




FLASHPOINT: DOL ISSUES MISSING PARTICIPANT AND LOST & FOUND GUIDANCE

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The U.S. Department of Labor (“DOL”) recently released guidance on two related topics – Missing Participants and Beneficiaries and the Retirement Lost and Found Program dictated by the SECURE 2.0 Act of 2022 (“SECURE 2.0”). The usefulness of both of these for most plan sponsors will remain to be seen.

Missing Participants and Beneficiaries

Field Assistance Bulletin (“FAB”) 2025-01 was released on January 14, 2025. The last guidance released by the DOL in relation to missing participants was back in 2021. The key issue being addressed is what plan sponsors are permitted to do with missing participants and beneficiaries and the plan benefits for them. Ideally, a plan administrator should have some sort of procedure to quickly identify and locate participants when they first go missing. The sooner that a participant can be identified as missing, the easier it is to locate them. Beneficiaries are more challenging because it could be years or decades before a plan administrator even knows that a former participant has died and that it has to determine and locate the proper beneficiaries for the benefit.

Historically, the DOL has encouraged plan administrators to utilize individual retirement accounts (“IRAs”) for missing participants. However, commenters have pointed out that this is not always available and have encouraged the DOL to reconsider the availability of state unclaimed property programs (“SUPPs”), commonly known as “escheating” the funds to the state.

In 2019, when the ERISA Advisory Council made the recommendation to consider the SUPPs, it was prior to the release of SECURE 2.0, which created the Lost and Found Program. The driving factor for the recommendation regarding SUPPs was the lack of fees that would be taken by the SUPP, thus preserving the account balance for the participant or beneficiary. In 2020, the Internal Revenue Service provided important guidance in Rev. Proc.

2020-46, which permits participants whose funds are forwarded to a SUPP to later take the funds they recover from the SUPP and roll them over to a qualified plan on a pretax basis, if certain conditions are met.

With the FAB, the DOL created a temporary enforcement policy to clarify that it will not automatically pursue plan sponsors who escheat funds to a SUPP for violations under the fiduciary duties of Section 404(a) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). The DOL requires a SUPP to meet nine criteria to qualify as an appropriate recipient of lost participant funds. If it does, the plan may transfer the account of the missing participant/beneficiary if it is \$1,000 or less, including any rollover account. Upon doing so, if the fiduciary complies with the conditions below, the plan fiduciary will be deemed compliant with its ERISA fiduciary duties.

The conditions are:

1. The plan fiduciary determined that the SUPP is a prudent destination for the funds;
2. The plan fiduciary has implemented a prudent program to find missing participants and beneficiaries (following the 2021 guidelines) and was unable to locate the participant or beneficiary at issue;
3. The plan fiduciary selects the SUPP offered by the state of the participant or beneficiary’s last known address;
4. The Summary Plan Description explains that these funds might be transferred to the SUPP and identifies who the participant/beneficiary can contact for more information; and
5. The SUPP meets nine criteria outlined in the FAB needed to qualify as an eligible state fund.

Some of the nine criteria for an acceptable SUPP set forth in the FAB might be difficult for a plan fiduciary to confirm, so the FAB permits the plan fiduciary to rely on the State Treasurer’s representations that it meets the requirements, unless the plan fiduciary has knowledge to the contrary.

While this appears to be very good news for plan fiduciaries that may have a number of missing participants with these small balances (which may include uncashed checks from prior cash-out transactions), the key will be condition #2 above. The plan fiduciary has to take sufficient action to try to locate the missing participant/beneficiary. The 2021 guidelines provide suggestions on how this location process might be executed, such as using online search options (free and paid), contact with named beneficiaries or emergency contacts in the employee’s folder, and reviewing possible information held by other plans of the employer.

Lost and Found Database

SECURE 2.0 §303 dictated that the DOL create a Lost and Found Database (the “Database”) to enable participants and beneficiaries to identify “lost” benefits being held for them in plans covered by ERISA. The DOL released a Notice on November 18, 2024 (the “Notice”), announcing the program and touting the \$7 billion it allegedly previously recovered for participants and beneficiaries. It should be celebrated that the DOL met its timing obligation under the law, and certainly it beat out the PBGC, which was given a similar task in relation to its Missing Participant Program in 2006, but took over a decade to implement it.

Participation in the Database program is completely voluntary. Plan Administrators and other authorized third parties, such as recordkeepers, have the power to use the program. The willing Plan Administrator must submit information about unclaimed accounts to the DOL via a structured template provided under the Notice Once that is done, covered participants/beneficiaries can then search this database to locate lost and forgotten account balances. Once in the program, the Plan Administrator or other submitter of the template information must to update the template annually with the DOL.

The DOL took great pains to ensure that the Database’s upload interface has the tightest level of cybersecurity since the required data includes Social Security Numbers. As a result, the DOL has clarified that a plan fiduciary that uploads information to the Database is deemed to have satisfied its duties under ERISA §404 to ensure the proper mitigation of cybersecurity risks. This was one component about which a number of commenters expressed significant concerns, but the DOL seems confident that it is fully buttoned up. Only time will tell for that.

So, who can use this program? The program is currently open only to receive data from plans in relation to missing participants age 65 or older. The plan fiduciary remains obligated to track down any missing participants who are younger than 65 (unless their account holds \$1,000 or less, in which case using a SUPP, as described above, might be an option).

The template for the report and the upload are available at <https://lostandfound-intake.dol.gov> once the plan fiduciary has the appropriate login.gov credentials. Those credentials are obtained by a simple registration process that can be done on the login.gov website.

Is the Database program a better option than the PBGC Missing Participant’s Program (currently found at <https://www.pbgc.gov/prac/missing-participants-program>)? Well, under the DOL program, the money stays with the Plan. So if the Plan Administrator is trying to get rid of participant account balances to stay under the audit level, this won’t help. And the program doesn’t work if the plan is terminating and the Plan Administrator is looking to pay out all assets in the near future. On the other hand, the PBGC program will take the funds from a plan once it is terminated, but not in relation to an ongoing plan. Neither the DOL nor the PBGC program will help an ongoing plan with missing participants with accounts that

contain more than the \$1,000 cash-out or \$7,000 forced rollover limit. In short, the Database is a good option for an ongoing plan; the PBGC Program is likely the better choice for a terminated plan.

Here's one more little catch with this DOL Lost and Found Database: it may violate certain state privacy laws. Some states automatically exempt programs where the information is being provided to the government, but there may be a requirement for participant consent. Ironical, right? *Consent* from a participant that's *missing*. (Who writes these laws?) Bottom line – anyone who wants to use this program would first need to research whether there are any limitations to its use under state law based on the location of the participant.

Conclusion

We give an A for effort to the DOL. Both pieces of DOL guidance provide a potential route for plan sponsors that have tried (and failed) to locate certain participants/beneficiaries and just want to help them connect with their money. Likely, however, the private sector solutions for both locating the missing participants/beneficiaries and distributing the funds from the plan will remain the predominant methodology.

If you have questions about missing participants or the Lost and Found Database (or, for that matter, anything related to retirement plans), you don't need to search far and wide for assistance: call us! We are, after all, your ERISA Solution!

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