# One Minute Memo®

## New DOL Guidance on "Missing Participants"

*By Hannah B. Widlus*

On August 14, 2014, the Department of Labor ("DOL") issued updated guidance regarding a fiduciary's duties to locate participants and beneficiaries (referred to as "missing participants") when making distributions from terminated defined contribution plans. The new guidance was prompted, among other things, by the termination of both the IRS' and the Social Security Administration's letter forwarding programs that were previously used by many fiduciaries to try to contact missing participants, as well as the increase in internet search technologies.

### Searching for Missing Participants

According to the DOL guidance, a fiduciary must make a reasonable effort to locate missing participants so that the fiduciary can implement directions regarding plan distributions from the participant or beneficiary. Reasonable expenses incurred in the search may be charged to missing participants' accounts.

The guidance provides four search steps that should always be taken. In addition, other approaches may be required if the account balance is large enough to warrant additional expense (*note:* this decision is a fiduciary decision). The required steps are:

1. **Use Certified Mail.** The DOL has previously provided a model notice that could be used for such a mailing or other forms of notice can be used.

2. **Check Related Plan and Employer Records.** It is possible that the employer or another of the employer's plans, such as a group health plan, may have more up-to-date contact information, and, so, the DOL's second step is for the fiduciary of the terminated plan to ask both the employer and administrator(s) of related plans to search their records for a more current address. According to the DOL, if there are privacy concerns, the fiduciary engaged in the search can request that the employer or other plan fiduciary contact or forward a letter to the missing participant.

3. **Check With Designated Plan Beneficiary.** The third step is for the fiduciary to try to identify and contact any individual that the missing participant has designated as a beneficiary (e.g., spouse, children, etc.) to find updated contact information for the missing participant. Again, if there are privacy concerns, the fiduciary can request that the designated beneficiary contact or forward a letter.

4. **Use Free Electronic Search Tools.** A fiduciary must make reasonable use of Internet search tools *that do not charge a fee* to search for a missing participant. Such online services include Internet search engines, public record databases (such as those for licenses, mortgages and real estate taxes), obituaries and social media.

If these steps do not find the participant, then, the fiduciary must consider if additional search steps are appropriate. Possible additional search steps include the use of Internet search tools, commercial locator services, credit reporting agencies, information brokers, investigation databases and other services that may involve charges. Whether to take additional steps is a fiduciary decision that should take into account the size of the benefit and the amount of the additional expense.

## Distributions on Account of Missing Participants

If a missing participant cannot be found, then the fiduciary must select a distribution method. *The DOL preferred option is for the distribution to be transferred to an individual retirement plan (IRA).* The DOL has previously published a safe harbor for plans when making certain mandatory rollover distributions to individual retirement plans or distributions on terminations of defined contribution plans. The new DOL guidance notes that the DOL has discussed the application of customer identification rules with other federal regulators and has been informed that the customer identification compliance rules only apply at the time the former participant or beneficiary first contact the institution to claim ownership of the account. Thus, the customer identification rules should not preclude opening an IRA for a missing participant.

Alternative distribution options are (i) opening an interest-bearing federally insured bank account in the name of the missing participant or beneficiary[1], or (ii) transferring the account balance to a state unclaimed property fund. In making the fiduciary decision to use one of these options, the fiduciary must take into account adverse tax consequences, and ability of a missing participant to readily determine whether the state escheat fund is holding the participant's funds.

*NOTE: 100% income tax withholding is not an acceptable option.*

Once the fiduciary properly distributes the entire benefit to which a missing participant is entitled, the DOL's position is that the distribution ends the individual's status as a participant and the distributed assets are no longer plan assets under ERISA. Nonetheless, the DOL states that if the distributed benefit is reduced due to a fiduciary breach, the individual would still have standing to file a breach of fiduciary duty suit.

## Conclusion

While this guidance applies to terminated defined contribution plans, many fiduciaries, from time to time, contact terminated participants eligible to take distributions to remind them that they are welcome to do so. Best practices would suggest that the initial four steps should also be taken if a fiduciary decides to canvass eligible participants. Similarly, it is arguably equally appropriate for the four steps in locating missing participants to be used by defined benefit plans, at least prior to plan termination.

Finally, it should be noted that the DOL guidance is quite clear that these decisions regarding steps to take and distribution methods are fiduciary decisions and not mere administrative decisions.

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[1] The same rules regarding customer identification discussed in connection with opening of individual retirement accounts , also apply to the opening of bank accounts, according to the DOL guidance.