

# QRP Legal Issues

## Learning Objectives

- ✓ Recognize when plan assets may be used to cover plan expenses
- ✓ Better understand the legal distinctions between contractors and employees
- ✓ Identify the rules for plan audits, including new AICPA auditing standards
- ✓ Describe the options employers have with missing, nonresponsive, or terminated participants



# Paying Plan Expenses

# Paying Plan Expenses



Must act in best interest  
of participants and  
beneficiaries



Reasonable administrative  
expenses incurred in  
maintaining employer-  
sponsored retirement plan

# Self-Dealing



No self-dealing



Exemption allows  
reasonable  
compensation for  
services rendered



Fiduciary can recover only  
amounts incurred for  
services performed directly  
for employer-sponsored  
retirement plan

## Type of Expenses: Administrative vs. Settlor



Administrative fees  
may be paid from  
plan expenses



Settlor fees should  
not be paid from plan  
expenses

## Additional Considerations



Fees must be reasonable



Uniform and nondiscriminatory

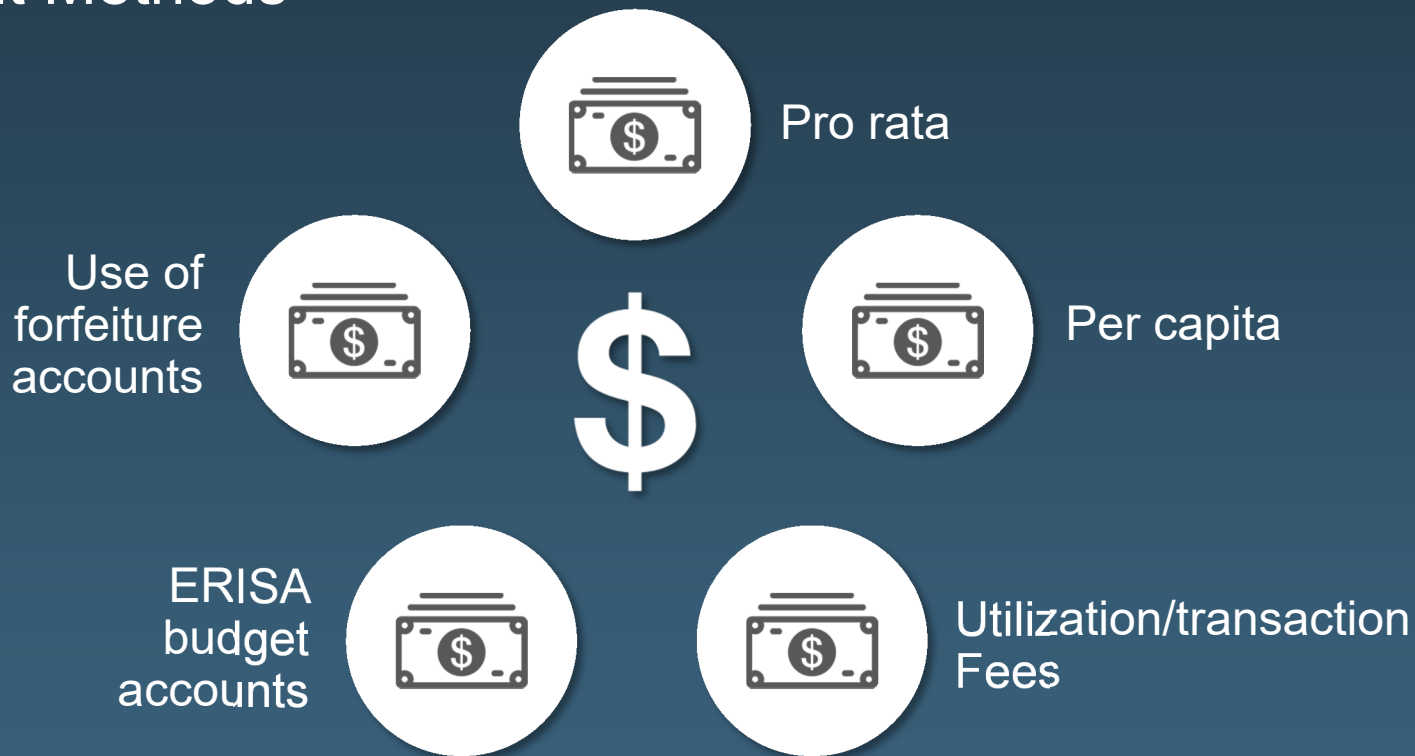


Charge fees to only those participants who use service



Allows employer to cover fees for active participants while terminated participants can be required to pay fees pro rata

# Payment Methods





# Independent Contractors



# Independent Contractors

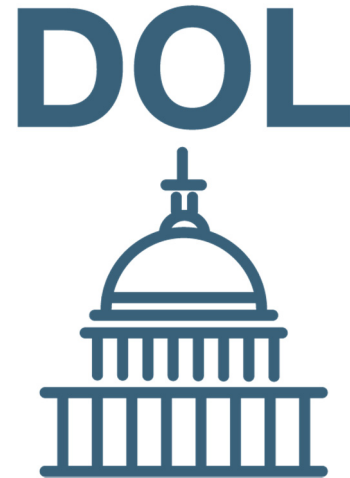


Can reduce administrative burdens and costs associated with hiring employees



Must be diligent in ensuring that they are not employees

# Determination of Worker Relationship



# IRS Determination



Behavioral  
control



Financial  
control



Type of  
relationship

# DOL AI No. 2015-1



# DOL AI No. 2015-1

## Factors to consider



- Extent to which work performed is integral part of employer's business
- Worker's opportunity for profit or loss
- Extent of relative investments of employer and worker
- Whether work performed requires special skills and initiative
- Permanency of relationship
- Degree of control exercised or retained by employer

# DOL Opinion Letter FLSA2019-6

Application of Law to Specific  
Circumstances Issued April 2019



Service provider for virtual  
marketplace economy



Employee vs. independent  
contractor



Identifies factors to consider



Workers who provide services through  
this specific company's virtual platform  
are independent contractors

## Factors to consider



- Extent to which work performed is integral part of employer's business
- Worker's opportunity for profit or loss
- Extent of worker's investment in facilities, equipment, and helpers
- Whether work performed requires special skills and initiative
- Permanency of relationship
- Degree of control exercised or retained by employer



# Case Law

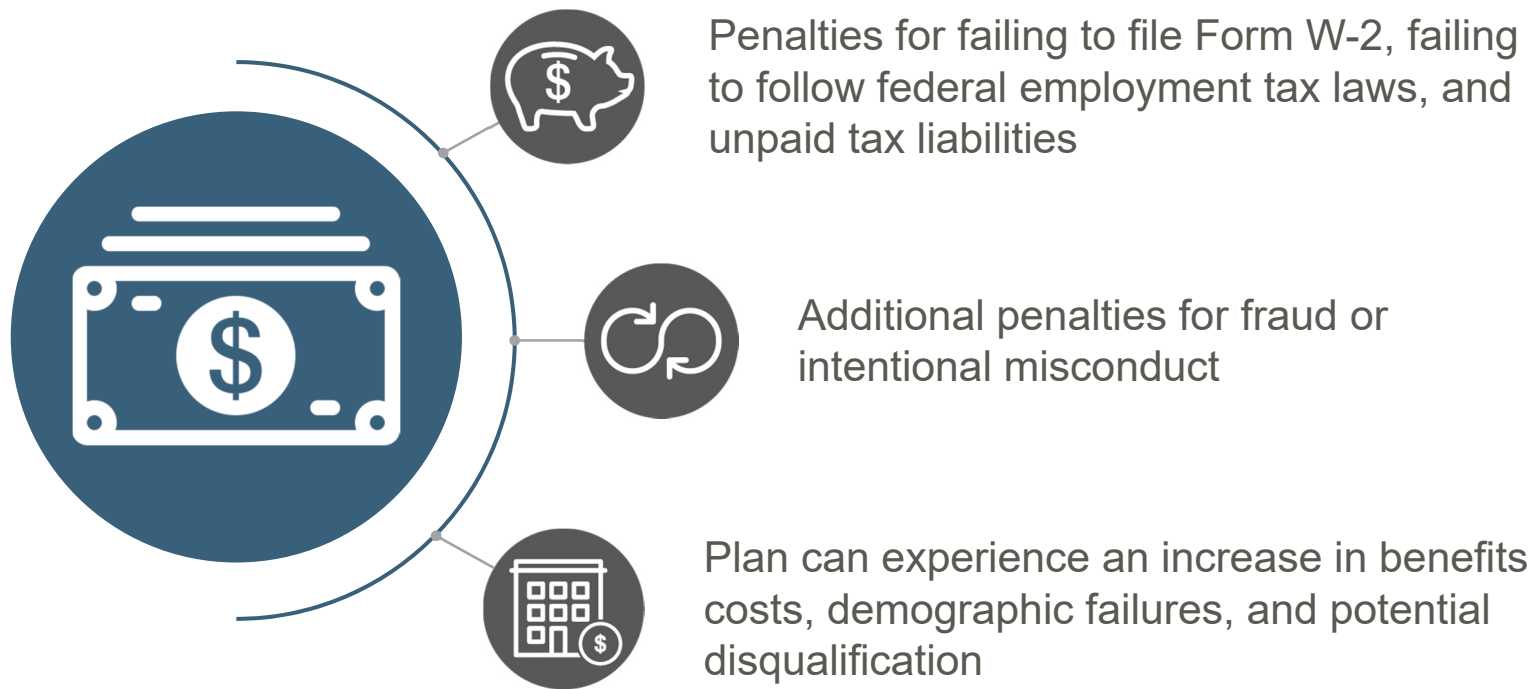


***Nationwide Mutual  
Insurance Company v.  
Darden***



***Vizcaino v. Microsoft***

# Consequences of Misclassification



## Voluntary Classification Settlement Program



- Take advantage of lenient penalty framework
- Pay less in back taxes and avoid interest
- Reclassify workers to employees on a go-forward basis
- Consistently treat workers as non-employees
- Cannot currently be under audit



# Plan Audits

## Plan Audits

### ERISA Reporting and Disclosure Requirements



Employers with qualified plans generally are required to file an annual report with DOL



IRS Form 5500 gathers information on plan's financial condition and operations

**ERISA**  
THE EMPLOYEE RETIREMENT  
INCOME SECURITY ACT

# Audit Requirements



## **Certain plans have additional requirements**

File an annual audit along with Form 5500



## **“Large plans”**

100 or more eligible participants



## **“Small plans”**

Now have 121 or more eligible participants



## **Eligible participant**

- Any employee eligible to participate
- Terminated employees with a balance

# Types of Audits

## Limited Scope Audit



Do not audit investments or plan value  
Trustee/custodians provide certified statements

## Full Scope Audit



Audit investments and plan value  
No certified statement provided by trustee or custodian  
Nontraditional assets



# Hire an Auditor

## Select a firm

- ERISA rules and regulations
- Experienced or skilled in retirement plan audits

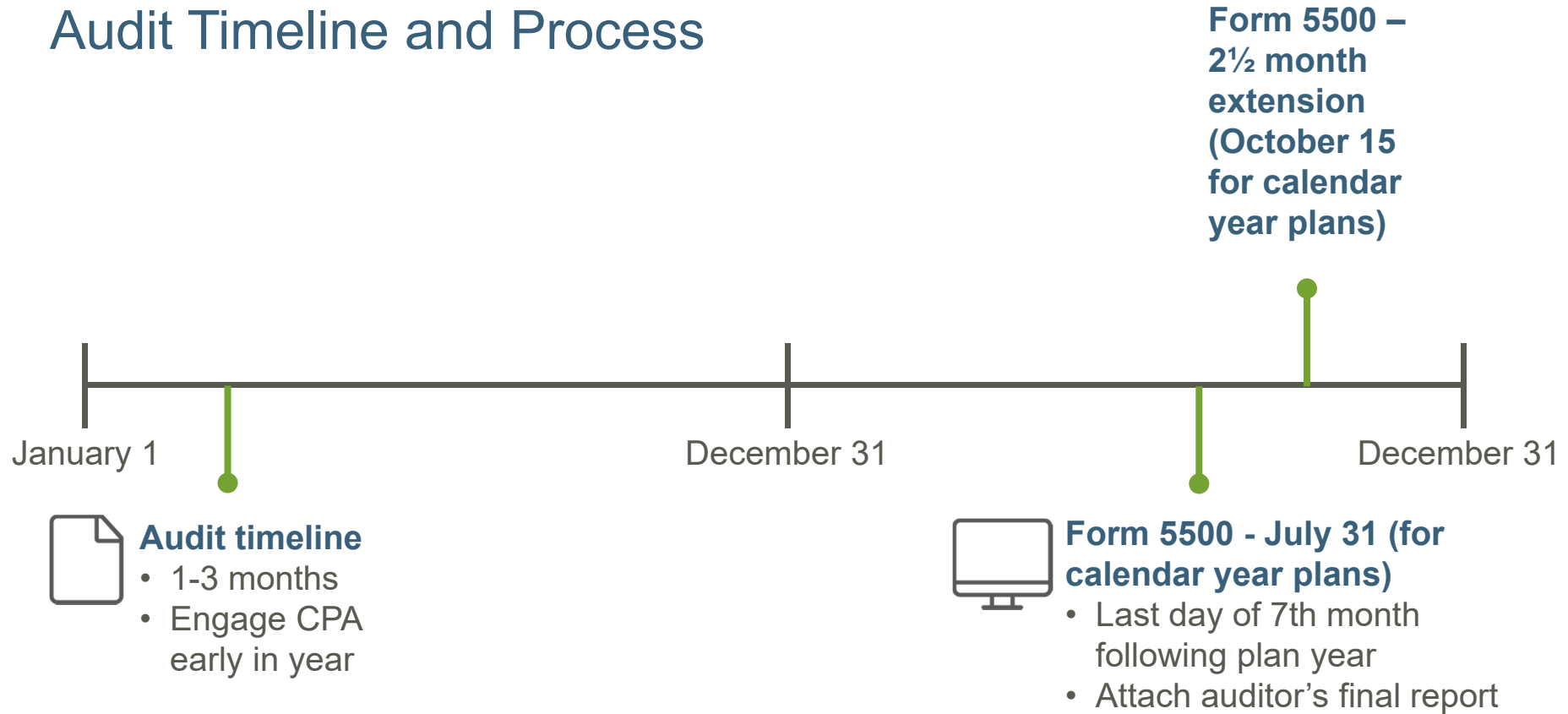


## Plan for costs

- Plan complexity
- Full scope vs. limited scope



# Audit Timeline and Process



## Collect Documents and Information



- Executed plan documents
- Current SPD
- Copies of prior year Form 5500 filings
- Plan census data
- Distribution and loan reports

# Auditor Testing and Verification



## Plan Compliance

- Operation of plan follows plan document
- Eligibility
- Timely deposit of contributions
- Compensation
- Testing



## Financial Reporting

- Plan financial data
- Assets and liability data



## Internal Controls

- In place
- Procedures being followed

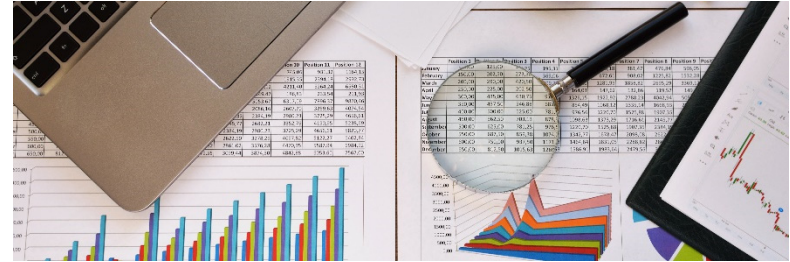
# Auditor Completes Report

## Final Analysis



### Opinion on

- Financial statements
- Whether internal controls are effective and sufficient



### Types of Opinion

- Unqualified
- Qualified
- Adverse
- Disclaimer of Opinion

# AICPA Plan Auditing Standard

## DOL Assessment

- 2015 DOL report
- Audit deficiencies



## Changes to Plan Audit Standards

- AICPA worked with DOL
- Final standard issued in July 2019
- Creates new reporting and performance requirements
- “Limited scope” audit now “ERISA Section 103(a)(3)(C)” audit
- Effective for audits of ERISA plan financial statements for periods ending on or after December 15, 2020



# Missing Participants

# Missing Participants



# IRS Guidance



Rev. Proc. 2019-19



Must take  
reasonable actions  
to find all individuals  
entitled to benefits



IRS and Social  
Security letter  
forwarding programs  
no longer available



# IRS Internal Memo

Plans should not be considered in violation of RMD standards if plan



Searched records  
of plan, plan  
sponsor, and  
publicly-available  
records for  
alternative contact  
information



Used any  
commercial locator  
service, credit  
reporting agency, or  
proprietary Internet  
search tool



Attempted contact  
by U.S. Postal  
Service certified  
mail to last known  
mailing address

# DOL Guidance



FAB 2014-01

1 

Applies to certain terminating defined contribution plans

2 

Relevant to ongoing plans

3 

Replaced FAB 2004-02

# DOL Guidance



# DOL Guidance

## Distribution options

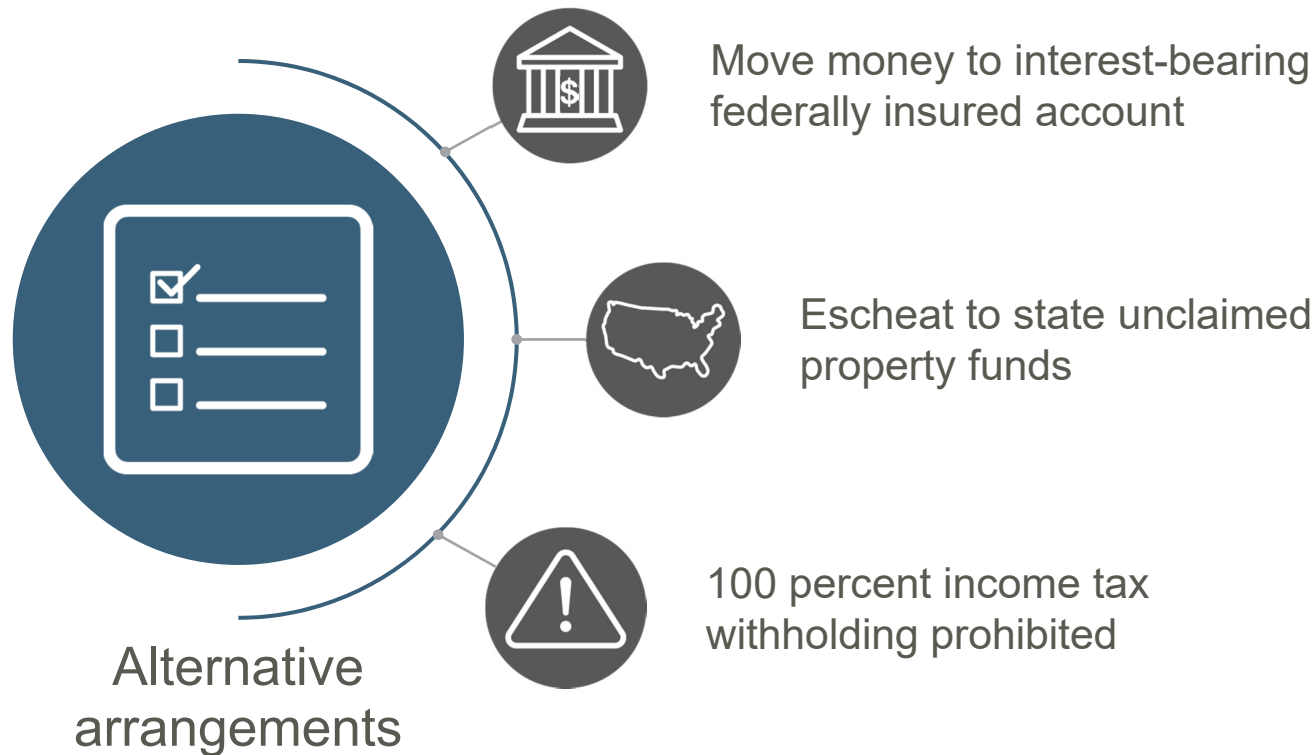


Forfeit missing individual's  
account balance

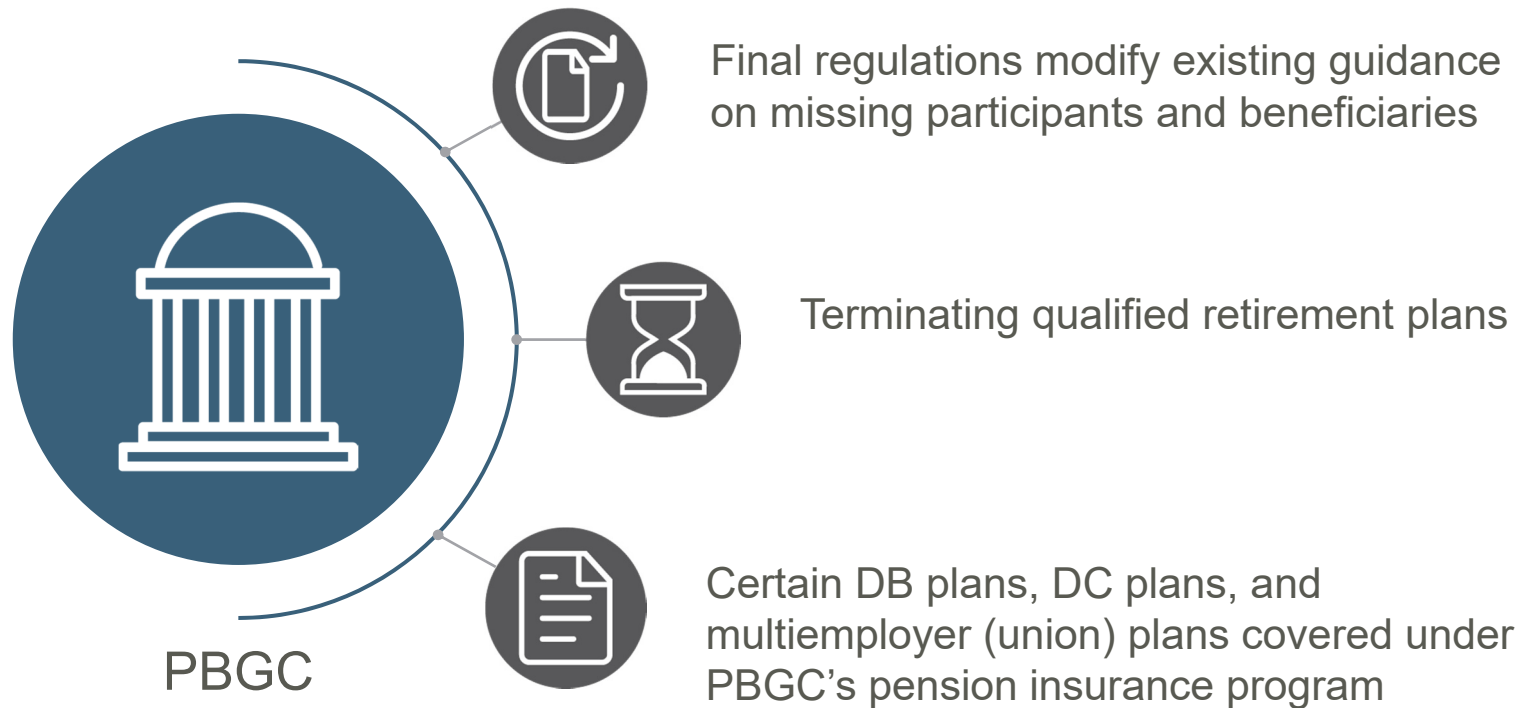


Roll over balances  
to an IRA

# DOL Guidance

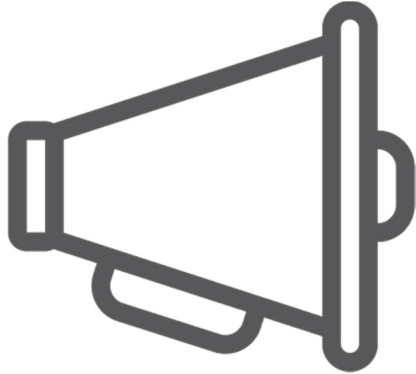


# DOL Guidance



# Recent Activity

## Legislation



Retirement Savings Lost  
and Found Act



Assist participants and beneficiaries in finding and obtaining unclaimed retirement benefits



Provide plan administrators with a new option for balances of missing or lost participants

# Recent Activity

## GAO Report

- Released to public in 2018
- Recommends DOL issue guidance to help ongoing plan sponsors search for separated participants





# Recent Activity

## Stepped-Up Enforcement

- DOL audit initiative of missing participants in DB plans
- Attention turned to DC plans
- Industry has called for formal guidance
- DOL working to address concerns



# Appendix: Plan Expenses Case Study

Page 23



# Appendix: Independent Contractor vs. Employee Exercise

Page 25



# Additional Case Studies

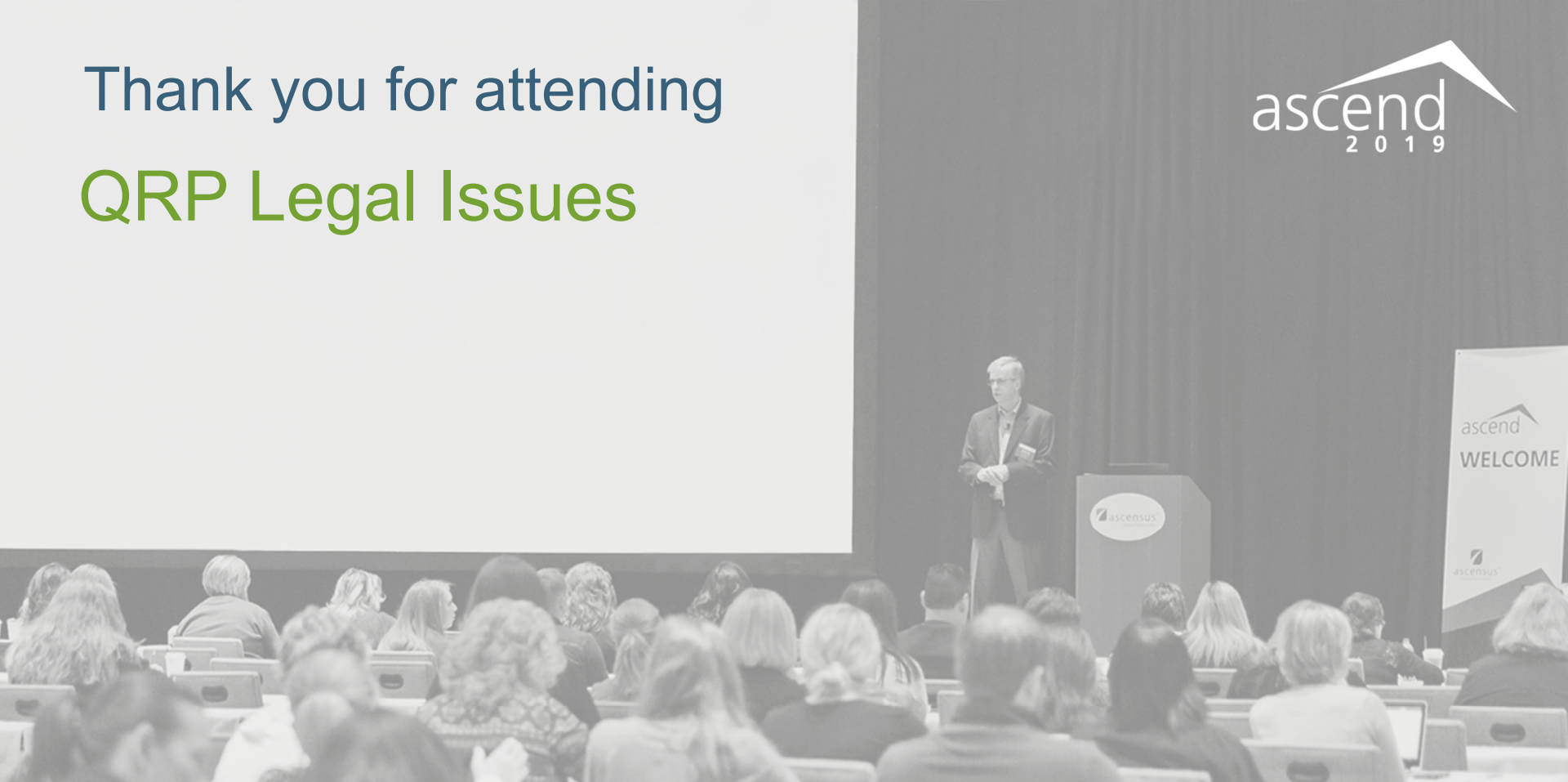
Field Assistance Bulletin  
(FAB) 2014-01



# Questions?

# Thank you for attending QRP Legal Issues

ascend  
2019



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