NELA Advocates for Employee Rights℠
National Employment Lawyers Association

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Submitted Via Email
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Larry Good
Executive Secretary
Advisory Council on Employee Welfare and Pension Benefit Plans
U.S. Department of Labor
200 Constitution Avenue, N.W.
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Re: Comments on Current Challenges and Best Practices Concerning Beneficiary Designations in Retirement and Life Insurance Plans

Dear Mr. Good:

On behalf of the National Employment Lawyers Association (NELA), I submit the following comments for the 162nd open meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans (ERISA Advisory Council). Our comments will address the issue of the "Current Challenges and Best Practices Concerning Beneficiary Designations in Retirement and Life Insurance Plans." Thank you for the opportunity to add our views to those previously submitted, which tend to reflect the perspectives of plans and third party administrators. While NELA's comments represent the interests of individual plan participants and beneficiaries, our conclusions are largely similar to the other presenters.

NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. With 68 circuit, state and local affiliates, and 3,000 members across the country, NELA is the nation's largest professional organization composed exclusively of lawyers who represent individual employees in cases involving employment discrimination, wrongful termination, employee benefits, and other employment-related matters. NELA has participated as *amicus curiae* in the U.S. Supreme Court to protect the rights of workers and their beneficiaries under ERISA. *See, e.g., CIGNA Corp. v. Amara*, 563 U.S. __ (2011), *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358 (1999); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989).

I am a NELA member who has been in private practice representing individuals in benefit claims for over 40 years, since before the passage of ERISA. Over the last 35 years I have also represented two Taft-Hartley multiemployer plans, and thus have engaged with these issues from the employer/plan administrator perspective as well.

1. Default Rule.

NELA agrees with the default rule. As much as one would like to believe that keeping beneficiary designations up to date is purely a matter of personal responsibility, the fact is that

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even otherwise diligent and careful individuals may fail to maintain current designations. For a recent example, one may review the facts of *Andochick v. Ronald & June Byrd*, Civil Action No.: 1:11-cv-739, 2012 U.S. Dist. LEXIS 65903 (E.D. Va. May 9, 2012), in which a lawyer at a prominent law firm died without updating her beneficiary designations following her divorce. Granted, most plans will never face a beneficiary challenge but, as previous witnesses have stated, each challenge that does arise is likely to be fraught with emotion and expense.

Compounding the problem is that many family law attorneys fail to remind their clients about changing beneficiary designations. Of those that do, that reminder too often takes the form of a single item in a long list of "things you should do after your divorce." It is unfortunate, but not unsurprising that such advice is often overlooked or forgotten. Plan fiduciaries should recognize this fact and take it into account when evaluating beneficiary designations.

NELA agrees with those witnesses who supported adopting a default beneficiary designation. As one witness pointed out, it has worked well for 401(k) investment choices, and we believe it will work well for beneficiary designations as well. NELA believes the defaults should be in the following order:

1. To the current spouse to the extent of the current spouse's minimum legally required interest in the plan;

2. Designated beneficiary. If the designated beneficiary is the current spouse, the designation form (and the plan document) should provide that if the participant and spouse are divorced at the time of the participant's death, it will be conclusively presumed that the spouse predeceased the participant. We suggest the "predeceased" option rather than voiding the designation, because the designation may contain the name of a secondary beneficiary. There is nothing to prevent the participant from later redesignating the former spouse as beneficiary.

3. Spouse, but only to the extent of the spouse's minimum legally required interest in the plan. In order for the spouse to receive this benefit, the person must be the legal spouse at the time of the participant's death. While there are often disagreements about who is a "legal spouse," plan fiduciaries are uniquely well-positioned to resolve such disputes, and the fiduciaries' conclusions are almost always upheld in court.

4. If the participant has a living trust, then in accordance with its terms.

5. If the participant has a will, then in the same manner as set forth in the will. (Please note that this is different from paying the monies to the estate to be distributed through the will.)

6. Per intestate succession in the state of residency of the participant.

NELA urges that the living trust and will be considered before proceeding to the intestate succession default (e.g., spouse, child, parents, etc.). A plan I represent had an interesting situation where the unmarried participant died without a beneficiary designation, but had a will in which he specifically directed (in rather dramatic terms) that his children receive nothing. Under the plan terms at the time, the children received his benefits anyway. Because a living trust and a will contain affirmative expressions of the participant's intent, we believe they should prevail over the intestate succession list. Even state laws of intestate succession do not apply when there is a will. There is no good reason for a plan to be administered otherwise.

2. Small Estates and QDROs.

The Council has asked about plans using state laws that avoid probate for small estates through the use of declarations. The plans I have represented have always used these without problems, relieving the heirs of significant administrative burdens.

NELA also agrees with the witness who recommended that the plan's QDRO procedures and model QDRO form be amended to provide that all pre-divorce beneficiary designations naming the divorcing spouse will be void and of no effect. While such a provision merely echoes existing rules, it does provide valuable notice to the parties of how those pre-divorce designations will be handled. If the family law court wishes to require that the ex-spouse remain as a beneficiary, it may order the participant to re-designate the ex-spouse, being fully aware that the participant may revoke that designation at any time, thereby leaving the former spouse with only state law remedies.

3. Participant Communications and Accurate Record Keeping.

Most of the witnesses also supported setting up internet access for participants so that they could go online to change their beneficiary designations and to verify their current designations. In addition, those witnesses suggested that benefit statements inform participants who their current designees were. These are also good ideas, but depend heavily on the quality of the implementation. In a case I handled recently, a Fortune 500 corporation hired a well-known TPA to take over pension plan administration and to provide just such services. Despite the TPA's recommendation, however, the company decided not to go back into the paper beneficiary designations and digitize that information. To make matters worse, and again contrary to the TPA's recommendation, the company directed that benefit statements state "no beneficiary designation on file," even though there might be just such a designation in the paper files. Only after the participant died, did the company pull the old files from its warehouse and discover a 38-year-old designation of the participant's ex-spouse whom he had divorced 36 years before his death—and had barely spoken to since. Thus, we would caution plans and TPAs that if they are going to represent to participants that "there is no designation on file," such representations must be truthful.

Some witnesses noted that certain plans' benefit statements do not tell participants who their current beneficiaries are, but instead state that "you should review your beneficiary designations." While we understand the caution that motivates the communication of such limited information, it is unhelpful. We know that the vast majority of participants will not take the time to "review their beneficiary designations," so telling them to do so, without more guidance, only serves as an attempt to create a cover against future liability and is hardly consistent with the spirit of one's fiduciary duties.

In the case we mention above, for the eight years before his death the company had been telling the participant that the participant had no designated beneficiary. In the face of this, the company still argued that the participant should have remembered that 38 years before he had designated his (then) spouse as his beneficiary. While we understand that this was the company's litigation position, the point of the current inquiry is to set out *best practices that help the participants, not place unreasonable and impractical burdens on the participants.*

NELA recommends that as part of the reporting and disclosure requirements, companies provide participants with a list of all the plans in which they participate, as well as the beneficiary designations applicable to each plan. As an alternative, some witnesses have suggested an omnibus beneficiary designation that would apply across all plans. We do not have a strong opinion on this, but we would be inclined against it. My (limited) experience is that once we can get a participant to make choices, those choices may be different amongst the different plans.

4. Managing Benefit Disputes.

As mentioned by other witnesses, there is a bubbling cauldron of case law following footnote 10 in the Supreme Court's decision in *Kennedy v Plan Adm'r for DuPont Sav. & Inv. Plan,* 555 U.S. 285 (2009). There, the Court held that a plan was not required to inquire into the niceties of state law issues and questions of intent, and was only required to follow the beneficiary designation. In footnote 10, the Court noted that it was not ruling on the question of whether ERISA preempted state law—as it applied to claims between the disputing beneficiaries. The typical case, as was the situation in *Kennedy*, is where the spouses divorce, the pension is awarded to the participant, but the participant fails to change the beneficiary designation. Upon the participant's death, the benefit is paid to the former spouse. The remaining question is whether the heirs of the participant are allowed to sue the ex-spouse on a state law claim, whether for constructive trust, waiver, unjust enrichment or other theories. The circuits are split on this question. The Ninth Circuit says the beneficiary designation determines who has legal title to the benefits. *Carmona v. Carmona*, 603 F.3d 1041 (9th Cir. 2010). The Third Circuit's position is that ERISA does not preempt state law, and that after distribution the disappointed beneficiaries may sue for a constructive trust. *Estate of Kensinger v. URL Pharma, Inc*., 674 F.3d 131 (3rd Cir. 2012).

Plans should be structured to minimize the possibility of future disputes. They are, after all, administered by fiduciaries who owe "the highest duty known to the law." If those fiduciaries can take some steps to help participants make known and effectuate their wishes, there are no compelling reasons for them to avoid taking those steps. Here, the default rules will certainly not eliminate every potential dispute, but they will go a long way toward addressing the obvious problems that currently exist.

5. Answers to Council's Questions.

With regard to the list of questions posed by the Council, NELA offers the following thoughts.

Several witnesses suggested that while interpleader of the funds was an option, it could be expensive. In my experience, however, if done correctly the entire interpleader process can be conducted for $3,000 to $5,000 and, if the plan chooses it can have the Court award those expenses out of the disputed benefits. The usually reasonable alternative is to hold the disputed funds until the parties reach an agreement as to how they should be disbursed. On the other hand, holding the benefits rather than interpleading them can be complicated, especially where the parties are unrepresented by counsel and it comes time to prepare a settlement agreement that is satisfactory to the plan.

The Council has asked whether benefit disputes should go through the plan's administrative procedures. Of course they should. It is up to the plan to interpret its rules and to find facts related to benefits. We cannot think of any reason why such disputes, insofar as they involve the plan's obligations, would not be subject to administrative review. One oddity we have noticed is that when there are legitimate benefit disputes, plans tend to do either too much or too little. In the case mentioned above, the plan sent the money to the ex-spouse despite the estate's claim and without holding any type of hearing. Needless to say, this was an expensive mistake. Other times, in the face of a dispute a plan simply throws up its hands and either tells the parties to resolve it or interpleads the money. It would be more sensible for the plan to engage the parties in administrative exhaustion first, come to a decision, and only then either direct the parties to resolve their dispute or file an interpleader action. This way, the plan can at least give the court the benefit of its expertise as well as ensure consistency in application of its rules. On a more practical note, if the parties are represented by knowledgeable counsel and the plan fiduciaries have discretionary authority, it will go a long way in assuring a more rapid resolution of the dispute.

The Council also asked about locating missing beneficiaries. This should not be a problem. I recently resolved a class action involving some 3,500 participants, the last known addresses for many of whom were more than seven years old. The settlement administrator was able to locate all but 11 of them. We expect that with minimum expense we should be able to locate those 11 as well. While we appreciate that there are costs, even though minimal, associated with finding every participant, the fact remains that it is important that each one be found.

On state law issues, the Council asked whether plans treat state laws as preempted by ERISA, and whether DOL guidance should be requested. As to the latter question, there are so many varied situations that it is unlikely that guidance would be of much help. As to the preemption question itself, plans that buy insurance should recognize that those insurance policies will be governed by state law as well as choice-of-state-law-issues. But state laws can arise in a host of different contexts. For example, I had a case where a participant who lived in a community property state designated his brother as his beneficiary on his life insurance. When he died, his (estranged) spouse claimed a state law community property interest in the benefit. Fiduciaries will be required to evaluate state law claims in a variety of contexts, and there is no evidence that the fiduciaries have been, or will be, unable to navigate state law issues as part of their duties.

Two other issues often arise with respect to state law guidance. The first is whether a beneficiary designation "substantially complies" with a plan's rules so as to be effective. If there is a dispute, a disappointed beneficiary may urge a court to apply state law concepts of substantial compliance as a federal common law of pensions. The most effective way to address this potential issue is to define clearly in the plan precisely what constitutes substantial compliance. Of course, plans should understand that if a beneficiary designation does not substantially comply with the plan's rules, the time to tell this to the participant is when the designation is filed, not after the participant dies. Still, there will always be situations that could not be anticipated at the time of designation. For example, there is a case where a plan accepted a beneficiary designation submitted by the participant's girlfriend after the participant's death that named her as the beneficiary. The form was not filled out in the participant's handwriting and was unsigned. The plan claimed the form "substantially complied" with its rules. The matter, as one may expect, is in litigation.

The second is the interesting issue of the application of state slayer statutes. Everyone worries about them, but reported cases actually applying them seem rather rare. The heart of the problem is that everyone agrees with the principles of slayer statutes, but nearly everyone also agrees that they are likely to be preempted, unless (arguably) it is an insured benefit. We agree with the witnesses who suggest that a plan be amended to include mirror language of the state's slayer statute. The difficulties are matters of proof and the timing of paying the benefit—do you pay at the time of the indictment, conviction, or after appeals? Compared to allowing a potential slayer to benefit financially, however, these are inconsequential concerns.

We appreciate the opportunity to provide the Council with the above comments. Please do not hesitate to contact Terisa E. Chaw, NELA's Executive Director, should you have any questions or wish to discuss these comments (Tel: (415) 296-7629, ext. 101; Email: tchaw@nelahq.org).

Very truly yours,

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