

# **Assignment and Alienation of Benefits**

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## **A. Introduction**

This internal guidance describes how PBGC implements ERISA's rule against assigning or alienating pension benefits. Assigning a benefit means giving away the right to receive one's future benefits - for example, if it were not prohibited, a participant might give (assign) the right to receive his or her future benefits from the pension plan to a lender in exchange for a loan. Alienating a benefit has a similar meaning - any action that has the effect of transferring to another party the right to receive from a pension plan a participant's or beneficiary's future benefits. More generally, IRS regulations interpret ERISA's (and the Internal Revenue Code's) assignment and alienation rules as prohibiting levies, garnishments, and any other direct or indirect arrangement by which a party acquires a right - enforceable against the pension plan - to a participant's or beneficiary's future benefits.

There are a limited number of specific exceptions to the assignment and alienation rules set forth in the law and IRS regulations. Probably the most well known of these is the exception for payments to an alternate payee under a qualified domestic relations order (QDRO), but there are a few other exceptions, which are described in this internal guidance.

After plan termination, PBGC generally follows the rules about assignment and alienation applicable to ongoing plans. This internal guidance provides specifics on how we do so.

This third edition of the internal guidance adds one more exception to the assignment and alienation rules to allow garnishment of PBGC benefits pursuant to a court order under the Mandatory Victims Restitution Act.

## **B. Scope and Effective Date**

This internal guidance establishes rules for assignment or alienation of benefits in PBGC-trusteed plans, and for alternative treatment of majority owners' benefits in any distress or involuntary termination. It is effective upon issuance.

## **C. General Rule**

PBGC will not honor any arrangement under which a party acquires a right to receive directly from PBGC all or any part of a benefit payment that is or may become payable to participant, beneficiary or alternate payee except as specifically described in section D of this internal guidance. Examples of arrangements that will not be honored include assignments to creditors, garnishment orders and benefit waivers.

Arrangements that are not considered assignment or alienation of a benefit include: tax withholding; recoupment and recovery of benefit overpayments, whether pre-DOPT or post-DOPT; and direct deposit of benefit payments to an account bearing the name of the participant, beneficiary or alternate payee. Request guidance by emailing PSDGuidance@pbgc.gov for a determination regarding any arrangement not specifically described in this internal guidance.

## **D. Exceptions to the General Rule**

## **1. Alternative Treatment of Majority Owner's Benefit**

In a plan undergoing a distress termination, an individual who is a majority owner may elect to forgo receipt of all or a portion of his or her benefit if the conditions for doing so in PBGC's distress termination regulation are met. See 29 CFR § 4041.47(d) and 4041.21(b)(2) for those conditions. For alternative treatment of a majority owner's benefit in an involuntary termination, the same rules apply. OGC concurrence is required for any alternative treatment permitted under this section.

## **2. IRS Tax Levies**

PBGC will honor federal tax levies against a benefit upon receipt of a notice of levy from the Internal Revenue Service. If the benefit is not in pay status when the levy is received, PBGC will not unilaterally place the benefit in pay status unless the participant, beneficiary, or alternate payee under a separate interest QDRO is entitled to go into pay status and the IRS specifically asks PBGC to put the person into pay status.

## **3. Mandatory Victims Restitution Act Orders**

PBGC will comply with garnishment orders issued by a United States District Court judge when made pursuant to the Mandatory Victims' Restitution Act ("MVRA"), 18 U.S.C. § 3613(a), subject to the conditions below. Refer any MVRA garnishment orders to PSD Federal for review by emailing them to PSDGuidance@pbgc.gov. PSD Federal will refer any deviations from the conditions below to OGC for guidance.

- a. The order must state that it is made pursuant to the MVRA. The order should also specify the pension plan and contain instructions on delivering the garnished benefit. Typically, an MVRA order will instruct the payor to deliver the money to the Office of the Clerk ("Clerk") for the relevant Federal District Court.
- b. The participant subject to the MVRA order must be in pay status.
- c. If the participant is due only a *de minimis* lump sum benefit, PBGC may comply with the order by delivering the entire benefit to the Clerk.
- d. If the participant is receiving a benefit in the form of a life-time annuity or any other form of benefit paid in monthly installments, PBGC will only garnish 25 percent of the participant's monthly benefit and will continue to pay the participant 75 percent of his or her benefit.
- e. A surviving spouse will not be subject to any MVRA garnishment unless there is an order specifying that the spouse was separately found guilty of a crime covered by the MVRA. After the death of the participant, the surviving spouse will receive their survivor benefits as normal.
- f. Any benefits being paid to an alternate payee of the participant or any benefits payable in the future to an alternate payee pursuant to a separate interest QDRO, are unaffected by the garnishment order and should continue, or be put into pay status at the appropriate time as provided in the QDRO. Further, if a QDRO requires the participant to elect a QJSA with the alternate payee as the spouse, the survivor portion payable to the alternate payee will not be subject to any MVRA garnishment unless there is an order specifying that the alternate payee was separately found guilty of a crime covered by the MVRA. An alternate payee under a shared payment QDRO that assigns a portion or percentage of the benefit

paid to the participant to the alternate payee will receive a portion of the participant's benefit that remains after it has been reduced by any MVRA garnishment. However, if a shared payment QDRO assigns a flat dollar amount or otherwise indicates that the amount payable to the alternate payee under the QDRO should not be reduced for post-QDRO events, the amount payable to the alternate payee will generally not be reduced by the MVRA garnishment.

#### **4. Qualified Domestic Relations Orders (QDROs)**

PBGC will pay all or a portion of a participant's benefit to an alternate payee pursuant to a QDRO. See Internal Guidance Qualified Domestic Relations Orders (QDROs).

#### **5. Payments to Third Parties**

- a. **General.** A PBGC payee may have 100% of his or her future benefit payments directed to another person or to an account that is not in his or her name in accordance with the following rules:
  1. the arrangement must be revocable at any time;
  2. the third party must acknowledge in writing that he, she or it has no enforceable right to the PBGC payee's benefit; and
  3. the PBGC payee must complete and sign a "Direction to Third Party" agreement.

The holder of a durable power of attorney may execute a third-party payment agreement on behalf of an incompetent PBGC payee. (See Internal Guidance Power of Attorney, for rules relating to durable powers of attorney.)

- b. **Incarcerated payees.** A request to have the benefit of an incarcerated payee directed to a warden or an account established to offset the cost of incarceration will be honored only if the incarcerated payee requests the change in writing. If the account is not in the name of the payee, the redirection will occur only if the requirements of subsection 5.a., above, are met.
- c. **Cessation.** Payments to the third party will cease upon receipt of written notice of revocation of the agreement from the person who executed it, or upon a finding that the PBGC payee who executed an agreement has become incompetent.

#### **6. Plan Loans**

PBGC will offset (permanently reduce) a benefit by the amount of an unpaid loan balance at DOPT in accordance with Internal Guidance Plan Loans.

#### **7. Fiduciary Breach and Related Offsets**

This section applies to judgments, orders, decrees, or settlement agreements made on and after August 5, 1997. Any offset under this section must have OGC concurrence. The benefit offset under this section is treated as a distribution for purposes of federal income taxation.

- a. **Conditions for offset.** PBGC will offset against a participant's benefit an amount the participant is ordered or required to pay to the plan where the following conditions are met.
  1. The order or requirement to pay to the plan arises—

- from a conviction of a crime involving the plan;
  - under a court order in a civil case involving a violation (or alleged violation) of the fiduciary-responsibility provisions of Title I of ERISA; **or**
  - under a settlement agreement between the participant and either PBGC or the Department of Labor involving a violation (or alleged violation) of the fiduciary-responsibility provisions of Title I of ERISA;
2. The applicable judgment, order, decree, or settlement agreement expressly provides for the offset against the participant's benefit; **and**
  3. If the participant has a spouse on the effective date of the order or agreement that provides for the offset —
    - the spouse is not entitled to a survivor benefit (e.g., because the participant is receiving a benefit and the spouse was not married to the participant on the annuity starting date, or because the amount of the participant's benefit was *de minimis* under plan rules);
    - the spouse waived the QJSA, in accordance with all applicable requirements, at the participant's annuity starting date and the participant did not elect any other joint-and-survivor annuity with the spouse as the beneficiary;
    - the spouse consented in writing to the offset and the consent is witnessed by a notary public or representative of the plan;
    - the spouse is ordered or required under the same judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation (or alleged violation) of the fiduciary-responsibility provisions of Title I of ERISA (PBGC may decide not to rely on this condition if the spouse is only ordered to pay a nominal amount and the amount of the protected survivor annuity with respect to the offset benefit is large.); **or**
    - the judgment, order, decree, or settlement provides that the spouse retains the right to receive the survivor benefit as though the participant's benefit were not reduced under this paragraph (i.e., a protected survivor annuity, as described below.) If the order is silent in this regard, PBGC will provide a protected survivor annuity.
- b. **Protected survivor annuity.** If the spouse described in section 7.a.(3), above, does not provide required consent, his or her minimum survivor benefit with respect to the amount of the benefit offset will be protected. See sections 4.d and E of Internal Guidance Plan Loans, for rules regarding protecting a survivor annuity, but substitute a 50% QJSA and a 50% QPSA for the plan QJSA and QPSA. Note that the protected survivor annuity will be paid to this spouse only if he or she is still married to the participant at the participant's annuity starting date or, if earlier, date of death.
- c. **QDROs.** PBGC will not offset against an alternate payee's benefit under a separate-interest QDRO that became effective before the date of the crime or violation (or alleged violation) described in section 7.a.(1). PBGC may offset against an alternate payee's benefit under any other separate-interest QDRO or under a shared-payment QDRO. (Of course, to the extent

an alternate payee has a right to a survivor benefit at the effective date of the order or agreement, that person is treated as a spouse for purposes of that survivor benefit, and the spousal consent rules in this section apply.)

- d. **Method of offset.** An offset for a fiduciary breach under this section is offset in the same manner as a pre-DOPT or post-DOPT distribution (see section 8, below), based on the effective date of the offset.

## 8. Other Distributions

- a. **Pre-DOPT distributions to participants.** If a participant alleges to have taken an undocumented loan from a plan that does not allow participant loans, or is otherwise determined to have received plan assets other than by a bona fide loan, an actual distribution of the participant's benefit occurs. The distribution occurs as of the date of the transfer of funds from the plan to the participant, reducing the participant's benefit and creating taxable income in the amount of the distribution. However, if the plan administrator has not taken action to notify the participant and the IRS of the distribution, PBGC will do so as soon as practicable after the date of trusteeship of the participant's plan. PBGC will report it as a distribution, for federal tax purposes, in the year of such notification. The distribution is treated as having taken place before DOPT for purposes of asset allocation and benefit determination.

If the participant was married to the same person at the time of the distribution and at DOPT, the spouse did not consent to the distribution, and the distribution was not de minimis under the plan's rules, PBGC will seek spousal consent as soon as practicable after it becomes trustee. If the spouse does not consent, his or her survivor benefit with respect to the amount distributed will be protected. See section C.4.d and section E of Internal Guidance Plan Loans, for rules regarding protecting a survivor annuity. Note that the protected survivor annuity will be paid to this spouse only if he or she is still married to the participant at the participant's annuity starting date or, if earlier, date of death.

- b. **Post-DOPT distributions to participants.** If, after DOPT, a participant alleges to have taken an undocumented loan from a plan that does not allow participant loans, or is otherwise determined to have received plan assets other than by a bona fide loan or benefit payment by the plan, an actual distribution of the participant's benefit occurs. The distribution occurs as of the date of the transfer of funds from the plan to the participant, reducing the participant's benefit and creating taxable income in the amount of the distribution. If the plan administrator has not taken action to notify the participant and the IRS of the distribution, PBGC will do so as soon as practicable after the date of trusteeship of the participant's plan. PBGC will report it as a distribution, for federal income tax purposes, in the year of such notification. The distribution is disregarded for purposes of the plan valuation. The participant's termination benefit is subsequently permanently reduced by the annuity equivalent of the amount taken, discounted back to DOPT.

If the participant was married to the same person at the time of the distribution and at the date of PBGC trusteeship, the spouse did not consent to the distribution, and the distribution was not de minimis under the plan's rules, PBGC will seek spousal consent as soon as practicable after it becomes trustee. If the spouse does not consent, his or her survivor benefit with respect to the amount distributed will be protected. See section

C.4.d and section E of Internal Guidance Plan Loans, for rules regarding protecting a survivor annuity. Note that the protected survivor annuity will be paid to this spouse only if he or she is still married to the participant at the participant's annuity starting date or, if earlier, date of death.

- c. **To others.** If plan assets are improperly transferred directly to a person who is not a participant or to an entity (including the employer that sponsors the plan), the transfer is not a (permissible or impermissible) distribution that will affect directly a participant's benefit. The action is probably a fiduciary breach and the fiduciary responsible, as well as the receiving person, may be sued for recovery. PBGC's claim is a plan asset and, because of the difficulties inherent in collecting from an individual, in many if not most cases it will be valued as uncollectible (i.e., as having zero value). Note that if the fiduciary is a plan participant, benefit offset may occur if the requirements of section D.7, above, are met.

## **E. Spousal Consent**

Spousal consent required or obtained under this internal guidance must meet the requirements of Spousal Consent (Qualified Joint-and-Survivor Annuities).