SECURE Act

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ty-free distribution up to $5,000 for a qualified birth or adoption, the creation of a fiduciary safe harbor for selecting a "Lifetime Income Provider" (i.e., annuity company) for ERISA fiduciaries (thus assuaging at least some liability concerns around using lifetime income annuities in qualified plans), a substantial increase in the tax credit available to small businesses when establishing a retirement plan (as well as a brand new tax credit for small businesses that adopt an auto-enroll provision in their retirement plans), an increase in the allowable auto-enrollment default 401(k) plan contribution, improved access to employer plans for long-term, part-time workers, and a significant reduction in the barriers to creating and maintaining multiple employer retirement plans (which in theory will help to create economies of scale for lower plan costs when a group of small employers band together to provide a retirement plan), as well as several other miscellaneous smaller retirement provision changes.

Other notable nonretirement provisions attached to the SECURE Act include a repeal of the TCJA-introduced kiddie tax changes (reverting away from a requirement to use trust tax brackets and back to using the parents' top marginal tax bracket), adjustments to the medical expense deduction threshold (back to 7.5 percent of AGI again for 2019 and 2020!), expanded provisions for 529 college savings plans to be used for apprenticeships and (up-to-$10,000 of) student

How a Prenup Can Trigger a Brawl over Retirement Benefits

Daniel L. Morgan

An Alabama Supreme Court decision involving a couple's prenuptial agreement and the question of who is entitled to a deceased spouse's pension benefits offers an important lesson. Couples entering prenups who have agreed to include a waiver of rights to a spouse's pension are well advised to have that waiver signed as soon after the marriage occurs as possible.

For many individuals, one of the most significant assets transferred when they die is their benefits under an employer-sponsored retirement plan. A case recently decided by the Alabama Supreme Court, *Moore v. Estate of Moore,* is a reminder of the complex interaction between prenuptial agreements and the spousal rights provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

Under ERISA, a married person's benefits under an employer's retirement plan, including a 401(k) plan, must be paid to the person's surviving spouse, unless the person obtains a waiver from their spouse, agreeing to a different beneficiary.

Although prenuptial agreements are often thought of as a contract that specifies how the assets of a married couple will be divided in the event of their divorce, they also typically include limitations on the rights of a spouse to inherit assets upon the death of the other spouse.

Spousal Waivers under ERISA

ERISA sets forth explicit instructions as to what steps must be followed by a married participant to be able to name someone other than their spouse as the beneficiary of their benefits under their employer's retirement plan:

(i) the spouse of the participant consents in writing to such election

(ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly loan repayments, and a series of tax extenders for the mortgage insurance premium deduction and the higher education tuition and fees deduction.

Ultimately, the key point is that, although not nearly as sweeping as the Tax Cuts and Jobs Act of 2017, the SECURE Act of 2019 makes numerous updates to the rules around retirement plans in an effort to increase access to employer-sponsored retirement plans, and (hopefully) takes a positive step towards addressing the so-called retirement crisis. But as with other legislation in recent years, what legislation may give with one hand, it takes with the other, and in practice, many financial advisors may spend more time dealing with what is lost under the SECURE Act—in particular, the stretch IRA—than what is gained. At the very least, though, financial advisors will be busy in months ahead as they reevaluate plans for clients impacted by the new and updated provisions introduced by the SECURE Act. ■

This article was originally published as the executive summary to "SECURE Act and Tax Extenders Creates Retirement Planning Opportunities and Challenges," posted on the Nerd's Eye View *blog on December 23, 2019. It is reprinted with permission. The full article can be accessed at* https://www.kitces.com/blog/secure-act-2019-stretch-ira-rmd-effective-date-mep-auto-enrollment.

Jeffrey Levine, CPA/PFS, CFP, CWS, MSA, is the director of Advisor Education for Kitces.com, CEO and director of financial planning for BluePrint Wealth Alliance, and lead creator and content expert for Savvy IRA Planning®, offered through Horsesmouth. You can follow Jeff on Twitter @CPAPlanner and via his personal website.

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permits designations by the participant without any requirement of further consent by the spouse)

(iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public (29 U.S.C. §1055(c)(2)A)).

These requirements, also found in the Internal Revenue Code (26 U.S.C. §417(a)(2)(A)), are mandated by the IRS to be spelled out in the retirement plan document. A retirement plan fiduciary that authorizes payment to a nonspousal beneficiary in the absence of a married participant having obtained a consent from his/her spouse risks liability under ERISA for not following the terms of the plan document, as well as potentially causing the plan to lose its tax qualification.

The Facts of the *Moore* Case

The facts in *Moore* are relatively straightforward. Jimmy Lee Moore named his brother as the beneficiary of his benefits under his employer's 401(k) plan and pension plan. In August 2016, Moore married. Shortly before doing so, he and his bride-to-be entered into a prenuptial agreement.

The prenuptial agreement stated that both parties renounced any right to the retirement benefits of the other, and each party agreed to execute any necessary "spousal consents or waivers."

Moore died soon after getting married. At the time of his death, his brother was still his named beneficiary under the 401(k) plan and the pension plan. His spouse never executed a waiver or consent in favor of his brother, as beneficiary.

Relying upon the principle that ERISA obligates a retirement plan, in the absence of a qualifying waiver and consent, to pay the plan benefits of a married plan participant upon the death of the participant to the participant's surviving spouse, the plans paid Moore's wife benefits "totaling over $500,000" from the 401(k) plan and the pension plan.

The brother filed a lawsuit against Moore's spouse arguing that her receipt of the retirement plan benefits constituted a breach of the prenuptial agreement.

The Alabama Supreme Court's Analysis

In its opinion, the Alabama Supreme Court discussed an Eighth Circuit Court of Appeals decision, *MidAmerican Pension & Emp. Benefits Plan Admin. Comm. v. Cox* (720 F. 3d 715 (8th Cir. 2013), which held that a promise in a prenuptial agreement to execute a waiver of spousal rights to receive a retirement plan death benefit does not satisfy the statutory require-

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ments of ERISA and, therefore, is not binding upon the plan in determining who is the beneficiary.

The spouse sought to use this reasoning to bootstrap her right to retain the distributions she received by arguing that, because she did not sign a consent and waiver that complied with ERISA, the prenuptial agreement did not result in her renouncing the benefits.

The Alabama Supreme Court rejected this contention, observing that her position "assumes that the waiver requirements under ERISA trump the contractual obligations to the prenuptial agreement."

The court concluded that the lack of a valid ERISA waiver only impacts to whom a retirement plan must pay benefits. It does not preclude a breach of contract action against a spouse who receives the benefits where the spouse agreed to take actions that would have permitted the payment of the benefits to someone else.

Some Thoughts Regarding the *Moore* Decision

Thankfully, from the point of view of the retirement plans in which Moore participated, his brother did not bring a claim against the plans, presumably recognizing that the reasoning of the *MidAmerican Pension & Emp. Benefits Plan Admin. Comm.* opinion (and other, similar decisions) made it unlikely that he would have prevailed.

Had Moore's brother sought distributions from the retirement plans, the plans would have been faced with a competing claim from the widow. In that event, the plans would have had indifferent stakeholders and their recourse would have been to file an interpleader action under Fed. R. Civ. P. 22, which provides: "Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead."

In *Moore,* the resolution of who was entitled to the retirement benefits was resolved by a breach of contract lawsuit, which was successful. That said, the lesson to be learned from *Moore,* of course, is that, although there may be a right of recourse against a spouse who does not follow through on a commitment in a prenuptial agreement to execute a valid ERISA waiver, it would be far better (and easier on all those involved) to execute the waiver promptly following the date the couple gets married. ■

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Daniel L. Morgan, Esq., is a partner in the Washington, D.C., office of Blank Rome LLP. His practice specialty is employee benefits and executive compensation.

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Editor Anne Rigney, JD, CLU, ChFC
Society of FSP™
610-526-2536
arigney@SocietyofFSP.org

3803 West Chester Pike., Ste. 225
Newtown Square, PA 19073-2334
Tel: 610-526-2500 • Fax: 610-359-8115
Website: www.SocietyofFSP.org

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Financial Service Professionals