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Retirement Lost: Enhancing the Durability of the 401(k) Account

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Abstract

American workers have left billions of dollars in 401(k) accounts that they may never be able to find. The problem affects low-wage workers the most, aggravating income-based retirement inequality. Workers who are laid off or change jobs often leave their 401(k) savings in a former employer's plan. As time passes, communication breaks down between departed employees and their plans, and changes to the employer, plan provider, or individual accounts may prevent the worker from finding the account. Once participants and plans have lost contact with each other, many plans force transfer balances under $5000 into Individual Retirement Accounts, without the knowledge of the absent account owners. Whether a retirement product can endure for the years necessary to provide retirement support—what this article calls the product's "durability"—depends upon (1) whether the product retains its value and (2) whether the owner will, as a practical matter, retain access to that value over time. This Article argues that there is an urgent need to enhance the practical durability of 401(k) accounts, and advocates for the consolidation of plan and individual account information into an accessible Retirement Savings Lost & Found database. A database that utilizes and leverages information already existing across government agencies will empower workers and retirees to locate their lost accounts, building a stronger and more equitable retirement system for the future.

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INTRODUCTION

Retirement security for millions of Americans depends on the money set aside in 401(k)[1] and other defined contribution accounts during their working years.[2] Yet, billions of dollars that workers have saved are subsequently lost to them, simply because the retirement system is so complex and confusing that the participants lose track of their plans after they leave their jobs, and the plans lose track of their participants.[3]

Employees contribute to 401(k) accounts to provide support for themselves and their families years or decades into the future.[4] They forego current income and spending to contribute to a retirement account with the expectation that those funds will grow over time and be available to them when they retire.[5] To serve this purpose, 401(k) plans and the processes tied to them must be robust enough to ensure that funds are accessible decades after they were earned.[6]

There is a tension between this fundamental aspect of employer-sponsored retirement accounts—their "durability" over time—and the transient nature of the employer-employee relationship in the United States.[7] This is compounded by mergers, acquisitions, and other changes impacting both companies and pension plans.[8] The decentralized nature of the U.S. retirement system cre-

1. While this Article focuses on the 401(k) account, other types of defined contribution accounts are subject to similar issues.

2. Andrew G. Biggs, et al., *Why Are 401(k)/IRA Balances Substantially Below Potential?* 2 (Ctr. for Ret. Rsch., Working Paper No. 19-17, 2019), https://bit.ly/2YbFbcJ [https://perma.cc/5GXK-3QSJ].

3. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-73, 401(K) PLANS: GREATER PROTECTIONS NEEDED FOR FORCED TRANSFERS AND INACTIVE ACCOUNTS 1–2 (2014), https://bit.ly/3GNmJsA [https://perma.cc/25DH-42CS].

4. Neil Bhutta et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, FED. RSRV. BULL., Sept. 2020, at 1, 10.

5. *Id*.

6. As described in Section II *infra*, 401(k) plans are often the entry point for funds that are subsequently rolled over into Individual Retirement Accounts (IRAs). *See* Alicia Munnell & Anthony Webb, *The Impact of Leakages from 401(k)s and IRAs* 4 (Ctr. for Ret. at Bos. Coll., Working Paper No. 2015-2, 2015), https://bit.ly/3B43Hei [https://perma.cc/8VLK-BNEY].

7. At the beginning of 2020, median job tenure was 4.3 years for men and 3.9 years for women. U.S. BUREAU OF LAB. STAT., USDL-20-1791, EMPLOYEE TENURE IN 2020 (2020), https://bit.ly/3zW55OP [https://perma.cc/YR58-N8MS].

8. Mergers and acquisitions activity has remained strong since the 1980s, and although it has occurred in several waves over time, has seen an upward trend overall. *See Number and Value of M&A North America Chart,* INST. FOR MERGERS, ACQUISITIONS AND ALLIANCES (Jan. 8, 2021), https://bit.ly/3o3AHOM [https://perma.cc/54DQ-CB5J].

ates a dilemma for participants who cannot find their accounts. Over the years, lost accounts may remain 401(k) accounts, but they also may become Individual Retirement Accounts (IRAs), or even be cashed out without the knowledge or consent of their missing owners. The United States lacks a national database of 401(k) accounts, IRA accounts, or uncashed checks. Participant protections are not enforced by a single regulator, or governed by a single set of laws. As a result, once a plan and participant lose contact, there is no single government agency or comprehensive database where the participant can turn for help connecting with the account again.[9]

The unfortunate result is that millions of workers and retirees lose access to their money over time, not because of poor market performance or mismanagement, but simply because the retirement system is so complicated that they cannot find their accounts.[10] Instead of combining their retirement savings over time as they move from job to job, many workers simply lose track of them entirely.[11] The amount of retirement savings at risk is potentially in the tens of billions of dollars, if not more.[12] Accounts of any size may become lost, but those that are most likely to be affected have balances below $5000—accounts that may belong to lower-paid workers, for whom the lost retirement income could have a significant impact on financial well-being at retirement.[13] This problem urgently needs to be corrected as a matter of fundamental justice for workers, older Americans, and their families.

This Article analyzes the lost 401(k) problem by examining gaps in the retirement system and the impacts on individual account owners. Section I provides an overview of defined benefit and defined contribution accounts. This section also defines a new term, retirement product "durability," to explain the failures of the 401(k) account as currently structured and situated within the existing retirement system. Any financial product intended for retirement must have the practical durability to be accessible to the account owner when that person needs the funds. The 401(k) account lacks this practical durability for the millions of workers

9. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 26–28.

10. *Id.* at 1–2.

11. *Id.*

12. *See infra* Section IV.B.

13. *See* ADVISORY COUNCIL ON EMP. WELFARE & PENSION BENEFIT PLANS, REPORT TO THE HON. THOMAS E. PEREZ, U.S. SEC'Y OF LAB., PARTICIPANT PLAN TRANSFERS AND ACCOUNT CONSOLIDATION FOR THE ADVANCEMENT OF LIFETIME PLAN PARTICIPATION 10 (2016), https://bit.ly/2YcCulk [https://perma.cc/H4MJ-2ZK4] [hereinafter ADVISORY COUNCIL 2016]

whose accounts are lost, and who have limited avenues under the status quo to reunite with their money.

Section II explains the basics of how 401(k) accounts work, focusing on the options that are available to workers when they depart their employer. Section III then explains how the existing retirement system undermines the practical durability of participants' accounts after they depart their employment. This is particularly the case when their employer, plan, or employer-sponsored retirement account goes through significant changes over time.

Force-transferred accounts complicate the challenge of finding lost 401(k) accounts for many workers. This Article uses the term force-transferred IRA to refer to an account created under IRC § 401(a)(31)(B)[14] when a retirement plan cannot locate a plan participant and no longer wishes to maintain the participant's account within the plan. Under the statute the plan may transfer the account to an IRA. These accounts are also called "automatic rollover IRAs" and "safe harbor IRAs," but this Article uses the term "force-transferred IRA" as this is the terminology used by the Government Accountability Office (GAO) in its report on the issue.[15]

In Section IV, the Article conducts a participant-centric analysis of lost 401(k) accounts, with a focus on the role of force-transferred IRAs. Finally, Section V considers two enhancements to the retirement system that improve practical durability. The first, "auto portability," was recently the subject of action by the Department of Labor (DOL) to pave the way for the company Retirement Clearinghouse LLC to offer this service.[16]

The second enhancement is the creation of a centralized, national retirement account registry, or "Retirement Savings Lost and Found," where any person with a U.S. retirement account could access up-to-date information about their plan in real-time. This registry has been the subject of recent legislative proposals, including the Securing a Strong Retirement Act of 2020 ("SECURE Act 2.0").[17] A registry would centralize the significant retirement plan

14. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 657, 115 Stat. 38, 135–37.

15. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3. These accounts are also referred to as "automatic rollover IRAs" and "safe harbor IRAs." *See id*. at 2 n.7; *see, e.g.*, *Safe Harbor IRA*, MILLENNIUM TRUST CO., https://bit.ly/3D6GRnb [https://perma.cc/RA4W-FGKE] (last visited Feb. 8, 2021).

16. Notice of Exemption Involving Retirement Clearinghouse, LLC, 84 Fed. Reg. 37,337 (July 31, 2019).

17. *See, e.g.*, H.R. 2954, 117th Cong. § 306 (1st Sess. 2021) ("The Securing a Strong Retirement Act of 2020," or "SECURE 2.0"). Similar provisions were included in the version of SECURE 2.0 that was introduced in 2020; and in several prior bills introduced in past years that failed to advance. *See* H.R. 8696, 116th

information that is currently in the possession of U.S. government agencies and plan providers, granting Americans access to their information as they need it.

Finding solutions is critical to ensuring that workers have access to their retirement savings. Workers and retirees are often powerless to fix these problems on an individual level.[18] By the time they realize that their accounts are missing, it may be too late to act.[19] Existing protections under the Employee Retirement Income Security Act of 1974[20] (ERISA) are insufficient, particularly when accounts are moved to forced-transfer IRAs and out of ERISA's purview.[21] Without significant enhancements to the current system, participants will simply continue losing their money—and they, their families, and communities will suffer down the road when it comes time to retire.[22]

In addition to the impact on the individual, the lost-accounts problem violates basic values of equity and fairness and undermines a fundamental goal of the modern retirement system.[23] ERISA was designed to reduce plan discrimination favoring higher-income workers, and to create a retirement system that supports workers across the income spectrum.[24] Yet, the current system of 401(k) and IRA accounts does a poor job of facilitating retirement savings for low-wage Americans.[25] These workers are less likely to have access to a plan through their employer, and are less likely to voluntarily participate when their employer sponsors a plan.[26] As a group, low-income workers are also more likely to deplete their retirement savings through early withdrawals.[27] Not surprisingly, the result is that

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Cong. § 306; S. 7439, 116th Cong. ("Retirement Savings Lost and Found Act"); S. 2474, 115th Cong. ("The Retirement Savings Lost and Found Act of 2018"); S. 3078, 114th Cong. ("The Retirement Savings Lost and Found Act of 2016").

18. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 48–49.

19. *Id.* at 48.

20. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in part at 29 U.S.C. ch. 18).

21. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 15.; Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in part at 29 U.S.C. ch. 18).

22. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 47.

23. *See* H.R. REP. NO. 93-533 (1973).

24. *Id.*; *see also* 26 U.S.C. § 401(a)(5).

25. ALICIA MUNNELL & ANQI CHEN, 401(K)/IRA HOLDINGS IN 2019: AN UPDATE FROM THE SCF 7 (2020), https://bit.ly/3bMUBI7 [https://perma.cc/JCP2-DYRR].

26. *See* April Yanyuan Wu, Matthew S. Rutledge, & Jacob Penglas, *Why Don't Lower-Income Individuals Have Retirement Savings Plans?*, COMMUNITIES & BANKING, Winter 2015, at 1, 2.

27. *See* ARIEL EDUC. INITIATIVE & AON HEWITT, 401(K) PLANS IN LIVING COLOR: A STORY OF 401(K) SAVINGS DISPARITIES ACROSS RACIAL AND ETHNIC

lower-wage workers retire with significantly less money in retirement accounts than higher-paid workers—if they have any retirement savings at all.[28]

In light of these inequities, it is imperative to preserve retirement savings contributed by low-income workers. While retirement accounts of all sizes may become lost, lower-wage workers are particularly affected through the forced transfer of accounts with balances below $5000.[29] Left to grow tax-free for several decades, an account with even a few thousand dollars could become a significant nest egg by the time the money is withdrawn for retirement. Even the most robust financial performance is useless, though, if a retiree cannot locate the account at retirement.

I. FINANCIAL AND PRACTICAL DURABILITY

Since the passage of ERISA, the U.S. retirement landscape has experienced a dramatic shift from defined benefit plans, to defined contribution plans. As defined contribution plans began growing in popularity in the 1980s, they were considered primarily as a way to supplement traditional pensions.[30] Over the subsequent years, however, private defined benefit plans have become relatively rare as an employer-offered benefit, while defined contribution account coverage grew substantially.[31] In 2019, 85 percent of U.S. workers were covered by a defined contribution plan, while only 28 percent were covered by a defined benefit plan.[32] The 401(k) has become the most popular form of defined contribution plan.[33]

Defined benefit pensions support workers who remain with their employers for a long time—maybe as long as an entire career. For workers who have the good fortune to stay with a single employer in a job covered by a defined benefit pension, collecting the pension at retirement could be as straightforward as walking across

GROUPS 11 (2012), https://bit.ly/3ip2YgG [https://perma.cc/5EEY-58EZ] [hereinafter *Ariel/Aon Hewitt Study*].

28. In 2019, of those working households in the lowest income quintile nearing retirement who had a 401(k), the median balance in their retirement accounts was just over $32,000. MUNNELL & CHEN, *supra* note 25, at 6. By comparison, the figure was $805,500 for the highest income quintile. *Id.*

29. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 21; *see also* DAVID C. JOHN ET AL., SMALL RETIREMENT ACCOUNTS: ISSUES AND OPTIONS 4 (2021), https://brook.gs/3l3J24N [https://perma.cc/7WYX-UBDS].

30. Munnell & Webb, *supra* note 6, at 4.

31. MUNNELL & CHEN, *supra* note 25, at 3.

32. *Id.* (providing data for both public and private plans).

33. *See* INV. CO. INST., DEFINED CONTRIUTION PLAN PARTICIPANTS' ACTIVITIES, FIRST HALF 2021 3 (2021), https://bit.ly/3k0y6Uh [https://perma.cc/R98A-GDF4].

the hall to human resources, or across town to the union headquarters.

U.S. retirees are likely to have worked for several employers, possibly accumulating small 401(k) accounts at multiple jobs.[34] As will be explained below, their employers and retirement plans are likely to have changed over the intervening years as well.[35] Yet ERISA's participant protections have not been enhanced to account for these dynamics. The result is that the popular 401(k) defined contribution account is lacking in the durability necessary to provide retirement support for many participants, particularly those who are lower-income.

A. Defined Benefit and Defined Contribution Retirement Plans

A defined benefit plan provides a pension to employees who work sufficient years to earn a non-forfeitable, vested benefit.[36] Employees do not have individual accounts, but instead receive benefits based on a formula that typically accounts for years of service and salary.[37] The employer must meet funding requirements designed to ensure that the plan can pay benefits to those who have earned them.[38] Qualified defined benefit plans must offer an annuity, and may offer other forms of benefits as well, such as single, lump sum payments.[39] If the participant is married, then the default form of payment includes a spousal survivor benefit as well, unless waived by the spouse.[40] Because these benefits are determined by formula, the employer—rather than the employee—bears the risks of participant longevity, poor market performance, and changes in

34. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 21.

35. *See infra* Section III.D.

36. Until 1988, the most common single-employer, pre-retirement vesting schedule was 10 years, consistent with the minimum requirements under ERISA for cliff vesting. In 1988, the requirement changed to five years for single employer plans. STEPHEN BRUCE, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 191 (1st ed. 1988). Multiemployer plans could require 10 years of vesting service until the late 1990s, when the cliff-vesting requirement changed to 5 years for multiemployer plans as well. *See id.*; Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1442, 110 Stat. 1755, 1808. Both single and multiemployer plans also may elect graduated vesting schedules, instead of cliff-vesting. 26 U.S.C. § 411(a)(2)(A).

37. *See* COLLEEN M. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 129 (5th ed. 2018). For example, the formula might average an employee's highest five years of earnings, and multiply by a factor that increases as total years of service increase. In most circumstances, if the employee retires at an age other than normal retirement age, any monthly benefit is adjusted to reflect the anticipated payout period.

38. 26 U.S.C. § 412.

39. *Id.* § 401.

40. *Id.* § 417.

interest rates.[41] If the employer decides to terminate the plan it must ensure that all benefits are either paid out, or provided through the purchase of annuities.[42] In addition, if an employer declares bankruptcy or encounters other financial distress that prevents it from meeting its funding obligations, then the Pension Benefit Guaranty Corporation (PBGC) generally steps in to pay the benefits, up to a certain amount.[43]

In contrast, employees who participate in defined contribution plans each have their own, individual accounts.[44] Employees are immediately vested in their own contributions, and vest in employer contributions pursuant to a vesting schedule.[45] Employees bear investment and interest rate risks, as there is no guarantee that any particular level of benefits will be available.[46] At retirement, the account owner has access to the entire balance in the account, and therefore bears responsibility for budgeting to ensure that the amount lasts as long as it is needed.[47]

B. *Defining "Durability"*

This Article uses the term "durability" to describe the quality that allows a financial product to last long enough to provide its intended benefits. Durability is, of course, critical for any retirement savings product and the retirement savings system as a whole.[48] Why would workers forgo present income or present consumption to contribute towards retirement, unless they can rely on having their money available to them when they retire?[49]

With its strong assurances of specific, lifetime payments, the defined benefit pension is a relatively "durable" financial product.[50] Consider the extraordinary set of financial obligations taken on by a defined benefit pension plan once a participant becomes vested.[51]

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41. *See* MEDILL, *supra* note 37, at 129.
42. 29 U.S.C. § 1341(b)
43. *Id.* § 1341(c).
44. *See* MEDILL, *supra* note 37, at 126.
45. 26 U.S.C. § 411(a)(2)(A).
46. *See* MEDILL, *supra* note 37, at 128.
47. *Id.* at 129. In addition to defined benefit and defined contribution plans, employers also may sponsor so-called hybrid plans, such as cash balance plans. *Id.* at 130–31.
48. *See* Bhutta et al., *supra* note 4, at 10.
49. *Id.*
50. *See* KATHERINE S. NEWMAN, DOWNHILL FROM HERE: RETIREMENT INSECURITY IN THE AGE OF INEQUALITY 3 (Henry Holt & Co. ed. 2019) (stating that the defined benefit pensions "are regarded by most workers as among the most durable of promises.").
51. *See* MEDILL, *supra* note 37, at 129–30.

The plan must make a retirement benefit available to the retiree at age 65 as a monthly annuity, payable for the worker's lifetime.[52] If the worker is married, the plan must provide spousal survivor benefits for the spouse's lifetime, unless they are waived by the spouse.[53] The plan assumes market and interest rate risk, and—in almost all circumstances—must pay the required benefit regardless of broader economic circumstances.[54] PBGC protections apply up to certain limits if the plan sponsor finds itself in financial distress and unable to meet its funding obligations.[55]

C. *Financial Durability*

The durability of a retirement product can be further broken down into two additional classifications. The first is how well, over time, the financial product protects the value of the principal amounts initially contributed.[56] This may be referred to as the product's *financial durability*.

The defined benefit pension, with its promise to pay a fixed, monthly annuity, regardless of market performance, falls toward the stronger end of the financial-durability spectrum. Workers know with substantial certainty how much their pension will pay them each month for the rest of their lives. Inflation, however, will deteriorate the benefit's financial durability because few private defined benefit plans provide post-retirement cost-of-living adjustments sufficient to protect against inflation risk.[57]

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52. 26 U.S.C. § 401(14).

53. *Id.* § 401(11).

54. *See* MEDILL, *supra* note 37, at 129.

55. *See id.* at 130.

56. Enhancing financial durability was the motivation behind legislation passed in 2001 that first required defined contribution plans to transfer small account balances between $1000 and $5000 to IRAs, when previously they could be paid directly to participants through a cash-out. Unfortunately, force transfers can, in fact, reduce an account's financial durability, as the default investments are conservative, and investment gains may not keep pace with fees charged by the IRA provider. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 4.

57. Jeremy Bulow, *The Effect of Inflation on the Private Pension System*, *in* INFLATION: CAUSES AND EFFECTS 124 (Robert Hall ed., 1982), https://bit.ly/2ZMiNHD [https://perma.cc/KF8B-6CXF]. Few private pensions include post-retirement adjustments for inflation. *Id.* Many defined benefit pensions base their benefit formula on wages paid in the last few years of service, which may either protect against, or aggravate inflation risk, depending on inflation trends. *Id.* Cost-of-living adjustments (COLAs) are more common among public defined benefit plans than private plans, although they may only partially offset inflation. Many public pensions are changing or reconsidering their COLAs in order to address plan funding challenges. *See generally* NAT'L ASS'N OF STATE RET. ADM'RS, NASRA ISSUE BRIEF: COST-OF-LIVING ADJUSTMENTS (2021), https://bit.ly/3zM0xdR [https://perma.cc/5JBA-MN3F].

While defined contribution accounts more effectively protect workers' retirement savings against inflation, they have less financial durability than defined benefit pensions in other respects.[58] The amount of 401(k) savings available at retirement depends on factors, including the workers' choices regarding participation, contribution, investment, and portfolio allocation, as well as market performance.[59] Defined contribution accounts are also subject to pre-retirement leakage, with many participants taking withdrawals either when they leave employment, or during employment to address financial emergencies.[60] Numerous scholars have evaluated whether 401(k) accounts are effective at retaining retirement savings in the face of these risks.[61]

D. Practical Durability

The primary focus of this Article, however, is on a different set of challenges that may be fatal to accessing accounts at retirement: whether, as a practical matter, their balances remain accessible to their owners at retirement, regardless of how the value may have fluctuated over the intervening years. This may be referred to as the retirement product's *practical durability*, which has been the subject of less attention from scholars.[62] Questions relevant to understanding a 401(k)'s practical durability include: will 401(k) providers remain going concerns until retirement; or, if not, are there legal protections in place to protect access to account balances? Is there sufficient transparency about the current state of the provider, as well as any changes to the account itself, to ensure that the account owner understands the current status of the provider and the account? When the time comes to access the account, is the retiree able to do so in a timely manner?

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58. *See* Munnell & Webb, *supra* note 6, at 9.

59. *Id.*

60. *Id.*

61. *See generally* David Pratt, *Too Big to Fail: The U.S. Retirement System in 2019*, 27 ELDER L.J. 327 (2019); Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 HOUS. L. REV. 153 (2013); Jeff Schwartz, *Rethinking 401(k)s*, 49 HARV. J. ON LEGIS. 53 (2012); Jacob S. Hacker, *Restoring Retirement Security: The Market Crisis, the "Great Risk Shift" and the Challenge for Our Nation*, 19 ELDER L.J. (2011).

62. *But see* Ellen Bruce & John Turner, *Lost Pension Money: Who is Responsible? Who Benefits?*, 37 J. MARSHALL L. REV. 695, 701 (2004) (discussing the problems of lost defined benefit and defined contribution pensions); Susan Harthill et al., *Missing and Unresponsive Participants in ERISA Plans*, *in* N.Y.U. Review of Employee Benefits § 3 (2019) (discussing the problem of lost and missing participants in qualified retirement plans).

Practical durability is a subjective measure, evaluated from the standpoint of the individual participant; it can shed light on how the retirement system works more effectively for some workers than for others.[63] For example, while accounts of all sizes can become lost over time, forced transfers to IRA accounts occur primarily when balances are below $5000.[64] As a result, lower-wage and younger workers are more likely to lose 401(k) accounts than are higher-income or older workers. The practical durability of a 401(k) for lower-wage and younger workers is lower; for higher-income and older workers, it is higher.[65]

The concept of practical durability shifts the focus back to the experience of the individual account owner, validating the harm that occurs whenever someone unjustly and unnecessarily loses their savings. It recognizes that the loss of a relatively small account could have a meaningful impact on the equity and fairness of the retirement system; and a substantial financial impact for a participant whose resources to save for retirement are limited. This is critical given the enormous inequities in the U.S. private retirement system, which is subsidized by all U.S. taxpayers, but disproportionately benefits higher income workers.[66]

While the terms "durability," "financial durability," and "practical durability" are new, the basic concept that the product should match its purpose is a mainstay in other areas of consumer protection law. The Federal Trade Commission Act standard for deception provides one example.[67] Many state consumer protection

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63. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 11 (stating that because low wage workers and younger workers change jobs more often, they are particularly likely to be impacted by forced transfers); *see also* DAVID C. JOHN ET AL., *supra* note 29.

64. 26 U.S.C. § 401(31). In its report on forced transfers and inactive 401(k) accounts, GAO described how accounts larger than $5000 may be subject to forced transfer if they include additional amounts that were rolled over from a previous employer's plan. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 17. In addition, larger accounts may be force transferred when a plan is terminated. *Id.* at 6.

65. *Id.* at 11.

66. *See* Wu, Rutledge & Penglas*, supra* note 26, at 16–17; *see also Ariel/Aon Hewitt Study*, *supra* note 27.

67. To demonstrate that an act or practice was deceptive, the FTC must show that (1) there was a representation; (2) the representation was likely to mislead consumers acting reasonably under the circumstances; and (3) the representation was material. 15 U.S.C. § 45; *see also* FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003); *see, e.g.*, FTC v. Cyberspace.com, LLC, 453 F.3d 1196 (9th Cir. 2006) (regarding a defendant who mailed checks that appeared to be rebates, but that when cashed would enroll the payee in internet service); FTC v. QT, Inc., 448 F. Supp. 2d 908 (N.D. Ill. 2006) (involving an allegedly medicinal metal bracelet that does not cure pain); FTC v. Am. Fin. Benefits Ctr., 324 F. Supp. 3d 1067 (N.D. Cal.

statutes follow a similar standard.[68] Just as a consumer is justified in expecting that a washing machine or automobile will continue to provide service for a number of years, a worker who participates in a retirement plan is justified in expecting that the account and the money it contains will be available to provide support in retirement.[69]

II. THE ROLE OF THE 401(K) IN AMERICAN RETIREMENT

While defined contribution retirement accounts pre-date ERISA, their popularity—and the preeminence of the 401(k) in particular—has evolved over time.[70] Following legislative changes in the 1970s, and subsequent regulations, employee-directed, individual account-based, deferred compensation plans became more feasible and increasingly common.[71] 401(k) accounts have grown to become the most popular form of employer-sponsored retirement accounts, playing a critical role in retirement security for millions of current and future retirees.[72] They now hold approximately $7 trillion in retirement assets.[73]

Unfortunately, accessing this money at retirement proves challenging for many people. This section provides a basic overview of 401(k) accounts, and what happens when account owners leave the employers who sponsor their plans. The complexity of the options available to departing employees, the practice of force transferring 401(k) accounts to IRAs, and the constantly shifting landscape of plans and plan sponsors reduce their practical durability for many workers.

2018) (concerning a firm that offered student loan debt relief, but allegedly failed to actually reduce student debt for its customers).

68. *See*, *e.g.*, Purity Supreme, Inc. v. Att'y Gen., 407 N.E.2d 297, 301 (1980); Aliano v. Ferriss, 988 N.E.2d 168, 175 (Ill. App. Ct. 2013); Panag v. Farmers Ins. Co. of Wash., 204 P.3d 885, 895 (Wash. 2009).

69. Elizabeth Warren and Amelia Warren Tyagi drew a parallel between protections for consumers purchasing consumer goods and protections for financial products in work that lay the foundation for the creation of the Consumer Financial Protection Bureau. *See* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS PARENTS ARE GOING BROKE 146–47 (2003).

70. Munnell & Webb, *supra* note 6, at 4.

71. Revenue Act of 1978, Pub. L. No. 95-600, § 135(a), 92 Stat. 2763, 2785–87; MEDILL, *supra* note 37, at 127; *see also* Daniel Halperin, *Fifty Years of Pension Law* 5 DREXEL L. REV. 503, 506 (2014).

72. MUNNELL & CHEN, *supra* note 25, at 1–2.

73. *See Frequently Asked Questions About 401(k) Plan Research*, INV. CO. INSTITUTE (Oct. 11, 2021), https://bit.ly/3EKXmWR [https://perma.cc/SL2M-GG5W].

A. 401(k) Plan Basics

The employer serves as the plan sponsor of a 401(k) plan and assumes numerous responsibilities under the Internal Revenue Code (IRC) and ERISA.[74] As plan sponsor, the employer also selects a plan administrator, who is in charge of the day-to-day operations of the plan.[75] The administrator may be the same as the plan sponsor, or may be a separate company, or individual.[76] In addition to the plan administrator, there will typically be another company—often a financial company—called the plan provider or recordkeeper that serves as the primary point of contact for individual plan participants.[77] The plan may contract with other third party entities to conduct various aspects of plan administration.[78]

Employees who meet the requirements to participate in a traditional 401(k) may elect to have their employer contribute pretax earnings into their accounts.[79] In 2006, Congress included new provisions in the Pension Protection Act[80] to promote auto-enrollment, whereby an employer enrolls all eligible employees in a 401(k) plan by default.[81] These provisions provide a safe harbor from certain nondiscrimination rules for plans that adopt auto-enrollment.[82] Plans have increasingly adopted auto-enrollment since the measure was enacted. Vanguard reported that at the end of 2019, 50 percent of its plans offered auto-enrollment, and 63 percent of its participants had been auto-enrolled.[83] Adoption of auto-enrollment has been shown to dramatically increase plan participation, including among lower-income workers and workers of color.[84]

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74. *See generally* 26 U.S.C. § 401 *et seq.*; 29 U.S.C. § 1001 *et seq.*

75. 29 U.S.C. § 1002(16).

76. *Id.*

77. While some recordkeepers focus on that business exclusively, others are large investment management companies, insurance companies, or payroll companies. *See* David Ramirez, *401(k) Recordkeeper: What They Do and What to Look For*, FOR US ALL (Feb. 21, 2020), https://bit.ly/3A4g5tB [https://perma.cc/2TN7-WWRA]; *see also* Jeff Brown, *What If Your Company Switches to a New 401(k) Provider?* STREET (Feb. 13, 2014, 8:00 AM), https://bit.ly/3iofTzi [https://perma.cc/NJ8E-FYXK].

78. Brown, *supra* note 77.

79. 26 U.S.C. § 401(k)(2)(A).

80. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780.

81. *Id.*

82. *Id.*

83. BRIAN T. ALLING ET AL., HOW AMERICA SAVES 2020 3 (Jean A. Young ed., 2020), https://vgi.vg/3miC4rO [https://perma.cc/DE48-W8SW].

84. *See Ariel/Aon Hewitt Study*, *supra* note 27, at 7. Recent legislative proposals would make auto-enrollment mandatory. *See* H.R. 2954, 117th Cong., § 101 (1st Sess. 2021).

The IRC also provides for an optional employer match to employee contributions.[85] According to Vanguard, 96 percent of its plans provided an employer contribution in 2020.[86] Participants immediately vest in their own contributions, but employer contribution vesting may depend on years of service.[87] To satisfy the minimum requirements under the general vesting rules, the plan may select either cliff vesting at 3 years, or graduated vesting over 2 to 6 years, with 20 percent vesting occurring each year from year 2 until year 6.[88]

401(k) accounts provide significant tax advantages for participants. In a traditional, non-Roth 401(k), funds are contributed before taxes and grow tax-free until withdrawal.[89] When participants retire and begin to take withdrawals from the account, they must pay taxes on the distributions.[90] Penalties for early withdrawal incentivize workers to keep their money in their accounts until retirement; withdrawals before age 59 and a half are subject to a 10 percent tax penalty, in addition to taxes due.[91] Provisions allow for withdrawals for hardship, and also allow participants to take loans from their accounts to the extent provided for in the plan.[92]

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85. 26 U.S.C. § 401(k)(3)(D)(a).

86. ALLING, *supra* note 83, at 11.

87. 26 U.S.C. § 411(a)(1), (a)(2)(B).

88. *Id.* § 411(a)(2)(B). For example, if a plan has a 3-year cliff vesting schedule, then a worker who remains at the employer for 3 years is fully vested in the employer's contributions; but a worker who remains employed for only 2 years would not be entitled to any portion of the employer's contributions. Under a 6-year, "graduated vesting" schedule, the worker's right to the employer's contributions increases gradually throughout the years of service. A worker who departs after only one year does not have any right to employer contributions. A worker who departs after 2 years has a non-forfeitable right to 20 percent of the employer's contributions; a worker who departs after 3 years, 40 percent; and so forth, increasing by 20 percent each year, until the worker is fully vested in the employer's contributions after 6 years of service. Additional rules apply when a worker has breaks-in-service. *Id.* § 411(a)(6). Other vesting rules will apply to employer contributions—and, in some situations, employer matching contributions are immediately 100 percent vested—depending on the type of plan, and the type of matching contribution. *See Issue Snapshot–Vesting Schedules for Matching Contributions*, IRS, https://bit.ly/3BLU9V6 [https://perma.cc/LP3D-L676] (June 3, 2021).

89. 26 U.S.C. § 402A. Contributions to a Roth 401(k) are made with after-tax earnings, while qualified distributions are not taxed. *See id.*

90. *Id.*

91. 26 U.S.C. § 72(t).

92. *Id.* § 401(k)(13). In response to the COVID-19 pandemic, Congress passed additional provisions to provide for less costly loans and withdrawals from 401(k) accounts. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2202, 134 Stat. 281, 340–43 (2020).

To ensure that tax revenues are eventually collected, the IRC sets an age at which required minimum distributions (RMDs) must commence.[93] In 2019, the age for commencing RMDs was pushed back a year and a half to 72.[94] Retirees who fail to take RMDs as required face an excise tax of 50 percent on the amounts that are not distributed.[95]

Sponsoring a retirement plan can help attract talented workers, and also has significant tax benefits for employers. Employers who sponsor a 401(k) can deduct contributions made on behalf of employees into the trust, up to certain limits.[96] Employers with fewer than 100 employees also may receive an initial tax credit for establishing a new plan.[97] The total value of these benefits is considerable; tax expenditures for qualified defined contribution accounts are estimated at more than $1 trillion over the period 2020–2024.[98]

ERISA and its implementing regulations include numerous protections for participants and their beneficiaries, including the right to disclosures regarding the plan terms and status.[99] This includes the right to request a copy of the current Summary Plan Description (SPD), which the plan must provide within 30 days of the request, as well as other notices regarding significant changes to the plan.[100] Plans also must establish and maintain reasonable claims and appeals procedures, through which a participant may argue the case for benefits to the plan administrator.[101] Once these administrative remedies are exhausted, participants may file a civil case to pursue benefits.[102]

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93. 26 U.S.C. § 401(a)(9)(C).

94. *Id.*; *see also* Further Consolidated Appropriations Act of 2020, Pub. L. No. 116-94, § 114, 133 Stat. 2534, 2714 (2019).

95. 26 U.S.C. § 4974. A waiver is available if the taxpayer can demonstrate that the failure to take the full RMD was due to reasonable error, and that reasonable steps are being taken to remedy the error. *Id.*

96. *See id.* § 404(a)(3) (outlining the deductibility of employer contributions).

97. *Id.* § 45(E).

98. STAFF OF JOINT COMM. ON TAX'N, 116TH CONG., REP. ON ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020–2024 34 (Comm. Print 2020). This amount was almost double the estimated expenditures reported for 2016 to 2020. *See* STAFF OF JOINT COMM. ON TAX'N, 115TH CONG., REP. ON ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2016–2020 38 (Comm. Print 2017).

99. 29 U.S.C. §§ 1024(b), 1025.

100. *Id.* § 1132(c)(1). Penalties may be assessed at $100 per day for delays in furnishing this information. *Id.*

101. *Id.* § 1133; 29 C.F.R. § 2560.503–1 (2021).

102. *See* 29 U.S.C. § 1132(a).

ERISA also imposes fiduciary duties on certain parties involved with sponsoring and administering the plan.[103] Fiduciaries must exercise their duties solely in the interests of the plan's participants and beneficiaries; and with the care, skill, prudence, and diligence of "a prudent man acting in a like capacity and familiar with such matters."[104] The fiduciaries' obligations end, however, when a plan is terminated. If a participant's account moves to a forced-transfer IRA, fiduciary duties end with respect to that account as well; although, the selection of an IRA provider is itself a fiduciary function.[105]

B. When the Employment Relationship Ends

The portability of defined contribution accounts provides a potential advantage over traditional, defined benefit pensions. When participants in defined benefit pension plans leave their employers, they generally lose the credit they have earned toward benefits that have not yet vested.[106] In contrast, a participant in a defined contribution plan may roll over the vested balance—including any vested employer contributions—to an account with a new employer, and the employee can continue accumulating retirement savings.[107]

In reality, however, 401(k) participants face a complicated set of options when they leave employment: (1) roll over the money into a retirement account sponsored by the new employer, if permitted by the plan; (2) roll over the money into an IRA, which is not tied to an employer; (3) cash out the account in whole or in part, or (4) keep the money in the existing 401(k) account.[108] Each of these options has potential benefits and drawbacks for the par-

103. *See id.* § 1104.

104. *Id.* § 1104(a)(1), (a)(1)(B).

105. *See id.* § 1104(c)(3); U.S. Dep't of Lab., Emp. Benefits Sec. Admin, Advisory Opinion (Nov. 5, 2018), at 2018-01A, https://bit.ly/3m604hS [https://perma.cc/H9GE-DFAL]. In recently issued guidance, EBSA clarified that "ERISA's fiduciary obligations fully apply to missing participants . . . . [T]hese participants and beneficiaries remain fully entitled to all their promised benefits; and the fiduciaries have an obligation to keep accurate records and take appropriate steps to ensure that the participants and beneficiaries are paid their full benefits when due." EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., MISSING PARTICIPANTS–BEST PRACTICES FOR PENSION PLANS n.1 (2021), https://bit.ly/3BGvSQa [https://perma.cc/PR8R-M38X] [hereinafter EBSA BEST PRACTICES].

106. 26 U.S.C. § 411(d)(3)(B).

107. ALICIA MUNNELL ET AL., AN ANALYSIS OF RETIREMENT MODELS TO IMPROVE PORTABILITY AND COVERAGE 11 (2018), https://bit.ly/3BER7BR [https://perma.cc/PW6C-HTSN].

108. *Id.* at 12. Some of these options may remain available to the participant at a later date, and thus need not be completed at the time of leaving employment.

ticipant, as described below. In addition, there are significant practical obstacles to rolling over funds into a new 401(k).[109]

1. *Rollover to a New Employer-Sponsored Plan*

If the departing employee is joining a new employer who also sponsors a defined contribution plan, the employee usually has the option to roll the account over into the new plan.[110] Approximately 10 to 15 percent of departing participants roll over their accounts to a new employer-sponsored plan.[111] Rollovers may be either direct, in which case the funds are exchanged directly between the old and new plans; or indirect, in which case the funds are transferred first to the participant, who then forwards them to the new plan.[112]

Consolidating 401(k) accounts at each new employer throughout a worker's career has numerous benefits. It may be easier to keep track of the status of one or two larger, consolidated accounts.[113] When participant contact information changes, there are fewer plans to notify. Account consolidation also facilitates more effective investment portfolio management by simplifying the process of assessing overall risk and appropriately diversifying across retirement assets.[114]

Unfortunately, completing a rollover between accounts has been described as "an obstacle course" by the Advisory Council on Employee Welfare and Pension Benefit Plans (ERISA Advisory Council).[115] Employers are not required to allow rollovers into their plans, and many do not.[116] When rollovers are allowed, the multi-step process is exceedingly complex and varies among plans.[117] The ERISA Advisory Council found that this lack of standardization poses a significant obstacle to lifetime participation

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109. *See generally* ADVISORY COUNCIL 2016, *supra* note 13.

110. MUNNELL ET AL., *supra* note 107, at 12.

111. *Id.*

112. *Id.* No taxes are withheld in connection with a direct rollover. In an indirect rollover, the former plan disburses funds to the participant, withholding 20 percent for taxes. The participant then must re-deposit the funds into a qualified account within 60 days. The amount re-deposited must make up the 20 percent withheld for taxes; otherwise, this amount is treated as a withdrawal, and could be subject to early withdrawal penalties depending on the age of the participant. *See id.* at 11–13.

113. *Id.* at 15.

114. *See id.* at 13–14.

115. ADVISORY COUNCIL 2016, *supra* note 13, at 6. The ERISA Advisory Council, which was created by ERISA, advises and makes recommendations to the Secretary of the U.S. Department of Labor regarding duties under ERISA. 29 U.S.C. § 1142(b).

116. MUNNELL ET AL., *supra* note 107, at 2.

117. ADVISORY COUNCIL 2016, *supra* note 13, at 6–8.

in the retirement system, and it recommended that government and industry actors collaborate to enhance standardization to facilitate rollovers.[118]

For now, however, participants may forego consolidation of accounts at a new employer in favor of either rolling the funds into an IRA or taking a cash-out.[119] These options are significantly less cumbersome, but they also have certain disadvantages for retirement savings, relative to a consolidated 401(k) account and, in the case of a cash-out, may have significant tax consequences as well.[120]

2. *Rollover to an IRA*

More than half of all funds originally saved in 401(k) accounts are eventually moved by participants into IRAs.[121] Thus, as 401(k) coverage has increased, so too has the size of the rollover IRA industry, growing to almost $300 billion in 2010.[122]

Rolling 401(k) savings into an IRA preserves them in a tax-advantaged, retirement savings vehicle.[123] Consolidating multiple employer-sponsored accounts into a single IRA also may facilitate both investment portfolio management and the tracking of accounts over time.[124] Workers may perceive other benefits to choosing an IRA over a 401(k), including the ability to choose among financial services providers and investment options; or even the opportunity to make a clean break from the former employer by moving the account out of the sponsored plan.[125]

IRAs nonetheless have some drawbacks relative to employer-sponsored accounts. When retirement money in a 401(k) is transferred to an IRA, it is removed from the protections of ERISA.[126] There is less transparency regarding IRA fees, which could result in some workers paying more than they would have if they had stayed with their employer-sponsored plan.[127] Financial advisors and companies may take a commission or otherwise benefit financially from

118. *Id.* at 21–23.
119. Biggs et al., *supra* note 2, at 4.
120. *Id.*
121. *Id.* at 15.
122. ADVISORY COUNCIL ON EMP. WELFARE AND PENSION BENEFIT PLANS, REPORT TO THE HONORABLE THOMAS E. PEREZ, UNITED STATES SECRETARY OF LABOR, ISSUES AND CONSIDERATIONS SURROUNDING FACILITATING LIFETIME PLAN PARTICIPATION 6 (2014), https://bit.ly/3k2SAfo [https://perma.cc/E7RJ-5WQP] [hereinafter ADVISORY COUNCIL 2014].
123. *See id.* at 7.
124. *See id.*
125. *Id.*
126. MUNNELL ET AL., *supra* note 107, at 24–25.
127. Biggs et al., *supra* note 2, at 7.

a participant's rollover decision.[128] Participants who are tempted to access their savings before retirement face fewer hurdles to withdrawing from an IRA, relative to a 401(k), and therefore an IRA may be more vunerable to "leakage" over time.[129]

3. *Withdraw Funds*

In 2013, approximately 43 percent of defined contribution plan participants withdrew their retirement savings entirely upon leaving their jobs.[130] Taking a cash withdrawal has significant consequences for retirement savings, with an overall impact on future retirement streams estimated at 1 trillion dollars.[131] There are significant tax consequences as well. Once removed from a qualified vehicle, the savings no longer continue to grow tax-free until retirement. Upon withdrawal, the plan must withhold 20 percent of the balance for taxes and also may withhold a 10 percent penalty if the participant is under the minimum withdrawal age of 59 and a half.[132]

Some participants may cash out because they need immediate access to the funds, or because they anticipate needing access before retirement.[133] Others might withdraw their money because of the complexities of the retirement system, rather than because it was their first choice.[134] Perhaps they would have completed a direct rollover if that process were easier. Or perhaps they even attempted to complete an indirect rollover but succeeded only in obtaining the funds from their former employer's plan, without ever rolling them over into the new plan.[135]

A plan may cash out an account with a balance below $1000, even in the absence of directions or consent from the participant.[136] The plan can make this decision any time after the employee has

128. One industry survey of plan sponsors found that 40 percent of rollovers went to IRA accounts at the plan sponsor's recordkeeper. This finding may indicate that 401(k) participants are influenced by the marketing efforts of their plan's own recordkeeper to open an IRA, possibly foregoing the process of shopping other providers for the lowest fees or best investment options. *See* ADVISORY COUNCIL 2014, *supra* note 122, at 8.

129. *See* MUNNELL ET AL., *supra* note 107, at 24–25.

130. ADVISORY COUNCIL 2014, *supra* note 122, at 6.

131. *Id.*

132. *See* 26 U.S.C. § 401(k)(13); ADVISORY COUNCIL 2014, *supra* note 122, at 12, 26.

133. Lower-income workers are significantly more likely to take a cash-out at separation. ADVISORY COUNCIL 2014, *supra* note 122, at 6.

134. Biggs, et al., *supra* note 2, at 4.

135. *See* ADVISORY COUNCIL 2016, *supra* note 13, at 6.

136. *See* 26 U.S.C. §§ 401(31)(B), 411(a)(11)(A); *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 6.

left employment.[137] Allowing these involuntary cash-outs reduces plan costs by eliminating the need to maintain these much smaller accounts indefinitely on behalf of former employees.[138] However, like voluntary cash-outs, forced cash-outs create tax liabilities and potential penalties for participants, and they remove savings from the retirement system.[139] There is no clear set of rules for what action a plan must take when a check goes uncashed.[140] The ERISA Advisory Council has found that plans take a variety of approaches, but in many instances, plans may take no further action to locate the payees.[141]

4. *Keep Money in the Current 401(k) Plan*

Departing employees also may choose to keep their money in their existing 401(k).[142] From a participant's perspective, maintaining the funds in the existing 401(k) is likely the simplest option, as it requires no affirmative action.[143] It avoids the need to complete the paperwork to roll over the funds into a new 401(k) or an IRA, as well as the need to research new investment options, fees, or investment advisor conflicts of interest.[144] Keeping money in the existing 401(k) plan also preserves the funds in a qualified account that will continue to grow tax-free until distribution.

The apparent simplicity of keeping the money in the original 401(k) account can be misleading, because the process of actually

137. *See* 26 U.S.C. § 401(31)(B).

138. Harthill et al., *supra* note 62, § 3.03.

139. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO 19-88, RETIREMENT ACCOUNTS: FEDERAL ACTION NEEDED TO CLARIFY TAX TREATMENT OF UNCLAIMED 401(K) SAVINGS TRANSFERRED TO STATES 37 (2019).

140. *See* ADVISORY COUNCIL ON EMP. WELFARE AND PENSION BENEFIT PLANS, REPORT TO THE HONORABLE EUGENE SCALIA, UNITED STATES SECRETARY OF LABOR, VOLUNTARY TRANSFERS OF UNCASHED CHECKS FROM ERISA PLANS TO STATE UNCLAIMED PROPERTY PROGRAMS 14 (2019), https://bit.ly/3CF6ITa [https://perma.cc/W9TD-NQCP].

141. *See id.* In addition to the "do nothing" approach to uncashed checks, the ERISA Advisory Council identified two other common approaches: (1) transferring the money to either an IRA or a taxable, federally-insured individual account; or (2) forfeiting the amount to the plan, with a right of restoration.

142. ALLING ET AL., *supra* note 83, at 103 (surveying Vanguard's recordkeeping data and finding that almost all of its defined contribution plans reviewed allow employees to keep balances over $5000 in their accounts indefinitely; 2% required terminated participants to take a full distribution at either age 65 or age 70).

143. In fact, a very high percentage of 401(k) participants move their savings into IRAs, which has been attributed to aggressive marketing by the IRA industry. *See* ADVISORY COUNCIL 2016, *supra* note 13, at 11–12.

144. *See id.* at 6–8 (discussing the administrative challenges involved in rolling over funds between 401(k) plans); *see* MUNNELL ET AL., *supra* note 107, at 20 (noting that the IRA market is characterized by fewer participant protections, higher fees, and potential conflicts of interest).

accessing that money many years later may be considerably more challenging, or even impossible.[145] This is due in part to the common communication breakdowns between plans and participants.[146] Participants may neglect to update their plans about new mailing addresses, email addresses, and telephone numbers.[147] Job changes and physical moves are times of personal upheaval, and it is not at all surprising that participants may forget to update their contact information with a retirement account—particularly when they may not expect to access the money in the account for decades. Participants may mistakenly believe that their plan will come looking for them when their mail is returned as undeliverable, or when they fail to respond to voicemails, emails, or texts.

The Department of Labor issued new E-Disclosure Rules in 2019, making it easier for plans to use email or text messaging to provide participants with important plan information.[148] The new rules may help plans maintain contact with participants after they move to a new mailing address, but the rules also could increase the risk that participants overlook important communications about account status, such as forced transfers.[149]

III. MISSING PARTICIPANTS AND MISSING PLANS

The end result of the breakdown in communication is that an account owner may become a "missing participant"—someone whose whereabouts are unknown to the plan.[150] A participant who has become separated from their benefit risks losing access to those funds permanently.

A. Limited Plan Search Obligations

A 401(k) plan's obligation to search for a participant with out-of-date contact information is limited and generally is not triggered unless the plan terminates or the participant reaches the age when

145. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 24–25.

146. EBSA BEST PRACTICES, *supra* note 105.

147. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 25.

148. Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, 85 Fed. Reg. 31,884 (July 27, 2020) (to be codified at 29 C.F.R. pts. 2520, 2560).

149. *The Labor Department's New Disclosure Rule: What Could it Mean for You?* PENSION RTS. CTR. (July 24, 2020) https://bit.ly/3AV5R7x [https://perma.cc/9XR3-ZLPE].

150. *See* Harthill, et al., supra note 62, § 3.02 (describing participants as missing "because the plan cannot locate them or the plan lacks critical identifying information, and the plan is therefore unable to effectively communicate with them to advise them of their retirement benefits and help them start their benefit payments").

required minimum distributions become due, which currently is 72.[151] There is no requirement for plans to continue these efforts until they succeed in finding their missing participants.[152]

In January 2021, the Employee Benefits Security Administration (EBSA) issued additional guidance describing "best practices" for locating missing participants.[153] In this guidance, EBSA states its finding "that in the context of an acquisition, merger, or divestiture, well-run plans make missing participant searches . . . part of the collection and transfer of records."[154] The guidance stops short of requiring plans to take these steps, however.[155] If an active plan decides to rid itself of a missing participant's account by cashing out a balance under $1000, or force transferring an account under $5000 to an IRA, no heightened search requirements are triggered.[156]

B. Social Security Administration Retirement Benefit Notices

After decades of estrangement, missing participants may be reminded about the account when they apply for social security benefits.[157] At that time, the SSA will send them a form SSA 99L-C1, titled "Notice of Potential Private Retirement Benefit Information" ("SSA Private Retirement Benefit Notice" or "SSA Notice"), listing the type and amount of the benefit; as well as the name and

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151. Both IRS and DOL have regulatory jurisdiction with respect to the missing participant issue. IRS examination procedures indicate that the agency expects qualified plans to perform a diligent search for missing participants when required minimum distributions become due. The procedures describe the steps required in a diligent search. *See* IRM 4.71.1.4(15) (Dec. 17, 2018), https://bit.ly/3k4ffrB [https://perma.cc/MWL3-MVMW]. Guidance issued by EBSA in January 2021 sets forth that agency's non-binding guidance regarding "best practices" for searching for missing participants in defined contribution plans. *See* EBSA BEST PRACTICES, *supra* note 105. This new guidance supplements guidance previously provided with regard to terminated plans only in 2014; which, in turn, updated earlier guidance provided in 2004. *See* EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., FIELD ASSISTANCE BULLETIN NO. 2014-01: FIDUCIARY DUTIES AND MISSING PARTICIPANTS IN TERMINATED DEFINED CONTRIBUTION PLANS (2014), https://bit.ly/3mFA3rc [https://perma.cc/4LNV-67Z4] [hereinafter FAB 2014-01]; EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., FIELD ASSISTANCE BULLETIN NO. 2004-02: FIDUCIARY DUTIES AND MISSING PARTICIPANTS IN TERMINATED DEFINED CONTRIBUTION PLANS (2004), https://bit.ly/3k6QXx0 [https://perma.cc/A594-4NVB].

152. *See* Harthill et al., *supra* note 62, at § 3.04 (recommending that enhanced DOL guidance "consider a one-time search that is more robust than the FAB 2014-01 steps at a particular point in time, such as following a transition or after a merger or acquisition of the plan sponsor").

153. EBSA BEST PRACTICES, *supra* note 105.

154. *Id.*

155. *See id.*

156. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 25–26; 29 C.F.R § 2550.404a-2.

157. *See id.* at 30.

Employer Identification Number of the plan, and the name and address for the plan administrator.[158] The SSA Notice is populated by information reported annually to the Treasury by plan sponsors regarding benefits for anyone who separated from service, who is entitled to a deferred vested benefit, and who did not receive their benefits at separation.[159] The Treasury Secretary transmits this information to the SSA, which then provides it to retirees.[160] The information is not included in the online SSA databases that are accessible to individuals and contain information about earnings and government benefits.[161] Currently, the SSA's information about pensions may be obtained only by sending a written request or by waiting to obtain a form in the mail automatically at retirement.[162]

The information listed on the notice is usually the information provided at the time that the employee departs the company.[163] If the plan or the company has been through changes since then, the original information will be out of date, as it is not updated by the SSA.[164] If the employer and plan listed on the SSA Private Retirement Benefit Notice no longer exist, employees may face significant challenges in locating their accounts because there is no single or centralized repository of information about employer and plan history.

C. Forced Transfers

Forced transfers can create a new set of obstacles for missing participants. Plan sponsors use forced transfers or "automatic rollovers" to remove low-balance 401(k) accounts from the plan, transferring them to IRAs instead.[165] Following the passage of the Economic Growth and Tax Relief Reconciliation Act of 2001[166] ("EGTRRA") and DOL's subsequent issuance of safe harbor regulations, many plans added automatic rollover provisions to take ad-

158. *Id.*

159. 26 U.S.C. § 6057(a).

160. *Id.* § 6057(d).

161. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 30–31.

162. *Id*. Few individuals avail themselves of this on-demand service, however, with the SSA reporting that it received only 760 requests in 2013. *Id*.

163. 26 U.S.C. § 6057(d).

164. *See id.*

165. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 1–2.

166. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38.

vantage of the new rules. Approximately half of plan sponsors had made this change by 2012.[167]

Forced transfers were born as an imperfect solution to three problems: the costs to the plans of maintaining small accounts; the challenges of locating missing participants; and the desire to enhance financial durability by protecting the value of missing participants' balances.[168] In practice, forced transfers have had the effect of further distancing many account holders from their savings.[169] For these participants, any positive impact on financial durability is offset by the negative impact on practical durability, as they may find themselves unable to locate or access their accounts.

1. Forced Transfers and Financial Durability

Forced transfers were originally intended to help preserve the financial durability of 401(k) accounts. Prior to EGTRRA, if a plan was unable to contact a participant to communicate about distribution of funds in the account, the plan was permitted to involuntarily cash out balances of up to $5000.[170] This resulted in significant leakage from the retirement system, as money was removed from tax-qualified accounts, with detrimental tax consequences for participants.[171]

Congress attempted to address this problem through language in the EGTRRA. Under these provisions and subsequent implementing regulations, qualified plans may use forced transfers to distribute balances less than $5000, even if the plans have not been able to contact participants to obtain consent.[172] The plan sponsor terminates its fiduciary responsibilities to the account owner with the transfer to the new IRA.[173] EGTRRA also restricts cash-outs to accounts with balances less than $1000.[174]

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167. MILLENNIUM TRUST CO., AUTOMATIC ROLLOVER IRAS: FROM LEGISLATIVE FOOTNOTE TO FIDUCIARY BEST PRACTICE 5 (2019), https://bit.ly/3CFuWwC [https://perma.cc/F7FT-LE4D].

168. Harthill et al., *supra* note 62, at § 3.03; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 4–5.

169. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3.

170. *Id*. at 4. A plan might have accomplished a cash out by sending a check to the participant's last known address, or by transferring the money to a state unclaimed property database.

171. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 4.

172. *Id.* at 4 (citing Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 657(a), 115 Stat. 38, 135–36 (codified at 26 U.S.C. § 401(a)(31)(B))).

173. *See* U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Advisory Opinion (Nov. 5, 2018), at 2018-01A, https://bit.ly/3m604hS [https://perma.cc/H9GE-DFAL].

174. *Id.* at 4.

Subsequent DOL regulations created a safe harbor for plan fiduciaries with respect to forced transfers, and certain other mandatory distributions.[175] The regulations contain a number of requirements relating to the preservation of the value of the initial principal amount.[176] They also state that the investment product selected for the forced transfer must be offered by a state or federally-regulated bank, credit union, insurance company, or investment company; and that the fees and expenses charged must not exceed those charged by the same provider for other IRA accounts.[177]

These requirements may help the account maintain its value until it is claimed by the participant. However, the GAO has raised concerns that these protections are, in fact, insufficient for that purpose, as conservative investments and IRA maintenance fees may significantly impact net returns over time—particularly if many years pass before the participant re-claims the account.[178] Certainly, a forced-transfer account will not be invested in the manner chosen by its owner. Many participants prize the ability to manage how their 401(k) retirement savings are invested, making the loss of this control a harm unto itself.[179]

Lower-income workers are more likely to be impacted by forced transfers because they are more likely to have smaller accounts. A recent study examined the characteristics of households with retirement accounts worth less than $10,000.[180] Not surprisingly, the study found that lower-income households with defined contribution accounts were much more likely to have accounts with balances below $10,000.[181] While the $10,000 threshold used in this study is higher than the $5000 ceiling for most forced transfers, these findings nonetheless provide additional evidence that forced

175. 29 C.F.R. § 2550.404a-2(a)(1) (2021).

176. *Id.* § 2550.404a-2(c)(3) (2021).

177. *Id.*

178. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 9–11. The GAO analyzed information about default investments, fees, and returns for 19 possible products across 10 forced-transfer IRA providers. The analysis found that, for 13 of the 19 products, a $1000 account decreased to zero within 30 years. *See id.* at 10. GAO recommended that investment options for forced-transfer IRA accounts be expanded to include target date funds, which tend to have higher returns than the current safe harbor options. *See id.* at 12–13. A recent legislative proposal would adopt this recommendation but has yet to be passed by Congress. *See* H.R. 2954, 117th Cong. § 306(b)(3) (1st Sess. 2021).

179. *See* Barbara Burica et al., *The Disappearing Defined Benefit Pension and Its Potential Impact on the Retirement Incomes of Baby Boomers*, 69 SOC. SEC. BULL. 1, 3 (2009).

180. DAVID C. JOHN ET AL., *supra* note 29, at 4.

181. *Id.*

transfers aggravate income inequity within the retirement system.[182]

2. Forced Transfers and Practical Durability

The movement of money from 401(k) to IRA accounts further exacerbates an already decentralized regulatory landscape, with a predictably negative impact on the practical durability of 401(k)s. It is difficult to overstate the potential for confusion when an employer-sponsored retirement account is transferred to an entirely different provider. Missing participants who have lost contact with the plan will not learn about the transfer when it occurs. By the time they contact the plan sponsor or 401(k) provider to access the account, years may have passed since the initial transfer.

Notice requirements under ERISA are largely useless for participants who are not currently in contact with the plan. Plans that force transfer accounts are required to describe the practice in the SPD or summary of material modifications.[183] However, participants who lost contact with a plan sponsor before the plan began forcing out accounts would never have received these notices. Even participants who do receive these disclosures are unlikely to understand how this may impact their retirement accounts in the future.[184]

In 2016, the ERISA Advisory Council reported that approximately 60 to 65 percent of plans had adopted safe harbor provisions allowing them to force transfer accounts to IRAs.[185] Plan sponsors have financial incentives to reduce the number of small 401(k) accounts on their books by transferring them to IRA accounts. Forced transfers help 401(k) plans control costs by more efficiently managing smaller accounts, and accounts belonging to missing participants in particular. Instead of maintaining these accounts within the plan, the plan identifies a new IRA provider to administer them. The ongoing costs of maintaining small accounts after employees have

182. The study also looked at the distribution of smaller accounts by race and ethnicity, finding that Black and Hispanic/Latino households were more likely than white or other households to have small IRA accounts, while the distribution patterns for employer-sponsored accounts were similar across these groups. *Id.* Other researchers have identified significant racial disparities in participation, contribution rates, and withdrawals and loans from employer-sponsored accounts. *See generally Ariel/Aon Hewitt Study*, *supra* note 27. For an in-depth discussion of racial disparities in the U.S. retirement system and the need for further data and research, see DOROTHY A. BROWN, THE WHITENESS OF WEALTH 132–65 (2021).

183. 29 C.F.R. § 2550.404a-2(c)(4).

184. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 27 (stating that workers struggle to understand complex notices about retirement accounts).

185. ADVISORY COUNCIL 2016, *supra* note 13, at 10.

departed service is an unwelcome burden for employers.[186] Smaller accounts are less profitable for providers than larger accounts, while many administrative costs are the same.[187] Because of the challenges of maintaining contact between plans and participants—particularly when account balances are low—the likelihood of losing contact increases the longer the accounts remain on the books.[188]

Further administrative and compliance costs arise once participants become missing, as plans may incur search costs to try to locate them.[189] In recent years, EBSA has focused substantial enforcement resources on missing participants.[190] The related compliance risk may have the unintended consequence of making forced transfers an attractive option for plans with a large number of former-employee accounts under management.[191] Once these accounts become IRAs, the plan fiduciaries' liability for them ends, and they no longer are subject to the numerous protections under ERISA that are enfoced by DOL.[192]

As sponsors amended their plans to allow forced transfers, an industry emerged around providing the new safe harbor accounts.[193] After the initial entry of a few larger entities, the list of safe harbor IRA providers expanded to include a number of boutique firms as well, with a variety of charters and regulators.[194] While some of these entities also provide accounts that are covered

186. Harthill et al., *supra* note 62, at § 3.03.

187. *See* DAVID C. JOHN ET AL., *supra* note 29, at 4–5; MILLENNIUM TRUST CO., *supra* note 167, at 4.

188. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 23–26. A study of state lost property databases found that smaller benefits are generally less likely to be claimed by their owners. *See generally* CORINA MOMMAERTS & ANITA MUKHERJEE, LOST AND FOUND: CLAIMING BEHAVIOR IN ABANDONED RETIREMENT ACCOUNTS (2021), https://bit.ly/3A7zHNo [https://perma.cc/US2W-SNL6].

189. *See* FAB 2014-01, *supra* note 151.

190. *See* U.S. DEP'T OF LAB., COMPLIANCE ASSISTANCE RELEASE NO. 2021-01: TERMINATED VESTED PARTICIPANTS PROJECT DEFINED BENEFIT PENSION PLANS (Jan. 12, 2021), https://bit.ly/3GPSWzt [https://perma.cc/SU3N-2CXR] [hereinafter EBSA COMPLIANCE ASSISTANCE RELEASE].

191. *See* MILLENNIUM TRUST CO., *supra* note 167, at 6–7; *see also* Harthill et al., *supra* note 62, at § 3.03.

192. 29 U.S.C. § 1104(c)(3). The Securities and Exchange Commission and the Internal Revenue Service each play a role in regulating IRAs, but neither has been publicly active in addressing unclaimed forced-transfer IRAs.

193. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 4.

194. For example, providers of these accounts have included large public companies, *see, e.g.*, Principle Fin. Grp., Inc., Annual Report (Form 10-K), https://bit.ly/3Fbnfjt [https://perma.cc/VZ8J-Z7KK], privately owned firms, *see, e.g.*, Retirement Clearinghouse, LLC, Annual Report (Form 10-K), https://bit.ly/3Fbnfjt [https://perma.cc/6UN2-K8SC], and state-chartered financial institutions, *see, e.g.*,

by ERISA, others operate entirely outside DOL's regulatory and enforcement jurisdiction.

There are few sources of information about transferred accounts, even for a participant who is sophisticated enough to search for a forced-transfer IRA. Because there is no single, centralized database of plan information, participants bear the burden of hunting down and contacting the entities where their accounts may be located.[195] Some IRA providers offer user-friendly websites with search engines and toll-free numbers available to participants searching for their missing accounts; but there is no requirement that they do so.[196] There is no federal or state law that explicitly requires the IRA custodians to make their records accessible to the public; nor are they required to search for missing participants.

As a result, unless a participant is able to identify someone at their former employer or provider who understands the force-transfer process, and who knows the ultimate destination of the plan's forced-out accounts, it can be exceedingly difficult to locate a forced-transfer IRA. The GAO cited one IRA provider who reported that 70 percent of force-transferred accounts it had opened in the previous 5 years remained unclaimed.[197]

D. *Shape-Shifting Sponsors and Plans*

The force transfer process described above exists within a constantly-shifting superstructure of companies, plans, and plan providers. Name changes, mergers, and acquisitions make finding a former plan highly challenging.[198] When companies merge, their 401(k) plans may be maintained separately, merged, or even terminated.[199] When there is a spin-off of a single division or group, the 401(k) accounts for the affected employees may stay with the origi-

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Auto Rollover IRAs, GOLDSTAR TRUST CO., https://bit.ly/3yvQF9e [https://perma.cc/K4MR-UV8Y].

195. One IRA custodian provides a database with information about many lost accounts, not just those under its custody. However, participation in their database is optional, so the information contained in the database is not comprehensive. *See About Us*, NAT'L REGISTRY OF UNCLAIMED RET. BENEFITS, https://bit.ly/3osZ5Lu [https://perma.cc/2SUQ-RDMV] (last visited Feb. 8, 2021). The National Registry of Unclaimed Retirement Benefits is a product of Penchecks Trust. *See PenChecks Company Information*, PENCHECKS TRUST, https://bit.ly/3Fe2Udq [https://perma.cc/3X9C-SSPK] (last visited Jan. 27, 2021).

196. *See, e.g.*, Retirement Clearinghouse, *supra* note 194; *Rollover Accounts: Take Control of Your Retirement Savings*, MILLENNIUM TRUST CO., https://bit.ly/3DSp96R [https://perma.cc/6RN8-T24Y] (last visited Jan. 27, 2021); *PenChecks Company Information*, *supra* note 195.

197. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 17.

198. *Id.* at 48.

199. *See id.* at 26.

nal employer, or move to the new employer.[200] When multiple changes occur over many years—as has been the case in many industries since the early 1980s—the chain can become extremely challenging for a layperson to follow.[201]

In addition to changes in plan sponsors, the financial companies that serve as providers or recordkeepers may change as well.[202] Plan sponsors generally contract with third party providers to administer, provide, and service 401(k) accounts.[203] Depending on the arrangements, branding for these third parties may be prominent on communications with participants, who may come to associate the third party with the account.[204] This can create confusion for participants who contact the large financial company that once served as the recordkeeper for their 401(k), only to find that the company no longer has a record of the account or participant.[205]

Employer sponsors also terminate 401(k) plans.[206] Plan termination is subject to a set of disclosure requirements and other regulations that are intended to protect plan participants.[207] At termination, the plan attempts to search for missing participants, consistent with guidance issued by DOL.[208] If the search is unsuccessful, however, then accounts of any amount may be force transferred to an IRA.[209] Alternatively, the plan may purchase an annuity with an insurance company; escheat the money to the state of last known residence or work location; or transfer to PBGC's missing-participant program.[210]

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200. *See id.*

201. Bruce & Turner, *supra* note 62, at 697.

202. *See* EBSA BEST PRACTICES, *supra* note 105.

203. *See id.*

204. *See id.* (recommending that plan communications to participants clearly identify the name of the original employer sponsor or plan name on the outer envelope).

205. *See id.*

206. *401(k) Plan Termination*, IRS, https://bit.ly/39VcMdI [https://perma.cc/22GA-ECUC] (Oct. 26, 2021).

207. *See, e.g.*, 29 C.F.R. § 2550.404a-3.

208. FAB 2014-01, *supra* note 151.

209. 26 U.S.C. § 401(31).

210. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 15–16 (citing 26 U.S.C. § 4975 and 29 U.S.C. § 1108). PBGC's program was included in the Pension Protection Act of 2006, but not implemented by regulation until 2017. Under the program, if a terminating 401(k) plan cannot locate a participant after a diligent search, it may either (1) transfer the account to PBGC; or (2) notify PBGC of the names of missing participants, and what entity will be responsible for paying their benefits. *See* 29 C.F.R. § 4050.203(a), (b). The program is optional for 401(k) plans and covers only terminating plans. It does not cover force-outs from active plans that are not terminating. *See id.* pt. 4050.

In theory, participants should receive notice when these types of changes impact their retirement accounts.[211] However, because contact information for former employee participants may be outdated and inaccurate, they might never learn about the changes.[212] Even when participant information is up-to-date, the importance of the communications may not be evident.[213] Or, participants may lose track of the information in a sea of retirement account notices and disclosures, a problem recognized by the GAO as contributing to participants losing track of their accounts.[214]

Because the retirement system is decentralized, there is no single location where lost participants can go for information about finding their account.[215] Unlike other countries, the United States does not maintain a public registry of information about pension plans and accounts that tracks historic transactions to help participants in their searches.[216] Even government agencies that maintain detailed plan histories, such as DOL, may lack complete information needed to identify the current status of lost accounts.[217] Participants can try contacting their former employer or a successor company, but personnel turnover may have attenuated or eliminated any institutional knowledge about former employees' 401(k) accounts.

IV. A PARTICIPANT'S PERSPECTIVE ON THE LOST 401(K) PROBLEM

The natural result of this extraordinary complexity is that many participants lose track of their accounts, and particularly accounts with balances under $5000.[218] If they fail to re-connect with their accounts when they need them, they may never be able to access the money they saved. Regardless of how well the 401(k)—or the forced-transfer IRA—may perform as an investment vehicle over time, it will not serve its purpose of providing retirement support.[219]

211. *See, e.g.*, 26 U.S.C. § 401(31).

212. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 26–27.

213. *Id.*

214. *Id.*

215. *Id.* at 49.

216. *Id.* at 35. According to the GAO's research, Australia, Belgium, Denmark, and the Netherlands all use tracking tools to assist retirees in locating their benefits. *Id.*

217. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 27 ("[A]lthough 401(k) plans are required to report annually on plan design, finances, and other topics to DOL, IRS, and PBGC . . . the information reported may not always result in a clear record or trail of employer or plan changes.).

218. *See id.* at 48.

219. *See supra* Section I.

This has significant financial and emotional impacts on individual account owners, and aggravates existing inequalities in the U.S. private retirement system.[220]

A. Mergers, Spin-offs, and Forced Transfers

Consider the fictional case of Patricia Participant, who experiences a scenario that is commonplace for many American workers.[221] Patricia worked for First Company in the Sales Division from 1995–2000. During this time, she contributed a small amount of each biweekly paycheck to a 401(k) account.

First Company's 401(k) Plan—"First 401(k) Plan"—is administered by American Investment Company. In 2000, First Company merges with Second Company, and also arranges to merge First 401(k) Plan into the plan sponsored by Second Company—"Second 401(k) Plan." Second Company contracts with the Boston Investment Company to administer the Second 401(k) Plan.

When Patricia hears that First Company will be merging with Second Company, she starts looking for a new job, and leaves her position just before the merger is finalized. At the time that she leaves, she has about $4000 in her account with First 401(k) Plan. Because she is busy managing these significant life transitions, she decides to leave the 401(k) account at American Investment Company for the time being. She provides her forwarding address to First Company but does not separately communicate the new information to American Investment. Due to an administrative error, First Company never communicates the new contact information to American Investment, and Patricia stops receiving statements and other disclosures about her account. She never learns that her account with First 401(k) Plan has transitioned to Second 401(k) Plan, or that it is now administered by Boston Investment.

In 2002, Second Company spins off the Sales Division—where Patricia once worked—to Third Company. Second Company remains the plan sponsor for the Second 401(k) Plan. Then, in 2006, Second 401(k) Plan decides to force transfer all 401(k) accounts with balances between $1000 and $5000 to reduce costs and liability. Second Company identifies the Transfer IRA Company as a provider of forced-transfer IRA services; and the lower-balance 401(k) accounts become safe harbor IRA accounts at Transfer IRA Company. Patricia's account is among those transferred to Transfer

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220. *See* Bruce & Turner, *supra* note 62, at 1.

221. The fictional example of Patricia Participant is an amalgamation of assistance requests received over the years by the Pension Action Center at the University of Massachusetts Boston, where the author serves as Director.

IRA Company. At the same time, Second Company switches 401(k) administrators from Boston Investment to Colorado Investment.

Fast-forward to 2021, when Patricia loses her job at age 60, and decides to begin taking distributions from her retirement accounts. She recalls that she had about $4000 in her 401(k) 20 years ago and expects that the savings will have grown considerably since that time. It has been many years since she received a statement, but she knows that American Investment Company is still a respected, existing company that manages hundreds of billions of dollars in retirement accounts.

She starts her search by calling American Investment. American Investment has no record of her in their system—perhaps, they explain, because the account dates from 20 years earlier. They suggest that she call the employer where she earned the money for more information. That is impossible, of course, because First Company merged into Second Company in 2000.

Patricia decides to call Second Company to see if they have any helpful information. Second Company looks in their system, but because she never was an employee of Second Company, there is no record of her or her account there, either. Second Company suggests that she contact the current administrator for their 401(k) plan, Colorado Investment, as well as Third Company. Colorado Investment has no record of Patricia, as her account was never with Colorado. Third Company has no record of her, either—she never worked for Third Company, nor did the company ever serve as sponsor for her 401(k) plan.

If Second Company's human resources office were exceptionally knowledgeable and helpful, Patricia might learn from them that some of the company's 401(k) accounts had been moved to forced-transfer IRAs in the past. They might even direct her to Transfer IRA Company to see whether her account exists there as an IRA. That would require, however, that someone working in human resources in 2021 has information about (1) the merger of First Company into Second Company in 2000, and the merger of the 401(k) plans; (2) the fact that the Sales Division 401(k) accounts stayed with Second Company as plan sponsor, rather than transferring to Third Company at the time of the spin-off; and (3) the history of forced transfers to Transfer IRA Company. It is possible—but highly unlikely—that the person Patricia speaks with would have such detailed, historic knowledge about the company's retirement plans or would go to the lengths necessary to research such information for a former employee of a predecessor company.

There is no library or database that would help Patricia find her account at Transfer IRA Company. While she could learn about the corporate history from public or proprietary corporate databases, she would be hard-pressed to find any publicly-accessible documents that describe the history of the 401(k) plan. It would be harder still for her to track down the history of her individual account. Perhaps Second Company would have information about which particular accounts were transferred, but they are not obligated to either keep that information or disclose it to Patricia.

B. Assessing the Harm

It is reasonable to estimate that tens of millions of participants are at risk of losing their 401(k) accounts, and that the amounts at risk add up to at least tens of billions of dollars, if not more.[222] At the Pension Action Center, a pension counseling center that serves workers and retirees in New England and Illinois, approximately 25 percent of all plan participants who contacted the Center concerning a lost benefit in 2019 were inquiring about a defined contribution account—the remaining 75 percent were inquiring about defined benefit plans.[223] While this limited sample is not necessarily representative, it nonetheless evidences a sizeable problem.

Unfortunately, the lack of transparency experienced by individual 401(k) participants also hamstrings efforts to measure the amount of harm. With limited reporting requirements and government oversight, there is no comprehensive data on the number of lost 401(k) accounts, their value, or the number of participants affected. The following sections describe two recent studies that have tried to assess the scope of the potential monetary harm and analyze additional harm that may not be captured by the dollar value of the lost accounts alone.

1. The Number and Value of Accounts Left Behind

One clue to the size of the problem can be found in data that pension plans report each year to federal government agencies regarding participants who depart employment and leave behind a vested balance in a retirement account.[224] This data is informative regarding the number and value of accounts that are vulnerable to

222. *See infra* Section IV.B.1.

223. The author reviewed Pension Action Center intake data for the year 2019 in order to compile this statistic. Documentation is on file with the author.

224. Plans are required to report this information to DOL and IRS on Form 8955-SSA. *See* IRC § 6057(a); *see also* I.R.S. Announcement 2011-21, https://bit.ly/3oqZVZ0 [https://perma.cc/KX7T-H234] (last visited Nov. 4, 2021).

becoming lost—essentially, it provides an upper bound on the accounts that actually do become lost.

The GAO reported its analysis of this data in its 2014 report on forced transfers. According to the GAO, over a 10-year period from 2004 to 2013, 25 million participants left at least 1 account behind when departing their jobs.[225] GAO also reported that between 2004 and 2013, more than 16 million accounts of $5000 or less were left behind when employees departed their jobs, worth a total of $8.5 billion.[226] The time period reviewed by GAO covered only a fraction of the four decades that 401(k) plans have been available, and presumably the cumulative number and value of accounts could be significantly higher.[227]

A more recent industry white paper found that in 2018, employer-sponsored plans reported having 21 million participants who had departed employment and left a 401(k) account behind.[228] The paper also reported that this number was over 40 percent higher than it had been in 2013, when the total number of accounts reported as left behind was 14.8 million.[229] These numbers are snapshots in time that include vested balances remaining with the plan after employees depart their employment. They would not, however, include smaller accounts that had been cashed out or force transferred in the past, and therefore no longer were subject to DOL and IRS reporting requirements.

When accounts are left behind and lost, participants also lose the investment returns that would have compounded tax-free until distribution. The $8.5 billion reported by GAO does not account for subsequent growth of these initially smaller accounts over the participants' lives.[230] The Employee Benefit Research Institute (EBRI) has estimated that the overall effect from automatically transferring accounts with balances under $5000 into another employer-sponsored account or IRA held by the account owner could be as high

225. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 23.

226. *Id.* at 7 (citing data from the Social Security Administration).

227. Accounts of any size may become lost over time, although retirees may be less likely to lose track of a larger account because the potential impact on future retirement income may be more apparent than with a smaller account. *See id.* at 25. Furthermore, larger accounts can, in limited circumstances, also be force transferred, if the balance accumulated at the current employer is less than $5000. *See id.* at 17.

228. CAPITALIZE, THE TRUE COST OF FORGOTTEN 401(K) ACCOUNTS 5 (2021), https://bit.ly/3im5NyZ [https://perma.cc/94ES-796T].

229. *Id.* at 5–6.

230. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 7.

as $266 billion.[231] The effect would be even greater if accounts of any size were transferred automatically.[232] Because an account may be passed to a named beneficiary upon the participant's death, losses may continue to grow for additional decades.[233]

2. *Potential Harm Exceeds Accounts' Financial Value*

The dollar amounts of potential losses are staggering, but they nonetheless fail to capture the impact that losing even a small retirement account may have on financially vulnerable workers and retirees.[234] Shortfalls in retirement savings are part of a larger phenomenon of low savings overall, particularly among lower-income Americans. The Consumer Financial Protection Bureau found in a recent study that fewer than half of those people surveyed reported having at least $3000 in their household's checking and savings accounts combined.[235] This number provides a useful baseline for assessing the significance of a smaller 401(k) to someone's overall financial picture. In addition, participants who have changed jobs multiple times without rolling-over or withdrawing their balances may have several smaller accounts, increasing the potential harm to each individual.[236]

Workers who fail to connect with their accounts before the date when they must begin their required minimum distributions face additional tax burdens. If they do not begin taking distributions when required—currently at age 72—IRS imposes a 50 percent excise tax on the amounts that were not distributed on time, unless it finds that a waiver is appropriate.[237]

Financial harm may be compounded by non-monetary harm, such as the time and mental effort spent tracking down an account. Losing even a small nest egg can be very distressing, given the chal-

231. JACK VANDERHEI, THE IMPACT OF AUTO PORTABILITY ON PRESERVING RETIREMENT SAVINGS CURRENTLY LOST TO 401(K) CASHOUT LEAKAGE 14–15 (2019), https://bit.ly/3kZuCm9 [https://perma.cc/DG58-MHSA]. The $266 billion figure is based on changes that would lead to all accounts under $5000 being transferred automatically to either IRAs or other employer-sponsored accounts. *Id*. The impact from this change would include reductions in cash-outs at job change; and therefore would overstate the effect due to reductions in lost 401(k) accounts alone. *Id*.

232. *Id.*

233. Bruce & Turner, *supra* note 62, at 699.

234. *See* Munnell & Webb, *supra* note 6, at 7.

235. *See* CFPB, PERCEIVED FINANCIAL PREPAREDNESS, SAVING HABITS, AND FINANCIAL SECURITY 6 (2020), https://bit.ly/3urdb0G [https://perma.cc/DV42-XDZE].

236. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 23.

237. 26 U.S.C. § 4974.

lenges in restoring the savings from scratch; and could even create a sense of futility in trying to generate future savings.[238]

The problem causes additional, non-monetary harm by undermining the fairness and equity of the retirement system, particularly among younger and lower-wage workers. 401(k) accounts that are lost due to forced transfer will have a disproportionate impact on lower-income workers, for whom a small retirement savings account could make up a significant percentage of savings overall.[239] In 2019, households approaching retirement in the lowest income quintile had median retirement savings of $32,200—an amount that could represent an initial investment of just a few thousand dollars early in someone's working career and invested in an indexed mutual fund.[240] For many low-income Americans, losing a 401(k) account could mean getting shut out entirely from the retirement system.

V. PROPOSALS TO ENHANCE PRACTICAL DURABILITY

The existing retirement system does not do enough to prevent this harm. When 401(k) accounts were added to the U.S. retirement system, they joined an existing regulatory framework that had not been established to protect this type of investor-directed, portable, individual account.[241] Participant protections under ERISA, including fiduciary obligations, do not extend to force-transferred IRAs. Furthermore, a participant with a lost account may never even be able to identify the current custodian in order to bring a claim.[242]

The participant's lack of choice when participating in employer-sponsored retirement accounts makes this situation all the more troubling. The employer sponsor—not the participant—selects the recordkeeper, and ultimately any safe harbor IRA custodian.[243] The participant has no opportunity to identify an IRA cus-

238. *See* CFPB, *supra* note 235, at 6 (stating that people who report having less savings than they believe they need are also less likely to report a habit of savings).

239. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 11; Neil Bhutta & Lisa Dettling, *Money in the Bank? Assessing Families' Liquid Savings Using the Survey of Consumer Finances,* BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://bit.ly/3BMKTzN [https://perma.cc/CA2N-9LQZ] (Nov. 19, 2018).

240. *See* MUNNELL & CHEN, *supra* note 25, at 7. The median American household approaching retirement has $144,000 in savings in 401(k) and IRA accounts. However, the amount varies significantly by income level. For the lowest income quintile, the median balance was $32,200. *Id.*

241. *See* Halperin, *supra* note 71, at 5.

242. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 25.

243. *Id.* at 5.

todian whose practices would be most likely to find the force-transferred IRA owners and return the missing money.[244]

Today's workers and retirees need new protections to enhance retirement plan durability. Recent proposals have the potential to empower participants to maintain contact with their accounts and locate them if they should become lost.[245]

A. Facilitating Rollovers to Reduce Lost Accounts

Facilitating employee-initiated rollovers between 401(k) plans would help reduce the number of accounts that workers must track over time.[246] Standardizing rollover processes and requirements among plans would smooth the way for workers who wish to move their funds when they change jobs.[247] New standards could be implemented through a technology-based solution shared across 401(k) providers.[248]

The ERISA Advisory Council has recommended that DOL and Treasury coordinate to summarize current roll-over requirements, by clarifying in particular that the receiving plan does not need to review an IRS determination letter for the sending plan in order to reasonably conclude that the funds are an eligible rollover distribution.[249] The Advisory Council found persistent confusion on this point, and determined that prior efforts by the IRS to clarify could be enhanced and better-communicated.[250]

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244. *See* EBSA BEST PRACTICES, *supra* note 1055.

245. The ERISA Advisory Council also has recommended enhanced investor education and enhanced disclosures regarding rollover options. *See* ADVISORY COUNCIL 2016, supra note 13, at 23, 26. Such measures could help, but represent only marginal enhancements over the status quo. *See id*. (describing current disclosures to participants via the "§ 402(f) Notice").

246. *See id.* at 21 (recommending DOL issue a Request for Information "to explore how it can support the development of a process, system, platform and/or clearinghouse to facilitate acceptance and expedite processing of eligible rollovers into retirement plans").

247. *Id.*

248. *Id*. at 12–13. Technology in place to facilitate rollovers from 401(k) to IRA accounts allows those transactions to occur in a fraction of the time that it takes to roll over funds between 401(k) plans. *Id.* at 13 (describing "middleware" solutions for rollovers to IRAs, as well as technology solutions used for other types of financial services).

249. *Id*. at 25. An IRS determination letter states that a plan is qualified under IRC § 401(a)—information that helps the receiving plan determine whether the funds are eligible for a roll-over. *See* INTERNAL REVENUE SERV., FAVORABLE DETERMINATION LETTER: PUBLICATION 794 1 (2016), https://bit.ly/3ELLQKJ [https://perma.cc/4KGZ-434E]. Obtaining and reviewing a determination letter can cause complications and delays in roll-over processing, however. *See* ADVISORY COUNCIL 2016, *supra* note 13, at 25.

250. *Id.* at 16–17

The Advisory Council also considered how retirement benefit clearinghouses might facilitate 401(k) rollovers.[251] A clearinghouse would match existing 401(k) accounts with new 401(k) accounts as they are opened.[252] Including IRAs as well as 401(k) accounts in the clearinghouse would further increase the opportunities to find matches.[253] This approach has been tried with success in several other countries: the United Kingdom, Switzerland, and the Netherlands automatically consolidate force-transferred accounts.[254]

In July 2019, DOL issued an exemption to IRA custodian Retirement Clearinghouse ("RCH"), paving the way for full implementation of its proprietary clearinghouse, or "auto-portability" model.[255] The RCH program uses what it calls a "locate and match technology" to periodically compare information about prior employer plan accounts, with information about newly opened 401(k) accounts.[256] The program's aim is to match the former to the latter, and roll over the funds into the active account.[257]

Under the arrangement, plan sponsors wishing to force transfer accounts with balances below $5000 transfer them to default IRAs provided by RCH.[258] RCH then attempts to identify potential matches with new accounts, using information about new 401(k) ac-

251. MUNNELL ET AL. *supra* note 107, at 23 (citing BIPARTISAN POL'Y COMM., SECURING OUR FINANCIAL FUTURE: REPORT OF THE COMMISSION ON RETIREMENT SECURITY AND PERSONAL SAVINGS 50 (2016), https://bit.ly/3GPjMbd [https://perma.cc/6MHH-7J8V]).

252. *Id.*

253. *Id.*

254. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 35.

255. Notice of Exemption Involving Retirement Clearinghouse, LLC, 84 Fed. Reg. 37,337, 37,338 (July 31, 2019). On November 5, 2018, DOL issued an Advisory Opinion finding that RCH was acting in a fiduciary capacity within the meaning of section 4975(e)(3) of the Code when performing the key action in its auto-portability service; namely, transferring an abandoned IRA account to the individual's new employer plan without the individual's affirmative consent. U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Advisory Opinion (Nov. 5, 2018), at 2018-01A, https://bit.ly/3m604hS [https://perma.cc/H9GE-DFAL]. As a result, RCH ordinarily would be prohibited from receiving certain fees in connection with the transfer. Notice of Exemption Involving Retirement Clearinghouse, LLC, 84 Fed. Reg. 37,337, 37,345 (July 31, 2019). RCH applied for an exemption from these prohibitions, which was subsequently granted by the Department for five years. *Id.*

256. *Id.*

257. *Id.*

258. *See id.* at 37,348. DOL regulations define "Default IRA" as:

> an individual retirement account that is described in Section 408(1) of the Code, and established pursuant to and in compliance with the requirements of Section 401(a)(31) of the Code and regulations 29 CFR 2550.404a-2; or an individual retirement account established as a result of a plan termination under 29 CFR 2550.404a-3.

Id.

counts that it receives from participating plan recordkeepers.[259] RCH collects a number of fees in connection with this service.[260] DOL's exemption prevents RCH from transferring accounts belonging to lost or missing participants; however, if RCH is able to match a missing participant account with a newly-opened 401(k) account, then the participant would no longer be missing, and the account could be included in the service.[261] In order to maximize success, a clearinghouse requires participation from a meaningful share of the market. As of September 2021, two recordkeepers, The Vanguard Group and Alight Solutions, have joined the program.[262] Vanguard and Alight were the third and fourth largest 401(k) recordkeepers by assets in 2020, respectively.[263]

An auto-portability model holds significant promise as a way of consolidating multiple small-plan accounts when employees move between jobs, or when their prior plans are terminated. Additional DOL action to expand the RCH-specific exemption to other providers could facilitate greater sponsor uptake. Increased competition might also decrease the fees associated with an auto-portability model. Currently, the exemption granted to RCH essentially grants a monopoly over this type of service, although DOL also restricted certain fees that RCH may charge. Data collected in connection with RCH's program could form the basis for broader regulatory action that would cover a larger segment of the market.[264]

B. Empowering with Information: Retirement Account Registry

A centralized database with information on all qualified retirement accounts would largely solve the lost 401(k) problem. Legislation re-introduced in the U.S. House of Representatives in 2021 would create a Retirement Savings Lost and Found—a single office in PBGC where account owners could locate up-to-date contact information for their retirement plans.[265] This proposal also would

259. Notice of Proposed Exemption Involving Retirement Clearinghouse, LLC, 83 Fed. Reg. 55,741, 55,742 (Nov. 7, 2018).

260. *Id.* at 55,744.

261. *Id.* at 55,743.

262. *The Retirement Clearinghouse Network Consists of Participating Recordkeepers Who Support the RCH Auto Portability Program*, RET. CLEARINGHOUSE, https://bit.ly/2ZWb8H3 [https://perma.cc/J4W3-8ZVW] (last visited Nov. 4, 2021).

263. *2020 Recordkeeping Survey, Table: Top Recordkeepers: Top 10, by Total 401(k) Assets*, PLANSPONSOR (July 15, 2020), https://bit.ly/3F8k9wI [https://perma.cc/YW96-NY7N].

264. For a discussion of the potential benefits and challenges of a proprietary auto-portability model, see DAVID C. JOHN ET AL., *supra* note 29, at 17–18.

265. H.R. 2954, 117th Cong. § 306 (1st Sess. 2021).

require retirement plans to transfer abandoned accounts with balances below $1000 to the Lost and Found in order to be reunited with their owners.[266] Coupled with enhanced reporting requirements, the proposed Lost and Found would finally create transparency for individual workers and retirees who otherwise have little hope of finding their lost accounts.

The legislation would expand current reporting requirements about individual accounts. Under the proposal, plans would report to the Lost and Found extensive and detailed information regarding deferred vested benefits that are left behind, as well as benefits that the plan distributed to employees who previously departed their jobs.[267]

Plans also would report information about the whereabouts of accounts that are force transferred to IRAs, including the name and address of the financial company where the new IRA is located, and the account number for the new account.[268] This would be a dramatic improvement over current reporting requirements. Millions of 401(k) accounts have been transferred to IRAs without their owners' knowledge or consent; but currently, there is no historic record or database that would allow the account owners to locate these accounts after the transfer.

The Retirement Lost and Found would use this data to create an online and searchable database that will allow participants to locate current plan administrator contact information.[269] This information would be updated over time to reflect changes to plans due to mergers, plan consolidations, plan spin-offs, bankruptcies, plan terminations, plan name changes, or changes in plan contact information.[270] This is a great improvement over the status quo, as currently plans are not obligated to update the information about deferred vested benefits that they report to IRS and DOL, and which the SSA provides to retirees on a SSA Retirement Benefit Notice. Whereas the information on the SSA Notice typically reflects the plan information that was accurate at the time that the participant left employment, the information in the Lost and Found

266. *Id.*

267. *Id.* § 306(d).

268. *Id.* The enhanced reporting requirements also would help workers with lost defined benefit plans. When a defined benefit plan is terminated, the plan sponsor may purchase one or more group annuity contracts with an insurance company to provide benefits to former participants. The legislative proposal would require plans to report to the federal government detailed information about these contracts, including the contract or certificate number. *Id.*

269. *Id.* § 306(a)(1).

270. *Id.* § 306(a)(iii).

would be current, and therefore significantly more useful for plan participants.[271]

The legislation introduced in 2021 calls for plans to transfer accounts worth under $1000 to the Lost and Found at PBGC, rather than cashing them out, or transferring them to an IRA.[272] Before making a transfer, a plan first would need to either notify the participant of their entitlement to the benefit, or attempt to pay the benefit to the participant.[273] If, within six months, a participant fails make an election with respect to the benefit, or fails to accept direct payment, then the plan administrator would be required to transfer the amount in the account to the Lost and Found.[274]

The mandatory transfer of these amounts, and their maintenance within a fund at PBGC, would constitute a major expansion of PBGC's existing, optional missing-participant program for defined contribution accounts.[275] PBGC would periodically conduct a search for the non-responsive participants whose funds have been transferred to the Lost & Found.[276] This is another dramatic change from the status quo because force-transferred IRA providers are not currently obligated to search for lost account owners.[277] The Lost and Found would not, however, be permitted to receive transferred accounts valued at over $1000, leaving those account owners to their own initiative to use the information in the Lost & Found to find their accounts.[278]

A separate provision in the legislation would require DOL to clarify the steps that plans must take to locate missing participants, and to prevent participants from becoming missing in the first instance.[279] The Secretary of Labor would be required to issue a new rule to: (1) define what steps a sponsor is required to take to locate a deferred vested participant; and (2) define what ongoing practices and procedures are required to maintain updated contact information on deferred vested participants.[280]

The Lost & Found database would be superior to the existing SSA Notices because it would make accurate, updated retirement

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271. *Id.* § 306(a).
272. H.R. 2954 § 306(b)(2).
273. *Id.* § 306(b)(2).
274. *Id.*
275. *See supra* note 210.
276. H.R. 2954 § 306(b)(1).
277. *See supra* note 194 and accompanying text.
278. H.R. 2954 § 306(c). The legislation also increases the maximum size of accounts subject to forced transfer to $6000. *Id.* at § 306(c)(2)(B).
279. *Id.* at § 306(f).
280. *Id.*

information available to workers throughout their lives. Currently, workers receive a copy of the SSA Notice when they claim social security benefits.[281] While this timing is helpful for accessing the benefits at retirement, it does not allow workers to track the benefits earlier, when they might be easier to locate, and when there is still time for the participant to actively manage the account.[282] While it is possible to request a SSA Notice at an earlier date, a very small number of workers currently do so.[283] Having a website with current, up-to-date information about retirement accounts, available throughout working and retirement years, would be a helpful supplement to the mailed notices that retirees currently receive.

The SECURE Act 2.0 was reported out of the House Ways and Means Committee in May 2021.[284] While prior versions of the Retirement Savings Lost and Found legislation have not moved forward, the proposal continues to have broad, bipartisan support, suggesting that it might become law in the future.[285]

CONCLUSION

Finding solutions to the lost 401(k) problem is critical to the financial well-being of millions of Americans.[286] Approximately 10,000 Americans will reach the age of 65 each day this year, a trend that will continue well into the 2030s.[287] Yet older Americans are increasingly unprepared for retirement, with over 50 percent at risk of being unable to maintain their standard of living.[288] The problem is even more acute for those who lost their jobs during the pandemic, with 75 percent of households in that group unprepared for retirement.[289]

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281. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 30.

282. *See id.* at 48.

283. *Id.* at 31.

284. *H.R. 2954–Securing a Strong Retirement Act of 2021*, CONGRESS.GOV https://bit.ly/3A5C03m (last visited Nov. 4, 2021).

285. The version of the bill that was introduced by Representative Richard Neal (D-MA) in 2020 and had 32 cosponsors, including 14 Democrats and 18 Republicans. *See* H.R. 8696*,* 116th Cong. (2020).

286. *See* EBSA COMPLIANCE ASSISTANCE RELEASE, *supra* note 190.

287. Guillaume Vandenbroucke, *How Many People Will Be Retiring in the Years to Come?* FEDERAL RESERVE BANK OF ST. LOUIS ON THE ECON. BLOG (May 30, 2019), https://bit.ly/3kUqOCs [https://perma.cc/6M5N-RWUA].

288. ALICIA MUNNELL, ANQI CHEN & WENLIANG HOU, HOW WIDESPREAD UNEMPLOYMENT MIGHT AFFECT RETIREMENT SECURITY, 1 (2020), https://bit.ly/3BT7RWg [https://perma.cc/6PR3-Q9MW].

289. *Id.* at 4.

The economic challenges created by COVID-19 will exacerbate the missing-participant problem as well.[290] In guidance issued in January 2021, EBSA stated its "expect[ation] that the economic disruption caused by the outbreak could result in large numbers of workers losing contact with their employers and plans."[291] The national unemployment rate in April 2020 was 14.7 percent—the highest seen since the Great Depression.[292] The job losses of 2020 occurred within the chaos of a pandemic, when issues of health, safety, and care for family members created additional obstacles to completing the paperwork necessary to effectively track a retirement account.[293] Even displaced workers who find new employment may have left 401(k) accounts behind. Meanwhile, retirement plans have been operating under pandemic-related strain, with their staff working remotely.[294] While the economic circumstances created by the pandemic may pass, any errors introduced into plan data during this chaotic period will persist, and it will become harder over time for workers to re-connect with their savings.[295]

Addressing this problem is fundamental to the fairness of our retirement system. Workers who forego present consumption to save for retirement are justified in anticipating that the money they earned and carefully saved will be available to them when they need it in the future. A benefit that is described as a retirement product should, in fact, have the practical durability to provide support at retirement—regardless of the worker's income level or the amount of money they have been able to save. Indeed, the money is even more critical for lower-income workers whose smaller accounts are more likely to be lost through a forced transfer.[296] They are also less well-prepared for retirement, and a smaller account may represent a larger share of retirement savings.[297]

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290. *See* EBSA COMPLIANCE ASSISTANCE RELEASE, *supra* note 190.

291. *See id.*

292. *See* TED: The Econs. Daily, *Unemployment Rate Rises to Record High 14.7 Percent in April 2020*, U.S. BUREAU LAB. STAT. (May 13, 2020), https://bit.ly/2Y7hyBS [https://perma.cc/2WU5-UV26]; *see also* MUNNELL, CHEN & HOU, *supra* note 288, at 5.

293. *See* EBSA COMPLIANCE ASSISTANCE RELEASE, *supra* note 190.

294. U.S. DEP'T OF Lab., EMP. BENEFITS SEC. ADMIN., FIELD ASSISTANCE BULLETIN NO. 2021-01: TEMPORARY ENFORCEMENT POLICY REGARDING THE PARTICIPATION OF TERMINATING DEFINED CONTRIBUTION PLANS IN THE PBGC MISSING PARTICIPANTS PROGRAM (Jan. 12, 2021), https://bit.ly/3mND08U [https://perma.cc/4VE7-V4JB].

295. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 48.

296. *See id.* at 21.

297. *See generally* MUNNELL & CHEN, *supra* note 25, at 6.

Now is the time to create a centralized retirement account registry to reconnect Americans with their savings. With a national database and enhanced rollover procedures, the 401(k) can become a more durable retirement vehicle—and workers will no longer face the unpleasant surprise of learning, too late, that their hard-earned retirement savings have gone missing.

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