

# ROLLOVER DISTRIBUTIONS FROM TERMINATING PLANS

## AUTOMATIC ROLLOVER PROGRAM

For terminating plan distributions, the Department of Labor (DOL) has issued separate guidance on the steps that plan sponsors must take to search for lost participants in Field Assistance Bulletin No. 2004-02. This advice relates only to terminating defined contribution plans. Generally, the notice details what the DOL expects from fiduciaries of terminated plans in terms of looking for missing participants and distributing plan assets. If participants remain missing after following the search steps as outlined by the DOL, plan fiduciaries may be deemed to have satisfied their ERISA fiduciary responsibilities by rolling over benefits, regardless of the amounts, to IRAs. The DOL recommended search steps include:

- Certified mail
- Review of related plan and employer and administrator records
- Checking with designated beneficiaries of the participant
- Letter forwarding services of IRS or SSA

These steps are required, unless the participant is found. The DOL also suggests other possible methods including:

- Internet search tools
- Commercial locator services
- Credit reporting agencies

The plan fiduciaries can consider which of these tools are appropriate given the number of missing participants, the size of the benefits due and the costs of using the tools. The plans' cost to search for participants may be passed on to the accounts of the missing participants.

After participants are determined to be still missing or non-responsive, the plan fiduciaries must decide how to distribute benefits in order to finalize the termination. Generally, the plan termination will not be recognized unless the plan assets are distributed within a year of the date of termination. The preferred distribution method of the DOL is the rollover of benefits to an IRA so as to preserve retirement assets and avoid tax for the participant.

The DOL finds the circumstances of terminated plans with missing participants similar to that faced by plans making involuntary cashout distributions, and in FAB 2004-02, provides that "fiduciaries who choose investment products that are designed to preserve principal should, as an enforcement matter, be treated as satisfying their fiduciary duties in connection with such distributions, when the fiduciary complies with the relevant requirements of the automatic rollover safe harbor regulation, without regard to the amount involved in the rollover distribution." Therefore, plan fiduciaries that follow the relevant requirements of the Automatic Rollover rules may be deemed by the DOL to have satisfied their ERISA fiduciary duties with respect to the missing participant accounts rolled over to IRAs.

The DOL is expected to expand on its guidance in the future. With respect to defined benefit plans, the foregoing discussion is not relevant for benefits other than those available in a lump sum. Generally, traditional pension plans do not offer a lump sum distribution, other than with respect to involuntary cashout of small benefits of \$5,000 or less. For these, the terms of the Automatic Rollover safe harbor apply. Cash balance plans are more likely to have a lump sum distribution option.

For benefits in excess of \$5,000, a defined benefit plan must pay in the form of a joint and survivor annuity, unless a lump sum option is offered and elected by the participant, in which case spousal consent will be required. Without a lump sum election and spousal consent, any benefits in excess of \$5,000 payable from a terminating plan will be required to be annuitized by the plan through the purchase of an annuity contract from an insurance carrier in the name and on behalf of the participant.

The DOL also issued new regulations which establish standards for determining when a retirement plan is abandoned. The DOL estimates that thousands of retirement plans are abandoned each year by plan sponsors and the new regulations eliminate the need for costly court approval and allow participants to access their benefits sooner.



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