

The National Women's Law Center and the Pension Rights Center appreciate the opportunity to present their views to the ERISA Advisory Council in connection with the Council's examination of Current Challenges and Best Practices Concerning Beneficiary Designations in Retirement and Life Insurance Plans. Our comments will focus on two areas, electronic communication and recommendations for best practices.

Electronic communications

As organizations that represent consumers and women, we are generally concerned with the potential impact that electronic communications by retirement plan sponsors can have upon vulnerable populations and upon beneficiaries, including spouses, and we have recently communicated those concerns to the Department of Labor.¹ Although we understand that electronic communications is not the focus of the Council's study, we believe that increased reliance on electronic technology for beneficiary designations and spousal consent could cause harm to those spouses and beneficiaries who are protected by the law.

Industry groups have consistently asked the Treasury Department and the Department of Labor to expand their ability to meet the spousal consent requirements through electronic means, most recently in recent public policy discussions of annuities.² Advocates of this proposal contend that greater use of electronic technologies in this context would ease administrative costs, and we understand that is important to employers. However, the expanded use of electronic technologies has the potential to place current substantive spousal protections in jeopardy.

Spousal pension protections are vital to women, who are more likely than men to rely on their spouses' retirement benefits.³ The spousal protections applicable to DB pensions, more specifically, have a significant impact on women's retirement security.⁴ In 2010, women aged 60 and over received a median survivor benefit of \$7,680 per year – which represents more than half the annual income of a typical woman over age 60.⁵ Moreover, the data suggest that DB

¹ See Letter to Assistant Secretary Borzi Re Electronic Disclosure (April 19, 2012), *available at* <http://www.pensionrights.org/newsroom/speeches-statements/group-letter-and-memorandum-dept-labor-electronic-disclosure>.

² See, e.g., American Benefits Counsel, Re: Request for Information – Lifetime Income (RIN 1210-AB33) 5 (May 3, 2010), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB33-646.pdf>.

³ Frank Porell & Diane Oakley, Nat'l Inst. on Retirement Security, The Pension Factor 2012: The Role of Defined Benefit Pensions in Reduce Elder Economic Hardships 6 (July 2012), *available at* http://www.nirsonline.org/storage/nirs/documents/Pension%20Factor%202012/pensionfactor2012_final.pdf.

⁴ U.S. Gen. Accounting Office, GAO/HRD-92-49, Pensions Plans: Survivor Benefit Coverage for Wives Increased After 1984 Pension Law 7 (1992) (examining data from 1984–1989), *available at* <http://archive.gao.gov/t2pbat6/146159.pdf>.

⁵ Email from Frank Porell, Professor of Gerontology, John W. McCormack Graduate School of Policy Studies, University of Massachusetts Boston, to Amy Matsui, National Women's Law Center (August 4, 2012) (on file with NWLC); Wider Opportunities for Women, Doing Without: Economic Insecurity and Older Americans (March 2012), *available at* <http://www.wowonline.org/documents/OlderAmericansGenderbriefFINAL.pdf> (average annual income of women over 60 about \$14,000).

pension survivor benefits help lower-income older women avoid poverty.⁶ The importance of spousal pension benefits, and in particular the survivor benefits provided through a QJSA, therefore, should not be minimized.

ERISA requires that spouses who choose to do so waive spousal pension benefits, in writing, in the presence of a notary public or plan administrator.⁷ This is intended to reduce the possibility of fraud. Without such requirements, the participant could deprive the spouse of a critical source of retirement income, without the latter's knowledge or consent. In particular, the in-person requirement recognizes that husbands and wives don't always have a unity of interest in economic matters, and because of potentially conflicting interests,⁸ husbands who for whatever reason wish to deny their wives a widow's pension might forge the consent papers or coerce the spouse to sign them. In other words, unlike other consumer transactions in which the perceived threat of fraud is deemed to come from outside the household, ERISA recognizes that the threat to the right being protected — the spouse's right to withhold consent to a waiver of the QJSA — comes from the *inside* the household, from someone who shares the spouse's home and has easy access to the forms and the mailbox (and today possibly to PINs and passwords).

By providing some measure of protection from coercion and forgery, these procedural requirements go a long way toward preventing violations of spousal rights from occurring in the first place. But, even the current process is not fraud-proof. There are reported instances in which participants have lied about being married, turned in forged forms, and even had a girlfriend impersonate the wife in signing the consent form in front of a plan representative. The defrauded spouse may not learn of the fraud until the participant dies and she applies for survivor benefits, only to be told she had waived the QJSA. In such cases, the requirement that spousal waivers be in writing is critical, because it facilitates independent authentication of the waiver.

A meaningful ability to challenge the validity of a spousal consent form, whether because it did not comply with statutory requirements or because it was forged, is an important back-stop protection, one that is implicitly recognized under ERISA.⁹ Although proponents of expanded electronic transmission of spousal consent contend that the protections are largely unnecessary, an after the fact avenue for redress in the case of consent forms that may appear valid but are not, are vital protections.¹⁰

⁶ *Id.* Thirty-one percent of women receiving DB pension survivor benefits were in the second income quartile, which greatly surpassed the percentage of such women in the first income quartile (25%), suggesting that survivor benefits raised the incomes of these women enough to remove them from the lowest income quintile. *Id.*

⁷ 29 U.S.C. § 1055(c)(2)(A).

⁸ “The potential conflict of interest between spouses rises from the fact that providing protection to a surviving spouse is costly....” Saku Aura, *Does the Balance of Power Within a Family Matter? The Case of the Retirement Equity Act*, Working Paper no. 202, at 1 (IGIER, Oct. 2001), available at <ftp://ftp.igier.uni-bocconi.it/wp/2001/202.pdf> (last visited Aug. 6, 2012). But, a reduced pension for the participant is not the only conflict of interest with a spouse. For instance, spouses may disagree over how to manage and spend retirement assets, or the participant spouse may wish to deprive the spouse of the benefit of the pension for malevolent reasons.

⁹ Section 1055(c)(6) provides that, in the event a plan fiduciary acts in accordance with fiduciary responsibilities and relies on what on its face appears to be a valid spousal consent form in paying benefits, the consent “shall be treated as valid for purposes of discharging the plan from liability *to the extent of payments made pursuant to such Act*” (emphasis added). 29 U.S.C. § 1055(c)(6).

¹⁰ See, e.g., *Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d 301(9th Cir. 1995) (participant falsely claimed to be unmarried in order to elect a single life annuity. The surviving spouse did not learn of the fraud

Unless the waiver process yields concrete evidence of identity that is capable of independent authentication, the right to seek redress from the plan is empty. A “signature” that is accomplished by the push of a telephone button or the click of a mouse, whether done with the accompaniment of a PIN/password or not, will not later be capable of independent authentication that the spouse was indeed the one pushing the buttons, thereby denying the spouse any legally convincing way to prove her case and exercise her rights under § 1055(c)(6).

In 2006, the Department of the Treasury considered the extent to which electronic technologies should be employed in the transmission of spousal consent.¹¹ Treasury concluded in final regulations that a spouse could provide consent with an electronic signature, in the presence of a notary public or plan administrator, but rejected the use of PIN numbers or telephonic technologies.¹² In our view, the Department appropriately rejected the use of two electronic technologies that did not adequately ensure either sufficient protection from coercion or fraud, or permit independent authentication of the transmission of consent; we are not aware of any electronic technologies other than electronic signatures made in the physical presence of a notary or plan administrator, that do so.

In sum, we believe that broadening the use of electronic technologies beyond what has recently been permitted through regulation poses a serious threat to spousal rights. Moreover, reducing those protections in the hope of making the administration of beneficiary designations less burdensome for employers presents a significant risk that policymakers should not take.

Best Practices

Employers and service providers must create their own forms and procedures for designating beneficiaries. Guidance from the Department of Labor could help employers, especially smaller and mid-sized employers, establish procedures that will minimize confusion and mistakes in identifying and locating beneficiaries. Participants also benefit when their beneficiary designations are clear and current. Good procedures can facilitate this process. We believe there are several areas where guidance would be useful.

Designation form

The form should contain sufficient information to enable a plan administrator to locate a beneficiary without much difficulty. The Department of Labor could recommend the minimum amount of information that typically would be needed to verify and locate a beneficiary. Social Security Numbers could be important sources of information, particularly since they can be used to locate missing beneficiaries, for example, through the letter-forwarding services provided by the IRS and the Social Security Administration (see discussion below). However, it is possible

until two months after the participant’s death, when she applied for survivor benefits.). The Ninth Circuit Court of Appeals held that § 1055(c)(6) offered only a limited discharge of liability, and that a plan is *not* discharged from any liability for payments that remain due but for the fraud. *Id.* at 304-305.

¹¹ Use of Electronic Technologies for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents, 71 Fed. Reg. 61,877, 61,882–83 (Oct. 20, 2006) (codified at 26 C.F.R. § 1.401(a)-21), *available at* <http://edocket.access.gpo.gov/2006/pdf/E6-17528.pdf>.

¹² *Id.* at 61,882.

that some beneficiaries may not have Social Security Numbers, or are reluctant to provide that information due to privacy or other concerns. A sample beneficiary designation form that is clearly written, and that clearly outlines the extent to which confidential information is protected, would be helpful. All designation forms should have room for the voluntary designation of secondary beneficiaries. Any beneficiary designation form should include the name and contact information for the employer.

Once a designation form is complete and on file, we recommend that a paper copy be sent or given to the participant for review and to keep for future reference. The Department of Labor could solicit comments on the advisability of also sending a copy of the completed form to the designated beneficiary.

Incomplete forms

As discussed above, participants completing forms during plan enrollment may not have complete information about a beneficiary. When forms are incomplete, the Department should encourage sending at least one reminder to the participant indicating that the form is incomplete. This should include a specific list of what information is missing, contact information in case the participant has questions, and a brief explanation of the consequences of an incomplete form as well as a blank form to complete.

Some have suggested that required electronic registration would solve the problem of incomplete forms, because the system would reject any form that is incomplete. We disagree. We oppose any requirement for participants to use electronic technology to designate a beneficiary or to change a beneficiary designation. Electronic forms may not fit all individual circumstances. We have expressed concerns about limiting access to paper-based information about pension benefits, and many of those same concerns would apply to preventing participants from designating beneficiaries using paper forms.¹³ Indeed, under current law, it would not be possible to effectuate beneficiary designations requiring spousal consent electronically.

In addition, some have suggested that employers or service providers accept partially completed designations. However, given the legal requirements for spousal consent to the designation of alternate beneficiaries, we reiterate our belief that a follow-up reminder from the plan administrator, as we suggest above, would be the preferred way to handle incomplete forms.

Out-of-date forms

Several practices, if adopted by plans, could remind participants to update their forms. The Thrift Savings Plan (TSP) for federal workers recently added a brief section to the quarterly statement that states whether a designation form is on file and the date of the most recent designation. It also includes a reminder to the participant to ensure that their designation is current. Since the beneficiary is not named, this is a simple way to remind participants to update their forms. A contact phone number for questions and to obtain forms could be included.

¹³ See Letter to Assistant Secretary Borzi Re Electronic Disclosure (April 19, 2012), *available at* <http://www.pensionrights.org/newsroom/speeches-statements/group-letter-and-memorandum-dept-labor-electronic-disclosure>.

The Department should issue guidance on including information about beneficiary designations on benefit statements, as described above, at least once a year for individual account plans. Defined benefit plans that send benefit statements every three years could send a beneficiary notice with each statement. A beneficiary statement naming all beneficiaries could be distributed at termination of employment or separation from service. This could include a sentence on the importance of current information, the usefulness of naming secondary beneficiaries, a blank form in case a change is needed and contact information for questions and changes.

Divorce

Because so many participants choose spouses as their beneficiaries, there is a significant likelihood that beneficiary designations will need to be changed following a divorce. We agree with some commenters that notice to the plan of a divorce should trigger an automatic re-solicitation sent to the participant to name a beneficiary, even if the beneficiary remains the same. However, we do not believe that automatically cancelling the designation on file at divorce is an appropriate solution, particularly to the extent that doing so might conflict with a valid QDRO awarding particular benefits pursuant to divorce. As the Department is well-aware, spousal benefits and QDROs are an extremely complex and technical area of the law, and the prevalence of pro se divorces exacerbates the potential for problems in the division of pension benefits and the execution of QDROs. We would, therefore, also encourage the Department to more widely publicize, and make available to family law practitioners and state courts, information about the kinds of benefits that can be awarded under ERISA and links to the Department's model QDRO forms.

Spousal consent to waivers

Besides the concerns presented by expanding electronic transmission of spousal consent discussed above, there are several issues related to spousal consent that the Department of Labor should consider. Under current law, employers and service providers are not prevented from providing and accepting a general waiver of rights by a spouse. In our view, insofar as possible, a waiver of rights in favor of someone other than the participant should specify the beneficiary of the waiver. When a spouse signs a waiver it should be clear for whose benefit the spouse is waiving rights.

In addition, we are aware that some plans provide that waivers are irrevocable. Plans should be encouraged to permit revocation of a previously effectuated waiver, unless payment of benefits has started. Moreover, the language in waivers is often confusing to spouses. The Department should consider, in conjunction with the Treasury Department, revising the model language for spousal waivers for the QJSA and the QPSA in defined benefit and defined contribution plans, and putting effort into educating the industry about the revised model language.

Finding a beneficiary

The Department of Labor should develop guidance on a plan fiduciary's responsibilities in searching for a beneficiary. Since beneficiary addresses can be out of date, a listing or description of appropriate search options should be helpful to plan fiduciaries. When a beneficiary is not located after an appropriate search, the Department should require the use of the letter-forwarding services provided by the Social Security Administration and the Internal Revenue Service. Any guidance issued should make clear that the plan fiduciary is responsible for procedures used in locating a beneficiary.

The National Women's Law Center and the Pension Rights Center appreciate the opportunity to present their views on these important issues. Should you have any questions, please do not hesitate to contact Amy Matsui, Senior Counsel at the National Women's Law Center, at amatsui@nwlc.org or (202) 588-7615.

Sincerely,



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