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PBGC Opens New Missing Participants Program

PBGC has finalized regulations that open their missing participants program to ERISA defined contribution plans, PBGC-insured multiemployer plans, and small professional service defined benefit plans. The program aims to help plan administrators efficiently close out plans and plan participants to gain access to funds they had forgotten about when moving on to new jobs. The regulation reinforces key points for ongoing plans — keep tabs on terminated participants and payments and don't assume forfeiting lost participant benefits is forever.

Background

A sponsor terminating its single-employer PBGC covered pension plan must distribute all plan benefits owed to participants and beneficiaries. To address the issue of providing for participants and beneficiaries whom the plan administrator is unable to locate (known as missing, or lost, participants), the Retirement Protection Act of 1994 created PBGC's missing participant program. Under this program, after unsuccessfully trying to find a participant or beneficiary through a diligent search, a plan sponsor can either buy an annuity in the individual's name and send PBGC information about it or send equivalent funds to PBGC for distribution when the participant is found. PBGC then searches for the missing individual — and, when it finds the individual, either pays the benefit owed or provides the information needed to claim the annuity. The public can search PBGC's Internet Missing Participant List, which incorporates names, last-known addresses, company names, and pension plan termination dates.

The Pension Protection Act of 2006 authorized PBGC to expand the existing program to handle the benefits of missing participants and beneficiaries under other ERISA plans such as defined contribution (DC) plans, PBGC-insured multiemployer plans, and small professional service defined benefit (DB) plans (25 or fewer plan participants) that the PBGC insurance program does not cover. On September 20, 2016, PBGC proposed regulations to revise the existing missing participant program and add the additional PPA categories. Our October 5, 2016 *For Your Information* explained how the new options would work and changes to the existing program for single-employer DB plans. Key aspects of the proposal included:

- A one-time $35 fee per missing participant/beneficiary with a benefit of more than $250 would be imposed, payable when the plan pays the benefit transfer amount to PBGC.
- Diligent searches would be required and would be aligned with DOL guidance for DC plans. Plans would have to search not only plan records but employer records — including those of an employer's other plans (such as health plans) — and conduct a no-fee Internet search.
- For DB plans, PBGC would use plan lump sum and early retirement factors but their own rates for optional forms.
- For DC plans, a choice would be provided to either send funds to PBGC (a "transferring plan") or to send information about the location of the missing participant funds such as contact information for an IRA provider (a "notifying plan").

Program opens effective January 1, 2018

Final regulations from PBGC open the program up to the three new categories of plans and implement changes generally as proposed, with the following notable exceptions and clarifications:

Determining who is a "missing" distributee

PBGC will treat participants or beneficiaries as "missing" if they fail to make necessary benefit elections upon plan termination or fail to accept lump sum benefits. This includes situations where there are uncashed checks (whether the lump sum distribution was a result of a mandatory cashout provision or a voluntary election).

A distributee will be considered not to have accepted a lump sum if the check is not cashed by the "cash-by" date prescribed on the check or by a notice. The cash-by date must be at least 45 days after issuance of the check, or, if no "cash-by" date is stated, by the date the check becomes stale.

"Lost" participants whose benefits were forfeited in accordance with plan terms that require reinstatement if later claimed by the participant or beneficiary (as permitted under Treasury regulations) are treated as missing.
A "notifying" plan must purchase a commitment from an insurer; a "transferring" plan must turn the benefit over to the PBGC.

> **Key point.** This reinforces that plans cannot forever forfeit missing participant benefits. Records need to be retained and responsibility for these participants must be considered when plans merge, transfer, or otherwise change sponsors.

Determining a "diligent search"

PBGC requires plan sponsors to perform diligent searches before treating a distributee as missing; diligent searches are required only for missing distributees whose location the plan doesn't know with reasonable certainty. Compliance with DOL's fiduciary search guidance satisfies PBGC's diligent search standard for DC plans; plans must: attempt to contact the distributee using certified mail, check with a designated plan beneficiary, search plan and employer records (including those of an employer's other plans such as health plans), conduct a no-fee Internet search, and, if warranted, use a commercial locator service.

> **Comment:** These DC search methods are not much different than those required by the IRS in its field directive to exam agents on missing distributees and required minimum distributions.

The methods for locating missing distributees of DB plans are essentially the same as DC plans, though applied differently: a plan administrator must use a commercial locator service or, as an alternative for a distributee with a very small benefit, that is, a normal retirement benefit of $50 or less per month, the "records search method" (check with a designated plan beneficiary, search plan and employer records and conduct a no-fee Internet search). The search (DB or DC) would have to be made within nine months of the date when the distributee is identified as missing in a filing with the PBGC.

If a DB plan uses a commercial locator service and does not locate the distributee, regardless of the size of the benefit, no further searching is required. Similarly, if the "records search method" does not locate the distributee with a very small benefit, no further searching is required.

Addressing the real issue of the potential burden of records searches that could go back many years or involve the records of another employer where there has been an acquisition, the PBGC requires that the search apply only to the extent reasonably feasible and affordable (i.e., the cost should not be more than a reasonable fraction of the value of the distributable benefit).

> **Comment**. That PBGC would be satisfied with such a reasonable search does not mean that the plan sponsor can avoid the cost of searching for payment evidence and potential litigation costs when former participants assert a claim for benefits and cannot be found on plan or PBGC records. Distribution registers to memorialize how payments have been made may serve to address this related issue.

In the case of unknown beneficiaries of deceased participants, PBGC will take into account the fact that there is no known person to search for in evaluating the plan's fulfillment of the diligent search requirement. The account balance of the deceased participant may be transferred into the missing participants program.

Reversing IRA rollovers

PBGC was asked whether terminating plans that had rolled over mandatory cashouts to IRAs would be forced to unwind those transactions and send the money to PBGC — a requirement recently experienced by some plan administrators of terminating plans. PBGC clarified that a plan that routinely made such rollovers in accordance with plan provisions and consistent with pre-termination practices would not need to make any changes to previous plan operations. However, transfers made just before the start of plan termination in a form that would be improper upon plan termination may need to be reversed.

Determining the transfer amount

The benefit transfer amount for a DC plan is relatively straightforward — the account balance available for distribution in connection with the close-out of the plan. For DB plans, a calculation is needed to assess the value of the lifetime benefit that takes into account benefit payment dates and a benefit determination date.

Assumed benefit start date. For participants not in pay status who have not yet reached the plan's normal retirement age, the PBGC expected retirement age (XRA) is used as the assumed start date to calculate the value of the benefit. XRA is an age that varies based on the size of the benefit reflecting that the larger the benefit, the more likely the participant will choose to retire early. Under the proposal, PBGC called for using the required beginning date as the assumed benefit start date for determining present value in the case of individuals not yet in pay status but older than the plan's normal retirement age. The final rule changes this to normal retirement date or accrual cessation date, if later.

Benefit determination date. Instead of the benefit transfer date as proposed, the final rule defines a benefit determination date for the calculation of the amount to transfer. The benefit transfer amount will be determined as of the benefit determination date and will not change even if it is paid to PBGC on a later date. However, if payment is more than 90 days after the benefit determination date, interest will be owed for the period after 90 days through the actual transfer date. The benefit determination date is selected by the plan administrator but must be within the period from the first plan termination distribution to a non-missing distributee to the last such distribution.

Accounting for missed payments. Plans must value missed payments whichever way the plan would ordinarily value them. The amount of the missed payments with interest is added to the present value of future benefits to yield the benefit transfer amount.

Reporting. For each missing participant, a DB plan will need to report the monthly straight life annuity payable at each integral age from 55 through the normal retirement date (or in some cases accrual cessation date). When the participant is located, the annuity PBGC provides is based on those reported amounts.

Forms and future refinements

PBGC has posted forms and instructions for the missing participants program. PBGC's regulations reserve the authority to modify fees, data requirements, requirements for using commercial locator services, and other mechanics of filing by making changes in the forms and instructions. To preserve as much flexibility as possible while treating like cases in like manner, the final regulation authorizes PBGC to grant waivers, extend deadlines, and in general adapt to unforeseen circumstances, with the proviso that similar treatment be given to similar situations.

In closing

Through its final regulations, the PBGC is taking steps to connect people to their money in terminated retirement plans — both DB and DC. However, as commenters to the proposed regulations emphasized, there remains a need for an ongoing plans program, an issue that continues to plague plan sponsors. Meantime, plan sponsors can take steps such as those emphasized by PBGC, DOL and IRS to improve search methods and participant records to minimize the number of participants who become "missing."

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