

Spousal Consent (Qualified Joint-and-Survivor Annuities)

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A. Background

The Employee Retirement Income Security Act (ERISA) as enacted in 1974 required pension plans to provide a joint-and-survivor annuity (J&S annuity) benefit as the automatic form of benefit for married participants. The J&S annuity had to provide a survivor annuity for the participant's spouse of at least 50% of the participant's benefit. However, under ERISA as originally enacted, spousal consent was not required if a married participant elected a form other than the plan's J&SA. The Retirement Equity Act of 1984 (REA) continues to require pension plans to pay a married participant a qualified J&S annuity (QJSA) that provides a surviving spouse benefit equal to at least 50% of the participant's benefit. However, under REA, written, informed spousal consent is required if the participant wants to waive the QJSA and elect another form of benefit. This internal guidance document provides guidance for the rules PBGC follows in requiring spousal consent and supplements PBGC's rules for paying QJSA benefits.

The sixth edition of this internal guidance document has been revised to increase the de minimis threshold from \$5,000.00 to \$7,000.00 for plan terminations on or after January 1, 2024, to reflect the updated dollar limit for mandatory distributions under section 304 of the SECURE 2.0 Act of 2022, Division T of the Consolidated Appropriations Act, 2023. (For plan terminations on and before December 31, 2023, the de minimis threshold remains \$5,000.00.)

B. Scope and Effective Date

This internal guidance document applies to payees in any PBGC-trusteed plan regardless of the DOPT of the payee's plan or the date of the participant's separation from service and is effective upon issuance.

C. Internal Guidance

1. General

PBGC pays a QJSA to a married participant unless the participant waives the QJSA with spousal consent as provided by Internal Guidance Document Annuity Benefit Forms. Before trusteeship, plans are not required to obtain spousal consent to a participant's election of a form of benefit that (i) meets the requirements for a QJSA, including that it provides a survivor annuity between 50% and 100% of the amount payable during the participant's lifetime, (ii) is actuarially equivalent to the plan's QJSA, and (iii) names the spouse as the beneficiary. However, in trusteed plans, PBGC requires spousal consent even if the participant is electing a PBGC optional joint-life annuity form with the spouse as the beneficiary. PBGC will provide the participant with relevant information, including the monthly benefit amounts of the annuity benefit forms with the spouse as beneficiary, so the spouse may provide informed and effective consent.

- a. At the time a participant applies for a PBGC benefit, the participant's waiver of the QJSA with spousal consent must be obtained in writing on a form that is acceptable to PBGC. Spousal consent must be notarized; however, for an application processed by the prior plan administrator, spousal consent may otherwise be witnessed by the plan representative.
- b. A participant's waiver of the QJSA and the spousal consent must be executed no more than 180 days before the participant's annuity starting date (ASD). If a participant has a retroactive ASD, the waiver and spousal consent must be executed no more than 180 days before the date they are received by PBGC.
- c. Before the first payment date, PBGC generally will honor a request to revoke spousal consent as provided under section H.1.b. of Internal Guidance Document Annuity Benefit Forms.
- d. If a spouse is incapacitated, PBGC will accept spousal consent given on behalf of the spouse by his or her legal guardian or agent under a durable power of attorney, if the guardian or agent is authorized to waive benefits, pursuant to Internal Guidance Documents Power of Attorney and Internal Guidance Document Guardianships and Conservatorships. The guardian or agent may be the participant.
- e. PBGC may request or accept spousal consent in any benefit payment situation PBGC deems prudent, even if it is unclear whether spousal consent is required. For example, if a participant chooses a form of benefit other than the QJSA and a marriage is alleged, but it is unclear whether PBGC can recognize the marriage (such as with a common-law marriage), PBGC may request spousal consent, and if it is provided, will pay the benefit in the elected form.

2. Assignment and alienation of benefits

PBGC may require spousal consent if assignment or alienation of a participant's pension benefits is permitted (e.g., by alternative treatment of majority owner's benefit or by a benefit offset for a plan loan, fiduciary breach, or other transfer of assets) as provided by Internal Guidance Document Assignment or Alienation of Benefits.

3. De minimis lump-sum distributions

PBGC generally will not require spousal consent to pay a benefit in a lump sum if the lump-sum value or residual lump-sum value of a benefit is de minimis (that is, \$5,000.00 or less for plans terminating on and before December 31, 2023, or \$7,000.00 or less for plans terminating on and after January 1, 2024) as of DOPT.

4. Employee contribution distributions

PBGC requires spousal consent if a participant elects a return of his or her accumulated mandatory employee contributions (AMEC) as provided by Internal Guidance Document Payment of Priority Category 2 Benefits.

5. Cash balance plans – de minimis lump-sum distributions

PBGC pays a cash balance benefit in a lump sum if either the lump-sum value of the benefit or the hypothetical account balance is de minimis (that is, \$5,000.00 or less for plans terminating on and before December 31, 2023, or \$7,000.00 or less for plans terminating on and after January 1, 2024) as of DOPT, even if one of them is not de minimis. If either the lump-sum value of the benefit or the hypothetical account balance is not de minimis as of DOPT, spousal consent is required to pay the lump sum as provided by Internal Guidance Document Cash Balance Plans - Valuing and Paying Benefits.

6. Retroactive Annuity Starting Dates

PBGC generally will require spousal consent to a participant's election of a retroactive annuity starting date as provided by Section D 1 of Internal Guidance Document Annuity Starting Dates.

7. Change of Beneficiary for Certain and Continuous Annuity

PBGC requires that a participant who wishes to change the beneficiary of a previously elected certain and continuous annuity benefit form, and who was married at the time of their original benefit form election, must obtain spousal consent prior to changing their beneficiary. The consent must be obtained from the spouse to whom the participant was married when their original benefit form election was made (i.e. the spouse to whom the participant was married when the participant started receiving benefits) if that spouse is still living, unless that spouse is being named as the 100% beneficiary of the certain and continuous annuity. This requirement applies to pre-trusteeship and post-trusteeship retirees.

PBGC will not retroactively require spousal consent for changes of beneficiaries for certain and continuous annuities that were made prior to the effective date of the new forms that require the additional consent.

If a participant or spouse raises an objection about the additional spousal consent or the original spousal consent provided when the participant made the original benefit election (e.g., because of an earlier general consent, which purports to fully waive the right to limit consent to future changes to optional forms of benefit and future changes to beneficiaries), request guidance by emailing PSDGuidance@pbgc.gov.

8. Exceptions

a. Spousal consent not in file

If a participant is receiving a benefit that required spousal consent, but evidence shows that effective spousal consent was not properly obtained, PBGC will provide the spouse the opportunity to consent retroactively to or to refuse to consent to the participant's waiver of the QJSA and election of an optional form of benefit. If the spouse is deceased, PBGC will continue to pay the benefit in the elected form.

If a spouse claims that a QJSA survivor benefit is payable and spousal consent is not in the file, PBGC will determine if the spouse is due a benefit as provided by the applicable pension plan provisions, regulations, and/or internal guidance document in effect when the participant retired (except as provided in Internal Guidance Document Marriage Requirements¹).

1. Annuity starting dates on or after January 1, 1985.²

- a. **Post-Trusteeship Retiree.** If the participant had an annuity starting date on or after January 1, 1985 and PBGC does not have spousal consent on file, PBGC generally will pay the QJSA survivor benefit. However, if PBGC determines that a post-trusteeship retiree was correctly paid in accordance with prior PBGC internal guidance, PBGC generally will not change the benefit to the QJSA.
- b. **Pre-Trusteeship Retiree.** PBGC generally will assume that a prior plan administrator routinely followed the REA requirements when placing a pre-trusteeship retiree into pay status and will not change the benefit to the QJSA unless convincing evidence to the contrary is found.³

2. Annuity starting dates before January 1, 1985.⁴ If the participant's annuity starting date was prior to January 1, 1985, and a benefit determination has become final, PBGC generally will only pay benefits in accordance with the benefit determination; PBGC will not pay a surviving spouse benefit. If the benefit determination has not become final, PBGC will determine if surviving spouse benefits are due as provided by the applicable pension plan provisions, regulations, and/or PBGC internal guidance in effect as of the annuity starting date (except as provided in Internal Guidance Document Marriage Requirements¹).

3. Affirmation that spousal consent was not given. Prior to making payment under this provision, PBGC may require a spouse to affirm in writing that he or she did not give spousal consent for the form of benefit in pay and that he or she agrees to immediately repay PBGC any survivor benefits received if PBGC subsequently finds otherwise.

Note 1: Internal Guidance Document Marriage Requirements addresses, among other things, PBGC's recognition of same-sex marriages. PBGC generally will recognize such marriages in open cases for purposes of QJSA and QPSA entitlement.

Note 2: Effective January 1, 1985 (or the earlier of the expiration of the current collective bargaining agreement and January 1, 1987 for collectively bargained plans), REA requires pension plans to pay a married a participant who had at least one hour of service or paid leave on or after August 23, 1984, a QJSA unless the spouse consents to the participant's waiver of the QJSA. When putting a participant into pay, PBGC does not require participants to have the one hour of service or paid leave as provided in REA.

Note 3: PBGC may not be able to obtain all retiree records and forms when it trustees a plan. The absence of a spousal consent form is not considered indicative that the plan did not follow the REA requirements.

Note 4: Prior to January 1, 1985, in ongoing plans, spousal consent was not required for participants to waive a plan's automatic J&S annuity. However, prior to October 22, 1986, PBGC generally paid benefits based on the participant's marital status at DOPT and did not give participants the opportunity to waive a plan's automatic J&S annuity.

b. Abandoned or separated spouse

PBGC will treat a participant as unmarried (for purposes of requiring spousal consent) if the participant provides a court order declaring the participant to be legally separated or legally abandoned (within the meaning of local law); thus, spousal consent will not be required to elect a form of benefit other than the QJSA. If PBGC is later provided with a court order reversing or vacating the court order provided by the participant, PBGC will provide the spouse the opportunity to consent to or to refuse to consent to the participant's waiver of the QJSA.

c. Missing or unlocatable spouse

When a married participant who does not want to receive a QJSA applies for pension benefits and asserts that the spouse is missing or cannot be located, PBGC will attempt to locate the spouse.

1. If PBGC establishes to its satisfaction that the spouse is "unlocatable," PBGC will not require spousal consent to pay the benefit in a form other than a QJSA.
2. **Spouse located.** If the spouse is located, before or after the participant enters pay status, PBGC will provide the spouse the opportunity to consent to or to refuse to consent to the participant's waiver of the QJSA.

PBGC generally will not communicate (in writing or orally) any confidential information (e.g., name used, address, location, phone number, etc.) about the participant or the spouse to the other party even if the parties agree to the communication of the information.

3. **Participant deceased.** If the spouse is subsequently located after the participant's death, PBGC will pay the spouse a surviving spouse benefit as provided in Internal Guidance Document Annuity Benefit Forms. If the participant's death was on or after the participant's ASD, PBGC will pay a QJSA survivor benefit. If the participant's death was before the participant's ASD, PBGC will pay preretirement survivor benefits as provided under PBGC Internal Guidance Documents Qualified Preretirement Survivor Annuities - Plans Terminating On and After August 23, 1984 and Survivor Annuities – Plans Terminated Before August 23, 1984.

d. Alleged forgery of spousal consent

If a spouse alleges that his or her signature on a spousal consent is forged, PBGC will refer the matter to its Office of Inspector General (OIG) for possible investigation.

1. If the OIG finds that the signature was forged, PBGC will change the participant's form of benefit to the QJSA.
2. If the OIG concludes the signature was not forged, PBGC will not change the participant's form of benefit to the QJSA.
3. **Instances where the OIG does not make a determination on the alleged forgery.** PBGC generally will assume that a notarized spouse signature is valid. Also, for applications processed by the prior plan administrator, PBGC generally will assume any spouse signature witnessed by a plan representative is valid.
4. Prior to changing the participant's form of benefit, PBGC may require a spouse to affirm in writing that he or she did not give spousal consent to the participant's waiver of the QJSA and that he or she agrees to immediately repay PBGC any survivor benefits received if PBGC subsequently finds otherwise.

e. QJSA-related benefit changes and recoupment

PBGC will change a form of benefit to the QJSA and recalculate a benefit when appropriate under this internal guidance document and in accordance with Internal Guidance Document Benefit Corrections. (If the participant wants a form of benefit other than the QJSA, request guidance by emailing PSDGuidance@pbgc.gov.) Any resulting net benefit overpayments or underpayments will be calculated, recouped or recovered, or paid in accordance with Internal Guidance Documents Underpayment Reimbursement and Interest Payments, Recoupment, Recovery and Administrative Correction, and Computation and Netting of Post-DOPT Overpayments and Underpayments.