Where Have You Gone, Joe Participant?
(Best Practices and Warnings From the DOL)

By Alison J. Cohen

Mrs. Robinson is so proud of herself. She completed her annual census and additional plan data forms, and submitted them to Garfunkel Pension Services two weeks before the deadline. In just a few shorts weeks, her assigned consultant, Simon, calls her to review the testing results. Most everything went smoothly, but Simon lets Mrs. Robinson know that, based on the participant count, the plan will need to be audited in 2021. Once Mrs. Robinson finds out how much a typical audit report costs, she becomes highly motivated to figure out why, with only 75 employees, they could have over 120 participants in the plan. After reviewing the participant data with Simon, Mrs. Robinson learns that there are a lot of terminated participants lingering in the plan and that she should have been forcing them out of the plan. Some of these folks have been gone for years and she has no clue where to find them.

Red Flags: There is a Problem

In January 2021, the U.S. Department of Labor ("DOL") published Compliance Assistance Release No. 2021-01 regarding the investigation process and the errors for which the DOL will look for regarding terminated vested participants. Although the focus of the Release was on defined benefit plans, the red flags that the DOL highlighted apply to all plans and should concern Mrs. Robinson because many of these flaws apply to her plan. Warning flags include:

- More than a small number of missing or nonresponsive participants;
- Systemic errors that cause missed pay status due to required minimum distributions or death benefits;
- Inadequate procedures for identifying and locating missing participants and beneficiaries;
- Inadequate procedures for notifying terminated vested participants nearing normal retirement age of the right to commence payment of benefits;
- Inadequate procedures for contacting terminated vested participants who are approaching the start of required minimum distributions;
- Inadequate procedures for addressing uncashed distribution checks; and
- Absence of procedures for handling undeliverable mail and/or emails.

Depending on whether Mrs. Robinson's company has engaged in mergers or sold divisions, data may be incomplete or entirely missing from HR records. So, exercising best practices can keep the plan lean and efficient and out of the red flag zone.

What Has Mrs. Robinson Done Wrong?

Mrs. Robinson is going to have to learn about the audit process, because she failed to understand about the plan provisions related to forced cash-outs and automatic rollovers. In 2005, the IRS modified the rules regarding the handling of terminated vested participants. Such provision, once elected in the plan document, must be followed (it's not optional). So, not complying with the cash-out rules in the plan is an operational failure.

The plan sponsor can generally elect one of two procedures in the document. First, the plan could have forced cash-outs only. This means that only terminated vested participants with a vested balance of $1,000 or less can be forced out of the plan by the Plan Administrator. If not done quickly after the participant leaves the company, a problem can arise with uncashed checks remaining outstanding. So, the Plan Administrator should make sure it verifies the participant's address at termination and initiate the clearance of these accounts on a quarterly basis. Telling the participant to keep the Plan up to date on address changes is not a bad idea either, as is providing in the SPD that it is the participant's obligation to keep the plan advised of where benefits can be delivered.

The second design option is to have automatic rollovers. Any terminated participant with a vested account balance between $1,001 – $5,000 can be forced out of the plan and into an IRA that is set up by the Plan Administrator on the participant's behalf. One interesting design choice for this option is to exclude rollover funds when calculating the vested account balance. Here's how this would work: suppose Dustin becomes eligible for the plan and rolls $10,000 over from his prior employer's plan. During his employment, Dustin only defers $1,000 before he terminates service. Although his total vested account balance is $11,000, the Plan Administrator can exclude the rollover and consider his vested account balance to be less than $5,000. So, the entire $11,000 can be automatically rolled over to an IRA. With this design option, Mrs. Robinson may be able to force out a large enough number of terminated vested participants to be considered a small plan again and avoid the required plan audit.

What Are the DOL's Recommended Best Practices?

In further guidance from the DOL, best practice examples were outlined and should be carefully considered by Mrs. Robinson.

Maintain Accurate Census Information

- Contact participants, both current and terminated, and beneficiaries on a periodic basis to confirm their contact information.
- Include contact information change requests in all plan communications.
- Flag undeliverable mail/email and uncashed checks for follow-up.
- Maintain and monitor an online platform for the plan that participants can use to update contact information for themselves.
- Provide prompts for participants and beneficiaries to confirm contact information upon login to online platforms.
- Regularly request updates to contact information for beneficiaries, if any.
- Regularly audit census information and correct data errors.
- If changing recordkeepers, ensure that addresses transfer fully and completely.

Implementing Effective Communication Strategies

- Use plain language and offer non-English language assistance where appropriate.
- State up front and prominently what the communication is about.
- Encourage contact through websites that can prompt confirmation of contact information.
- Communicate information about how the plan can help eligible employees consolidate accounts.

Missing Participant Searches

- Check related plan and employer records for participant, beneficiary, next of kin/emergency contact information.
- Check with the designated plan beneficiaries for information about the participant's location.
- Use free online search engines, public record databases, and social media.
- Use a commercial locator service, a credit-reporting agency, or a proprietary internet search tool.
- Attempt contact with the participant via U.S. Postal Service certified mail or private delivery service.
- Attempt contact with the participant via email, telephone, text messages, and social media.
- Death searches (e.g., Social Security Death Index).
- Ask colleagues of the missing participant who may still be employed, or not, if they can assist with the location process.
- Register missing participants on public and private pension registries with privacy and cyber security protections (e.g., National Registry of Unclaimed Retirement Benefits).

Documenting Procedures and Actions

- Prepare written policies and procedures to ensure they are clear and result in consistent practices.
- Document key decisions and the steps and actions taken to implement the policies.
- For plans that use a third party administrator or recordkeeper for communications, ensure that this vendor is performing participant location services and work with them to identify and locate any missing participants.

Conclusions

Mrs. Robinson has some work to do. She must review her plan document and figure out whether an amendment is in order to help her meet her goal. Then, she needs to review all of the terminated vested participants in the plan to identify those for whom she has good addresses and those for whom she needs to start the search process. The last part is probably going to be the most difficult piece: Mrs. Robinson needs to create her own procedures and determine not only how she's going to fix the current problems, but how she will ensure that the plan will remain in compliance moving forward.

So, where have you gone, Joe Participant? Mrs. Robinson will soon find out and the plan will be the better for it.

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