Chair DeSaulnier, Ranking Member Allen, and members of the Subcommittee, thank you for the opportunity to submit this testimony. My name is Amy K. Matsui, and I am the Director of Income Security and Senior Counsel at the National Women’s Law Center.

The Center fights for gender justice—in the courts, in public policy, and in society—working across the issues that are central to the lives of women and girls. The Center uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes society and to break down the barriers that harm everyone—especially those who face multiple forms of discrimination. For almost half a century, the Center has been on the leading edge of every major legal and policy victory for women.

Women face a higher risk of economic insecurity throughout their lives, especially in their later years. In 2020, the poverty rate for women 65 and older was 10.1 percent (compared to 7.6 percent for older men)—and poverty rates are consistently higher for older Black, Latinx, Asian and Native American women. Women need retirement income from employer-sponsored pensions and retirement savings plans (like 401(k)s) to supplement Social Security’s modest benefits in order to experience a secure and dignified retirement. Because women face workplace inequities and shoulder the burden of family caregiving, they experience disparities in retirement income and retirement savings. As a result, married women rely on their spouses’ retirement income and savings more than men do. Right now, loopholes in spousal protections under ERISA undermine women’s retirement security—and are long-overdue to be addressed.

Women Workers Faced Challenges to Building a Secure Retirement, Even Before the Pandemic

Women, especially women of color, face deep inequities in the workforce and our economy. Women in the U.S. who work full-time, year-round are typically paid only 83 cents for every dollar paid to their male counterparts, and wage gaps are even larger for Black women, Native American women, and Latinas. Women are overrepresented among part-time workers, and poorly-paid workers. Women bear disproportionate responsibility for caregiving, and workers of color are the least likely to have access to affordable, high-quality child care and the paid sick days and family and medical leave that enables them to balance work and caring for themselves and their loved ones.

Income gaps and work-related disparities translate into lower lifetime earnings for women. The gender wage gap alone can cause women to lose $400,000 over a 40-year career, with the lifetime loss of earnings for Black women totaling nearly $1 million, and the lifetime earnings loss for Latinas exceeding $1.1 million. Work-related disruptions caused by caregiving responsibilities, whether they occur early in

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women’s careers when they are caring for young children or during prime-earning years when they are
caring for older relatives or a spouse, also reduce women’s cumulative earnings. A mother with one
child earns 28 percent less than a childless woman over the course of her lifetime, and each additional
child decreases her lifetime earnings by another 3 percent—although fathers do not experience any
decrease.xi

Because the primary sources of retirement income—Social Security, employer-sponsored pensions, and
tax-favored retirement savings accounts—are based on employment and earnings, women workers face
greater barriers to attaining retirement security. Being paid less than men means that women have
fewer resources to save for retirement, and lower Social Security and pension benefits in their own right
as workers. Taking time out of the workforce likewise reduces the earnings that women can contribute
to retirement savings accounts and that are used to calculate Social Security and pension benefits.xii
This lifetime impact falls most severely on women of color, who have the largest wage disparities and are
more likely to act as caregivers. These are also among the reasons why women lag behind in
accumulating assets and wealth more generally,xiii which may make it even harder to earmark savings
for retirement.

COVID-19 Will Likely Further Undermine Women’s Ability to Save for Retirement

The pandemic has had devastating health and economic impacts on women.xiv Increased caregiving
responsibilities, whether due to closed schools and the lack of child care or elder care providers or the
illness of family members, fell largely on women.xv Women of color are overrepresented in the front-line
workforce, risking their lives to provide health care, child care, and other essential services.xvi And
sectors in which women workers predominate and women of color are also overrepresentedxvii suffered
heavy job losses.

Overall, women have lost nearly 1.8 million net jobs lost since February 2020.xviii While women’s
unemployment rate dropped to 3.6 percent in January 2022, this overall rate masks further disparities
for women of color: 5.8 percent of Black women and 4.9 percent of Latinas remained unemployed.xix
Further, if the nearly 1.1 million women who have left the labor force since February 2020 were counted
as unemployed in January 2022, women’s unemployment rate would have been 5 percent in January.xx
And, in January 2022, nearly 1 in 4 unemployed women ages 20 and over (26.3 percent) had been out of
work for 6 months or longer.xx1

The pandemic will likely have long-term negative effects on women’s lifetime incomes, wealth, and
retirement security—especially for women of color, who faced higher rates of material hardship
throughout the pandemic,xxii and who tend to recover more slowly from recessions.xiii Research
suggests that younger workers entering the job market in a period of high unemployment may
experience reduced earnings for up to 10 years, as well as reduced job mobility,xxiv both of which will
impact lifetime earnings. Older women of color who become unemployed during a recession may have a
more difficult time finding another job because of race, gender, and age discrimination. Some older
workers have dropped out of the workforce altogether: In October 2021, there were 369,000 fewer
women ages 55 and older in the labor force than there were in February 2020. Many of these workers
are struggling to find work: nearly 2 in 5 women ages 55 and older (38.2 percent) had been out of work
for 6 months or longer in October 2021.xxv And, in fact, many of those who would still be in the
workforce if the pandemic never happened have been forced to retire earlier than anticipated,
especially Black older workers.xxvi Job loss and extended periods of unemployment during the pandemic
will not only undermine women's economic security in the short term, but also reduce their lifetime earnings.

Women May Have Less Access to Retirement Benefits and Savings Plans

Workers are automatically enrolled in traditional defined benefit (DB) pensions and, in the private sector, are not required to contribute. DB pensions provide retirement benefits in the form of annuities, and married workers' spouses (including divorced spouses) can also receive pension benefits based on the worker-spouse's pension. DB pension benefits have been shown to help keep lower-income workers out of poverty and annuities are especially beneficial for women because of their longer life expectancies. However, the share of workers who have a traditional pension has steeply declined in recent years, with employers shifting to defined contribution retirement savings plans.

While more employers offer defined contribution (DC) retirement savings plans (like 401(k) or 403(b) plans), women, workers of color, and lower-income workers may have less access to retirement savings plans at work. Poorly paid jobs, in which women of color predominate, are especially unlikely to offer retirement benefits. There are also racial disparities in retirement savings plan participation: in 2016, 51 percent of white workers participated in DC plans—such as 401(k)s—compared to 33 percent of Black and 28 percent of Latinx workers. And until recently, employers were not required to offer retirement savings plans to any part-time workers, and women are more likely to work part-time than men.

Moreover, even if women have access to their employers' retirement savings plans and are eligible to participate, they still need to be able to spare income to contribute to their retirement savings accounts. That is because, unlike traditional DB plans, DC plans rely on the worker to put savings into their accounts, sometimes with an employer match. With smaller paychecks, women are able to spare less income to save for retirement, and exempting contributions to retirement savings plans from income tax does not make it any easier for them to do so. Given women's lower lifetime earnings, compared to men's, it is unsurprising that men's retirement savings tend to exceed women's.

During the pandemic, moreover, many women have depleted existing retirement savings (after penalties on withdrawals from 401(k) accounts in 2020 were waived under the CARES Act). According to an AARP survey, more than one in five (22 percent) women reported that they prematurely dipped into their retirement savings or stopped contributing altogether since the COVID pandemic began, jeopardizing their retirement security. Additionally, one in three women said that their financial situation is worse than it was in January 2020 (before the pandemic), and of those women the vast majority said that their ability to save for retirement has worsened. The pandemic may therefore have further reduced women's retirement savings.

Married Women Rely on Their Spouses' Pensions and Retirement Savings, But Lack Legal Protections to Retirement Savings

For all of these reasons, married women tend to rely more heavily on their spouses' income and savings than married men do. Pension benefits and retirement savings accrued during a marriage are generally considered marital property under state law, under the theory that they represent deferred compensation for the productive efforts of the working spouse. While pension benefits and retirement savings can be divided at divorce, Congress also recognized that it was necessary to
protect spouses’ rights to marital retirement benefits even in an intact marriage. The Retirement Equity Act of 1984 (REA), implicitly acknowledged that when the worker-spouse had the right to unilaterally decide whether the other spouse would receive survivor benefits, widows lost out on retirement income. Accordingly, the REA established spousal protections for DB plans by requiring the default form of benefit for married participants to be a joint-and-survivor annuity that provides retirement benefits during the couple’s joint life along with survivor benefits to a spouse after the participant-spouse’s death. A participant’s spouse must agree to receive benefits in a different form in writing, before a notary public or plan administrator. These protections are, understandably, more important when the spouse has fewer assets and retirement benefits of their own and outlives the participant-spouse. As a result, while spousal protections are gender-neutral, they have tended to benefit women.

However, although Congress established robust spousal protections for traditional DB pension plans, the same protections do not apply to DC plans. The REA’s requirement of the joint-and-survivor spousal annuity as the default form of benefit only applies to married DC plan participants if the plan offers an annuity benefit (and few DC plans have done so), and the participant spouse elects payment of benefits in the form of a life annuity. This discrepancy in ERISA means that spouses lack the legal right to participate in the decision of whether the DC plan account balance will be received as a lump sum or as an annuity at retirement. The potential impact of this discrepancy on spouses’ retirement security has increased, as DC plans have increasingly supplanted DB plans.

There is only one circumstance in which a participant in a DC plan must obtain spousal consent: if a participant in a DC plan declines to choose an annuity form of benefit, he or she must obtain spousal consent before designating a beneficiary other than the spouse who would receive the account balance if the participant died while participating in the plan. But spousal consent is not required for hardship withdrawals or loans taken out against the DC account funds. And no spousal consent is required if the participant retires or changes jobs and decides to withdraw the account balance.

At that point, there is nothing to stop the participant-spouse from taking actions that could deplete their retirement savings, jeopardizing the other spouse’s future retirement. As the GAO observed in a 2014 report, “In a worst case scenario, the spouse who participates in the DC plan could withdraw all the assets and spend them in ways that do not provide for the couple’s retirement security.” For example, the participant-spouse could make a risky investment, an extravagant purchase, or a gift that the other spouse did not consent to. He could lose the funds to a gambling habit or other addiction. In any of those cases, those retirement savings would be depleted and unavailable for retirement, to the spouse’s detriment. The withdrawal will be subject to income taxes and, if the spent funds were withdrawn before age 59 ½, the participant-spouse could also incur tax penalties for which the other spouse would be jointly and severally liable, if the couple jointly filed taxes.

Practitioners have reported instances where participant-spouses, in anticipation of divorce, have sought to drain retirement savings accounts in order to prevent the other spouse from receiving their share during divorce proceedings. Some participant-spouses will go so far as to change jobs in advance of divorce. For example, in one divorce case described by a practitioner, the husband was the primary breadwinner. Although he had a 401(k) through his company, he was not a high-earner and did not have an attorney. The wife was a stay-at-home parent and qualified for representation though a legal services organization. When he realized that his wife would be awarded a portion of his 401(k), the husband quit his job and withdrew all the money. This was the only real asset that the couple had, so the wife could
not recoup the portion of the benefits she would have been entitled to from another asset. If her consent had been required, then he would not have been able to deplete the one asset the couple had.

A participant-spouse leaving a job could, alternatively, roll the account balance into an IRA – an increasingly common practice. The potential implications of transferring DC account balances into an IRA for spouses are worth considering. Although spouses may have rights under state community property law, IRA account holders are not required, under federal law, to designate a spouse as the beneficiary of the account, even if it contains marital assets. This means that even if marital retirement savings are rolled over into an IRA from a DC plan, the worker-spouse can name a child from a previous marriage, sibling, or even a girlfriend as the recipient of those funds at his death – depriving their spouse of retirement assets they may have been counting on for retirement. Moreover, there is certainly no requirement that the worker-spouse obtain spousal consent to elect to receive account funds in a form other than a joint-and-survivor annuity, or make any other withdrawal from an IRA. As a result, if DC plan account funds are rolled over into an IRA following a job change or retirement, those funds are shielded from joint decisionmaking. What is more, spouses may be deprived of those funds when they are most in need of them, but least able to replenish them.

In sum, as the GAO wrote in 2014, “there is no protection against the assets being invested unwisely, inadvertently spent down too quickly, or simply withdrawn fully upon a job change and rolled into an IRA, with a change in beneficiary.” The limited spousal protections in DC plans means that there is a significant risk that retirement funds upon which the spouse will be relying for a secure retirement will be placed outside the spouse’s control – and the spouse bears the full measure of that risk, with no recourse.

Policymakers Should Strengthen Spousal Rights in Defined Contribution Plans

For all of the foregoing reasons, policymakers should strengthen spousal rights to defined contribution plans. By making the default form of benefit from DC plans a joint-and-survivor annuity, or its equivalent, if spousal consent is not obtained, Congress can close the gap in the ERISA’s protections and fully effectuate the intent of the REA. The Women’s Retirement Protection Act of 2021, for example, provides an example of robust spousal protections for the predominant form of employer-sponsored retirement benefits. While requiring spousal consent for distributions or rollovers to IRAs, this legislation would not do so for transfers to other employer-sponsored DC plans to be made. The legislation also creates an exception for instances where obtaining spousal consent would be inappropriate, which could include situations where the participant-spouse is a survivor of domestic violence, and the act of obtaining consent would subject him or her to the threat of economic coercion or physical risk.

While the spousal protections in DB plans are well-established and have been administered for nearly four decades, arguments have been made against extending these protections to DC plans. Industry groups have argued that ERISA’s existing qualified joint-and-survivor annuity requirement for DB plans should be restricted or eliminated because many spouses consent to the waiver of the annuity. But this assertion ignores the fact that the waiver means the legal protection is operating as intended: unless there has been fraud, the spouse has participated in a joint decision about marital pension benefits. Without that legal right, the worker spouse can unilaterally decide how pension benefits are received – creating the very risk to spousal retirement security that the REA was intended to eliminate. Others have argued that there is insufficient evidence that the weaker spousal protections in DC plans actually harm spouses. However, the fact that current law does not prohibit the scenarios described above means that
it is difficult to assess how frequently they occur. Because a participant-spouse who withdraws DC account assets without consent (and the plan that allows him to do so) are not violating any laws, unless the plan has been put on notice that there is a divorce pending, under some circumstances, there is no illegal behavior to report. There is no entity or agency (such as pension counseling projects, plan administrators, or state or federal agencies) that spouses would know to contact to report this wholly legal act, and no entity or agency is known to track such reports. Moreover, many spouses would not even become aware that the retirement assets were removed from their control before they have been spent or transferred to another – in other words, until it is too late.

Finally, an argument has also been raised that spousal consent for DC plans is not necessary because more women are working than in previous generations, and thus have access to their own retirement savings. This ignores that, as described above, many women continue to experience economic disadvantage and barriers to participation in the workforce, and thus to accruing sufficient retirement savings – and therefore continue to rely on their spouse’s retirement savings.

Conclusion

Women faced a retirement crisis well before the pandemic, and may experience decreased lifetime earnings, depleted savings, and an even more uncertain retirement in its wake. Strengthening spousal rights in defined contribution plans under ERISA would help ensure that women who rely on their spouses’ retirement savings because they have fewer of their own, do not risk economic insecurity in retirement because their spouse has depleted or given away retirement savings accrued during their marriage. The Center urges policymakers to close a longstanding and increasingly significant gap in ERISA’s protections and eliminate this risk to women’s retirement security.

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xix Id.

xx Id.

xxi Id.


TUCKER & VOGTMAN, supra note 6.

MORRISSEY, supra note 27.


MORRISSEY, supra note 27.


Morrissey, supra note 27.

Id.


AARP, supra note 14.


See Harris, Carbone & Teitelbaum, supra; Form and Payment of Benefits, 29 U.S.C. § 1056(d) (2021).

Statement on Signing the Retirement Equity Act of 1984, supra note 38 (“[The REA] improves and protects the vital role of pensions as retirement income to widows.”).


See id. § 203(b) (providing that spouse must consent in writing before a notary public if a married participant elects a form of benefit other than the default joint-and-survivor annuity).


For federal income tax purposes, IRAs are deemed to be separate property. 26 U.S.C. § 408(g). But federal tax law does not abrogate community property rights under applicable state law. See, e.g., I.R.S. P.L.R. 1999-37055 (Sept. 17, 1999) (finding that community property-based rights to IRAs should be determined under applicable state law). Specifically, in states that have adopted community property regimes (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin and, to a limited extent, Alaska and Puerto Rico), spouses have rights to IRA assets, even if the IRA is titled in the other spouse’s name alone, if the assets were earned or acquired during the marriage (except as an inheritance or gift to one spouse). Id; Wells Fargo Advisors, Individual Retirement Account Add/Change of Beneficiary Form, https://www.wellsfargo.com/advisors/builder/wellstrade/forms/578639.pdf (listing community property states where spousal consent may be necessary when the beneficiary is not a spouse).
1 U. S. GOVERNMENT ACCOUNTABILITY OFFICE, supra note 46.

II In addition, the Federal Thrift Savings Plan requires spousal consent for FERS participants. See Thrift Savings Plan, Spouse’s Rights, https://www.tsp.gov/planning-for-life-events/spouses-rights/.


III U. S. GOVERNMENT ACCOUNTABILITY OFFICE, supra note 46, at 49.