

CLIENT ACTION Bulletin

Employee Benefits

PBGC's Missing Participants Program Now Covers Defined Contribution Plans

SUMMARY The Pension Benefit Guaranty Corporation's (PBGC) recently released [final rule](#) updating the agency's [regulations](#) on missing participants in terminated single-employer defined benefit (DB) plans newly extends the program to retirement plans not previously covered. These include most defined contribution (DC) retirement plans (e.g., 401(k) and profit-sharing plans), PBGC-covered multiemployer pension plans (MEPPs), and small (25 or fewer participants) professional service organizations' defined benefit plans. The final rule, which will include a "unified unclaimed pension database," applies to plans – other than MEPPs – that terminate on or after Jan. 1, 2018, and gives DC plan sponsors the option to transfer the assets to the PBGC, rather than to establish individual retirement accounts at a financial institution for the missing participants. For terminating MEPPs, the rule applies to plans where the actual date of payment (i.e., plan close-out) is on or after Jan. 1, 2018.

DISCUSSION **Background**

Locating missing participants has long been a concern for retirement plan sponsors and administrators. The three agencies overseeing plans with missing participants have coordinated their efforts but have not formalized a single, unifying set of rules, leaving sponsors grappling with slightly different requirements. The PBGC's final rule is the latest effort to address those concerns, albeit for terminating, rather than ongoing, plans.

The PBGC's final rule adds to the guidance found in the Department of Labor's (DoL) [Field Assistance Bulletin \(FAB\) 2014-01](#) on the duties of fiduciaries of terminating defined contribution plans regarding missing participants and the IRS's October 2017 internal guidance for its examiners when auditing retirement plans for compliance with age-70-1/2 required minimum distributions, including to missing participants, under the tax qualification standards.

"Missing Participant" Defined

The PBGC's final rule modifies the proposed rule's criteria for being "missing." Under the clarification, a participant is missing if he or she is "unlocatable" at the time of the plan's close-out (i.e., the plan sponsor/administrator does not know the location of an individual with "reasonable certainty" following a due diligent search). A participant also may be deemed missing if he or she is "unresponsive" by failing to accept a lump-sum payment by not cashing a check by its expiration (or "stale") date or, for DC plans only, failing to elect a form of distribution after receiving a notice of the distribution.

"Diligent Search" Steps Required under the PBGC's Final Rule

In general, the PBGC's requirements are coordinated and consistent with the DoL's and IRS's guidance. Before DC plan sponsors may transfer accounts to the PBGC, the final rule mandates completion of the search steps listed in the DoL's FAB:

1. searching records of the plan, related plans, and the plan sponsor;
2. searching public records using free electronic search tools on the internet, search engines, public records databases, obituaries, and social media;
3. using certified mail to attempt contacting the participant;
4. checking for and with a designated beneficiary; and
5. if circumstances warrant it, paying for the use of commercial search/locator services and/or credit reporting agencies, information brokers, and investigation databases.

For defined benefit plans, the PBGC's rule offers the choice of meeting the diligent search requirement by either: a) completing steps 1, 2, and 4 to the extent reasonably feasible and affordable for participants with monthly benefits less than \$50 per month (i.e., step 3 is optional); or b) complete step 5 regardless of the amount of the monthly benefit. In addition, the final rule includes simplified procedures (i.e., fewer benefit categories, fewer sets of actuarial assumptions, and a free online calculator) for determining the appropriate sum to transfer to the agency on behalf of a missing participant (or beneficiary) of a traditional pension plan.

Application Process for Sponsors Eligible for Voluntary Election to the PBGC's Program

Plan sponsors desiring to take advantage of the PBGC's program may apply to the program no later than 90 days after the last distribution is made to participants who are not missing or, if later, one year after the plan termination date. They must decide to apply as a "transferring" plan, which transfers benefits of all missing participants to the agency for later distribution to participants, or a "notifying" plan, which only provides the PBGC information about the participants' accounts. Plan sponsors must file the applicable PBGC Form (MP-200 for DC plans or MP-300 for small DB plans) and either Schedule A (notifying plan) or Schedule B (transferring plan). A DC plan sponsor that elects to participate as a "transferring plan" must transfer the benefits of all of its missing participants (i.e., it cannot pick and choose on a case-by-case basis). All sponsors must conduct their searches for missing participants within nine months before applying to the PBGC.

Plan sponsors will be assessed a one-time fee of \$35 per missing participant, with no fee for benefit transfer amounts of \$250 or less and for plans that only send information about where the benefits are held (such as in an IRA or under an annuity contract). The benefit transfer amount for a missing distributee who does not cash a check is determined in the same way as any other missing distributee: the amount must reflect the total value of the distribution without a reduction for any previous tax withholding. Accordingly, if the plan already paid tax withholding on any such amount, the sponsor should consult its tax advisor as soon as possible regarding the steps and deadline for filing for a refund, as outlined in a 2003 [IRS Letter on Recovery of Erroneous Withholding](#). Following the transfer of amounts, participant accounts will not be charged for maintenance or distribution fees. After a participant is located, the PBGC will distribute his or her initial account balance with interest.

Ongoing Plans and Missing Participants

The pilot program's success at reuniting missing participants with their money also has led the DoL to conduct more audits of a plan fiduciary's duty to make reasonable attempts to locate missing participants, examining the efforts of a plan sponsor or administrator to follow the guidance in the agency's FAB. Plan sponsors of ongoing plans should review their procedures to locate missing participants and take steps to document their efforts in case of an audit, taking into account the IRS's guidance and the PBGC's new final rule as well.

PBGC's final rule might be useful in the plan termination context, but concerns remain for ongoing plans with missing participants. As noted in the agency's [Participant and Plan Sponsor Advocate 2017 Annual Report](#), the PBGC and the DoL's Employee Benefits Security Administration's Chicago Regional Office have been working together on a pilot program to locate missing participants and are considering an expansion to other regional offices or nationwide.

ACTION Sponsors of 401(k) and other retirement plans previously not covered by the PBGC's missing participants program should review the agency's final rule and consider the program if there is a potential for a plan termination with missing participants. Because the program begins with plans that terminate starting in 2018, the PBGC expects several months before the existing online missing participants' directory is updated. Plan sponsors and administrators also should consider the guidance from the DoL and IRS, and expect the agencies to coordinate further and release additional directives or advice.

For additional information about the PBGC's final rule expanding the missing participants program or assistance with assessing the feasibility of using the program, please contact your Milliman consultant.