DOL Issues New Guidance on Locating Missing Participants

By Marcia Wagner | Wagner Law Group

The U.S. Department of Labor ("DOL") has provided new guidance to plan fiduciaries of terminated defined contribution plans for locating missing or unresponsive participants in order to distribute their benefits. The guidance, which comes in the form of Field Assistance Bulletin ("FAB") 2014-0, replaces the prior guidance provided in FAB 2004-02.

FAB 2014-01 outlines the mandatory steps that plan fiduciaries must take to discharge their duty to locate missing participants and provides acceptable options for distributing a benefit when participants remain unresponsive.

Background. The inability to locate and make distributions to participants when terminating a retirement plan can present several quandaries for plan fiduciaries, including:

- Delaying the filing of the plan's final Form 5500. All plan assets must be distributed from the plan's trust before a final Form 5500 can be filed.
- Voiding a favorable determination letter issued by the Internal Revenue Service ("IRS") in relation to the plan's termination. In order to rely on an IRS determination letter, a plan administrator must make final distributions within a reasonable time following the plan termination.
- The Internal Revenue Code's mandate that fiduciaries must seek affirmative direction from plan participants when making termination distributions.

Prior Guidance. To address these concerns, in 2004 the DOL released FAB 2004-02. FAB 2004-02 provided plan fiduciaries with guidance on how to meet their obligations under ERISA to locate and distribute benefits to missing participants in the context of a defined contribution plan termination. FAB 2004-02 advised plan fiduciaries to use the following methods to locate missing participants:

- Send notices by certified mail;
- Review related plan and employer records;
- Contact the participant's designated beneficiary; and
- Use the letter-forwarding services of the IRS or Social Security Administration ("SSA").

Internet search tools, commercial locator services and credit reporting agencies were also recommended as search resources. FAB 2004-02 relied heavily on the IRS and SSA letter-forwarding programs. Both of these programs, however, were recently discontinued. (The SSA program ended in May of this year, and the IRS excluded retirement plans from its program effective August of 2012.)

DOL Safe Harbor Regulations. In 2006, DOL issued regulations to provide fiduciaries of terminating defined contribution plans with "safe-harbor" procedures for making distributions to participants who do not affirmatively request distributions. (See ERISA Regulation Section 2550.404a-3.) These regulations specify the content and manner for providing notice to missing participants, as well as various options for distributing an unresponsive participant's account balance. Distribution options include transferring the participant's account balance to:

- an interest bearing bank account;
- an individual retirement account ("IRA") in the participant's name; or
- the unclaimed property fund of the state in which the participant was last known to reside.

FAB 2014-01. FAB 2014-01, which supersedes FAB 2004-02, reflects certain changes that have occurred over the last decade, including the expansion of internet search tools and the discontinuance of the IRS and SSA letter forwarding programs. Similar to the prior guidance, FAB 2014-01 requires plan fiduciaries to take certain steps to locate missing participants in a terminated defined contribution plan and outlines certain additional steps that, in the DOL's opinion, plan fiduciaries must consider to fully discharge their duties under ERISA.

ERISA 404(a) requires plan fiduciaries to act prudently and solely in the interest of plan participants and beneficiaries. While DOL views the decision to terminate a retirement plan as a "settlor" function not regulated by ERISA, it maintains that steps taken to implement this decision are fiduciary activities, including steps taken to locate missing participants and distribute unresponsive participants' account balances. Thus, FAB 2014-01 notes that in accordance with their duties of prudence and loyalty, plan fiduciaries must take reasonable steps to locate missing participants.

> *"DOL maintains the position that plan fiduciaries may charge missing participants' accounts for search-related costs, provided the charges are reasonable."*

Required Search Steps. Where plan fiduciaries are unable to locate participants through routine delivery methods, such as first class mail or electronic notice (i.e., e-mail), FAB 2014-01 indicates that plan fiduciaries must take the following steps (before concluding their search efforts for the missing participants):

- Send notices by certified mail;
- Review related plan and employer records;
- Contact the participant's designated beneficiary; and
- Use free electronic search tools (e.g., internet searches, public records databases, etc.).

NOTE: DOL considers the failure to take these steps as a breach of fiduciary duty.

Additional Search Steps. If all four required search methods are unsuccessful, plan fiduciaries must determine whether additional steps are appropriate. In making this determination, plan fiduciaries must consider the size of a participant's account balance and the cost of further search efforts. Additional steps include fee-based Internet search tools, commercial locator services, credit reporting agencies, information brokers, and investigation databases and similar services that may include charges.

NOTE: DOL maintains the position that plan fiduciaries may charge missing participants' accounts for search-related costs, provided the charges are reasonable.

Distributing an Unresponsive Participant's Account. Where a missing participant remains unresponsive, a plan fiduciary must determine the appropriate method for distributing that participant's account balance. FAB 2014-01 establishes a range of options for distributing benefits to unresponsive participants after a plan fiduciary has exhausted the search efforts described above. Specifically, FAB 2014-01 identifies a preferred method and two alternative methods for consideration if the preferred approach is not viable.

NOTE: These methods are the same as those provided under the DOL's 2006 safe-harbor regulation.

The preferred method for distributing a missing participant's account is to roll over the benefit to an IRA established in the participant's name. DOL prefers this method because it avoids immediate taxation of the benefit and it is the option most likely to preserve the benefit.

NOTE: Because the selection of an IRA provider and the manner in which the benefit will be invested in the IRA are fiduciary actions, plan fiduciaries are advised to rely on the DOL's 2006 safe-harbor regulations when effectuating rollovers missing participants' accounts to IRAs.

Alternative methods for distributing a missing participant's account include:

- transferring the benefit to an interest-bearing account (in the name of the missing participant) in a federally insured bank; or
- transferring the benefit to a state unclaimed property fund.

When deciding between these two options, the plan fiduciary must consider the attendant facts and circumstances, including bank charges, interest rates, and the process for searching the state's unclaimed property fund. Before deciding to take either of these steps, however, the plan fiduciary must first conclude that using these methods is appropriate despite the adverse tax consequences to participants as opposed to the tax-free rollover to an IRA.

FAB 2014-01 clarifies that 100% income tax withholding is not an acceptable method for distributing a missing participant's account balance. In the past, plan fiduciaries have withheld 100% of a missing participant's distribution, thereby essentially turning the benefit over to the IRS. The DOL has confirmed that this method is objectionable because it does not necessarily result in an offset to the participant's income taxes and can deprive a participant of his or her benefit.

Action Steps for Plan Fiduciaries. Plan fiduciaries should review their plan procedures for missing participants and amend them, if needed, to conform to FAB 2014-01's guidance. In addition, plan administrators should be sure to thoroughly document all steps taken to locate and make distributions on behalf of missing participants.

While FAB 2014-01specifically applies to locating missing participants in connection with a defined contribution plan termination, it may provide useful guidance in other similar circumstances involving missing participants, such as un-cashed checks and required minimum distributions. ■

Marcia Wagner is a specialist in pension and employee benefits law, and is the principal of The Wagner Law Group. She can be reached at marcia@wagnerlawgroup.com