

# BENEFITS LAW

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# JOURNAL

## CSI: Missing Participant

### Connecting Retirement Plan Participants with Their Money

Given the dearth of savings, you would think job-hoppers would keep track of their 401k's and pensions left behind at their former employers. You would be wrong, however: the U.S. Department of Labor (DOL) believes that up to 7 percent of participants may have lost touch with their benefits. This is on top of the participants whose "small"—\$5,000 or less—benefit was involuntarily rolled over to an individual retirement account (IRA) when they failed to respond to their former employer's request about what to do with their money. There are no established best practice guidelines, regulations, or user-friendly database for ongoing retirement plans and lost participants to reconnect. A recent General Accountability Office (GAO) report—*Workplace Retirement Accounts: Better Guidance and Information Could Help Plan Participants at Home and Abroad Manage Their Retirement Savings*—has drawn welcome attention to this festering problem. Fortunately, this is one that is easily solved.

**Disappeared.** Participants disappear for a number of reasons. They move, marry, divorce, and change their names without informing their former employers. Worse is when someone dies or becomes mentally incapacitated without leaving a record to help heirs and loved ones to track down benefits or even know that there is something to look for. Another problem is what the GAO calls communication overload: plan participants receive so many legally required, but lengthy and poorly worded notices, that they overlook the important stuff. And with spam and fraudulent come-ons cluttering everyone's mailboxes and smartphones, even real benefits information can be disbelieved.

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On the flip side, employers can do a poor job of following-up on returned mail and other early warnings that a former employee has gone missing but may be still traceable without too much effort. Plus, over time, changing HR staff, plan advisors, and record-keepers, and sketchy records from acquired businesses, only compound the problem. Employers can disappear too after a sale, merger, or spin-off, making it extremely difficult for an individual who knows he or she has a benefit coming to locate the company now controlling the retirement plan.

**No winners.** All parties lose when a participant goes missing. Of course, the individual loses out on an earned benefit. Employers waste money on recordkeeping, compliance, and search costs, plus Pension Benefit Guaranty Corporation (PBGC) premiums if a pension plan is involved. Local government is harmed by providing support to seniors who unknowingly have money stashed away in a forgotten plan. In other words, the unclaimed benefit does not provide a windfall to anyone.

**Existing solutions.** Currently, the government does not offer much help. Employers are required to report to Social Security when an employee leaves the company with a vested benefit. When that person eventually retires, Social Security sends a notice that he or she may be entitled to a benefit from a former employer. As anyone involved in benefits administration will tell you, Social Security's information is often stale, causing the employer to scurry around looking for records showing that the benefit was paid years ago. Social Security blames employers for not providing updates when a benefit is paid, while employers claim that Social Security does a terrible job of maintaining its database. I would guess that it is some of each.

The PBGC helps when a plan terminates by running a program to connect lost participants with their benefits. The plan sponsor provides the government with the person's benefits and contact information, pony's up to the funding, and leaves it to the PBGC to find the participant. However, it is not clear how hard the PBGC tries to find the participant or what its success rate is. Per recent legislation, the PBGC extended the lost participant program to terminating 401(k)s and other defined contribution (DC) plans. This new extension was launched last December and allows employers, after a "diligent search" and payment of a \$35 fee, to transfer the lost participant's DC account to the PBGC. The voluntary DC program is too new to evaluate. Neither of the PBGC lost participant programs are available to a plan that is not terminating.

The IRS and Social Security Administration (SSA) used to help, for a fee, by forwarding benefit statements and employer letters to a participant's address on their respective systems. This useful service was

canceled in 2012 due to costs. (The IRS will forward communications for “humanitarian” reasons—for example, when a parent is dying.)

**DOL says.** The DOL position is that plan administrators have a fiduciary duty to search for missing participants and beneficiaries, and may deduct the reasonable cost of the search from their accounts. The effort should be commensurate with the size of the benefit, with larger amounts requiring more effort and justifying higher out-of-pocket expenses. In Field Assistance Bulletin No. 2014-01, the DOL lists four steps that must be undertaken before giving up:

1. Send certified mail to the last known address;
2. Check all plan and employer records, including health and welfare programs;
3. Check with designated beneficiaries; and
4. Use free e-tools.

After that, employers should consider using commercial locator services, credit reporting companies, and other databases. If the participant is still missing, the sponsor should consider establishing an IRA in the participant’s name to hold the benefit. The IRA would be invested in a “safe” capital preservation-type investment. Other possibilities, according to the DOL, include opening a bank account in the person’s name and making a taxable distribution to the account (less than 20 percent required withholding) or allowing the benefit to escheat to the state.

Not recommended are forfeiting the benefit to be restored if the person shows up (the IRS allows this) or 100 percent income tax withholding: paying the entire amount to the IRS in the participant’s name. Disturbingly, the GAO report concluded that the IRS does not routinely credit a lost participant with the taxes withheld on his or her plan distribution. Instead, the IRS expects the taxpayer to claim the withholding when filing a federal tax return—which, of course, will never happen, since the person does not know about the payment or withholding.

Partly in response to the GAO report, the DOL is conducting a nationwide plan audit to get a better measure of the problem. However, anecdotal evidence and my own practice show that the auditors can be both aggressive and inconsistent about how much effort is enough to meet the fiduciary obligations. Given the lack of guidance and accepted best practices, the DOL’s attempts to enforce unwritten rules is neither helpful nor reasonable.

**It’s easy.** Information technology and social media make this an easy problem to solve.

First, the IRS and SSA should be required to make their resources available in finding lost participants. Their combined database includes everyone who has filed a recent tax return, collected Social Security, enrolled in Medicare or Medicaid, or died in this country (they are notified when a death certificate is issued or is serviced by a funeral home). This combined database should ensure that every person who wants to be found *is* found. Of course, it will not help with folks who, for whatever reason, do not respond.

Second, the IRS should automatically credit a taxpayer with all withholding and notify a taxpayer if they did not claim all of the taxes withheld in their name on a tax return.

Third, the DOL should update its rules for the reasonable steps a plan sponsor should take in looking for lost participants. Agents should be instructed not to apply unwritten shadow regulations that they feel that employers should follow.

Finally, even with the best plan sponsor efforts, strong databases, and government cooperation, some folks either will not be found or will ignore all communications. The government should establish a voluntary pension and DC “lost and found” for both ongoing and terminated plans. (Note, a hastily crafted bill was proposed last month, mostly for the optics of appearing to do something, but it is a start.)

For pension benefits, the logical choice would be to expand the existing PBGC program. After going through established steps to locate missing participants, the employer should be able to transfer the benefit (fully funded under reasonably conservative actuarial assumptions) to the PBGC.

For DC plans, a sensible approach would be to either revive the myRA program or expand the federal Thrift Savings Plan to accept employer rollovers of lost participant accounts. By matching Social Security numbers, each person would have only one account, even if they have gone missing from more than one employer. The account could be invested in safe short-term treasuries for the first year or two. After that, it should be invested in an age-appropriate target-date fund offered under the Thrift Savings Plan. The target-date fund should provide superior returns and insulate the individual from what could be years, or perhaps decades, of inflation.

The pension and DC benefit lost and found would make it simple and easy for anyone to check whether they’ve “misplaced” a benefit while allowing employers to meet their fiduciary responsibilities and clean up their plans. Of course, some people will never show up, and their benefits could revert to the Treasury to cover the costs of the lost and found the program and, perhaps, shore up the PBGC single and multiemployer insurance programs.

With a little common sense and technology, it really should be easy to connect participants with their benefits. Alternatively, employers

From the Editor

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could insert a participant-locating chip in each departing employee's earlobe.

*The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated.*

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