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Retirement Savings Lost and Found— Where Is the Money?

The Retirement Savings Lost and Found to be established pursuant to the SECURE 2.0 Act may serve to reunite workers with their retirement accounts and resolve some of the outstanding challenges concerning missing participants and uncashed checks. Yet, this new online database can raise more issues than meets the eye. Plan sponsors and fiduciaries should consider taking proactive steps to prepare to comply with the new requirements, and continue to monitor the issuance of regulations and related guidance in this area.

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On December 29, 2022, the SECURE 2.0 Act passed as part of the Consolidated Appropriations Act, 2023 (SECURE 2.0 Act). Section 303 of the SECURE 2.0 Act amends Part 5 of Subtitle B of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA) to add a new Section 523 of ERISA, providing for a Retirement Savings Lost and Found, effective no

later than December 29, 2024 (Retirement Savings Lost and Found). The goal of the Retirement Savings Lost and Found is to allow individuals to locate their ERISA-governed defined benefit or defined contribution retirement plan in order to make a claim for benefits owed to them under the plan.

What Prompted the Need for a Retirement Savings Lost and Found?

As noted in the legislative summary of the SECURE 2.0 Act, thousands of people approach retirement every year, but are often unable to locate and receive their retirement benefits because the company they worked for moved, changed its name, or merged with a different company. Similarly, every year, there are employers around the country ready to pay benefits to retirees, but they are unable to find the retirees because the former employees changed their names or addresses. The Retirement Savings Lost and Found seeks to reunite individuals with their retirement accounts through a national online searchable lost and found database maintained at the Department of Labor (DOL). This database will enable retirement savers, who might have lost track of their pension or 401(k) plan, to search for the contact information of their plan administrator.

Retirement plan sponsors have been challenged for many years by missing participants and uncashed benefit distribution checks. Many times, plan participants change jobs and do not keep their contact information up to date with former plan administrators, or the participant may have misplaced retirement plan administrator information. In other cases, terminated vested plan participants may have died or have simply gone missing after reasonable search attempts have been made. Uncashed checks also arise for a myriad of reasons, including a plan participant's failure to cash or receive a distribution check (including small cash outs of \$1,000 or less that are not automatically rolled over to an individual retirement account (IRA)), failure to have a direct deposit arrangement on file with the plan, or due to death. Other times, a participant might obtain a full distribution of their plan account after separating from service, and an additional contribution is made to the plan for their benefit, perhaps due to a plan correction issue or refund that needs to be processed after the participant is long gone. While there has been guidance in relation to missing participants in terminated plans, plan fiduciaries maintaining an ongoing plan have needed more guidance to prudently address these challenges.

Recognizing the need to reunite missing participants with their savings in the most effective way possible, the Advisory Council on Employee Welfare and Pension Benefit Plans (ERISA Advisory Council) published a report in November 2019 entitled "Voluntary Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Programs" (Report). In the Report, the ERISA Advisory Council recommended that guidance should be issued by the DOL to confirm that plan fiduciaries could decide the extent to which a plan could voluntarily transfer uncashed checks to state unclaimed property programs pursuant to minimum standards, and that a plan fiduciary should not be treated as failing to satisfy the duty of prudence for such asset transfers. The ERISA Advisory Council also recognized that a federal clearinghouse approach to uncashed checks, if one could be developed to solve fiduciary concerns while providing participants ready access to lost funds, might be preferable to the voluntary state-by-state escheat approach outlined in its Report. In late October, 2020, The Securing a Strong Retirement Act was introduced in Congress [H.R. 8696], with a provision to create a national online lost and found for retirement accounts.

Thereafter, additional guidance was issued by the DOL to address certain general challenges in relation to missing participants and those concerns in the context of terminated or abandoned plans, as well as challenges concerning terminated vested participants. On January 12, 2021, the DOL's Employee Benefits Security Administration (EBSA) announced three-part guidance pertaining to the location and distribution of retirement benefits to missing or nonresponsive participants including: (1) Best Practices to minimize a missing plan participant population and uncashed check issues; (2) Compliance Assistance Release No. 2021-01 to foster consistent investigative processes and case-closing practices among EBSA's Regional Offices conducting terminated vested participants audits and voluntary compliance efforts by plan fiduciaries; and (3) FAB 2021-01, addressing the DOL's temporary non-enforcement policy of violations under Section 404(a) of ERISA against plan fiduciaries of terminating defined contribution plans or qualified termination administrators of abandoned plans in connection with the transfer of a missing or non-responsive participant's or beneficiary's account balance to the Pension Benefit Guaranty Corporation (PBGC) in accordance with the PBGC's missing participant regulations.

Thus, prior to the passage of the SECURE 2.0 Act, plan participants could try to locate old retirement accounts through their own searches of state unclaimed property databases, DOL abandoned plan sites, Form 5500 filings, or PBGC inquiries. There have also been voluntary search services available online, such as the National Registry of Unclaimed Retirement Benefits, which have provided a service to reunite plan sponsors with plan participants. Plan sponsors and fiduciaries could also implement best practices and procedures to minimize their missing participants and uncashed check issues based on available guidance.

The Road to the Retirement Savings Lost and Found

Prior to, and after, the issuance of H.R. 8696 in 2020, the concept of a retirement savings lost and found was introduced in several other bills leading up to the passage of the SECURE 2.0 Act, including the Retirement Savings Lost and Found Act of 2016 (S.3078), of 2018 (S. 2474), of 2021 (S. 1730), the Securing a Strong Retirement Act of 2021 (H.R. 2954), and in the Retirement Security and Savings Act of 2021 (S. 1770). Some bills had provisions involving oversight for a lost and found database by Pension Benefit Guaranty Corporation (PBGC) or the Social Security Administration. With the mandate for the Retirement Savings Lost and Found under the SECURE 2.0 Act, there is now a statutory requirement under ERISA to reunite plan participants and their beneficiaries with their vested benefits in ERISA retirement accounts.

The Retirement Savings Lost and Found will be an online searchable database managed by the DOL that will allow: (a) an individual to search for information to locate the plan administrator and their contact information for any plan to which the vesting standards of Section 203 of ERISA apply (that is, ERISA defined contribution and defined benefit pension plans), in which the individual is or was a participant or beneficiary; (b) the Secretary of Labor to assist such individual in locating any such plan in which the individual is or was a participant or beneficiary; and (c) the Secretary of Labor to make any necessary changes to contact information on record for the plan administrator based on changes to the plan due to merger or consolidation with another plan, spinoffs, plan terminations, plan name or plan administrator name or address changes, bankruptcies, or other causes. Importantly, the Retirement Savings Lost and Found

requirements call for all necessary precautions to be taken in the establishment of the Retirement Savings Lost and Found related to data privacy protection of individuals' personal information maintained by this database, and provides terms for an opt out from inclusion in the database.

Information Collected from Applicable Plans

For plan years after December 31, 2024, plan administrators of ERISA defined contribution and defined benefit pension plans will need to submit information to the Secretary of Labor at such time, and in the form, to be required in forthcoming regulations. Retirement plans that are not subject to the minimum vesting provisions under Section 203 of ERISA (such as government or church plans) are not subject to this requirement. The information to be collected from applicable retirement plans will include:

- The information described in Sections 6057(b)(1) through (4) of the Internal Revenue Code of 1986, as amended (Code) (that is, any change in the name of the plan or name or address of the plan administrator; any termination of the plan, or any merger or consolidation of the plan with another plan, or the division of the plan into two or more plans);
- The information described in Sections 6057(a)(2)(A) and (B) (that is, the name of the plan and the name and address of the plan administrator);
- The name and taxpayer identification number of each participant or former participant in the plan: (a) who, during the current year or any previous plan year, was reported under Section 6057(a)(2)(C) of the Code (that is, an individual who separated from service during the plan year, who is entitled to a deferred vested benefit under the plan as of the end of such plan year, and who had retirement benefits that were not paid under the plan during such plan year), and who was entitled to a deferred vested benefit under the plan that was fully paid during the plan year; (b) with respect to whom any amount was distributed under Section 401(a)(31)(B) of the Code during the plan year; or (c) with respect to whom a deferred annuity contract was distributed during the plan year; and
- In the case of a participant or former participant with respect to whom any amount was distributed under Section 401(a)(31)(B) of the Code during the plan year (that is, involuntary transfers of cash-outs in excess of \$1,000 but less than the applicable cash-out limit to an individual retirement plan of a

- designated trustee or issuer), the name and address of the designated trustee or issuer described under Section 401(a)(31)(B)(i) of the Code, and the account number of the individual retirement plan to which the amount was distributed; and
- In the case of a participant or former participant with respect to whom a deferred annuity contract was distributed during the plan year, the name and address of the issuer of such annuity contract and the contract or certificate number.

The Retirement Savings Lost and Found requirements state that the Secretary of Labor may only use or disclose the information collected for purposes of assisting individuals in locating their ERISA defined contribution or defined benefit plans, and to such employees of the DOL whose official duties relate to these purposes. The Retirement Savings Lost and Found also will be subject to an annual audit by the Inspector General of the DOL for each of the first five years commencing one year after the database is established, and every five years thereafter. The Inspector General will conduct an audit of the administration of the Retirement Savings Lost and Found and submit a report on such audit to the Committee on Health, Education, Labor, and Pensions; the Committee on Finance of the Senate; the Committee on Ways and Means; and the Committee on Education and Labor of the House of Representatives.

Considerations for Plan Sponsors and Fiduciaries

The Retirement Savings Lost and Found will increase administrative burdens for plan administrators. Plan sponsors and fiduciaries should start to consider the implications of the Retirement Savings Lost and Found on plan administration, cybersecurity, and record retention requirements, and take proactive steps to plan ahead. For example:

- (a) There will be extra administration to organize and maintain information to provide to the online database, such as information related to: (i) deferred vested participants with benefits under the plan; (ii) participants with small balance cash-outs that were automatically rolled to an IRA and the related IRA information; (iii) participants with deferred annuities and annuity provider information; and (iv) plan changes such as mergers, and spin-offs. This information could be organized

and formatted well in advance of the go-live date for the database.

- (b) Consider the interplay of the Retirement Savings Lost and Found rules with Section 120 of the SECURE 2.0 Act that provides for rules relating to automatic portability transactions effective after December 29, 2023. These rules allow for transfers of assets from IRAs that were established due to small balance cash outs (that is, cash-outs of small retirement accounts of more than \$1,000 but \$5,000 or less (or \$7,000 or less after 2023)) to other employer-sponsored retirement plans, as defined under Sections 402(c)(8)(B)(iii), (iv), (v), or (vi) (not including defined benefit plans) in which the affected individual participates. These asset transfers from the default IRA to the new applicable employer retirement plan will be made by automatic portability providers that have certain arrangements with recordkeepers for these employer-sponsored plans, and the transfer transactions will be subject to notice, search, record retention, and audit requirements. These requirements will commence 12 months prior to the creation of the Retirement Savings Lost and Found and will then run parallel to an employer's requirements to keep the Retirement Lost and Found database informed regarding the whereabouts of the initial small balance cash-out and default IRA. It is conceivable that there can be a disconnect between the information reported to the database concerning default IRAs that have been established and the automatic portability providers records regarding transfers of monies from default IRAs to new employer plans. Plan sponsors and fiduciaries should have an action plan to address any glitch in this movement of money between employer plans, default IRAs, and automatic portability providers. This could cause increased administrative burdens on employers and questions from participants regarding the whereabouts of their money.
- (c) With increased interest in adding lifetime income options to defined contribution plans since the enactment of the Setting Every Community Up for Retirement Enhancement, plan sponsors that desire

adding these options should establish practices to address the requirement to provide annuity provider and deferred annuity information to the Retirement Savings Lost and Found database. Plan sponsors and fiduciaries will need to consider the administrative issues that could arise in connection with the obligation to update the database on the annuity providers and any changes that the annuity provider undergoes, especially when annuities are paid outside of the plan.

- (d) While Section 303 of the SECURE 2.0 Act acknowledges that privacy of employee data will be protected in the database, it is unclear how compliance with a patchwork of evolving state data privacy and security laws, or even international and local laws, will be attained. Plan sponsors and fiduciaries will need to consider data privacy and security implications of sharing information with the database and update their benefit plan cybersecurity procedures to incorporate applicable protocols. The privacy opt-out request will also need to be administered.
- (e) Plan sponsors and fiduciaries should revisit plan record retention procedures and determine how the need to provide information to the Retirement Savings Lost and Found may impact current procedures and update them accordingly.
- (f) Consideration should be given to prioritizing missing participant and uncashed benefit

check projects using the DOL's Best Practice guidance so that the list of participants and beneficiaries can be streamlined before information is required to be provided to the Retirement Savings Lost and Found. Robust communication campaigns to terminated participants and beneficiaries may be helpful to spur them to request distributions of vested benefits prior to the time the database is established and to explain the information that will need to be provided to the database, as well as the opt-out provisions.

Concluding Thoughts

It will be imperative to stay abreast of the evolving guidance concerning the Retirement Savings Lost and Found and anticipated regulations. Plan sponsors and fiduciaries that start to organize their information well in advance of the anticipated due date will be in the best position to comply when the regulations are issued, and to reduce their reporting burden by narrowing down their list of deferred vested participants and missing participants in advance. Moreover, implications of adding annuity distribution options, and impact to record retention and cybersecurity protocols also should be considered. Issuing communications to participants and beneficiaries regarding the Retirement Savings Lost and Found also may serve to prompt them to take action with respect to their retirement accounts and to protect their personal information. ■

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