

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16TH STREET, N.W., WASHINGTON, D.C. 20006 • PHONE 202-737-5315 • FAX 202-737-1308



MICHAEL D. SCOTT
EXECUTIVE DIRECTOR
E-MAIL: MSCOTT@NCCMP.ORG

June 17, 2024

U.S. Department of Labor
Employee Benefits Security Administration
Office of Research and Analysis
200 Constitution Avenue NW, N-5718
Washington, DC 20210
Attn: James Butikofer

By electronic submission via email: ebsa.opr@dol.gov.

Re: Information Collection Request – ERISA Section 523 – Retirement Savings Lost and Found
OMB Control Number: 1210-NEW

Dear Mr. Butikofer:

The National Coordinating Committee for Multiemployer Plans (NCCMP) appreciates the opportunity to respond to the Information Collection Request (ICR) regarding the establishment of a Retirement Savings Lost and Found (Lost and Found),¹ as provided for under Section 523 of the Employee Retirement Income Security Act of 1974, *as amended* (ERISA), newly-added by Section 303 of the SECURE 2.0 Act. The NCCMP is fully supportive of the Department's goals of assisting plans in locating missing participants and their dependents and survivors in order to provide the benefits those participants earned during their working lives.

The NCCMP is the only national organization devoted exclusively to protecting the interests of multiemployer plans, as well as the unions and the job-creating employers of America that jointly sponsor them, and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and health and welfare plans. As such, the NCCMP is uniquely positioned to advocate on behalf of multiemployer plans, sponsoring employers and unions, participants and beneficiaries, and plan professionals to strengthen and preserve the multiemployer benefits system.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code (IRC) section 501(c)(4), with members from every major segment of the multiemployer universe. These industries include airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking/transportation. Multiemployer plans are jointly trusted by labor and management trustees.

¹ 89 Fed. Reg. 26932 (April 16, 2024).

Summary of Comments

The NCCMP has reservations about the mechanisms suggested by the Department in the ICR. In particular, the NCCMP and its members are concerned with the voluntary nature of the proposal. In addition to raising fiduciary concerns, we note that much of the requested information has already been provided to the government. Additionally, the government has tools at its disposal to assist multiemployer plans and their fiduciaries in locating missing participants and identifying deceased participants that it has chosen not to make available.

Comments on the ICR

As an initial matter, the NCCMP is disappointed that the Internal Revenue Service (IRS) determined that it would not cooperate in the construction of the statutorily-mandated Lost and Found database. As the Department is aware, the IRS previously provided a letter-forwarding service to pension and other benefit plans to enable them to locate missing participants.² In 2012, however, the IRS terminated this service, providing the following rationale:

Since the release of this revenue procedure in 1994, several alternative missing person locator resources, including the Internet, have become available.³

Two years later, the Social Security Service Administration (SSA), which had provided a similar letter-forwarding service since 1945, followed suit and discontinued that service as well. As stated by the SSA:

In recent years, the internet offers a rapid expansion of locator resources via free social media Web sites and for pay locator services. The public now has widespread access to the Internet and the ability to locate individuals without relying on our letter forwarding services. Based on the availability of the alternative locator resources and the effects it would be as a cost saving measure, we are discontinuing the letter forwarding service. This decision is in line with the Internal Revenue Service, which successfully eliminated part of its letter forwarding workload as of August 31, 2012.⁴

In enacting ERISA Section 523, of course, Congress determined, and the Department apparently agrees, that these agency pronouncements were mistaken—withdrawing these important tools used by multiemployer and other plans to locate missing participants has left a void that the “free social media Web sites and for pay locator services” cannot fill.

It is also true that one major reason participants cannot be found is because many of them have died. As was amply demonstrated by the recent focus on the plans that received Special Financial Assistance, notwithstanding their lack of access to the SSA’s Death Master File, thereby innocently and inadvertently including deceased individuals in their participant census data, the efforts of private commercial services to locate dead or missing participants would be greatly

² Rev. Proc. 94-22, 1994-1 C.B. 608 (Feb. 28, 1994).

³ Rev. Proc. 2012-35, 2012-37 C.B. 341 (Sept. 10, 2012).

⁴ 79 Fed. Reg. 21831 (April 17, 2014).

enhanced by having access to the full range of information currently in the government's possession. In the case of the full Death Master File, however, Congress itself denied plans and other private parties access to it.⁵

Notwithstanding plans' lack of access to information, the Department continues to make inaccurate and unhelpful statements, such as the following:

[Participants go missing] because of inadequate recordkeeping practices, ineffective process for communicating with such participants and beneficiaries, and faulty procedures for searching for participants and beneficiaries for whom they have incorrect or incomplete contact information.⁶

At the same time, however, the Department acknowledges that, in our mobile society:

[S]ometimes after workers change jobs, their former employers that sponsor the retirement plans go out of business or go through corporate events such as a merger, consolidation, or spinoff.

* * *

The Department believes that it is united with plan sponsors and administrators in the goal of making sure that workers and their beneficiaries receive the retirement benefits they earned and were promised.⁷

Indeed, people move and can be hard to find. Sometimes they move a lot and can be even harder to find. Sometimes they marry or divorce and change names, move into care facilities or with relatives and can be harder to find still. And despite plans' best efforts to remind their participants to notify them of each and every change, people often fail to provide updated contact information.

Currently, nearly all multiemployer plans have procedures to locate missing participants and to identify deceased ones, including using services of private locator companies and reviewing returned mail. Furthermore, because multiemployer plans are collectively bargained, these plans work with both the unions and contributing employers, to the extent they still exist, to locate missing participants. Of course, these efforts are all intended to obtain information that, for the most part, is in the government's possession.

The Department does note in its ICR that much of the data for which it seeks voluntary submission has already been submitted to the government on Form 8955-SSA and its predecessor form, Schedule SSA (Form 5500). Thus, the Department asks that plans now voluntarily re-do work they have already performed to provide information, which, like the Death Master File, is already in the government's possession.

⁵ 42 U.S.C. § 1306c(d), *added by*, Sec. 203, Bipartisan Budget Act of 2013, P.L. 113-67, 127 Stat. 1165 (Dec. 26, 2013).

⁶ 89 Fed. Reg. 26933.

⁷ 89 Fed. Reg. 26933.

One problem with voluntary submissions, of course, is reflected in the concerns expressed by the IRS to justify its refusal to cooperate in the construction of the Lost and Found. That concern is privacy. Just as Internal Revenue Code Section 6103 requires that the IRS protect information provided to it in tax returns, Plan trustees, who as the Department correctly notes are fiduciaries, are concerned that any unauthorized voluntary disclosure of personal participant and beneficiary information may be considered a breach of fiduciary duty.

This concern manifests itself in two ways. First, the individuals whose data may be shared with and, presumably, published by, the Department may seek redress against the multiemployer plan Trustees who voluntarily released that information.

Second, Trustees are concerned that the Department itself would use the information voluntarily submitted to the Lost and Found to act against plan Trustees who are unable to locate some of their participants and beneficiaries. As we have heard from numbers of our member plans, too much of the Department’s “enforcement efforts” and “extensive investigations into circumstances surrounding missing participants”⁸ literally consisted of Department investigators googling the names of missing participants, frequently to misidentify as participants people with similar names. Indeed, many of these investigations dragged on for years, with the investigators disappearing for months and then suddenly reappearing with extensive data demands made on unreasonably short and inflexible deadlines, all the while accusing the plans’ fiduciaries of malfeasance and threatening them with penalties and sanctions.

Indeed, the Department has not suggested that it would afford any sort of “safe harbor” or other protection against fiduciary liability to Trustees who voluntarily provide information to the Lost and Found. Furthermore, the voluntary disclosure by plans to the Department contemplated by the ICR would likely violate various state privacy laws, several of which generally impose an obligation to safeguard personal information from disclosures not specifically authorized by the affected individual, with only limited exceptions.⁹

Far more useful and effective, both for multiemployer plans and their participants and beneficiaries, would be a re-establishment of the now-terminated government programs to locate missing participants and beneficiaries, and the establishment of new such programs, enabling multiemployer plans to use the information already in the government’s possession without sacrificing the privacy of the affected individuals. The same is true for identifying deceased

⁸ Department of Labor Press Release, *US Department of Labor Announces Proposed Information Collection To Build Online Search Tool to Help Find ‘Lost’ Retirement Savings*, <https://www.dol.gov/newsroom/releases/ebsa/ebsa20240415>, April 15, 2024.

⁹ Although plans would argue that these statutes are preempted to the extent that they seek to regulate employee benefit plans, that argument has become even less certain as the result of the Department’s recent and abrupt change in its position on preemption reflected in its brief filed in the *Mulready* appeal. *PCMA v. Mulready*, (10th Cir., No. 22-6074), Docket Document No. 010110841003, Brief for *Amicus Curiae* The United States in Support of neither Party Urging Affirmance in Part and Reversal In Part, April 10, 2023, pp. 17-22.

U.S. Department of Labor
Employee Benefits Security Administration
Office of Research and Analysis
ICR – ERISA Section 523 – Retirement Savings Lost and Found
OMB Control Number: 1210-NEW
June 17, 2024
Page 5

participants. Although some programs, such as providing plans with safe and secure access to the Death Master File, would require legislative changes, others could be established administratively. We encourage the Department and the other interested agencies to engage in such efforts.

Conclusion

NCCMP is uniquely qualified to assist the Department and the other interested agencies in any efforts to provide additional resources for multiemployer plans to locate missing participants and beneficiaries and to identify deceased ones. We believe, however, that the approach outlined in the ICR is misguided and inadequate. The NCCMP also suggests that the Department work with the IRS to determine whether a different arrangement would be possible that would alleviate the IRS's concerns without requiring plans to resubmit information already in the government's possession. Alternatively, a revival of either the IRS's or SSA's letter-forwarding program, with the Department as an intermediary, may be a solution. If these suggestions are not viable, a legislative fix may be required, ideally one that protects the privacy of the participants and beneficiaries without exposing the nation's multiemployer pension plans to additional burdens and risks.

We appreciate the opportunity to provide these responses, and we thank you in advance for considering our views. Should you have any questions or require additional information, please do not hesitate to contact us. We stand ready to assist and consult with you as needed.

Regards,

A handwritten signature in black ink, appearing to read "MDS", written in a cursive style.

Michael D. Scott
Executive Director