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Many retirement plans have difficulty maintaining current contact information for former employees with account balances. Often, plans find it most difficult to keep track of participants with small account balances - without a significant financial incentive, many former employees simply forget that they have a vested benefit remaining with their old employer.

There are a few tools available to employers to combat the problem of missing participants. Chief among these tools is the "automatic cash-out" rule. Generally, a plan must have a participant's consent to make a distribution. However, the automatic cash-out rule permits plans to cash out account balances of \$5,000 or less without the participant's consent. Even this method, however, isn't always successful. Often a former employee will have moved by the time the check is processed, and the check is returned to the plan without a forwarding address. In those circumstances, the plan has few options remaining:

- * The plan could use the Social Security Administration's and the IRS's letter forwarding procedures. However, these procedures provide no guarantees, and no confirmation that the letters even reach the addressees.
- * The plan could use a private locator service. The disadvantage of this option, of course, is cost.
- * The plan could devote time and effort of its own administration to Internet and other searches. These actions may take time away from other important administrative duties, however, and are not guaranteed successful either.

Now, the Department of Labor has proposed regulations that make the cash-out rule even more effective. The regulations propose to implement a requirement passed in the 2001 federal law known as "EGTRRA." That requirement was that plans must roll over account balances between \$1,000 and \$5,000 to an IRA unless the participant elects otherwise. The regulations elaborate on the type of IRA and the limitations on how fees are charged to the IRA, in addition to other requirements. Notably, the DOL

also appears poised to permit financial institutions who sponsor plans to set up the rollover IRAs in house - without fear of violating ERISA's prohibited transaction rules.

In press releases, the DOL touts the mandatory rollover rule as an important step in reducing "leakage" - the tendency for participants with smaller account balances to cash out their accounts rather than rolling them over to preserve their retirement benefits. For employers, however, the proposed regulations will make it easier to avoid the missing participant issue. Specifically, former employees with small account balances (from \$1,000 to \$5,000) can be cashed out of the plan without their consent, and even if the plan does not have their current address for the participants.

The regulations are expected to be made final (perhaps with some modifications) this summer, and compliance will likely be mandatory six months after the final regulations are published. This means that you should watch carefully for the final regulations to be issued this summer. Soon after they are issued, you can expect to have to amend your plans, and to make arrangements with a financial institution (or yourself, if you meet the requirements for the prohibited transaction exemption) to accept the rollover amounts.

Feel free to contact any of the attorneys in Holland & Hart's employee benefits practice group if you have any questions about what these proposed regulations mean, or if you need advice on dealing with missing participant issues not addressed by the new law (such as participants with account balances over \$5,000).

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