The ERISA Industry Committee

Driven By and For Large Employers

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ERISA Advisory Council
U.S. Department of Labor
Suite N-5623
200 Constitution Avenue, NW
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Dear Members of the ERISA Advisory Council,

On June 26, 2019, I testified before the ERISA Advisory Council ("Council") on Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds. During that testimony certain questions arose for which I requested additional time in which to confer with ERIC's membership. This letter responds to those questions.

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. The answers below are from conversations with various members and reflect their current practices and concerns Given the practical and fiduciary concerns around uncashed checks, we appreciate the opportunity to provide this information and believe it will be helpful to the Council in addressing this important issue.

I. How long before the plan sponsor considers the participant unreachable?

This answer varies not only by plan sponsor but also by the facts and circumstances surrounding the participant/uncashed check.[1] This answer is also impacted by the practices of third-party service providers, such as record-keepers. As you are aware, plan sponsors work under ERISA's fiduciary duties, which are fact-specific and permit appropriate consideration of "reasonableness" factors such as plan cost and participant privacy. As such, the determination that a participant is unreachable will depend upon these types of plan-specific facts. For instance, if the plan receives a returned check due to an incorrect address, there will typically be additional attempts to find a correct address and resend the check. Another example is if the plan receives an indication of death, such as through a death audit. Such notice, in combination with an uncashed check, might lead the plan to consider the participant immediately unreachable. However, if the check is never returned but still not cashed, the plan sponsor

[1] In this letter, references to uncashed checks also includes returned electronic file transfer payments.

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may assume that the participant received the check but is unresponsive and will not make immediate attempts to find a new address. There can also be other facts that support the assumption that the participant is reachable, such as if the participant has a pattern of delay in cashing monthly checks or is cashing checks from another plan (for example, for a participant receiving payment under both a defined contribution plan and a defined benefit plan). Similarly, different approaches may be followed for a check that is $1000 versus a check that is $10 due to the associated costs.

While is it difficult to give a standard answer, it is important to emphasize that plan sponsors are consistently working with record-keepers and other service providers to implement processes and procedures to address this issue and ensure that participants receive their due benefits.

II. How is money re-invested if the plan keeps it?

In general, plan sponsors will forfeit uncashed/unclaimed amounts with the requirement that the amounts be restored if the participant returns to request payment. For defined contribution plans, these funds are typically placed in a forfeiture account and may be used to pay plan administrative expenses or to offset company contributions per the requirements of the plan documents. For defined benefit plans, the funds may be handled in the same manner, or returned to the plan's general assets. Even so, if a participant returns for the check, the plan sponsor will provide the benefit.

III. Should there be a difference between missing participants and unresponsive participants with respect to guidance from the Department of Labor?

In working with the Department of Labor on the missing participant issue, ERIC has asked that these issues be considered separately. Uncashed checks present enormous challenges for plan administrators, in part because there is essentially no existing fiduciary guidance. This area also presents practical difficulties because plan administrators have little control over the check 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). Also, as explained above in response to the first question, the challenges presented by uncashed checks can vary by the facts and circumstances surrounding the participant/uncashed check. These are just a few of the complicating challenges related to uncashed checks. Consequently, we feel that this topic is sufficiently complicated in its own right that it should receive its own deliberative attention and consideration.

IV. In addition to the questions raised by the Council, our members have raised two additional issues for the Council to consider.

Self-funded Health Care Plans. In many cases where a self-funded health care plan uses a third-party administrator ("TPA"), the TPA will pay the individual claims and then the plan sponsor will send one check from the plan to cover the aggregated claims. If the individual checks are uncashed/returned, some TPAs will escheat these monies. Since these are self-funded plans, it is assumed that these

amounts are still plan assets and, therefore, it is not clear whether escheatment is appropriate – especially without the plan sponsor's approval. ERIC asks that the Council research this issue to determine what, if any, additional guidance may be needed with respect to this situation and other similar situations.

<u>Stale Checks</u>. In instances where a participant uses a check cashing facility, the check cashing facility may not ever present the check – particularly for small amounts. However, a secondary business of buying stale checks (which may include benefit payments) from check cashing businesses for less than face value has arisen. The purchaser of these checks will then present the check to the plan for payment. Because the check is stale, the plan refuses to pay but then the purchaser sues the plan under UCC negotiable instruments and/or state presentment laws. The participant presumably has been paid the funds because the check cashing facility assumed the risk of the stale check and charged a premium for that risk. But, as for the plan, the check has never been properly presented for payment. Therefore, the plan technically has an uncashed check even though the benefit has been paid to the participant. Therefore, has the plan satisfied its obligation under ERISA?

While both of these issues present very different fact patterns, they both raise the question of the status of uncashed checks and whether the corresponding amounts set aside to cover those checks (which are typically held in an omnibus paying account by the plan's paying agent) are plan assets subject to ERISA. We believe that this is an area where additional guidance from the Department of Labor would be very helpful.

ERIC thanks the Council for its interest in this issue and we look forward to continuing this conversation with you and the Department of Labor.

Sincerely,

Aliya Robinson
Senior Vice President, Retirement and Compensation Policy