



# Fiduciary Fitness Program



Education Module #20: Missing Participants



# Fiduciary Fitness Program

## Module 20: Missing Participants

A missing participant is a participant or beneficiary who, after reasonable efforts made by the plan administrator, cannot be located. A participant or beneficiary is still considered missing if they are located, but fail to respond to plan correspondence and/or request for direction.

### Reasonable Efforts

What are considered to be reasonable search efforts?

#### Old Process

Previously, the Internal Revenue Service (IRS) provided letter forwarding Services to help locate missing participants, but with August 2012 release of Revenue Procedure 2012-35, the IRS stopped the letter forwarding program

The IRS no longer processes requests to locate retirement plan participants or beneficiaries

Similarly, the Social Security Administration (SSA) eliminated their letter forwarding program

#### New Process

January 2021 the SSA released 2021-01 launching a terminated vested participants project for defined benefit plans

January 2021 Department of Labor (DOL) announced a new enforcement policy for terminating DC plans use of PBGC expanded missing participants program.

January 2021 DOL release red flags and missing person best practices for all retirement plans.

# Fiduciary Fitness Program

## Module 20: Missing Participants

### Department of Labor – Red Flags

The Department of Labor (DOL) recently published their list of red flags which they consider to be warnings or indicators of a problem with missing and nonresponsive participants.

- More than a small number of missing or nonresponsive participants.
- More than a small number of terminated vested participants who have reached normal retirement age but have not started receiving their pension benefits.
- Missing, inaccurate, or incomplete contact information, census data, or both (e.g., incorrect or out-of-date mail, email, and other contact information, partial social security numbers, missing birthdates, missing spousal information, or placeholder entries).
- Absence of sound policies and procedures for handling mail returned marked “return to sender,” “wrong address,” “addressee unknown,” or otherwise, and undeliverable email.
- Absences of an effective communication program including preparation and distribution of benefit statements and communications to participants, spouses and beneficiaries regarding their benefit rights and claims procedures.
- Absence of sound policies and procedures for handling uncashed checks (as reflected for example, by the absence of an accounting journal or similar record of uncashed checks, a substantial number of stale uncashed distribution checks, or failure to reclaim stale uncashed check funds in distribution accounts).

***DOL: “A common characteristic of plans with low numbers of missing and nonresponsive participants is that staff are committed to making sure that plan records are complete and up to date and to proactively take steps to ensure that participants and beneficiaries get the benefits they have earned in a timely fashion”.***

# Fiduciary Fitness Program

## Module 20: Missing Participants

### Missing Participants – Best Practices for Pension Plans (released January 12, 2021)

#### *Key footnote states:*

“ERISA’s fiduciary obligations apply equally to defined benefit plans and defined contribution plans, and these best practice tips apply equally to both types of plans. The Department also stresses that ERISA’s fiduciary obligations fully apply to missing participants whose accounts the plan purports to treat as “conditionally forfeited” under Treasury Regulation 1.411(a)-4(b)(6). Under Title I of ERISA, plan fiduciaries retain full responsibility for adhering to Title I’s provisions with respect to such participants and their beneficiaries; these participants and beneficiaries remain fully entitled to all their promised benefits; and the fiduciaries have an obligation to keep accurate records and take appropriate steps to ensure that the participants and beneficiaries are paid their full benefits when due.”

# Fiduciary Fitness Program

## Module 20: Missing Participants

### 1. Maintain Accurate Census Information

- Contacting participants, both current and retired, and beneficiaries on a periodic basis to confirm or update their contact information. Relevant contact information could include home and business addresses, telephone numbers (including cell phone numbers), social media contact information, and next of kin/emergency contact information. Well-run plans regularly reconfirm that the information in their possession is accurate.
- Including contact information change requests in plan communications along with a reminder to advise the plan of any changes in contact information.
- Flagging undeliverable mail/email and uncashed checks for follow-up.
- Maintaining and monitoring an online platform for the plan that participants can use to update contact information for themselves and their spouses/beneficiaries, if any, and incorporating such updates into the plan's census information.
- Providing prompts for participants and beneficiaries to confirm contact information upon login to online platforms.
- Regularly requesting updates to contact information for beneficiaries, if any.
- Regularly auditing census information and correcting data errors.
- In the case of a change in record keepers or a business merger or acquisition by the plan sponsor, addressing the transfer of appropriate plan information (including participant and beneficiary contact information) and relevant employment records (e.g. next of kin information and emergency contacts). EBSA has found that in the context of an acquisition, merger, or divestiture, well-run plans make missing participant searches of plan, related plan (e.g., health plan) and employer records (e.g., payroll records) part of the collection and transfer of records

# Fiduciary Fitness Program

## Module 20: Missing Participants

### 2. Implementing effective communication strategies

- Using plain language and offering non-English language assistance when and where appropriate.
- Stating upfront and prominently what the communication is about – e.g., eligibility to start payment of pension benefits, a request for updated contact information, etc.
- Encouraging contact through plan/plan sponsor websites and toll free numbers.
- Building steps into the employer and plan onboarding and enrollment processes for new employees, and exit processes for separating or retiring employees, to confirm or update contact information, confirm information needed to determine when benefits are due and to correctly calculate the amount of benefits owed, and advise employees of the importance of ensuring that the plan has accurate contact information at all times.
- Communicating information about how the plan can help eligible employees consolidate accounts from prior employer plans or rollover IRAs.
- Clearly marking envelopes and correspondence with the original plan or sponsor name for participants who separated before the plan or sponsor name changed, for example, during a corporate merger, and indicating that the communication relates to pension benefit rights.

# Fiduciary Fitness Program

## Module 20: Missing Participants

### 3. Missing Participant Searches

- Checking related plan and employer records for participant, beneficiary and next of kin/emergency contact information. While the plan may not possess current contact information, it is possible that the employer's payroll records or the records maintained by another of the employer's plans, such as a group health plan, may have more up-to-date information. If there are privacy concerns, the person engaged in the search can request that the employer or other plan fiduciary forward a letter from the plan to the missing participant or beneficiary.
- Checking with designated plan beneficiaries (e.g., spouse, children) and the employee's emergency contacts (in the employer's records) for updated contact information; if there are privacy concerns, asking the designated beneficiary or emergency contact to forward a letter to the missing participant or beneficiary.
- Using free online search engines, public record databases (such as those for licenses, mortgages and real estate taxes), obituaries, and social media to locate individuals.
- Using a commercial locator service, a credit-reporting agency, or a proprietary internet search tool to locate individuals.
- Attempting contact via United States Postal Service (USPS) certified mail, or private delivery service with similar tracking features if less expensive than USPS certified mail, to the last known mailing address.
- Attempting contact via other available means such as email addresses, telephone and text numbers, and social media.
- If participants are nonresponsive over a period of time, using death searches (e.g., Social Security Death Index) as a check and, to the extent such search confirms a participant's death, redirecting communications to beneficiaries.

# Fiduciary Fitness Program

## Module 20: Missing Participants

### (3. Missing Participant Searches continued)

- Reaching out to the colleagues of missing participants by, for example, contacting employees who worked in the same office (e.g., a small employer with one or two locations) or by publishing a list of “missing” participants on the company’s intranet, in email notices to existing employees, or in communications with other retirees who are already receiving benefits. Similarly, for unionized employees, some have reached out to the union’s local offices and through union member communications to find missing retirees.
- Registering missing participants on public and private pension registries with privacy and cyber security protections (e.g., National Registry of Unclaimed Retirement Benefits), and publicizing the registry through emails, newsletters, and other communications to existing employees, union members, and retirees.
- Searching regularly using some or all of the above steps.

### 4. Documenting procedures and actions

- Reducing the plan’s policies and procedures to writing to ensure they are clear and result in consistent practices.
- Documenting key decisions and the steps and actions taken to implement the policies.
- For plans that use third party record keepers to maintain plan records and handle participant communications, ensuring the record keeper is performing agreed upon services, and working with the record keeper to identify and correct shortcomings in the plan’s recordkeeping and communication practices, including establishing procedures for obtaining relevant information held by the employer.



# Fiduciary Fitness Program

## Module 20: Missing Participants

### You've Tried to Locate, But Can't Find Them – Now What?

#### DOL Safe Harbor for Automatic Rollovers

- DOL issued safe harbor for mandatory “cash out” distributions to a missing/unresponsive participant
  - Plans may automatically “cash out” participants who terminate if the value of the participant’s vested benefit does not exceed \$5,000
  - If the cash-out amount exceeds \$1,000, the Code requires the plan to roll over cashed out amounts to an IRA established for participant
- Fiduciary responsibility to select IRA provider and investments deemed met if the safe harbor’s conditions are satisfied.
- DOL specifically declined to address whether the safe harbor could be used for distribution of amounts above \$5,000.

# Fiduciary Fitness Program

## Module 20: Missing Participants

### Forfeiture and Restatement

IRS recognizes “forfeiture and restatement” as an acceptable method for dealing with missing participants for plan qualification purposes.

Plan sponsors may forfeit amounts which are payable to a missing participant provided that the benefit is reinstated if a claim for the benefit is later made by the participant or beneficiary. The plan is not required to credit the participant’s benefit with any subsequent gains or losses.

When is the benefit payable to the missing participant?

- Likely means when the benefit may be paid without the participant’s consent.
- Thus, if vested benefit exceeds \$5,000, forfeiture should not occur prior to normal retirement age (or age 62, if later).

Unclear if “forfeiture and reinstatement” is consistent with the DOL’s interpretation of ongoing plan fiduciary’s obligations

- DOL has taken position during recent examinations that forfeiture and reinstatement is a breach of fiduciary duty and/or a prohibited transaction.
- This position is *ad hoc* and there is no national guidance specifically addressing this issue.

# Fiduciary Fitness Program

## Module 20: Missing Participants

### Plan Termination

Decision to terminate a plan is a “settlor” function, but implementing plan termination, including locating missing participants, is fiduciary in nature.

### Distribution Options

IRA rollover is the primary distribution method

If unable to find an IRA rollover provider (e.g., in the case of a very small account balance) the DOL offers two alternatives:

Transfer to a federally insured interest bearing bank account

**OR**

Transfer unclaimed property funds to state

# Fiduciary Fitness Program

## Module 20: Missing Participants

### Plan Termination

#### Pension Benefit Guaranty Corporation (PBGC) Missing Participant Program

Program expanded to cover defined contribution plans (e.g., 401(k) plans) that terminate on or after January 1, 2018.

Program is voluntary for terminating defined contribution plans.

Two ways to use the program:

- Transfer the participant's account balance to PBGC
- PBGC will provide the benefit once the participant is found
- Note: Must transfer to PBGC account balances for all missing participants; the "all or nothing" rule.
- Send PBGC information about the financial institution where the participant's account balance was transferred, in which case PBGC will share that information with the participant once found

# Fiduciary Fitness Program

## Module 20: Missing Participants

### Plan Termination

Pension Benefit Guaranty Corporation (PBGC) Missing Participant Program

### Who Counts as Missing?

#### Unlocatable

- Plan does not know the individual's location (e.g., notice from plan is returned as undeliverable)

#### Unresponsive

- Participant did not return paperwork instructing how distribution should be made (e.g., by check or direct rollover), or
- Distribution check remains uncashed by the "cash by" date on the check or in an accompanying notice.
  - "Cash by" date must be at least 45 days after the check is issued.
  - If there is no "cash by" date, then use the check's "stale date", which varies state-to-state, but is typically 6 months after the check is issued.

# Fiduciary Fitness Program

## Module 20: Missing Participants

### What You Cannot Do

#### Escheat

States have unclaimed property laws

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- Require “holders” to annually report and deliver property to the state if no activity on the account or contact with owner for a period of time – generally 3+ years
- DOL has taken the position that ERISA preempts state unclaimed property laws for ongoing plans. DOL Advisory Opinion 94-41A (Dec. 7, 1994)

#### 100% Income Tax Withholding

Withholding 100% of missing participant’s benefits, transfers benefits to the IRS

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- DOL
  - This option is not in the best interest of participants and beneficiaries
  - Plan fiduciaries should not use withholding as a way to distribute benefits to missing participants and beneficiaries

# Fiduciary Fitness Program

## Module 20: Missing Participants

### Summary

Use reasonable efforts and document your actions.

#### Ongoing Plan

- Less than \$1,000
  - Consider forfeiture and restatement
- Less than \$5,000
  - Transfer to IRA
- Greater than \$5,000
  - Maintain account balance in plan until benefits are “payable” without the participant’s consent
  - Then transfer to an IRA

#### Terminating Plan

- Options are to
  - Transfer to an IRA
  - Send to state unclaimed property office
  - Send to PBGC (all or nothing rule)



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