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Employee Benefits & Compensation



DOL Issues Guidance Regarding Missing Participants

The Department of Labor has issued a [Field Assistance Bulletin](#) providing fiduciaries with guidance regarding their obligations with respect to locating a missing participant of a terminating defined contribution plan. A plan fiduciary is obligated to take certain steps to locate a missing participant or beneficiary before determining that the person cannot be found. The reasonable expenses involved in locating a missing participant can be charged to the participant's account if consistent with the terms of the plan.

The steps that must be taken will vary depending on the circumstances. Since certain search methods involve such a nominal expense and can be very effective, fiduciaries are always obligated to use those methods regardless of the size of the participant's account balance. Those methods are:

- Sending information via certified mail.
- Checking the records of other plans of the employer, such as a group health plan, that may have a current address.
- Contacting anyone who the missing participant has designated as a beneficiary for a current address.
- Using the letter forwarding service of either the Internal Revenue Service or the Social Security Administration.

Depending upon the circumstances, in addition to these methods, fiduciaries should consider using internet search tools, commercial locator services and credit reporting agencies to locate missing participants. In determining whether it is prudent to use additional steps, fiduciaries must consider the size of a participant's account balance and the expenses involved in using such additional methods.

If the search proves ineffective, the fiduciary will have to distribute the missing participant's account in order to terminate the plan.

The distribution options a fiduciary should consider include:

- Distributing the account into an Individual Retirement Account. This method is the preferred distribution option since it is most likely to preserve assets for retirement purposes.
- Establishing an interest bearing federally insured bank account in the name of the participant.
- Transferring the account balances to state unclaimed property funds in the state of the

participant's last known residence or work location.

The Field Assistance Bulletin clarifies that one method of distribution currently used by some plan sponsors is unacceptable. Some plan fiduciaries have imposed 100% income tax withholding on a missing participant's benefits with the understanding that these amounts would be applied to the missing participant's income tax liability. The Field Assistance Bulletin clarifies that this option should not be used by fiduciaries as a means of distributing benefits to missing participants.



HIPAA Final Regulations Released

As an end of year gift, three government agencies issued new rules on the Health Insurance Portability and Accountability Act ("HIPAA") on December 29, 2004. Unlike recent HIPAA guidance that has focused primarily on the privacy and security provisions of HIPAA, these regulations focus on HIPAA's portability provisions.

The regulations were issued by the Departments of Labor, Treasury, and Health and Human Services, and include both final and proposed regulations. They apply to plan years beginning on or after July 1, 2005 (e.g., January 1, 2006 for calendar year plans) and basically mirror the interim regulations released in 1997. Among other subjects, the final regulations address pre-existing condition exclusions, certificates of creditable coverage, and special enrollments. The following highlights a few of the items identified with respect to these provisions.

Certificates of Creditable Coverage: The final regulations require plans to include an educational statement in their certificates of creditable coverage that informs participants of their rights under HIPAA's portability provisions. An updated model certificate of creditable coverage, including this new required educational statement, is included in the regulations. Additionally, the regulations add coverage under the State Children's Health Insurance Program ("SCHIP") and coverage under a foreign national health plan as creditable coverage. The regulations also include requirements for issuing automatic certificates and a requirement that plans must have written procedures informing an individual on how he or she may request a certificate of creditable coverage.

Special Enrollment Periods: An expanded list of the circumstances in which an individual may be eligible for special enrollment under a health plan is included in the final regulations. These include situations where an individual did not initially enroll in the plan and did not have other coverage but acquired other coverage after the enrollment date and declined later enrollment in the plan (e.g., during a subsequent open enrollment period). If the individual loses that other coverage, the final regulations clarify that he or she is still entitled to special enrollment under the plan. The regulations also clarify that an individual

who loses coverage because he or she no longer lives or works in an HMO service area is entitled to special enrollment. Additionally, individuals who are enrolled in a benefit option are entitled to switch benefit options if their dependent has a special enrollment right and that dependent is being added to the individual's coverage.

Pre-Existing Condition Exclusions: The final regulations identify a plan provision denying benefits for pregnancy in the first year of coverage as violating HIPAA's prohibitions against pre-existing condition exclusions relating to pregnancy. Also, the regulations reiterate that a pre-existing condition exclusion that relates solely to genetic information violates HIPAA. The regulations clarify that if an insurer sells policies with varying pre-existing condition exclusion periods, then the pre-existing condition exclusion notices sent to participants must include the maximum exclusion period applicable to that participant.

The agencies also issued proposed regulations. These proposed regulations solicit comments on provisions such as those that revise the 63-day break in coverage rule for individuals who don't receive a timely certificate of creditable coverage from their previous health plan and for individuals who decline coverage during a period of FMLA leave. The proposed regulations also clarify the timeframes for enrolling in the plan during a special enrollment period and clarify that certificates of creditable coverage do not need to be issued if an individual is simply changing benefit options under a plan.

The agencies also requested comments on a number of topics, such as whether benefit specific waiting periods constitute pre-existing conditions. The deadline for providing comments is March 30, 2005.

IRS Provides Guidance on Automatic Rollover Provisions

The IRS has issued [Notice 2005-5](#) providing guidance on the automatic rollover rules that will become effective on March 28, 2005. The Economic Growth and Tax Reconciliation Act of 2001 (EGTRRA) prohibits qualified plans from cashing out automatic distributions exceeding \$1,000 without a participant's consent, unless such cash-out distributions are rolled over to an IRA established for the participant. The Notice states that a mandatory distribution can be made to a deemed IRA that is part of the qualified plan making the distribution. Plan administrators can continue to make cash-out distributions of \$1,000 or less without a participant's consent. If a plan sponsor wishes to continue to make cash-out distributions of accounts with a balance of less than \$5,000, the plan sponsor must amend the plan to provide that distributions of more than \$1,000, but less than \$5,000, will be rolled over to an IRA in the event that a participant does not consent to receive the distribution. The Notice states that the anti-cutback rule is not violated by an amendment to change the cash-out distribution provisions.

The automatic rollover rules apply to mandatory distributions made on or after March 28, 2005. Qualified plans must be amended to comply with the new rules before the end of the first plan year ending on or after March 28, 2005. For calendar year plans, this will be December 31, 2005. The Notice states that if a plan administrator has not sufficiently established procedures to accomplish the automatic rollover of a mandatory distribution

before March 28, 2005, the plan will be treated as satisfying the rules if covered distributions are made on or before December 31, 2005.

Deferred Compensation Update

In conferences with employee benefit plan attorneys and advisors, the IRS has indicated that it will be issuing additional guidance throughout the first half of 2005 with respect to the new nonqualified deferred compensation rules. Since plans do not need to be amended to comply with the new rules before December 31, 2005, this guidance will prove helpful in establishing new plan designs.

This is an archive of past issues. As a result, it may contain information that is not current.

The logo for Robinson & Cole LLP is a dark blue, rounded rectangular banner with the text "ROBINSON & COLE LLP" in white, uppercase, serif font. The banner has a slight shadow and a wavy top edge.

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