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Department of Labor's Temporary Policy Allows Voluntary Escheatment of Certain Retirement Benefits

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In this article, the authors delve into the Department of Labor's temporary ERISA enforcement policy for unclaimed retirement benefit payments of \$1,000 or less.

The Department of Labor (DOL) has announced¹ a temporary enforcement policy under the Employee Retirement Income Security Act of 1974 (ERISA) allowing plan fiduciaries of retirement plans subject to ERISA to voluntarily pay over to a state unclaimed property fund retirement benefits of \$1,000 or less if certain prerequisites are established.

The DOL expressed that, since issuing its original guidance in 2021, it has “continued to engage with a range of stakeholders, . . . including representatives of retirement plans, employers, financial services providers, consumers, and state unclaimed property funds,” on issues surrounding missing participants.

Specifically credited is the ERISA Advisory Council, which in a 2019 report recommended the department issue guidance on voluntary transfers of covered benefits belonging to missing participants to state unclaimed property funds. The recommendation was based on “features” of state unclaimed property funds that would purportedly increase the likelihood that missing participants would locate their retirement benefits. These include:

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- That state unclaimed property funds “do not deduct fees from amounts returned to claimants.”
- That the “key purpose of state unclaimed property funds is returning lost assets to owners.”
- That states have “collectively returned billions of dollars to claimants annually for a number of years.”
- That states maintain “robust unclaimed property operations, with staff – and budgeted funds – devoted to outreach, claims processing, IT development, fraud prevention, and marketing.”

Taking the representations of states and their allies at their word, the department in its temporary policy has now stated that it will not pursue ERISA violations should a fiduciary voluntarily escheat benefit payments (including uncashed checks) owed to a missing participant or beneficiary from an ongoing plan (interestingly, the 2021 guidance allowing voluntary escheat was limited to terminating and abandoned ERISA-covered plans) if the benefit is \$1,000 or less, assuming the following five conditions are met:

- The plan fiduciary determines that the transfer to a state unclaimed property fund is a prudent destination for the participant's or beneficiary's retirement benefit payments;
- The plan fiduciary has implemented a prudent program to find missing participants consistent with the department's Best Practices for Pension Plans, and nevertheless has been unable to locate the participant or beneficiary;
- The plan fiduciary selects the state unclaimed property fund offered by the state of the last known address of the participant or beneficiary;
- The plan's summary plan description explains that retirement benefit payments of missing participants or beneficiaries may be transferred to an eligible state fund and identifies the name, address, and phone number of a plan contact for further information concerning the eligible state funds to which the retirement benefit payments are transferred; and
- The state unclaimed property fund qualifies as an eligible state fund.

The term “eligible state fund” is further defined to mean a state unclaimed property fund that:

- (1) Acts as the custodian of the funds for the benefit of the affected participants, beneficiaries, and their heirs and allows for claims to be made and paid in perpetuity regardless of when unclaimed property was received by the state;
- (2) Does not reduce the transfer amount by any fees or other charges; . . .
- (3) Maintains or causes to be maintained a searchable website that reliably shows, at no charge, the name of the missing participant or beneficiary and the name of the plan in the results page of a search and permits an electronic claims process;
- (4) Provides the public with the ability to make inquiries concerning unclaimed property by physical mail, electronic mail and telephone;
- (5) Participates in the National Association of Unclaimed Property Administrators MissingMoney.com website or similar non-commercial unclaimed property database operated under the auspices of the National Association of State Treasurers, Inc.;
- (6) Provides streamlined processing for small claims (e.g., claims of \$1,000 or less);
- (7) Diligently searches at least annually for an updated address for missing participants and beneficiaries for amounts in excess of \$50, and, upon obtaining an updated address, notifies the owner in writing that the state fund is holding the owner's money;
- (8) Permits a plan whose fiduciary has transferred the unclaimed property to the state to pay a reappearing participant or other payees directly, and then obtain reimbursement from the state; and
- (9) Participates in the States' Unclaimed Property Clearing House, as operated by the National Association of State Treasurers.

Put simply, an eligible state fund is a state-controlled unclaimed property repository that can hold benefits for participants in perpetuity without any fees until a claim is made for the return of the benefits. Notably, however, the department allows the plan fiduciary to rely on a representation of a state treasurer that the state possesses a qualifying eligible state fund. Plan fiduciaries may nonetheless wish to consider a periodic process for reviewing these representations to ensure they are current.

Plan fiduciaries looking to rely on this guidance should consider taking stock of their processes for reviewing state unclaimed property funds and searching for missing participants and evaluate how best to document these processes consistent with their duties as plan fiduciaries. Additionally, many summary plan descriptions may not currently contain language covering transfer to an eligible state fund. Plan fiduciaries looking to rely on this guidance may need to review and consider updating their summary plan descriptions to include this explanation. Plan fiduciaries that do elect to escheat amounts to state funds should also keep careful records of these distributions so they can show the actions taken should a participant or beneficiary later return to claim a benefit.

The department notes that its final policy on the disposition of benefits belonging to missing participants or beneficiaries is still up for consideration. Specifically, the department mentioned it is in the process of establishing the Retirement Savings Lost and Found, which will allow participants and beneficiaries to search for the contact information of their plan fiduciaries in order to make a claim for the payment of the unclaimed amounts. And as part of that project, it will consider "more formal guidance" related to the plan fiduciary's voluntary transfer of benefits to state unclaimed property funds.

MAY YOU VOLUNTARILY ESCHEAT?

With the department's issuance of the temporary policy, the same question we asked nearly four years ago should still be asked: may a plan fiduciary voluntarily escheat retirement assets? The department has acknowledged that under some circumstances, this may be a viable option, especially in some cases, at least when the total benefit is \$1,000 or less. The Internal Revenue Code and many plan documents already allow a mandatory distribution of amounts less than \$1,000 – voluntary escheatment may be a viable alternative in some cases when the plan fiduciary is unable to locate the participant or beneficiary. However, the temporary policy provides no insight into the more significant question of whether a plan fiduciary can escheat larger account balances.

As the DOL notes, ERISA requires fiduciaries to exercise prudent and loyal judgment when handling retirement benefit payments. The department attempted to address this requirement by explicitly conditioning its temporary policy on the fiduciary's determination that the state unclaimed property fund is a "prudent destination" for the benefit payments. But the policy falls short of providing adequate assurances to fiduciaries. The department's assurance that it will not pursue claims for violations under ERISA Section 404(a) says nothing about the fiduciary's obligation to participants and beneficiaries. To the contrary, the department states, "This memorandum . . . does not affect the rights of other parties." This leaves fiduciaries exposed to claims from participants and beneficiaries.

On the other hand, voluntarily escheating the benefit payments may be desirable for many reasons, including easing administrative and recordkeeping burdens on plan administrators, and may be attractive to some plan fiduciaries. Although in certain cases voluntary escheat can be appropriate, the absence of full protection from government prosecution or claims from participants and beneficiaries should be considered carefully.

Regardless, voluntary escheatment may now be a plausible option for plan fiduciaries to consider in some circumstances, alongside other options such as distributing small balances in cash or rolling them over to a plan-created IRA. Those interested in voluntarily escheating benefits should consult with legal counsel to evaluate whether the benefits of voluntary escheat and the adequacy of a particular state's representations outweigh any legal risk and ensure they have a prudent and well-documented fiduciary process in place.

IN SUMMARY

- Plan fiduciaries may voluntarily decide to escheat small unclaimed benefits to the state if prudent and if certain conditions are met;
- The DOL's final policy on the disposition of benefits belonging to missing participants or beneficiaries is still up for consideration; and
- The absence of full protection from government prosecution or claims from participants and beneficiaries should be considered carefully.

NOTE

1. <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2025-01>.

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