Expansion of PBGC Missing Participant Program

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The Pension Benefit Guaranty Corporation ("PBGC") recently updated and expanded its Missing Participant Program. For most defined benefit plans with missing participants, this program has been a required step in the termination process since 2006. The new regulation, effective January 22, 2018, expands the program to include, on a voluntary basis, terminating defined contribution plans and thereby alleviates problems that employers have had since the Internal Revenue Service ("IRS") and Social Security Administration ("SSA") ceased helping to find missing participants through their letter forwarding program. Now, plan sponsors of terminating defined contribution plans may transfer accounts of missing participants to the PBGC to liquidate the plan and, hopefully, reunite missing participants with their accounts.

The new PBGC program does not yet replace existing guidance from the U.S. Department of Labor ("DOL") regarding missing participants. For example, DOL Field Assistance Bulletin 2014-01, identifies an Individual Retirement Account ("IRA") as the preferred disposition of a missing participant's account and does not envision the possibility that the account may be transferred to the PBGC. However, the preamble to the final regulation indicates DOL's intent to review and possibly revise its guidance to coordinate with the PBGC's final rule.

In addition, below we review some common plan termination compliance snafus and how to avoid them:

1. **Final Amendment(s):** Regardless of the type of plan document, or how long ago it was restated, the document must be updated for all law changes up to the date of termination. To a certain extent, the termination of a plan accelerates the amendment deadline for any recent law changes. If the document is not properly updated, the qualified status of the plan will be at risk.

2. **Successor Plan Issues:** Plan sponsors often assume that terminating a plan will enable participants to take a distribution. This may not always be the case. There is a rule applicable to terminating 401(k) plans, which may prohibit participants from taking a distribution until they actually separate employment. This rule may be triggered if the plan sponsor maintains another plan or adopts a "successor" plan.

3. **Partial Termination:** Upon plan termination, all affected participant accounts must become

100% vested. However, similarly accelerated vesting must occur if there is a “partial termination” of the plan. A partial termination may occur when, for example, more than 20% of plan participants are laid off in a particular year. The IRS has published a website devoted to this concern.

4. **Filing Form 5310 with the IRS:** A plan sponsor may request that the IRS issue a favorable determination letter upon plan termination. While not required, this is often advisable to provide assurance that the plan is not disqualified (through audit or otherwise) after final distributions have been made.

Terminating a plan is often necessary. However, great care should be taken to ensure that the plan is properly wrapped up rather than unraveled.

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