



The ERISA Industry Committee

Driven By and For Large Employers

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

*Testimony before the ERISA Advisory Council on Employee Welfare and Pension Benefit Plans
U.S. Department of Labor
Washington, D.C.*

June 26, 2019

Thank you for the opportunity to appear before you today. I am Aliya Robinson, Senior Vice President for Retirement and Compensation Policy at The ERISA Industry Committee (“ERIC”). ERIC is the *only* national trade association that advocates *exclusively* for large employers on health, retirement, and compensation public policies on the federal, state, and local levels. ERIC member companies operate in *every* industry sector and most have employees or retirees in *every* state. Representing *solely the large plan sponsor perspective*, ERIC supports the ability of its large employer member companies to tailor retirement, health, and compensation benefits for millions of workers, retirees, and their families. Given the practical and fiduciary concerns around uncashed checks, we appreciate the ERISA Advisory Council (“Council”) recognizing this issue and providing a forum to discuss ways to address these concerns.

Introduction

As you know, offering retirement benefits is more than just providing a check at retirement. For plan sponsors, offering a retirement benefit requires thoughtful design to address the uniqueness of the workforce and industry, administration of the plan, education of participants, and following the many rules of ERISA before distributing a check (or several checks). While providing a retirement benefit is the ultimate goal, it sometimes is not as easy as it seems. One issue that arises is that occasionally beneficiaries do not cash checks. This topic presents enormous challenges for plan administrators because there is essentially no existing fiduciary guidance.

This area also presents practical difficulties because plan administrators have little control over the check and EFT payment process and have limited ability after a payment is issued to force the participant to cash the check or update his or her bank account information. There is also

applicable law (including under the Uniform Commercial Code) that makes it difficult for plans to frequently cancel uncashed checks. These challenges are compounded for small benefit payments (such as small annuity amounts). ERIC's member companies have reported ongoing problems with participants regularly failing to cash very small annuity payment checks (such as for several dollars). At the same time, it is very difficult for a plan administrator to repeatedly monitor, cancel, and reissue these small payments. These are just a few of the complicating challenges related to uncashed checks.

Large Plan Sponsor Concerns with Escheatment

I would like to share more specifically the concerns of large plan sponsors. As background, there can be several reasons for uncashed checks. First, the check might not make it to the participant or beneficiary. In such case, plan sponsors would treat the participant as "missing" or "lost". We understand that the issue of missing participants is not the focus of the Council's inquiry but it is important to note that this is a related function and can create an uncashed check situation for the plan sponsor. Another situation arises when the beneficiary or participant refuses to cash a check. We have heard from several plan sponsors who have mailing addresses for the beneficiary and have spoken with the beneficiary or the family members and still cannot get the beneficiary to cash the check.

I would also like to emphasize that this is a concern that plan sponsors take seriously. Several member companies have stated that they are consistently working with record-keepers and other service providers to address this issue. One member company has imposed procedures for uncashed checks and missing participants on its record keepers as part of their contractual arrangement. Another member company has implemented an annual "audit" of its record keeper's procedures to ensure steps are being taken to minimize uncashed checks, as well as other issues. These are just two examples of the commitment that plan sponsors are making to address this issue.

ERIC has found that most plan sponsors are hesitant to escheat uncashed amounts because they have been advised by their attorneys that ERISA preempts state escheatment laws.¹ As such, there is a question about a beneficiary's rights against the plan if the benefits are escheated to the state. Specifically, it seems that a beneficiary could assert a claim under ERISA section 502 that the plan should not have escheated the benefit because ERISA preempts state law. In such a case, the plan might find itself paying out the benefit twice – once to the state and then to the beneficiary. Without guidance or clarification, escheating benefit payments to the state, whether voluntary or not, presents legal risks for plan sponsors.

In addition to the legal concerns, there are also significant practical concerns. For one, which state should the plan sponsor transfer the money to? Must the plan sponsor transfer each uncashed check to the state of the last known address of the beneficiary or may the plan sponsor pick one state to which to transfer all uncashed checks? If the plan sponsor must use the state of the last known address of the beneficiary, the plan sponsor will then be required to comply with the relevant escheat rules of each different state for transferring the money, which would be

¹ See, Advisory Opinion 1994-41A (Dec. 7, 1994); Advisory Opinion 79-30A (May 14, 1979); Advisory Opinion 78-32A (December 22, 1978).

administratively burdensome for large employers like ERIC member companies with retirees in every state. For example, states have different waiting periods and notice requirements before funds can be transmitted so for large plan sponsors operating in up to 50 states these requirements would create significant administrative hurdles. Moreover, having to escheat benefits to the last known address could also create difficulties for the beneficiary. Workers and retirees are mobile and, thus, a beneficiary might not keep track of the last address given to an employer – particularly if the employment was several years before retirement. Consequently, a beneficiary seeking owed payments might have to reach out to several different states to find the escheated benefit payment.

Furthermore, on-going benefit payments create additional practical issues. Since the plan cannot escheat future benefit payments, it seems that the plan would have to continually send checks, wait for them to not be claimed, and then transfer the past amounts to the state unclaimed property fund. Moreover, the transfer of past payments to the state would create a situation where the beneficiary would have to seek payment from both the state and the plan.

Consequently, for all of the reasons listed above, plan sponsors are largely unwilling to transfer unclaimed benefit funds, even voluntarily, to state unclaimed property funds. However, plan sponsors would like further guidance and clarity in how to deal with uncashed checks.

Current Procedures Used by Large Plan Sponsors for Uncashed Checks

Since most plan sponsors are advised not to transfer checks to state unclaimed property funds, they must rely instead on other procedures. Unfortunately, there is not much guidance from the federal government in this area for plan sponsors and they are left on their own to determine how best to meet their obligations under ERISA. For amounts that are still considered plan assets, such as rollover amounts, plan sponsors may return these to the beneficiary's account. However, other amounts, such as required minimum distributions, cannot be returned to the beneficiary's account.

To preempt the number of uncashed checks, a plan sponsor in a defined benefit plan might suspend payments after 3-4 uncashed checks and hold the amounts until there is positive confirmation from the beneficiary. Some plan sponsors are requiring positive action from participants – particularly those over the age of 90 – before the checks are sent. However, these approaches do not address the problem of cashing the check – rather, they flag other issues which involve locating the beneficiary.

One process used by large plan sponsors that ensures the check is cashed is to encourage beneficiaries to use direct deposit. And, while plan sponsors are doing this to ease several administrative burdens, they are aware that this can create other issues in keeping track of the death of a participant and can lead to overpayment of benefits.

Recommendations

We understand that the Council has requested to keep this topic separate from the efforts of the Department of Labor to provide guidance to plan sponsors relating to missing participants.

However, ERIC has received reports that the Department is indeed examining uncashed check issues in at least a few of its Terminated Vested Participant Project investigations. ERIC is very concerned about this approach because of the lack of existing fiduciary guidance. Therefore, we request that as part of its report, the Council advise that the Department provide guidance on this topic and refrain from asserting any findings of fiduciary breach related to such uncashed check issues until it provides clarifying guidance on this specific topic.

Several of our member companies have shared with us that they would like to transfer uncashed amounts to state unclaimed property funds but note the concerns cited above. Therefore, it would be extremely helpful if the Department provided another mechanism for plan sponsors to meet their obligations. For example, the Department could create rules to allow permissive transfers in a way that would be beneficial to both plan sponsors and beneficiaries – such as allowing the plan sponsor to choose one state to which to transfer such funds with proper notice to all participants. Other alternatives could also include voluntary transfers to a central repository or to a federal agency. Any of these options could provide a clear, consistent, and streamlined process that would help plan sponsors fulfill their fiduciary obligations and make it easier to beneficiaries (and their families) to find amounts that are due to them.

Conclusion

Members of the Council, thank you again for the opportunity to participate today, and for your interest in this issue. ERIC looks forward to further discussions with you on permissive transfers and the burdens of uncashed checks. I look forward to your questions and continuing this conversation beyond this meeting.

Sincerely,

A handwritten signature in cursive script that reads "Aliya Robinson".

Aliya Robinson
Senior Vice President, Retirement and Compensation Policy
The ERISA Industry Committee