



update

Compliance News for Plan Sponsors

November 22, 2016

DOL Investigating Timely Payment of Pensions to Terminated Vested Participants Nationwide

The Department of Labor (DOL) wants pension plans to do a better job of paying benefits to terminated vested participants who have become eligible for payment. To underscore this concern, it has launched a nationwide project to investigate the payment practices of large defined benefit (DB) plans with regard to “unpaid benefits.” Unpaid benefits are benefit payments due to terminated vested participants because they have attained either normal retirement age (generally, age 65) or 70½. Anecdotal evidence indicates that the agency is already rigorously pursuing these investigations.

The DOL Investigations

The project began as a regional initiative with the identification of a group of large DB plans with significant numbers of terminated vested participants, as identified from data on their previously filed Forms 5500. The payment practices investigated included plan policies, procedures and actual practices for identifying and communicating with terminated vested participants eligible for payment and for locating terminated vested participants who were “missing” or “lost.” These investigations revealed a number of important findings:

- There were significant numbers of terminated vested participants eligible for payment who had not been paid. Many of these individuals elected to start their benefits immediately upon being offered the opportunity to do so.
- Unpaid benefit amounts were creating problems in the form of excise tax penalties for terminated vested participants with late 70½ required payments.
- In the aggregate, the amount of money held as unpaid benefits in the plans already under investigation was very large, with estimates of over one-half billion dollars.

The investigations also revealed that there were multiple reasons why so many benefits were not being paid. These included:

- Plans not having procedures to identify and locate missing or lost participants;
- Plans having such procedures but not using them at all, or not using them on a regular basis; and
- Plans not having adequate records to support initiation of benefit payments, for example accurate birth dates.

The fiduciary obligations of the Employee Retirement Income Security Act (ERISA) cover all aspects of plan administration, including the payment of benefits. The DOL believes that the failures identified above could indicate potential violations of



Retirement Compliance News Highlights:

- The DOL wants pension plan sponsors to improve payment practices for terminated vested participants.
- The DOL believes that the outreach obligation is ongoing.
- The IRS also is concerned with timely payment issues.

one or more of those duties including the duties of prudence and loyalty, the duty to follow the terms of the plan, and the duty to maintain adequate records. However, the DOL's main concern at this point appears to be more fundamental: plans need to do more to deliver benefits to their participants.

Related IRS Audit Activity

The Internal Revenue Service (IRS) also has an interest in timely payment of terminated vested participants. Its primary focus is on the commencement of required age-70½ benefits both because it is a problem that the IRS finds frequently on audit and because it raises qualification and excise tax issues.

A related focus of the IRS is the proper calculation of normal retirement age (NRA) benefits that commence after NRA. That is because another commonly found error in IRS plan audits is the failure to actuarially increase the NRA benefit to account for the delay in payment.

What Should Plans Do Now?

Although the DOL, the IRS and the Pension Benefit Guaranty Corporation all have provided guidance to some degree on searching for missing and lost participants, that guidance so far has been limited to specific circumstances (plan terminations, or in the case of the IRS, corrections). There has been no guidance for ongoing plans on either general standards for missing and lost participant searches or standards for communicating with terminated vested participants. Many plan sponsors consider their compliance with the Social Security registration and notice requirements (*i.e.*, IRS Form 8955-SSA and the related notice to vested participants following termination) as fulfilling their obligations with regard to terminated vested participants, and rely on participant benefit applications (as required by plan language) to trigger benefit payments, at least with respect to terminated vested participants who have not reached age 70½.

With the expansion of unpaid benefit investigations to all DOL Regional Offices, however, it appears that the agency is sending a clear signal that plans need to do more. Employers should take advantage of the DOL's advance notice on this issue, and while the original investigations were limited to DB plans, there is no reason to believe that defined contribution plans will not be included going forward.

Working with their attorneys and other advisors, employers should consider taking steps now to help ensure that they will not be caught off-guard if they receive a notice for one of these investigations. Those steps could include the following:

- Determine whether the plan has the necessary data to identify the terminated vested participants included on the most recently filed Form 5500 who are about to become or who already are eligible for payment. If there are gaps in the records, for example, missing birth dates, the plan should take steps to obtain the necessary information as soon as possible.
- Notify terminated vested participants who are about to become eligible for payment at NRA or be required to start payment at age 70½, if the plan has not already been doing so. The DOL has informally indicated that plans should consider adopting procedures that reflect *recurring efforts* to notify terminated vested participants of their right to collect a pension.
- Inform terminated vested participants who are at or who have passed their required age 70½ payment date that their payments must begin, and take steps to initiate payment as soon as possible. Plan sponsors should review with their attorneys any excise tax or correction issues that might be related to the delayed commencement of these benefits. The DOL has informally indicated that that not making reasonable and diligent efforts to locate and pay such participants in a timely fashion may be viewed as a breach of duty with the resulting risk of personal liability.

- Review and document the plan's policies and procedures related to paying terminated vested participants, some examples of which are noted in the text box below.
- Investigate the treatment of uncashed checks under the plan. Employers should know where the assets related to uncashed checks are held, who benefits from the "float" on the account, how long assets with respect to a particular participant are retained in the account before being returned to the plan, and other related questions.

Policies and Procedures Related to Paying Terminated Vested Participants

These could include policies and procedures about the following:

- How the plan identifies terminated vested participants and collects terminated vested participant contact information initially (e.g., when annual notices are returned as undeliverable; when a required distribution check is not cashed) and how and when that information is updated;
- When a terminated vested participant is treated as "missing;" when and how often "missing participant" searches are performed;
- When a terminated vested participant is treated as "lost" and what happens to his or her benefit at that time;
- When and how often "lost participant" searches are performed; and
- The steps that are included in missing and lost participant searches.

How Sibson Can Help

With both the DOL and the IRS making timely benefit payments to terminated vested participants a priority, plans need to look at, and revise if necessary, the policies and procedures, documents, and operations related to the way they fulfill this purpose. Sibson has considerable experience working with plans in all of these areas to improve their compliance with the law and their service to participants and beneficiaries. Please contact your Sibson consultant to discuss what assistance you need.

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