

Required Minimum Distributions and Missing Plan Participants

by Kimberly S. Couch on January 27, 2022

In January of 2021, we published two blog posts regarding Department of Labor (“DOL”) guidance on missing retirement plan participants. The first post describes DOL guidance on best practices for locating missing retirement plan participants. The second post describes the DOL’s Terminated Vested Participants Project (“TVPP”), which was initiated to encourage consistent DOL audit practices and voluntary compliance by plan fiduciaries to maintain better (i) recordkeeping for participant benefits (eligibility date and amount) and contact information, (ii) communication procedures for participants approaching the plan’s normal retirement age and the age to receive required minimum distributions (“RMDs”), and (iii) search procedures to locate missing participants. These posts are available [here](#) and [here](#).

RMDs and IRS Field Directive

In May of 2021, the IRS issued a field directive to all examination agents on missing participants and beneficiaries and RMDs under Section 401(a)(9) of the Internal Revenue Code of 1986, as amended (“Code”). The directive defines when a participant is considered “missing” and states that the failure to make timely RMDs to participants who are not “missing” will potentially disqualify a qualified retirement plan, exposing the plan sponsor and participants to taxes and penalties. The IRS field directive did not receive a great deal of attention last year because it was incorporated into the IRS’s lengthy [Employee Plans Examination Guidelines](#) in the IRS Manual.^[1] Unfortunately, plan sponsors that are currently undergoing IRS audits are experiencing the full effect of the IRS field directive.

Under Section 401(a)(9) of the Code, a participant in a qualified retirement plan is required to commence distributions under the plan by April 1 following the later of (i) the calendar year in which the participant retires or (ii) the calendar year in which the participant attains age 72 (age 70-½, if the participant attained age 70-½ on or before December 31, 2019). If a participant does not receive a timely RMD, he or she is subject to 50% excise tax on the RMD amount. Separate RMD rules apply to the beneficiaries of deceased participants. In general, if a participant dies before benefit payments commence, the participant’s benefits under the plan must be (i) distributed in full to his or her designated beneficiary within five years after the participant’s death^[2] or (ii) paid over the life of the designated beneficiary and commence within one year of the participant’s death.^[3] If the designated beneficiary is the participant’s surviving spouse, payments are not required to begin before the participant would have attained age 72.

The IRS Form 5500 Examination Procedures make it clear that the failure of a qualified retirement plan to make timely RMDs to participants is a qualification failure. A retirement plan must commence RMDs to plan participants by their required beginning dates regardless of whether the participants have made elections to commence their benefits under the plan or have failed to respond to notices regarding their RMD commencement dates. A plan will be treated as failing to satisfy Code Section 401(a)(9) unless the **only reason** for the plan's failure to make a timely RMD is that the participant or beneficiary is missing. A participant or beneficiary is treated as "missing" only after a diligent search that includes **all of the following steps**:

- a search for alternate contact information (address, telephone, or email) contained by the retirement plan, a related plan, the plan sponsor, and publicly-available records or directories;
- use of a commercial locator service, a credit reporting agency, or a proprietary internet search tool for locating individuals; and
- the mailing of a contact letter sent by U.S. Postal Service via certified mail to the last known address and to any other alternate address that is found.

Actions for Plan Sponsors^[4]

First, plan sponsors should promptly review their retirement plan records to determine if there are terminated deferred vested participants and/or beneficiaries of deceased participants who have reached their RMD commencement dates but have not commenced their RMDs. Plan sponsors should then verify if they have good contact information for affected participants and beneficiaries. If the plan does not have good contact information for an individual, the plan sponsor should commence a diligent search using the IRS procedures described above. The plan sponsor should document in writing that all procedures in the IRS field directive have been followed and designate participants who are officially "missing" as defined in the directive.

Second, plan sponsors must correct RMD commencement failures. A plan sponsor may be able to self-correct the plan's failure to make timely RMDs under the IRS Employee Plans Compliance Resolution System ("EPCRS"). The plan must notify affected plan participants and beneficiaries of the failure, commence RMDs, and pay out all outstanding RMDs (plus earnings or an interest payment based on the plan's actuarial equivalence factors). Full correction is required. If a plan sponsor self-corrects under EPCRS, the plan sponsor may avoid plan disqualification. However, affected participants and beneficiaries will be subject to the 50% excise tax on late RMDs.

A plan sponsor may also correct RMD failures with IRS approval using the voluntary compliance program under EPCRS. If a plan sponsor uses the voluntary correction program, it may avoid plan disqualification and request a waiver of the 50% excise tax on affected plan participants and beneficiaries.

If a plan sponsor does not correct under the self-correction or voluntary correction programs, and RMD commencement failures are discovered by the IRS on audit, the plan sponsor may face plan disqualification. To avoid disqualification, the plan sponsor may be required to pay substantial penalties under the EPCRS audit cap program.^[5]

Third, plan sponsors should incorporate the IRS guidelines for “missing participants” into their missing participant search procedures. They should also review DOL guidance on missing participants described in our 2021 blog posts (linked above) and take action to ensure participant databases, communications, and searches align with that guidance. Having good procedures in place will prevent future RMD failures.

Please contact a member of our [Employee Benefits & Executive Compensation Group](#) if you have any questions regarding the IRS field directive on RMDs or missing participant procedures.

[1] The field directive is incorporated into Part 4, Examining Process, Ch. 71, Employee Plans Examination of Returns, Section 4.71.1.4., Examination Objectives and Development of Issues, subsection (15), Distributions.

[2] For defined contribution plans, effective for distributions with respect to participants who die after December 31, 2019, ten years is substituted for five years, except in the case of a beneficiary who is not a designated beneficiary.

[3] For defined contribution plans, effective for distributions with respect to participants who die after December 31, 2019, the “payment over the life of the designated beneficiary” rule is available only to designated beneficiaries who are eligible designated beneficiaries. An “eligible designated beneficiary” means (i) a surviving spouse, (ii) a minor child, (iii) a disabled individual, (iv) a chronically ill individual, or (v) an individual who is not more than ten years younger than the participant.

[4] The duties described in this section may be delegated to the retirement plan administrator.

[5] The number of retired or separated participants entitled to future benefits must be reported on Form 5500. A large number of participants in this category may trigger an IRS and/or a DOL audit.



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