Insights

DOL Issues Temporary Safe Harbor for Missing Participants in Terminating Defined Contributions Plans

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In 2017, the Pension Benefit Guaranty Corporation ("PBGC") established the PBGC Defined Contribution Missing Participants Program (the "Program") for terminated defined contribution plans (e.g., 401(k), profit sharing and stock ownership plans). The Program was established to hold retirement benefits for missing participants and beneficiaries ("Missing Participants") in terminated defined contribution plans and help Missing Participants find and receive the benefits being held for them. Major features of the Program include:

- benefits of any size can be transferred to the PBGC.
- a searchable database that Missing Participants can use to locate unclaimed benefits.
- periodic active searches by the PBGC, increasing the likelihood of connecting Missing Participants with their benefits.
- a one-time administrative fee for most transferred accounts transferred, with no ongoing maintenance or distribution fees.
- treating participants and beneficiaries in terminating DC plans as "missing" if they fail to make the necessary benefit elections or fail to accept lump sum benefits (e.g., uncashed checks).
- transferred amounts grow with interest (at the applicable Federal mid-term rate).

The primary drawback to the Program was that it was not a "safe harbor" method of handling distributions to Missing Participants. In 2014, the Department of Labor ("DOL") issued Field Assistance Bulletin ("FAB") No. 2014-01 (*Fiduciary Duty and Missing Participants in Terminated Defined Contribution Plans*), which provides a safe harbor for Missing Participants in terminating defined contribution plans. The safe harbor generally requires that distributions be rolled over to an individual retirement account ("IRA"). Use of this safe harbor allows a fiduciary to be deemed to have satisfied the requirements of ERISA section 404(a), relieving the fiduciary from liability with respect to the distribution and investment of Missing Participants' benefits.

In January 2021, the DOL issued FAB No. 2021-01 which states, pending further guidance, the DOL will not pursue violations under ERISA section 404(a) against fiduciaries who use the Program to distribute Missing Participants' benefits, provided the fiduciary performs a "diligent search" for the Missing Participant, complies with the guidance in the FAB and acts in accordance with a good faith, reasonable interpretation of ERISA section 404(a). Thus, fiduciaries will be relieved from liability under ERISA whether rolling a Missing Participant's benefit over to an IRA (under FAB 2014-01) or transferring the benefit to the Program (under FAB 2021-01).

While transferring benefits to one of the thousands of financial institutions that offer IRAs makes it difficult for Missing Participants to get the information needed to access their benefits, using the Program may make it more probable they can find and receive their benefits.

If you would like more information regarding the distribution of Missing Participants' accounts in terminating defined contribution plans, please contact **Lisa A. Durham** or another member of Krieg DeVault's **Employee Benefits & Executive Compensation Practice**.

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