2019 Advisory Council on Employee Welfare and Pension Benefit Plans

Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds

Issue Chair: Jason Bortz
Issue Vice-Chair: Linda Kerschner
Drafting Team: David Blanchett, Glenn Butash, Tearyn Loving, Colleen Medill, Andrea Sellars

The 2013 ERISA Advisory Council ("Council") examined the issues plan sponsors, fiduciaries, service providers, and other parties ("Plan Representatives") face in handling plan benefits payable to participants and beneficiaries who cannot be found or are nonresponsive ("Missing Participants"). The focus of the Council's examination was on both methods of maintaining contact with participants so they do not become Missing Participants and methods of finding participants once they become Missing Participants.

It is, however, inevitable that employee pension benefit plans will owe benefits to participants and beneficiaries who simply cannot be found or are nonresponsive, notwithstanding the reasonable efforts of Plan Representatives. If the plan is unable to deliver benefits to a Missing Participant, including after Plan Representatives have exhausted reasonable efforts to locate the Missing Participant, the plan has a number of options to handle uncashed checks, which may, depending on the type of plan, include the following:

- Rollover to an individual retirement account or annuity ("IRA");
- Forfeiture with right of restoration;
- Transfer to a federally insured benefit account; or
- Voluntary distribution to a state unclaimed property fund.

Unless a Missing Participant is subsequently located or becomes responsive, certain of the above options will ultimately result in transfer to a state unclaimed property fund.

In Advisory and Information Letters issued by the Department of Labor, such as Advisory Opinions 1979-30A (May 14, 1979) and 1994-41A (Dec. 7, 1994), the Department has consistently applied a broad view of ERISA preemption of state unclaimed property and escheat laws. However, that guidance does not limit the extent to which a Plan Representative may voluntarily transfer uncashed checks to a state unclaimed property fund.

The 2019 Council's objective is to review the treatment and procedures utilized by state unclaimed property funds, which may vary significantly between states. Among others, there may be differences in:

- Rates of return credited to unclaimed property;
- Period before escheatment to states;
- Steps utilized by states to locate Missing Participants;
- Success rates of matching Missing Participants with unclaimed property;
- Tax treatment, i.e., are the distributions eligible for rollover treatment; and
- Issues for plans with participants in multiple states.

The 2019 Council does not intend to address what steps are necessary or appropriate in locating Missing Participants. Rather, the purpose of the review is to explore whether there are circumstances in which voluntary transfers of uncashed distribution checks to a state unclaimed property fund advances the Department of Labor's goal of reuniting Missing Participants with their retirement savings.