

WHO'S MISSING PENSION BENEFITS?

The DOL continues
its investigations
to find out.

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Despite the COVID-19 pandemic, the U.S. Department of Labor (DOL) has been quite busy issuing thousands of pages of regulations and guidance and continuing to flex its muscles on the enforcement side. In particular, we continue to see DOL investigations of defined benefit (including cash balance) retirement plans, most of which focus on ensuring that plan sponsors are vigilant in their hunt for “missing” pension plan participants. Are your

clients ready if the DOL comes knocking?

According to the DOL website, the DOL’s Terminated Vested Participant Project aims to reunite participants with their pension benefits which “may be at risk due to plan sponsor actions or failures to act” (i.e., the failure to maintain adequate records and procedures for contacting terminated participants with vested account balances in a timely fashion to better avoid risk of forfeiture upon death or the imposition of participant tax penalties upon “late”

distributions). The DOL has been successful in its quest, touting its “recovery” on behalf of 27,600 terminated participants of their vested benefits under defined benefit and cash balance pension plans totaling \$1.48 billion during its fiscal year 2020.¹

Our focus here is to provide you with practical tips and insights from our experience helping clients navigate these DOL investigations. We know that these investigations are stressful, time-consuming and frustrating for plan sponsors, fiduciaries and service providers alike.



THE INITIAL LETTER

Typically, the DOL's initial communication is a written letter sent to the plan sponsor. The DOL rarely discloses why it opens an investigation and even if you ask, the DOL investigator will state that he or she cannot tell you the underlying reason. The investigation potentially could have been initiated following participant inquiries to the DOL or the (relatively) high number of terminated vested participants reported on the plan's Form 5500 as eligible to commence benefits.

The initial letter will include a laundry list of requests for documents and usually a fairly short (2-3 week) deadline for producing them. *This is why quick action is needed upon receipt of this initial letter.* Plan sponsors should take two steps. First, take a deep breath and call the legal counsel who assists with the plan (whether internal or external); he or she will help you manage the process, the timelines (including requesting extensions and evaluating the appropriateness of the scope of the requests), and the interaction

with the DOL. Next, make sure that you alert your internal constituents and reach out to your pension plan's service providers because you will undoubtedly need their assistance throughout the investigation. Many service providers also have prior experience navigating the DOL investigation process.

DOL'S BROAD AUTHORITY

Under ERISA, the DOL has broad investigatory authority to determine whether any person has violated or is about to violate Title I of ERISA,



which covers fiduciary, reporting and disclosure obligations. Accordingly, you should expect that, over the course of the investigation, the DOL will utilize several approaches to obtain the information it needs. For example, in addition to document requests, the DOL will often request one or more on-site (or online video) interviews with the plan sponsor personnel who are actively involved in the administration of, or have fiduciary obligations to, the plan. The interviews are voluntary, are not recorded, and are not deposition-like (except that to the interviewee, they often *feel* like a deposition!).

Your counsel will work with you to prepare the interviewee because the line of questioning can be daunting and the DOL's initial statements will

warn the interviewee that information discussed in the interview can be referred to other agencies, including to the Department of Justice for prosecution. Counsel can (and, we recommend, should) attend these interviews to take notes and monitor the scope of the questions asked.

RESPONDING TO REQUESTS

It's common that the DOL will follow up with several rounds of additional document and information requests. *Good communication between the internal plan sponsor team working on the investigation, the plan's service providers, and the plan's ERISA counsel is essential during this back-and-forth exchange of information with the DOL.* Building a good rapport with the DOL investigator

tends to help when extensions are needed, and ERISA counsel and the plan's service providers can assist in prioritizing the responses to certain requests over others.

Note, however, that the DOL also has subpoena authority. We have seen the DOL threaten the use of its subpoena power when the investigator thinks that the plan sponsor/fiduciary is being uncooperative or refuses to provide certain documents or information. We recommend that you work with your ERISA counsel to determine the appropriate response to the often voluminous requests from the DOL, but sometimes having the DOL subpoena the information may be preferable if the documents and/or information requested by the DOL are highly confidential, contain protected

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health or other personal information, or could cause the plan sponsor or a service provider to breach a corporate (or plan) policy or contract.

PARTICIPANT SEARCH PROCESS

If the plan has missing participants who have not been responsive about commencing (or affirmatively delaying) their benefits, the DOL will typically conduct its own diligent search to find these individuals as part of the investigation. You should be prepared for the DOL to find individuals that you have never been able to find. While this can be upsetting after you feel like you have “looked everywhere,” remember that the DOL has access to an extremely robust search database. Furthermore, some “missing” participants are simply more inclined to open a letter or answer a phone call from the DOL than one from a former employer. In fact, the DOL’s location of these “missing” or otherwise unresponsive participants is ultimately quite beneficial to the plan sponsor, particularly to the extent the participants take a lump sum distribution.

DEATH BENEFITS

If some of the “missing” or unresponsive participants died before commencing plan benefits, the DOL will shift its focus to any death benefits that might be payable on behalf of the deceased participants. In order to prepare for this question, you should confirm your understanding of which death benefits are payable

under the plan’s formula(s) and whether you have information regarding participants’ marital status and required beginning date (for required minimum distributions (RMDs)). The DOL will sometimes assume that there is a death benefit due on behalf of all participants who died prior to commencing benefits, even though many traditional pension plan formulas only pay a death benefit to a surviving spouse. The DOL will also be looking to determine whether there may be late RMD payments due to a deceased participant’s estate.

CLOSING THE INVESTIGATION

In our experience, DOL investigations continue for at least six months to a year and in many cases, extend into multiple years. According to the DOL website, the policy is to promote voluntary compliance (when possible) and impose penalty amounts (when applicable) rather than bring a civil lawsuit with regard to the issues involved.² However, realize that it is the DOL investigator’s job to find violations under ERISA and that the DOL investigator needs to be able to sufficiently “prove” to his or her supervisor that the investigation was thorough and complete before the investigation can be closed. In other words, the DOL likely will not say, “Well, this is good enough.”

Most plan sponsors will ultimately receive a closing letter in which the DOL states its findings (likely including potential violations of ERISA) and indicating either that

no action is needed or that sufficient corrective actions have already been taken. In the context of these missing participant audits, we typically do not see the DOL impose fines or refer matters for further legal action.

TAKE ACTION NOW

We recommend that plan sponsors take the following proactive steps to better prepare for a potential DOL investigation:

- Ask your plan service providers and your internal team to provide you with their current procedures for: (1) maintaining participant census data; (2) when and how participants are contacted if they do not commence benefits or are unresponsive or determined to be missing; and (3) the process for handling uncashed checks.
- Review the recent DOL guidance, “Missing Participants—Best Practices for Pension Plans” and Compliance Assistance Release No. 2021-01.
- Set aside time with the plan’s ERISA lawyer and service providers to pressure-test these procedures against the recent DOL guidance and determine if any changes or improvements are needed.
- Report your review of these procedures to the plan’s fiduciaries. **PC**

The content in this column is for informational purposes and does not constitute legal advice.

Footnotes

¹ See DOL Fact Sheet (<https://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/our-activities/resource-center/fact-sheets/ebbsa-monetary-results.pdf>), last visited April 18, 2021.

² See <https://www.dol.gov/agencies/ebsa/about-ebbsa/our-activities/enforcement>, last viewed April 18, 2021.