

DO YOUR PLAN A FAVOR: ESCHEW ESCHEATING

Jan 06, 2014

Given the migratory nature of society these days, it is not uncommon for an employee benefit plan to accumulate significant sums of money attributable to the accounts of lost participants. For a number of States, the assets attributable to lost participants are an attractive revenue source.

Utilizing their unclaimed property statutes, many States attempt to seize these funds so they can add them to the State's coffers.

Most employee benefit plans subject to ERISA can sidestep this potential leakage of plan assets through the use of clear plan language that expressly provides for the forfeiture of amounts from the accounts of participants who are determined to be lost after some predetermined period. The language should also provide that those forfeited funds will be utilized either through a reduction of the sponsor's contribution obligation or their application to reduce plan expenses. The Department of Labor has unequivocally concluded that such plan provisions are to be honored irrespective of unclaimed property statutes that might otherwise dictate a contrary result. Most plans that provide for the forfeiture of the accounts of lost participants further provide that those accounts will be restored if the lost participants are later found.

Employee benefit plans that are not subject to ERISA and, therefore, do not benefit from ERISA preemption, can be designed to sidestep unclaimed property statutes with plan provisions that provide for forfeitures before the shortest applicable escheat period runs.

An exception to this approach, however, applies to employee benefit plans that are funded with insurance (even if subject to ERISA). Both the Department of Labor and courts have sided with the States regarding the application of their unclaimed property statutes based on the insurance exception to preemption under ERISA's statutory scheme. Further, the provisions of ERISA do not appear to preclude an employee benefit plan from voluntarily turning over assets attributable to lost participants to a State's unclaimed property department. We believe the better use of such plan assets provide for their utilization to reduce plan expenses or to reduce the sponsor's contribution obligation rather than letting them escheat.

MEET THE TEAM



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