).
- **Deemed Exhaustion of Claims and Appeals Processes:** Tracking the regulations applicable to non-grandfathered health plans, the final rules allow a claimant to file a civil suit under Section 502(a) immediately without exhausting the plan's administrative remedies if the plan fails to comply with the claims review regulations, unless the violation is (i) *de* minimis; (ii) non-prejudicial; (iii) attributable to good cause or matters beyond the plan's control; (iv) in the context of an ongoing good faith exchange of information; and (v) not reflective of a pattern or practice of non-compliance. The regulations further require a plan to provide a written explanation of the violation within 10 days upon a claimant's request, including a specific description of its bases, if any, for asserting that the violation should not cause the administrative remedies available under the plan to be deemed

exhausted *(note: in the preamble to the final regulations, a footnote clarifies that the new regulation supersedes all prior conflicting DOL guidance with respect to disability benefit claims, including but not limited to the deemed exhaustion discussion in Frequently Asked Question F-2, see https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/benefit-claims-procedure-regulation)*.

- **Retroactive Rescissions of Coverage Are Appealable:** The regulations require a rescission of coverage that has a retroactive effect to be treated as an adverse benefit determination that triggers the claimant's right to file an appeal, except if the cancellation or discontinuance of coverage stems from a failure to timely pay required premiums or contributions towards the cost of coverage.
- **"Culturally and Linguistically Appropriate" Notices:** Adopting the standards applicable to non-grandfathered health plans under the Affordable Care Act, the regulations require plans to provide notices in a "culturally and linguistically appropriate manner." This means that if a claimant's address is in a county where 10% or more of the population is literate only in the same non-English language as determined by guidance published by the United States Census Bureau (currently these are Chinese, Tagalog, Navajo and Spanish), any denial notice to the claimant must prominently disclose how to access the plan's language services in that non-English language. The plan must also provide a customer assistance process (such as a telephone hotline) with oral language services in the applicable non-English language (such as assistance with filing claims and appeals) and provide written notices translated in that non-English language upon request.

If you have any questions regarding the foregoing, please contact the author of this article.

DECEMBER 2016

FIRM NEWS

On November 7, **Brad Huss** led a roundtable discussion in San Francisco for the Defined Contribution Institutional Investment Association Public Policy Committee's Litigation Webinar. The webinar covered recent lawsuits against university-sponsored 403(b) plans which were examined by a panel, including Brad, that provided background and critical discussion on the litigation developing in this area. In-person roundtables featuring the webinar were also held in Washington D.C., Chicago, New York and Boston.

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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