

April 14, 2020

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Dear Ms. Weiser and Ms. Judson:

We write in response to letters recently sent to you by the SPARK Institute, U.S. Chamber of Commerce, and American Benefits Council asking for the issuance of guidance on handling certain disclosure and filing procedures during the COVID-19 crisis. All three letters asked for relief from compliance with certain spousal consent requirements. They also suggested that you consult with participant groups about protections for spouses as you address this issue.

The Pension Rights Center works to protect and promote the retirement security of workers, retirees, and their families. The National Women's Law Center is committed to improving the lives of women and their families across the nation. Although spousal benefits are important to all surviving spouses, because women are more likely than men to rely on their spouse's pension benefit in retirement, lifetime survivor pensions are particularly critical to women's retirement security.

For married participants, ERISA and the Internal Revenue Code require that tax qualified defined benefit pension plans, money purchase plans, and target benefit plans automatically pay out their benefits in the form of a qualified joint and survivor annuity (QJSA), which entitles the spouse to a survivor pension equal to (at least) 50% of the benefit payable to the participant.¹ In order for the participant to take a different form of payment (e.g., a single life annuity, lump sum, or other form of distribution authorized by the plan), or to designate a non-spouse beneficiary, the spouse must give her/his written consent to the participant's election. If she/he does not consent, there is no waiver of rights and the pension must be paid in the form of a QJSA.

The statute and regulations also specify that certain procedural safeguards must be met to execute a valid spousal consent. These requirements are not extensive, but they are the linchpin for the effective enforcement of this important right, and to help prevent fraud or coercion. Key requirements include:

- *Informed Consent* – Spouses are entitled to receive written disclosures explaining the various payout options, their value, the consequences of their decision, and their rights to withhold

¹ Defined contribution plans are not legally required to obtain spousal consent for the participant to take a loan or hardship withdrawal, to make a distribution to the participant, or to roll the funds over into an individually owned IRA. Spousal consent is only legally required for private-sector DC plans in order to designate a non-spouse beneficiary to receive the balance if the participant dies with funds in the plan, or if they offer annuity options and the participant wants a single life annuity. However, some defined contribution plans voluntarily impose spousal consent requirements on loans or distributions from 401(k) plans, in which case these plans could also be covered by whatever the Treasury and IRS decide to do for DB, money purchase, and target benefit plans during this temporary shutdown period.

consent. This information is vital to their ability to make informed decisions and to know their rights.

- *Provided in Writing* – The consent must be provided by the spouse’s signature. This requirement is necessary to help prevent fraud. A signature is capable of being independently authenticated and having it in writing (on paper or on an electronic pad) produces a record that can be used as evidence if there is a later dispute.
- *Witnessed in Person* – The consent must be signed by the spouse in the *physical presence* of either a notary or the plan administrator. By enabling the notary/administrator to check the identification of the signer, to see the signature being affixed, and to observe the signer’s demeanor while signing, the physical presence requirement helps to prevent fraud by imposter/forgery, and makes it less likely that the signature is the result of coercion.

Plainly, compliance with the physical presence element of this regime is not possible during a period in which businesses are temporarily shut down and individuals are being asked not to go out or be near others. Industry is recommending a temporary measure to address this problem, and we agree that some sort of temporary accommodation is needed so that participants can retire and access funds they may need to respond to the current emergency.

However, given the increased potential for fraud posed by sidestepping the physical presence requirement, as acknowledged by SPARK, and the increased risk of coercion, as evidenced by the worldwide spike in reports of domestic violence aggravated by the lockdown and financial stress, any temporary alternative to the physical presence requirement must be carefully structured and accompanied by adequate safeguards. Without appropriate protections at the front end, the benefits could be cashed out and placed beyond the reach of surviving spouses, who could face an irreversible, lifelong loss of retirement income. Thus, we make the following recommendations to reduce the risks for spouses.

Recommendations

1. *Modify, rather than excuse, the usual spousal disclosure and consent requirements.* A temporary inability to comply with the physical presence requirement does not excuse compliance with all the other requirements.
2. *Any modification to the physical presence requirement should be temporary* – It should automatically sunset when state or national shelter-in-place requirements end and businesses reopen, or in 6 months, whichever is sooner. If the shelter-in-place period needs to extend beyond 6 months, there is the option to extend the time period.
3. *Lump sum distributions from defined benefit plans should be limited in size* – Lump sum distributions permitted without physical presence should be limited to a maximum of 10% of the value of the participant’s pension benefit during this emergency period.² Ten percent of the lump sum value of a DB benefit is likely to be an amount that is sufficient to address most emergency needs. If the couple wishes to take more or all of the benefit in the form of a lump sum (or a form other than the default 50% QJSA), that action should await the

² Since few, if any, plans currently offer a partial (10%) lump sum distribution option, a plan amendment would be needed to permit a temporary emergency distribution option. This amendment could be made after-the-fact and on a model form prescribed by the IRS..

reopening of businesses and should require compliance with all spousal consent requirements, including the physical presence requirement. A temporary inability to comply with the physical presence requirement should not be a license to bypass protections that have lifelong consequences.

4. *Recorded video chats or telephone conversations can be permissible temporary alternatives* - During this period, the signing of the spousal consent form, witnessed using video technology (e.g., FaceTime, Skype, Zoom, etc.) between the spouse and the plan administrator, should be permitted if the additional requirements in Recommendation #6 below are also satisfied. The plan administrator should handle witnessing duties in the same manner that the administrator would normally do, plus authenticate identity visually and also ask to see a government-issued ID,³ determine coercion/duress (e.g., ask if anyone else is in the room, ask whether the spouse is making the decision freely, observe the spouse's demeanor), and watch the spouse sign the document. The video chat should be recorded by the plan administrator.

If (and only if) the spouse does not have access to video conferencing technology, these functions should be handled in a telephone conversation between the spouse and plan administrator, and the phone call should be recorded by the plan administrator. In addition, for telephone "witnessing," the plan administrator should execute some form of two-factor authentication. If the spouse can text or email a closeup photo of the government-issued ID plus a photo of herself/himself holding that ID, that could be one of the factors. While not fraud-proof, a call to the spouse using the spouse's home or cell phone number on record with the plan could be a second factor.⁴ In both cases, the plan administrator should retain the recording along with all other plan records related to the payment of benefits. At the outset of the video chat or telephone call, the spouse should be notified that the video chat or telephone conversation will be recorded and retained.

5. *Remote notarization should not be permissible for this emergency purpose* - Plan administrators are familiar with the plan rules and procedures, and they keep plan records, such as the participant's election and the spouse's signed consent form. They can easily preserve the video/telephone conference call as part of those records. Moreover, by having the plan administrator be responsible for witnessing the consent, it is easier to administer the below requirements for paper disclosures before the video/telephone call and a paper backup procedure afterward. Furthermore, as pandemic conditions increase the haste and stress under which participants and beneficiaries are making financial decisions, as well as the risk of fraud and coercion, it is important that the witnessing party have familiarity with the substance of the documents being signed to be able to answer questions, clarify content, and assess whether the beneficiary fully understands the consequences of her/his signing.
6. *Paper disclosures and backups required* - Before the execution of the spousal consent, the couple should receive the usual required informational disclosures on paper, sent by a method no slower than first class mail, unless the spouse has affirmatively elected to receive them as

³ This should require the spouse to hold the ID close up to the camera so that its details are readable and to help detect obvious ID tampering.

⁴ Simply asking the spouse for her/his Social Security number, home address, or other such basic information is not sufficient since it is likely to be known by the participant-spouse and could easily be provided to an imposter.

electronic attachments to email (*not* simply posted on a website). Following the video chat (or telephone call), the plan administrator should be required to send two paper copies of a special COVID-19 emergency consent form to the spouse by a method requiring signature confirmation (as prescribed by the U.S. Postal Service for the COVID-19 crisis), with a self-addressed stamped envelope (people cannot easily get to the post office and may not have a copier at home).

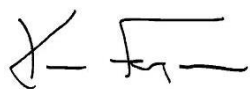
The special COVID-19 emergency consent form should explain the temporary spousal consent procedures and how they differ from standard procedures and also inform the spouse about the 10% limitation on lump sum distributions. The IRS could ease the burden on plan administrators by providing a model form. The spouse would keep one copy (interim copy) and sign one (in front of the plan administrator using video technology, if available) to send back to the plan. The plan should mail a paper copy of the signed final form back to the spouse for her/his records. In the event that the spouse raises any questions about the validity of the consent provided by video or telephone, the consent should be revocable within 30 days of receiving the signed final copy of the consent form.

Spousal pension rights can and must be protected during this unprecedented time of economic shutdown and physical distancing. Any alternative to the physical presence requirement should be temporary, limited, and accompanied by adequate procedural safeguards.

Finally, both SPARK and ABC have requested temporary authority to send joint and survivor and all other notices and disclosures electronically, “even if such delivery methods would not satisfy the Department’s *existing or proposed* electronic delivery safe harbors....”⁵ We strongly oppose this request. Most plan administrators are capable of complying with current requirements, especially if their requests to delay deadlines for making those disclosures are granted. For the few instances where it is not possible for a plan to send out paper disclosures, the plan could ask participants and beneficiaries if they would be willing to affirmatively opt in to electronic delivery for a very limited period of time (e.g., 3 months), with a commitment to resume paper notices after that limited time ends.

We urge you to do all you can to safeguard the rights of workers, retirees, their spouses during this difficult time. Please do not hesitate to contact us if you have any questions or need further information.

Sincerely,



Karen W. Ferguson
Director
Pension Rights Center



Amy K. Matsui
Director of Income Security & Senior Counsel
National Women’s Law Center

⁵ Letter from Lynn Dudley, Senior Vice President, American Benefits Council, to various DOL and I-Treasury officials 7 (Mar. 26, 2020) (emphasis added), available at <https://www.americanbenefitscouncil.org/pub/?id=1C8FAF08-1866-DAAC-99FB-0ED037160EE5>.