Retirement Security Anomaly

Quick-Take: A spouse's consent is not normally required when a plan participant takes a distribution or borrows from his/her qualified plan account, such as a 401(k) plan account. The ability to withdraw funds without a spouse's knowledge could jeopardize the spouse's long-term financial security.

Background: In the past we have covered the provisions of the 1984 Retirement Equity Act, which amended provisions of the Employee Retirement Income Security Act (ERISA), which provides that a participant's spouse's consent is required if the qualified plan participant wants to name a beneficiary, other than their spouse, to inherit their retirement account, e.g., children from a prior marriage. [Aside: I remember attending a seminar after the REA was passed where the speaker noted that the REA was the very first federal property law to be enacted, conferring a property interest in someone else's property.] This spousal consent 'requirement' appears frequently in federal court decisions when the beneficiary designation is changed by the plan participant without obtaining the formal written consent from the participant's spouse, resulting in a fight over inherited retirement account balances. ERISA's default rules require the award of a survivor annuity on the participant's death, thus ensuring that the surviving spouse receives regular plan payments, unless that spouse previously consented to the designation of another beneficiary.

Plan Withdrawals: Despite that policy which is intended to protect the retirement expectations of a surviving spouse, it is surprising to learn that no such spousal consent protection is required when funds held in many qualified plan accounts, like a profit sharing plan or a 401(k) plan, when funds are accessed by the participant via a plan distribution, withdrawal or a plan loan. A spousal consent requirement is only an 'option' that the qualified plan could decide to impose but it may choose not to add in light of the administrative hassles and delays associated with obtaining a spousal consent to the withdrawal or distribution of funds from the qualified plan account.

If a participant removes retirement funds from his/her account without their spouse's knowledge, it can significantly reduce the future retirement income for both of them. Adding to this problem is that federal law provides protections in some retirement plans by requiring consent to remove funds, but those protections vary among plan types. (Again, different rules for different plans often can lead to erroneous assumptions.) For example,

the Federal Thrift Savings Plan for federal workers generally requires spousal consent to remove funds from, but not for beneficiary changes to, a TSP account.

General Accounting Office: The GAO was tasked with studying the impact of the lack of spousal consent for a distribution from a qualified plan. [GAO-26-107536.] It looked at three issues:

- When married participants are required to obtain spousal consent to remove funds from or designated a beneficiary in defined contribution plans, and how often fund removal occurs.
- What stakeholders said about the potential effects on spouses when married participants take out funds without their spouse's consent; and
- What stakeholders cite as the trade-offs of increasing spousal protections and potential alternatives.

The GAO found that women are more likely than men to be negatively affected by the lack of requirement for any spousal consent to an in-plan distribution, in part because fewer women have their own retirement account. The GAO also concluded that adding a spousal consent requirement to all defined contribution qualified plans could increase financial safeguards for some spouses, but it could also delay processing distributions or increase costs for the plan and/or the participant if those costs are passed along from the plan sponsor to the plan participant. One example cited where a spousal consent requirement would be beneficial, is that it could prevent a participant from removing funds during a divorce without the knowledge of their spouse.

Some of the stakeholders interviewed by the GAO also identified some alternatives to a mandatory spousal consent requirement to reduce administrative burdens. They included notifying spouses when a participant removes funds from his/her account or only requiring a spousal consent to remove funds above a certain dollar or percentage of the account threshold. The stakeholders interviewed also noted the possible need for exceptions to a general spousal consent requirement such as in cases of domestic violence.

IRAs: Recall that IRAs are not governed by ERISA. Consequently, no spousal consent is required either to the owner's access of his/her IRA funds or to change his/her IRA beneficiary designation away from their spouse.

Conclusion: It will be interesting to see if Congress takes some action on the GAO's study and expands the spousal consent requirement to plan loans an in-plan distributions. Some protections may be required for a participant's spouse, but a formal spousal consent requirement might create more headaches than it solves.

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