



Nothing is Certain Except Death and Taxes

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October 26, 2022

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ATTORNEYS AT LAW
Employee Benefits & ERISA

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Boutwell Fay LLP Today's Presenters



Sherrie Boutwell
Sherrie has focused for thirty years in the areas of employee benefits law and ERISA, with an emphasis on retirement and deferred compensation plans. She advises and counsels a broad range of clients, including employers, employees, plan fiduciaries, financial institutions, government agencies and trade associations, on a wide range of employee benefits matters. Sherrie has extensive experience and is a highly sought-after speaker, writer, and advisor on employee benefits topics.



Evan Giller
Evan Giller has worked in the field of employee benefits law for over 30 years. He has extensive experience working with retirement plans on a wide variety of tax and ERISA issues, including plan design, administration, corrections, and fiduciary responsibility. He specializes in the retirement and deferred compensation plans of tax-exempt and governmental employers and has a particular focus on 403(b) and 457 plans.

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DISCLAIMER

The information provided during this program does not constitute legal advice. In addition, this program only provides a summary of certain complex and always evolving laws and regulations. Attendees should consult their legal counsel for guidance on the application and implementation of the many federal and state laws that impact employee benefit plans and the workplace, including the topics discussed during this program.

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What we will cover today

- Basic concepts
- Common mistakes and pitfalls
- Case studies illustrating best practices/creative solutions
- Pending legislation/regulations

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Who to Pay?

- Who is a "beneficiary"?
- Which law applies?
 - *Egelhoff v. Egelhoff*, the U.S. Supreme Court held that ERISA preempts state law that automatically revokes a pre-divorce designation of a former spouse as beneficiary upon divorce
- ERISA Section 3(8) - Definition of Beneficiary:
 - The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

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Who to Pay?

- Required plan provisions – start with plan document
 - Qualified pension plans/some profit sharing plans: QJISA/QPSA
 - Qualified profit-sharing plans: spousal consent to death beneficiary other than spouse, auto revocation on divorce
 - 403(b) plans: use same rules (follow plan document – many offer annuities)
 - Non-qualified plans – may be subject to ERISA claims procedures

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Who to Pay?

- Plan: default beneficiaries
 - Spouse
 - Descendants, per stirpes (common) or per capita
 - Other family members (usually parents, rarely others)
 - Estate
- Plan administrator's discretion upheld: (Gelschus v. Hogen, 8th Cir., No. 21-3453, 8/29/22)(participant failed to perfect new beneficiary designation after divorce)

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Basic concepts

- What is an estate?
 - It is the assets (and debts) of the decedent, on the date of death
 - Governed by state law, not ERISA
 - May or may not be part of a probate proceeding – technically there is an estate even if there is no formal probate

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Basic concepts

- What is a will?
 - It is document expressing a participant's desires for post-death matters
 - Generally, does not apply to distribution from a plan, but may nominate person to act on behalf of an estate, so may be relevant
 - May have a "pour-over" provision directing benefits to a trust

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Alternatives to Probate

- Plan assets generally pass "outside" of the estate but if the estate is the beneficiary, then may be able to use other laws to avoid probate:
 - Heggstad Petition (CA) - request to court to order transfer outside of probate if evidence that intended asset to be titled or paid to a trust
 - Small Estates/Affidavit in Lieu of Probate (CA) - dollar limit is approximately \$166,000 in 2022, but personal liability to affiant, cannot be a probate started (California Probate Code §§13100-13115)

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Who to pay?

- ERISA Fiduciary Requirements
 - Plan administration is a fiduciary function
 - Plan fiduciaries are required to act in a "timely fashion" in handling benefit claims (*Crew, Inc. v Walker, et. al.*, DC CD CA, 1/6/2022)(bad faith delay in bringing interpleader action resulted in award of attorney fees in excess of \$250,000)
 - Denial of a death benefit "claim" is subject to ERISA's mandated claims procedures (ERISA Section 503 and related regulations)
 - When is a claim a "claim"?

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Disclaimers

- Concept created under estate/gift tax rules - if the person entitled to the benefit "disclaims" the benefit, then does not belong to the beneficiary and instead is paid (and taxed) to the next person in line (often the default beneficiary if a named beneficiary disclaims)(GCM 39858)
 - Specifically recognized under RMD rules
 - Language contained in some plan documents, including pre-approved documents

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Who to pay?

- Disclaimers
 - What is a "qualified disclaimer"?
 - Written
 - Timely (9 months)
 - May not accept or control/direct the property
 - Valid under state law

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Marital Issues

- QJSA/QPSA
- Community property issues
- QDROS/Post-death QDROS
- Prenuptial agreements - Generally *not applicable* to override any retirement plan provisions
- Post-nuptial agreements may be enforceable under state law if consistent with plan provisions

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Post Death QDROs

- See: *Surviving Defendant v. Defendant*, 339 F.3d 1033 (9th Cir. 2003) (QDRO will not fail to be treated as a QDRO solely because of the time at which it is issued (example 1 – post death).
- See also: *Miletello v. RMR Mechanical, Inc.*, 921 F.3d 493 (5th Cir. 2019) (QDRO can be issued after death even if no pre-death order)

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Death of Business Owner

- Death of a business owner of a small business (especially if they were also the trustee of the plan/there were compliance issues) can create numerous issues:
 - Who will take over plan administration?
 - Is a court order needed to appoint a new trustee or plan administrator?
 - Are there potential conflicts of interest that need to be addressed?

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Do I Need a Subpoena?

- Case study: attorney calls plan administrator – says he represents the estate of a deceased participant and asks for plan documents and account statements. There is a designated beneficiary but it is an ex-spouse. The plan provides that if there is no designated beneficiary the estate is the beneficiary. The plan does not have a provision that automatically revokes the beneficiary designation on a divorce.
- How should the plan administrator respond to the document request?

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Missing Beneficiaries/Escheat

- Fiduciary duty to search for missing beneficiaries
- May be helpful to list named beneficiary on account statements
- Secure 2.0 – would create a national online database for lost participants
- If plan is terminating and beneficiary cannot be found, generally transfer to an IRA but in rare cases may need to escheat some accounts

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Who pays for all of this?

- General rules apply - employer acting as plan administrator cannot charge plan for employees on full-time payroll
- May be able to pass along consulting or legal fees to plan, but be aware of implications of paying legal fees out of plan assets
- May be able to specifically allocate costs related to death to that account if plan permits, properly disclosed
- ERISA attorneys' fees provisions will apply (See Crew case)

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What if more than one person makes a claim?

- Reminder: fiduciary duty rules apply
- Can use interpleader if needed and may be breach not to/not to use promptly after it is clear there are multiple claims:
 - Interpleader = court action filed by the plan, allege competing claims, pay funds to court (note – may want to ask court for leave to hold funds in trust while interpleader moves forward)
- When can you get a release or settlement?

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Interpleader

- Interpleader is not always available:
 - See, e.g., Metro. Life Ins. Co. v. McNatt, Case No. CIV-13-474, 2015 U.S. Dist. LEXIS 70950 (E.D. Ok. June 2, 2015)
 - Life Insurance Company of North America v. Nears, 926 F.Supp. 86 (W.D.La. 1996), and
 - Forcier v. Forcier, 406 F.Supp.2d 132 (D.Mass. 2005), the policy here vested MetLife with broad discretionary authority to distribute the proceeds
 - Metropolitan Life Insurance Company v. Price, 501 F.3d 271, 281 (3d Cir. 2007).

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Settling Disputes?

- When can you get a release or settlement?
 - Fiduciary cannot demand a release for a benefit that is owed
 - Need consideration to support a contract
 - Settlement may need to be approved by an independent fiduciary

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Case Study: the Indecisive Spouse

- Spouse waived self as sole death beneficiary in 401(k) plan and consented to children from former marriage as beneficiary after participant died (consistent with pre-nuptial agreement)
- Spouse hired counsel and rescinded post-death consent and demanded payment of account

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Case Studies

- The new recordkeeper
 - Although old recordkeeper has record of beneficiary designations, new recordkeeper will not take old beneficiary designations from old provider
 - Although old recordkeeper had an approved QDRO on file, it was not transferred to new recordkeeper, participant dies with a new spouse

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Case Studies

- The Unsigned beneficiary designation
 - Plan provides benefit goes to beneficiary, if none, spouse, if none, children, then to estate – parents of deceased participant prevent unsigned beneficiary designation with themselves listed as the beneficiary
- The pending QDRO
 - Both employees work for the same employer, they file for divorce and submit a proposed QDRO, but it is not approved and the 18-month period to approve passes, then the participant dies

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Case Studies: Separate Ways

- The missing spouse
 - Plan requires payment to spouse on death (unless spouse consents to other named beneficiary), participant filed for divorce, and employer is aware of this, years later the participant dies, but the divorce was never finalized – the sister claims the benefit

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Taxes

- Generally taxable to recipient/payee, with no early distribution penalty
- Rollovers – complex rules
- RMDs – complex rules
- Disclaimers – no tax to designated beneficiary
- Plan qualification and correction

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Rollovers

Spouse – generally ok

Non-spouse – must be a designated beneficiary and a direct transfer to an inherited IRA

Designated Roth – must be to Roth

If no direct rollover, 20% withholding applies

May be able to “look through” a trust (if can for RMD)



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Proposed RMD Regulations

- On February 23, 2022, the IRS released proposed regulations revising the required minimum distribution rules. The regulations are proposed to become effective January 1, 2022. The regulations permit a reasonable, good faith interpretation for 2021, but not for 2022. These regulations largely address changes to RMD rules made by the SECURE Act, but they also reflect other statutory amendments.



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Proposed RMD Regulations (cont'd)

- The RMD rules (in section 401(a)(9) of the IRC) apply to both the plan and to plan participants and beneficiaries:
 - The distribution of the correct required distribution amounts is a qualification requirement for the plan
 - Failure to take the correct required distribution subjects the participant or beneficiary to a 50% excise tax on the amount due



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Proposed RMD Regulations (cont'd)

- Highlights (for participants who die after 2019 with exceptions for governmental and union plans):
 - Generally eliminates "stretch IRAs" (that use beneficiary's life expectancy to calculate payments). Beneficiaries will no longer be able to take life expectancy payments - will have to deplete the account within 10 years. This rule applies to DC plans generally and not just to IRAs. Certain important exceptions apply.
 - SECURE Act changed start date for RMDs to age 72 for participants born on or after July 1, 1949. Regulations clarify that distributions before age 72 are not RMDs and participant is not considered to have begun RMDs until reaching age 72.

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Proposed RMD Regulations (cont'd)

- Three categories of beneficiaries under proposed regulations
 - Designated beneficiary: any individual named as beneficiary
 - Non-designated beneficiary: a beneficiary who is not an individual, such as a trust
 - Eligible designated beneficiary: new category

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Proposed RMD Regulations (cont'd)

- Eligible Designated Beneficiaries are:
 - Spouse
 - Child under age 21 (age of majority)
 - Disabled (as defined in the regulations)
 - Chronically Ill
 - Beneficiary not more than 10 years younger than the participant

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Proposed RMD Regulations(cont'd)

- Each category of beneficiary subject to different distribution requirements:
 - Non-designated beneficiaries: distributions must be completed by 5 years after death of participant
 - Designated beneficiary: distributions must be completed by 10 years after death of participant
 - Eligible designated beneficiary: can still use the life expectancy rules, meaning RMDs can be made either over the beneficiary's life or life expectancy if distributions begin in the year following the participant's death, or 10 years after death.



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Proposed RMD Regulations (cont'd)

- IRS Notice 2022-53: Transition relief to clear up confusion under the regulations
 - 10 year rule where participant dies after beginning distributions requires an RMD payment to be made each year, not just in the 10th year
 - Some beneficiaries did not take distributions in 2021 or 2022 because of confusion about this rule
 - Notice provides that IRS will not question qualification of plan or impose an excise tax on beneficiary who did not take these types of "specified" required distributions in 2021 or 2022
 - Final RMD regulations will not apply before 2023 distribution year



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Proposed RMD Regulations (cont'd)

- Dealing With Multiple Beneficiaries:
 - Treat as one beneficiary using age of the oldest and status of the beneficiary with lowest status
 - Pay out some or all beneficiaries prior to the beneficiary determination date (September 30 of year following death)
 - Split account into separate shares and determine RMDs separately
 - Beneficiary files qualified disclaimer under IRC §2518
 - Disregard beneficiary who dies before participant



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How do we know Participant Died?

- Could participant just be missing?
- Death audits: ss used to have database, work with vendor to running the population through a database to see if anyone is dead, more common in DB plan where benefits may no longer be payable

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Proposed Legislation

- March 24, 2022 letter to GAO from Senators Murray and Burr – asking if DC plans need more spousal protection similar to pension plans ([https://www.help.senate.gov/imo/media/doc/GAO%20Spousal%20Protctions%20Request%20FINAL%20\(3.24.22\).pdf](https://www.help.senate.gov/imo/media/doc/GAO%20Spousal%20Protctions%20Request%20FINAL%20(3.24.22).pdf))
- Secure 2.0
 - Increases RMD age to 75
 - Establishes national database for missing participants

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