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Retirement Plans

INSIGHT: IRS Expands Missing Participant Guidance for 403(b) Plans

Susan Bernstein of Schulte Roth & Zabel in New York explains the latest guidance from the IRS regarding the steps administrators of qualified employee benefit plans can take to show they have diligently tried to track down missing or unresponsive members.

BY SUSAN BERNSTEIN, ESQ.

Many sponsors of qualified plans have concerns about how to comply with certain Internal Revenue Service requirements involving payments to participants and beneficiaries who cannot be found or are not responsive (missing participants). Missing participants most often come to the attention of the plan administrator when communications are returned to the sender as undeliverable with no known forwarding address. Missing participants present significant challenges for plan sponsors seeking to maintain compliance with applicable law and governing plan documents.

Despite best efforts by many plan administrators to educate and communicate to participants that they have a duty to keep their contact information up-to-date, the problems abound. The challenges affect plans of all sizes, but are particularly onerous for larger plans and plans in industries with high turnover and immigrant workforces. There are numerous differing reasons why a plan may have an incorrect address on file:

(1) the plan may have entered in bad data—perhaps information was coded incorrectly, such as birthdays, social security numbers, zip codes, or the like;

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(2) the data may have become outdated, for example, the participant has moved without providing forwarding information; or

(3) participants may have provided the plan with erroneous information at the start, such as false social security numbers. For more in depth background on this problem, see Bernstein, *IRS Provides Some Relief on Missing Participant Compliance Concern*, Daily Tax Report (Nov. 20, 2017).

On June 7, 2017, the IRS Advisory Committee on Tax Exempt and Government Entities (ACT) issued a public report of recommendations to the Tax Exempt and Government Entities Division of the IRS, which included a recommendation that the IRS issue guidelines on what steps plan sponsors should take to find missing participants to satisfy qualified plan distribution rules. Advisory Committee on Tax Exempt and Government Entities (ACT), *Report of Recommendations*, p.49 (June 7, 2017).

In response, the IRS Employee Plans Examinations looked at what type of guidance it could provide in this area. In a field directive to Employee Plans examiners dated Oct. 19, 2017, TE/GE-04-1017-0033 (October 2017 field directive), the IRS issued guidance directing examiners to not challenge a qualified plan for violation of applicable required minimum distribution standards if certain steps have been taken. Now the IRS has expanded this guidance to include relief for 403(b) Plans set forth in a new field directive to exam agents (February 2018 field directive). Through both field directives, Employee Plans Examinations has provided relief to plan sponsors that are taking diligent steps to try to track down missing participants. In both field directives, the IRS addresses the application of Section 401(a)(9) to certain circumstances involving a plan's action related to a benefit of a participant or beneficiary whom the plan is unable to locate. With respect to Section 401(a)(9), the IRS makes clear that examiners will not challenge a qualified plan, including a 403(b) plan, for a violation of the minimum distribution requirements if the plan sponsor has taken the following steps:

1. Searched plan and related plan, sponsor, and publicly available records or directories for alternative contact information.
2. Used any of the search methods below:
   - A commercial locator service;
   - A credit reporting agency; or
   - A proprietary internet search tool for locating individuals; and
3. Attempted contact via U.S. Postal Service certified mail to the last known mailing address and through appropriate means for any address or contact information (including email addresses and telephone numbers).

Plan sponsors of 401(a) and 403(b) plans should implement procedures to (1) keep track of terminated employees to avoid them from becoming lost or missing, and (2) to search diligently for those who become missing participants. For suggestions on internal controls, see Bernstein, *IRS Provides Some Relief on Missing Participant Compliance Concern*, Daily Tax Report (Nov. 20, 2017). By staying on top of the census data, plan sponsors will reduce their need to manage missing participants. And, as soon as a participant or beneficiary becomes a missing participant, plan sponsors should initiate steps to diligently search for them in accordance with the two recent IRS missing participant field directives. Plan sponsors should remember to document all of their efforts to locate missing participants.

Plan sponsors have further relief now with respect to the Section 401(a)(9) minimum distribution requirements, however, further guidance is still needed for plan sponsors to navigate other qualification requirements that impact missing participants.

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