LOST/ MISSING PLAN PARTICIPANTS

Plan fiduciaries must act solely in the best interest of the plan's participants and beneficiaries for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. One of those obligations plan fiduciaries must make is reasonable efforts to locate missing participants or beneficiaries. Plan fiduciaries are also required to act according to the plan documents.

The plan fiduciary may send a first class notice to the participant at the last address they have on record. If the participant does not respond or the plan fiduciary reasonably believes that the participant moved without informing the plan fiduciary of their current address, the plan fiduciary must take steps to locate the participant or beneficiary.

REQUIRED SEARCH STEPS

The minimum steps that a plan fiduciary should take to locate a missing participant and obtain distribution instructions, without any particular order, are:

Certified Mail. This is an easy and low cost way to find out if the participant can be located in order to distribute their benefits. The notice should include the name of the plan and the notify them they have 30 days to respond. The DOL has a sample notice that can be used to satisfy the safe harbor.

Check Employer Records or Related Plan. It may be possible that the employer has updated records in the employer's plan such as a health plan may have more up-to-date information. The job application may have an emergency contact listed with information.

Check with Designated Beneficiary. Plan fiduciaries must try to identify and contact the beneficiary that the missing participant has designated in any employer plans, to find updated contact information for the missing participant.

Free Electronic Search Tools. Plan Fiduciaries must make reasonable use of free Internet search tools to search for a missing participant or beneficiary. Examples of Internet search engines include public record databases for licenses, mortgages, real estate taxes, obituaries and social media.

It is a good idea to keep copies of certified mail receipts, returned mail and any other documentation for your records. If after using these options, the plan fiduciary is still unable to locate the missing participant or beneficiary, then the duties of prudence and loyalty may require the plan fiduciary to consider if more steps are appropriate. The plan fiduciary should consider the size of the participant's account balance and the cost of further search efforts in deciding if any additional steps are appropriate. These expenses may be charged to the missing participant's account.

DISTRIBUTION OPTIONS

There are times when all of the plan fiduciary's efforts listed above will not locate a missing participant or beneficiary. In such cases the plan fiduciary has no choice and has to select an appropriate distribution option to complete the distribution from the plan. The preferred distribution option is an Individual Retirement Plan Rollover.

Individual Retirement Plan Rollovers – Preferred Distribution Option. ERISA requires plan fiduciaries to consider distributing missing participant benefits into individual retirement account or annuity (IRA). An IRA is more likely to preserve funds for retirement. The trustee to trustee transfer avoids immediate taxation and possible 10% excise tax, depending on age of missing participant. Funds in the IRA continue to grow tax-free and income taxes do not need to be paid until funds are withdrawn. Some of the IRA providers do an annual search for the missing participants. The fees are charged to the IRA account.

The choice of an IRA requires the fiduciary judgement with respect to the choice of the IRA trustee/custodian to receive the distribution and the initial investment in the IRA. In 2006 the DOL published safe harbor final regulations. The final regulations include conditions that include choosing investment products designed to preserve principal and whose fees and expenses are not excessive when compared to other IRA offered by the provider.

Alternative Distribution Options

If the plan fiduciary cannot find an IRA provider to accept a rollover for a missing participant or determines not to make a rollover distribution for some other compelling reason based on the missing participant's particular facts and circumstances, the fiduciary may consider two other options. Before making either of the other options the fiduciary must prudently conclude that such a distribution is appropriate despite the potential adverse tax consequences to the plan participants.

The two options are 1) opening an interest-bearing federally insured bank account in the name of the missing participant or beneficiary, or 2) transferring the account balance to a state unclaimed property fund. Unlike tax-free rollovers into an IRA, these two options are subject to income taxation, mandatory income tax withholding and a possible additional tax for premature distributions. These tax consequences reduce the amount of money available for retirement. A prudent and loyal fiduciary would not voluntarily subject a missing participant's funds to such negative consequences without compelling offsetting considerations.

Conclusion

Lost or missing participants can become a problem so you want to encourage terminated participants to take out their benefits from the plan as soon as the plan allows. If the participant is going to a new employer, it may take a year to join the new plan and roll over the benefits. Keeping that in mind (about a year after leaving) it may be a good idea to send a distribution form to remind the former employee to request their distribution.

If you have a missing participant and have tried the four search options, then please contact your administrator to discuss the next option to distribute the benefits out of the plan.