YEAR END
2019

Employee Benefits Update

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RMDs and "lost" participants

Steps to comply with your fiduciary duty

Losing contact with former participants who have vested benefits remaining in your plan can be problematic for both the former participants and the plan sponsor. The issue becomes more urgent when it's time for them to begin receiving their required minimum distributions (RMDs) the year after they hit 70½. Here's a look at why it's a problem and what plan sponsors can do about it.

The problem

From a sponsor perspective, incurring administrative charges for servicing lost participant accounts (whether RMDs are an issue or not) is surely a big negative. But keeping track of former participants before RMDs become an issue is important. The government is anxious to start taking its slice of taxable distributions. Sponsors who fail to take the job of tracking down lost participants seriously could face accusations of a fiduciary breach.

It's also a problem for participants themselves, who, perhaps unwittingly, are missing out on some income they're entitled to. Not to mention that they, too, face IRS penalties for their failure to take the distributions.

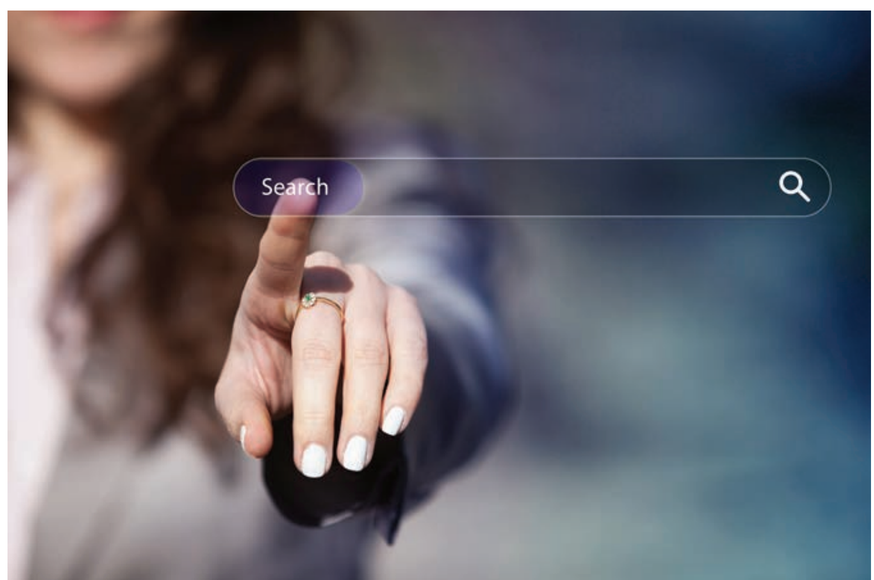
You might expect that retired former employees would be anxious to start receiving distributions and stay in touch. However, missing-in-action participants are all too common, even at the RMD stage. For example, a Retirement Clearinghouse survey found that 11% of records of terminated participants lack a current address. It also found that one-third of those polled have at some point learned of old retirement accounts they'd forgotten. And sometimes "lost" participants really aren't lost at all, but just don't respond to efforts to communicate with them. Curiously, 9% of respondents to the survey reported that they wouldn't verify their address if queried by a former employer, presumably anticipating some negative consequence.

The Pension Benefit Guaranty Corporation (PBGC) recently started a program in which defined contribution (DC) plans that are being terminated can offload lost participant accounts to the agency. It then assumes the burden of tracking down the account owners. But that initiative won't help you if your plan is still up and running, of course. (For the PBGC's definition of these participants, see "Defining missing participants" at page 3.)

EBSA involvement

The Department of Labor's Employee Benefits Security Administration (EBSA) has reportedly stepped up investigations into plan sponsors that have dropped the ball in this area. The agency's interest originated in its Philadelphia regional office, focusing on defined benefit (DB) plan participants.

That effort led to the recovery of more than $500 million in as-yet unpaid benefits to retired participants who had fallen off their former employers' radar screens. Six plans



Defining missing participants

The Pension Benefit Guaranty Corporation (PBGC) defines a former participant as "missing" under one or more of the following situations:

- The plan doesn't know the former participant's location with "reasonable certainty."
- Under the plan's terms, the benefit is to be paid in a lump sum without the former participant's consent, and the former participant hasn't responded to a notice about the distribution of the lump sum.
- Under the plan's terms and any election made by the former participant, the benefit is to be paid in a lump sum, but the former participant doesn't accept the lump sum.

A lump sum paid by check isn't accepted if the check remains uncashed after a "cash-by" date (written on the check or in an accompanying notice) that's at least 45 days after the date on which the check is written — or if no such "cash-by" date is so prescribed, the check's stale date (typically after six months).

were faulted in that investigation. The broadening of EBSA's focus to include lost DC plan participants has spread from Philadelphia to other EBSA offices.

Steps to compliance

So what steps must you take to stay out of trouble regarding former participants and RMDs? Experts say the key is not only to take all reasonable means to track down lost participants, but to be able to show that you've done so. And make sure you have an organized, consistent process in place.

An EBSA field assistance bulletin addressing plan terminations is instructive in the RMD context. It features the following search steps:

Use certified mail. This is a quick and inexpensive way to find out whether a participant can be located to distribute benefits.

Check related plan and employer records. Another of the employer's plans, such as a group health plan, may have more up-to-date information.

Check with a designated plan beneficiary. Presumably a spouse or child can lead you to a former plan participant, or at least let you know whether the individual is still alive.

Use free electronic search tools. As a plan fiduciary, you must make reasonable use of Internet search tools. This includes searching public record databases involving licenses, mortgages, real estate taxes, obituaries and social media.

If you don't have the time, you can hire a commercial service that specializes in these searches. A quick Google search using the phrase "locate missing retirement plan participants" yields a variety of such vendors.

Another possibility includes current employees who've kept in touch with "lost" participants and can supply current contact information. Even an old mobile phone number might still work.

Don't give up

Even if your efforts to find lost participants aren't bearing fruit, don't give up easily. Demonstrating persistence can also help establish that you're acting in good faith if your plan is audited. And remember: As plan sponsor you're always responsible for RMDs, even if you have a third-party administrator that handles your plan. ◻

How plan eligibility can help achieve recruitment goals

In a tight labor market, employees may feel more confident about finding another job if they're unhappy with the one they have. For plan sponsors, 401(k) plan participation eligibility requirements take on greater significance in this market. In general, employers can require a new hire to wait a year before being eligible to participate in a qualified retirement plan, in addition to requiring that the employee be 21 years old.

Debating the costs

Employers may debate whether it's worth the trouble and expense of giving new employees the opportunity to enroll in the plan right off the bat. If there's a fair chance the new hire will hop to another job sooner than the plan is legally required to let them join, why bother to jump through administrative hoops and incur financial costs?

Plus, of course, it's not unusual to have to terminate an employee who, during an informal probationary period, doesn't turn out to be a right fit for your organization. You could wind up having to pay for the administration of a very small account until this terminated employee tells you what to do with it.

Differing opinions based on plan size

Evidently, however, larger plans and smaller plans don't see eye to eye on the matter.

52% of plans with less than 50 participants impose a service requirement (typically one year) for new hires.

Data from the Plan Sponsor Council of America's (PSCA's) 61st *Annual Survey of Profit Sharing and 401(k) Plans* indicates that 52% of plans with less than 50 participants impose a service requirement (typically one year) for new hires. In contrast, only 23% of plans with at least 5,000 participants impose such restrictions.

Along similar lines, setting a minimum age for plan participation is also more common among smaller plans. For example, 77% of the below-50 participant plans in the PSCA survey have age restrictions, vs. 49% of the large plans.

Age 21 is the most common minimum age requirement for plans that do set a minimum age. An employee who turns 21 late in the calendar year might wind

up not joining the plan until age 22, if the next plan entry date isn't until the next year.

Computing service requirements

In addition to setting basic age and service requirements, sponsors can choose two ways to count employee service for participation eligibility purposes:

1. Elapsed time. This is simpler and more common; the countdown begins on the employee's date of employment.

2. Counting hours. This method involves counting hours worked during an "eligibility computation period" that can't exceed 12 months and cannot require more than 1,000 hours of service. It tends to weed out part-time employees from eligibility.

The arguments in favor of not restricting participation eligibility are similar to those for immediately vesting employer matching contributions. If you promote your 401(k) plan in recruitment efforts, stating that new hires can join the plan immediately could add another few points in your favor in the mind of employees you seek to recruit. Also, to the extent that you're thinking about employees' retirement readiness, the sooner they're in a 401(k) plan and saving, the better shape they'll be in down the road.

On the other hand, if your turnover rate is high (and not due to lacking an attractive 401(k) plan), imposing service restrictions could be the best option.

Making the decision

So which will it be? Consult with your benefits advisor. Only a careful analysis of your demographics and available plan choices will give you the level of assurance you'll need to change your current plan's eligibility requirements. ◻

Compliance Alert

Upcoming compliance deadlines:

12/1* Deadline for 401(k) and (m) safe harbor notices, annual qualified default investment alternative (QDIA) notice, and qualified automatic contribution arrangement (QACA) notice (can be made up to 90 days before the start of the plan year)

12/15* Extended deadline to distribute the Summary Annual Report for plans that filed Form 5500 by October 15 (calendar year plans)

12/31 Deadline for making required minimum distributions for 2019

12/31 Deadline for making corrective distributions for failed 2018 actual deferral percentage (ADP) and actual contribution percentage (ACP) tests with a 10% excise tax penalty, as well as for making a qualified nonelective contribution (QNEC)

12/31 Deadline for making a prospective amendment to add or remove safe harbor status for the 2020 plan year

12/31 Deadline for making a prospective amendment to add eligible automatic contribution arrangement (EACA) and QACA for the 2020 plan year (must give participants notice at least 30 days prior to the effective date)

12/31 Deadline to establish a new qualified plan for the 2019 plan year

1/31 2019 Forms 1099 are due to participants

** These dates fall on a Sunday. The IRS historically hasn't extended due dates for required disclosures, contributions or distributions.*

Plan advisor fiduciary category status: It's more than numbers

Like so many other facets of retirement plan management, the role of plan advisors who help you with plan investments is governed by ERISA. And it may seem that many plan sponsors speak in ERISA code sections. For plan sponsors, the question is: Do you need a 3(38) fiduciary, or is a 3(21)ii fiduciary more fitting?

Why it matters

The question of fiduciary status has become more urgent for many plan sponsors in recent years in the wake of a wave of fiduciary breach allegations. Many complaints involve high asset management fees on plan funds and poorly performing investments. Class action lawsuits against large plans have wound their way through the courts, with the U.S. Supreme Court weighing in. The litigation has generally involved large plans because litigation is costly, and the payday for plaintiffs' attorneys who prevail against small plans may be too modest to attract much interest.

This doesn't mean small plan sponsors don't need to worry. As a plan sponsor, you're always on the hook for the process by which you selected and monitored a fiduciary's performance. Thus, small plan sponsors need to understand the role of external fiduciaries not just from a liability reduction perspective, but to safeguard the interests of plan participants for its own sake. Remember, you can't evade responsibility altogether just by engaging a fiduciary.

Until relatively recently, small plans' investments were typically handled by investment brokers and advisors who didn't assume any fiduciary responsibility. But the landscape has evolved, and many brokers and advisors now offer to serve as what are known as ERISA 3(21)ii or 3(38) fiduciaries. Meanwhile, some seasoned retirement plan service providers that have always served in those roles worry that some former investment brokers are using this fiduciary status largely as a marketing tactic.

Who is who

In a nutshell, the two fiduciary categories describe not just the degree of fiduciary liability assumed by a firm, but the nature of the service it provides to plan sponsors. Plan advisor fiduciaries are either of the following:

3(21)ii fiduciaries. These fiduciaries provide advice and recommendations on plan investments, and perhaps other plan design, management, and strategy matters. But you're left to decide what to do with that input and assume fiduciary responsibility for your decisions. A 3(21)ii fiduciary maintains liability for the basic prudence of its recommendations.

3(38) fiduciaries. These fiduciaries are given discretionary authority to make decisions about plan investments, such as to hire and fire asset managers that operate the funds in your plan's investment lineup. A 3(38) fiduciary assumes liability for those choices and, as such, doesn't require the approval of the plan sponsor for its investment decisions.

The same plan services company could give you the choice of having it operate as a 3(21)ii fiduciary, or a 3(38) one. When a plan services company works for you as a 3(38) fiduciary, it's doing a little more work, and therefore might charge a bit more (10% to 15%) than it would for 3(21)ii services. But, the advice process should really be the same. You don't want to hire a fiduciary that takes a different approach based on whether it's a 3(38) fiduciary (risk on fiduciary) or a 3(21)ii fiduciary (risk on you).

Remember, ultimately, the plan sponsor is liable for ensuring that the 3(21)ii or the 3(38) advisor is performing the services agreed to and adhering to prudent person rules. When acting as a fiduciary, regardless of which role the advisor takes, the advisor must provide the plan sponsor a statement, *in writing*, that he or she is acting in such capacity.

What's best for you

Check carefully under the hood of any plan services company you're considering engaging. Look at its history, service capacity and all other selection criteria you normally apply to a crucial plan vendor. Don't be sidetracked by focusing too much attention on fiduciary categories. ◻

Should your 401(k) vest now or later?

Survey data from the Plan Sponsor Council of America (PSCA) indicates that roughly 40% of 401(k) plan sponsors provide immediate vesting on their matching contributions. In theory, employers that offer immediate vesting on matching 401(k) contributions might have a leg up on other companies when recruiting workers in a tight labor market. The jury's out, however.

Forfeitures and vesting schedules

One common rationale for using a vesting schedule is that, when plan participants leave the company prior to vesting (or fully vesting), the net savings from the forfeited matching contributions can subsidize plan costs. This benefits remaining plan participants.

Some employers use vesting schedules hoping that the prospect of forfeiting unvested matching contributions will discourage job-hopping. But other employers find that younger employees tend to change jobs often and aren't terribly focused on retirement savings anyway, so they won't give much weight to a prospective employer's 401(k) vesting schedule (or lack of one) when considering accepting a job offer.

But what about employers with recruiting strategies involving workers of all age brackets? A significant proportion of targeted recruits may look favorably on immediate vesting. Seasoned labor force participants might be drawn to a company whose compensation philosophy prioritizes facilitating employee retirement savings.

A look at the stats

In January 2019, MetLife shifted from using a graded vesting schedule to immediate vesting. MetLife sees this move as an investment in its people. It believes immediate vesting will help lure employees who aren't new to the workforce, and perhaps have already become fully vested in the plans where they're presently employed.

Greenheck Fan Corporation made a similar move in hopes of giving itself a competitive advantage in recruiting production workers. The company's 401(k) plan was ranked above paid time off as the "most popular benefit" in a PayScale.com employee survey. The immediate vesting feature is prominently noted on the Careers page of Greenheck's website.

Still, the percentage of sponsors with immediate vesting of matching contributions has remained essentially level over the past ten years, PSCA data indicates. Why? Perhaps because the pros and cons of immediate vesting haven't changed much over the years, and how they're weighted depends on each employer's compensation philosophy, profitability and competitive position in labor markets.

Time for a change?

Many plans have adopted safe harbor provisions which automatically result in immediate vesting. So candidates you're trying to recruit may have already experienced immediate vesting in their former employer's safe harbor plan. The bottom line: Plan sponsors should weigh how requiring a vesting period for matching contributions (and what kind of vesting schedule) impacts their recruiting and retention strategies. Also remember that vesting schedules for matching contributions are strictly optional. ◻

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Pension auditors must sift through enormous amounts of financial data in accordance with the requirements of numerous laws, regulations and professional standards. If they don't know what they're doing, they can easily get lost in the numbers, run up large fees and fail to provide an accurate assessment of a plan's financial status.

Pension audit specialists

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