



LOST PARTICIPANTS AND THE DOL AUDIT PROCESS

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WHY DO WE CARE? – STATUTORY REQUIREMENTS IRC SECTION 401(A)(9) – RMDS

- Required Minimum Distributions.
- (A) In general. — A trust shall not constitute a qualified trust under this subsection unless the plan provides that the entire interest of each employee ... will be distributed, beginning not later than the required beginning date
- (C) Required beginning date. — For purposes of this paragraph—
 - (i) In general. — The term "required beginning date" means April 1 of the calendar year following the later of—
 - (I) the calendar year in which the employee attains age 70½, or
 - (II) the calendar year in which the employee retires.





WHY DO WE CARE? – STATUTORY REQUIREMENTS – IRC SECTION 401(A)(14) – NRA

- A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, unless the participant otherwise elects, the payment of benefits under the plan to the participant will begin not later than the 60th day after the latest of the close of the plan year in which—
 - (A) the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,
 - (B) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or
 - (C) the participant terminates his service with the employer.





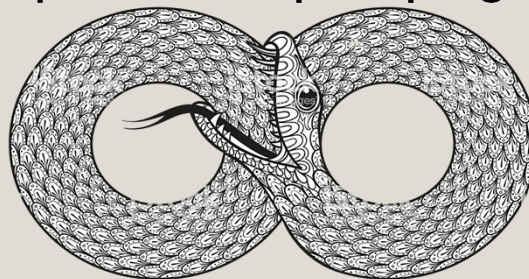
WHY DO WE CARE? – STATUTORY REQUIREMENTS – ERISA SECTION 404(A)(1)(D)

- “[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . **in accordance with the documents and instruments governing the plan . . .**”
- As a condition of qualification, plans must include language satisfying Sections 401(a)(9) and (14). This means that the plan language itself requires that benefits commence at Normal Retirement Age and, in any case (almost), no later than the “Required Beginning Date” after age 70½.
- The Trustees have a fiduciary obligation to follow the terms of the plan document.



EBSA AND THE NEVER-ENDING AUDIT

- Several years ago, the Director of the Philadelphia Regional Office of the Department of Labor's Employee Benefits Security Administration (EBSA) initiated a pilot program to see how well plans were doing in locating their missing participants.
- The program grew legs and was made nation-wide.
- Audits that originally began as part of that pilot program are still dragging on.
- ...And on. ... And on.



EBSA –WHY?



- The Trump Administration does not believe in government and has asked the agencies for plans to reduce both their budgets and numbers of employees.
- EBSA wants to save itself by showing how useful it is and pushing plans to find missing participants is one way to demonstrate its usefulness by creating impressive statistics.
- In its 2020 Budget Justification, EBSA notes that it “recovered \$904,200,000 in participant benefits from investigations” in 2018.
- Pushing plans to find missing participants, as it turns out, is low-hanging fruit.



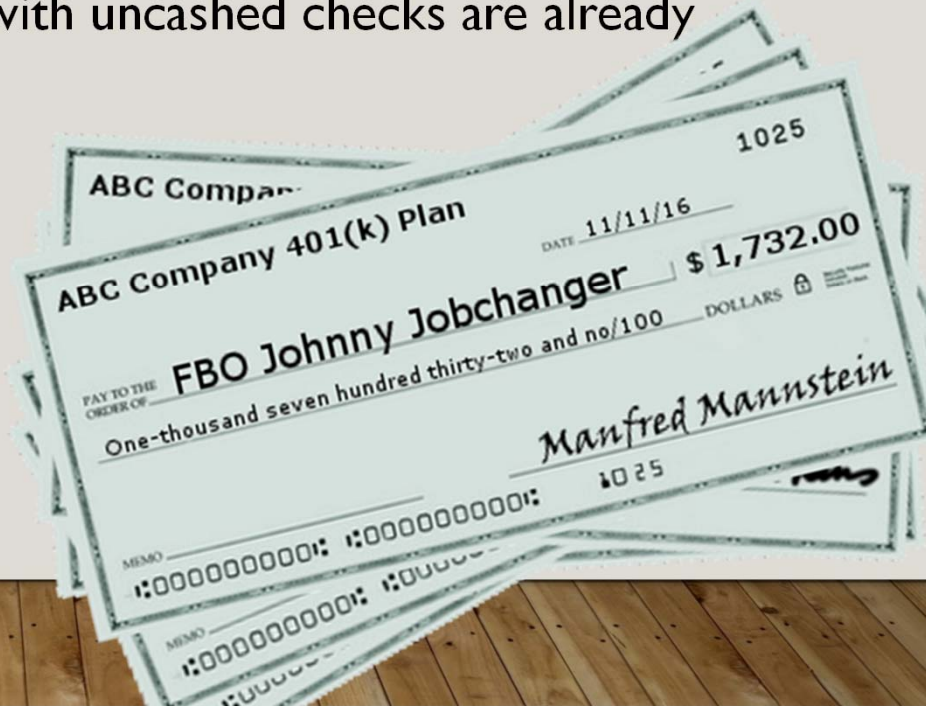
EBSA – THE ASK

- Typically, they ask for every document ever.
- They will ask for a census of participants who are:
 - At normal retirement age.
 - At 71.
- And how many are not in pay status?
- They will also ask for procedures for locating missing participants.
- They will interview Trustees to make sure the Trustees know those procedures.
- They will interview staff to try to determine if the procedures are being followed.
- They will second-guess the procedures at every step.





- Uncashed checks.
- Unlike missing participants, participants with uncashed checks are already in pay status.





GUIDANCE ON LOCATING MISSING PARTICIPANTS: IRS

- Locating lost participants. (i) Reasonable actions must be taken to find all current and former participants and beneficiaries to whom additional benefits are due, but who have not been located after a mailing to the last known address. In general, such actions include, but are not limited to, a ***mailing to the individual's last known address using certified mail***, and, if that is unsuccessful, an additional search method, such as the use of a ***commercial locator service***, a ***credit reporting agency***, or ***Internet search tools***. Depending on the facts and circumstances, the use of more than one of these additional search methods may be appropriate. A Plan Sponsor will not be considered to have failed to correct a failure due to the inability to locate an individual if reasonable actions to locate the individual have been undertaken in accordance with this paragraph; provided that, if the individual is later located, the additional benefits are provided to the individual at that time.
- [Revenue Procedure 2018-52](#), Section 6.02(5)(d).





DEFINITIVE GUIDANCE ON LOCATING MISSING PARTICIPANTS: DOL/EBSA – FAB 2014-01

- Hah! No way!
- Field Assistance Bulletin No. 2014-01:
 - “How can the fiduciaries of **terminated defined contribution plans** fulfill their obligations under ERISA to locate missing participants and properly distribute the participants account balances?”
- Despite being inapplicable on its fact, DOL seems to think this is definitive guidance. At the least, it is the most definitive guidance available.





GUIDANCE ON LOCATING MISSING PARTICIPANTS: DOL/EBSA – FAB 2014-01

- Required Search Steps:
 1. Use Certified Mail.
 2. Check Related Plan and Employer Records.
 3. Check with Designated Plan Beneficiary.
 4. Use Free Electronic Search Tools, such as:
 - a) Search Engines;
 - b) Public Record Databases;
 - c) Obituaries;
 - d) Social Media.





GUIDANCE ON LOCATING MISSING PARTICIPANTS: DOL/EBSA – FAB 2014-01

- Additional Steps.
- Are they necessary?
 - Depends on the size of the benefit.
 - You are allowed to do a cost-benefit analysis, both to decide whether to take additional steps and what those steps include.
- Steps may include:
 - Commercial Locator Services,
 - Credit Reporting Agencies;
 - Information Brokers;
 - Investigation Databases; and
 - Other Similar Services.





GUIDANCE ON LOCATING MISSING PARTICIPANTS: DOL/EBSA – FAB 2014-01

- Additional steps that don't make sense for an ongoing plan:
 - Setting up a bank account.
 - Paying to a state escheat (unclaimed property) fund.
- What you can't do:
 - Pay the benefit by withholding 100% in federal taxes and sending it to the IRS.





WHAT THE GOVERNMENT IS DOING TO HELP – PBGC

- Section 410 of the Pension Protection Act of 2006 added new ERISA Section 4050(c) and (d), which grants authority to the Pension Benefit Guaranty Corporation to administer a missing participant program for terminated multiemployer plans and terminated non-guaranteed (e.g., defined contribution) plans.
- PBGC issued regulations in 2018 and the program went live.
- Even the PBGC requires a “diligent search” first, which it generally defines consistently with the DOL guidance., except that if a benefit is at least \$50/month, it **requires** the use of a Commercial Locator Service.



WHAT IS THE GOVERNMENT DOING TO HELP?

- Not much.
- Both the IRS and SSA shut down their participant letter-forwarding services years ago.
- We are on our own.



SOME BEST PRACTICES



- Stay on top of things before DOL shows up.
- Make sure you document everything you do.
- Make sure you know what your plan document requires – change your plan document if you need to.
- Put a policy in place for finding missing participants.
- Be sure to follow your policy – better to not have a policy than to have one you don't follow.





SOME BEST PRACTICES

NOW

- Don't wait – start looking for participants early.
- Try to get them in the habit of staying in contact.
- Use the Union as a resource, whether it is membership records or even just people at the local who might know the person.
- Think about putting ads in the Union's publications.
- Death audits are an integral part of any missing participant program.



WHAT IF YOU DO IF YOU THINK YOU FOUND ONE?

- You send a letter, but they don't respond!
- How do you keep people from assuming its junk mail or a junk phone call?
- DOL has suggested putting a red stamp on the letter saying: "This is Important."
- As a last resort, send a check?



QUESTIONS, COMMENTS, THOUGHTS?

