Labor and Employment Alert: PBGC Missing Participant Program – It's Not Just For Defined Benefit Plans Anymore

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On December 22, 2017, the PBGC issued final regulations that expand their acceptance of benefits for missing participants. They will now accept missing participants from terminating defined contribution plans, terminating multiemployer defined benefit plans and terminating small professional service employer plans that are not covered by ERISA title IV. The PBGC declined to expand the new regulations to ongoing plans as beyond the scope of their current authority.

The new regulations apply for plans (other than multiemployer defined benefit plans) where the date of plan termination is after December 31, 2017. The new regulations apply to terminating multiemployer defined benefit plans where the date of payment (plan close-out) is after December 31, 2017.

Whose benefit can be sent to the PBGC?

The regulations allow you to treat a participant or beneficiary as missing if they fail to make a benefit election or fail to cash a lump sum distribution check. This solves one of the common problems of whether you can treat someone as missing if you know exactly where they are, but they are unwilling to accept the benefit payment. In accordance with that change missing participants and beneficiaries are now referred to as "distributees."

Moving forward, all distribution checks should include "cash-by" dates on the check (at least 45 days after the check date) and clearly describe the timing in the election forms. If no date is included, the check's stale date under applicable law will apply.

The regulations also address "conditional forfeitures" and make clear that benefits that had been forfeited pursuant to Treasury Regulation Section 1.411(a)-4(b)(6), subject to restoration if the missing participant makes a claim for benefits, must be treated as outstanding benefits at the time of the plan termination.

The regulations also make clear that a plan can send benefits to the PBGC for a deceased participant where the plan has been unable to locate the participant's beneficiary.

How much would be sent to the PBGC?

Importantly, even though an uncashed check was originally reported as taxable and had the 20% withholding taken at the time the check was cut, the amount paid to the PBGC for this distributee must reflect the original value of the benefit. The PBGC will withhold and report taxes when the distributee is found and paid by the PBGC. The preamble to the regulations reflects that the plan administrator may be able to request a refund of the tax withholding as described in the IRS Internal Revenue Manual Section 21.7.2.4.6 (Adjusted Employer's Federal Tax Refund or Claim for Refund). Because of the statute of limitations on refunds, it will often not be possible to claim a refund for all of the withheld taxes.

There would be an administrative fee (initially $35 per missing distributee, waived for small account balances - less than $250) for the transfer of a distributee's benefit to the PBGC. There would be no ongoing maintenance fees and no distribution charges against the participant's account balance when the PBGC paid the benefits to the participant. This will be dramatically different from the experience under the auto-rollover market where vendor fees frequently absorb a significant portion of small account balances.

Because the regulations specifically prohibit a plan from splitting accounts for missing participants and sending part to the PBGC and the rest to an IRA vendor, this creates an important decision for terminating plans: (a) transfer benefits for distributees to the PBGC with a higher up-front cost to the plan/employer, (b) transfer the benefit to an IRA with lower up-front costs but significantly higher subsequent costs for participants and either (i) notify the PBGC where the distributees' benefits have been transferred, or (ii) (for now) file nothing with the PBGC. The preamble to the regulations reflect that the PBGC will reevaluate whether to require notification by all terminating defined contribution plans after the PBGC gains experience with the expanded program.

Because of the availability of this program only for terminating plans, and the prohibition on splitting accounts, it will be important for terminating plans that currently have lump sums with automatic rollovers to monitor usage of the auto-rollover feature. The preamble to the final regulations makes it clear that payments of rollovers that are made in the ordinary course will be fine. But the preamble also notes that the addition of lump sum feature just before the termination process is begun is subject to scrutiny.

Historically, the PBGC regulations had required different actuarial assumptions for different categories of participants. The new regulations reduce the number of categories and require the PBGC to provide a free on-line calculator to calculate the amount payable to the PBGC to take on defined benefit plan obligations to missing participants.

What benefit is paid by the PBGC to a DC Plan Participant

The transferred account balance will be credited with interest at the applicable Federal mid-term rate. If the account balance at payout is under $5,000 or the distributee is under age 55, the benefit will be paid in a lump sum. If the account balance is at least $5,000 and the distributee is at least age 55, the benefit will be paid in a single life annuity (if unmarried or a spousal beneficiary) or a joint and survivor annuity (if married), unless the participant (or spousal beneficiary) elects a different form of payment.

Diligent Search

The regulations confirm that the plan must perform a diligent search for missing distributees whose location is not known by the plan with reasonable certainty.

For a defined contribution plan, the regulations refer to the DOL's standard under ERISA Section 404. Refer to our alert on Nov. 8, 2017 for information of the DOL's evolving standard for diligent searches.

For defined benefit plans, within the 9 months preceding transfer to the PBGC the plan must either:

1. Use a commercial locator service (regardless of benefit size); or
2. For benefits less than $50 per month, perform all of the following search steps, to the extent reasonably feasible and affordable:
    - Search the plan's records
    - Search the records of the participating employer that most recently employed the distributee
    - Search the records of all of the other retirement and welfare plans maintained by that employer to identify other records about the distributee (like spouse's and children's names and addresses)
    - Contact each beneficiary of the distributee identified from plan and employer records for information to locate the distributee
    - Use internet search methods for which no fee is charged Employers sponsoring terminating plans now have another option as they wind up benefits for missing participants. Employers sponsoring terminating DC plans will need to carefully consider whether they want to roll-over the accounts to an IRA or send the benefit to the PBGC and should document their rationale for their conclusion. If you have questions about terminating retirement plans, please contact your Vorys relationship attorney.

Conclusion

Employers sponsoring terminating plans now have another option as they wind up benefits for missing participants. Employers sponsoring terminating DC plans will need to carefully consider whether they want to roll-over the accounts to an IRA or send the benefit to the PBGC and should document their rationale for their conclusion. If you have questions about terminating retirement plans, please contact your Vorys relationship attorney.