The Division of Retirement Benefits Through Qualified Domestic Relations Orders

This publication provides general information about the qualified domestic relations orders (QDROs) under the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986. More information about QDROs submitted to the Retirement Benefit Guaranty Corporation after a retirement plan terminates and PBGC becomes the trustee is available from the Retirement Benefit Guaranty Corporation.

Introduction

More than 46 million private wage and salary workers are currently covered by employer-provided retirement plans in the United States. For many of these Americans, retirement savings represent one of their most significant assets. For this reason, whether and how to divide a participant's interest in a retirement plan are often important considerations in separation, divorce, and other domestic relations proceedings. While the division of marital property generally is governed by state domestic relations law, any assignments of retirement interests must also comply with Federal law, namely the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). Under ERISA and the Code, retirement interests may be assigned only if the judgment, decree, or order creating or recognizing a spouse's, former spouse's, child's, or other dependent's interest in an individual's retirement benefits constitutes a "qualified domestic relations order" or "QDRO."

This booklet was prepared by the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor to provide general guidance about QDROs[1] to employers, retirement plan administrators, participants, beneficiaries, employee benefit professionals, and domestic relations specialists. The views expressed in this booklet represent the views of the Department of Labor.

Chapter 1 provides a general overview of the QDRO provisions and the basic rules governing the content of QDROs.

Chapter 2 focuses on the duties of retirement plan administrators in making QDRO determinations and in administering retirement plans for which related QDROs have been issued.

Chapter 3 focuses on issues to be considered in drafting a QDRO. This chapter also discusses the provisions of section 205 of ERISA, which are substantially parallel to the provisions contained in sections 401(a)(11) and 417 of the Code to the extent these sections apply to QDROs. The provisions of section 205 require that retirement plans provide the spouses of retirement plan participants with certain rights to survivor benefits, which are relevant to the provisions governing QDROs. Sample QDRO language developed by the Department of the Treasury and the Internal Revenue Service, in consultation with the Department of Labor, is provided in Appendix C.

It is the hope of EBSA that the information furnished in this booklet will promote better understanding of the rights and obligations of those involved in domestic relations proceedings and those responsible for administering retirement plans.[2] A better understanding of these provisions of law should reduce the costs and burdens associated with QDRO determinations for both retirement plans and the affected individuals.

Cited in Anderson v. Suburban Teamsters, No. 07-15537, archived on December 4, 2009

The Department recognizes that this booklet does not answer every question that may arise in the development and administration of QDROs. In this regard, the Department is willing to consider addressing specific issues through its advisory opinion process (but see Question 1-15 regarding advisory opinion requests on whether a domestic relations order is a QDRO). The ERISA Advisory Opinion Procedure governing this process is set forth in Appendix B of this booklet.

Qualified Domestic Relations Orders: An Overview

This chapter includes a general overview of the provisions of Federal law governing the assignment of retirement benefits in a domestic relations proceeding and the requirements that apply in determining whether a domestic relations order is a qualified domestic relations order (QDRO). The following areas are addressed:

- Who can be an "alternate payee"?
- What information must be included in a domestic relations order in order for it to be "qualified"?
- Who determines whether a domestic relations order is a QDRO?

In general, ERISA and the Code do not permit a participant to assign or alienate the participant's interest in a retirement plan to another person. These "anti-assignment and alienation" rules are intended to ensure that a participant's retirement benefits are actually available to provide financial support during the participant's retirement years. A limited exception to the anti-assignment and alienation rules is provided for assignments of retirement benefits through qualified domestic relations orders (QDROs).

Under the QDRO exception, a domestic relations order may assign some or all of a participant's retirement benefits to a spouse, former spouse, child, or other dependent to satisfy family support or marital property obligations if and only if the order is a "qualified domestic relations order." ERISA requires that each retirement plan pay benefits in accordance with the applicable requirements of any "qualified domestic relations order" that has been submitted to the plan administrator. The plan administrator's determinations on whether a domestic relations order is a QDRO, therefore, have significant implications for both the parties to a domestic relations proceeding and the plan. The following questions and answers are intended to provide an overview of the Federal requirements a domestic relations order must satisfy to be considered a QDRO.

1-1: What is a Qualified Domestic Relations Order?

A "qualified domestic relation order" (QDRO) is:

- A domestic relations order
- That creates or recognizes the existence of an "alternate payee's" right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan, and
- That includes certain information and meets certain other requirements. See Questions 1-5 and 1-6.

Question 1-4 explains who may be an "alternate payee."

Reference: ERISA § 206(d)(3)(B)(i); IRC § 414(p)(1)(A)

1-2: What is a "domestic relations order"?

To be recognized as a QDRO, an order must be a "domestic relations order." A domestic relations order is:

- A judgment, decree, or order (including the approval of a property settlement)
- That is made pursuant to state domestic relations law (including community property law)
- That relates to the provision of child support, alimony payments, or marital property rights for the benefit of a spouse, former spouse, child, or other dependent of a participant

A state authority, generally a court, must actually issue a judgment, order, or decree or otherwise formally approve a property settlement agreement before it can be a "domestic relations order" under ERISA. The mere fact that a property settlement is agreed to and signed by the parties will not, in and of itself, cause the agreement to be a domestic relations order.

There is no requirement that both parties to a marital proceeding sign or otherwise endorse or approve an order. It is also not necessary that the retirement plan be brought into state court or made a party to a domestic relations proceeding for an order issued in that proceeding to be a "domestic relations order" or a "qualified domestic relations order." Indeed, because state law is generally preempted to the extent that it relates to retirement plans, the Department takes the position that retirement plans cannot be joined as a party in a domestic relations proceeding pursuant to state law. Moreover, retirement plans are neither permitted nor required to follow the terms of domestic relations orders purporting to assign retirement benefits unless they are QDROs.

Reference: ERISA §§ 206(d)(3)(B)(ii), 514(a), 514(b)(7); IRC § 414(p)(1)(B)

1-3: Must a "domestic relations order" be issued by a state court?

No. A domestic relations order may be issued by any state agency or instrumentality with the authority to issue judgments, decrees, or orders, or to approve property settlement agreements, pursuant to state domestic relations law (including community property law).

Reference: ERISA § 206(d)(3)(B)(ii); IRC § 414(p)(1)(B); Advisory Opinion 2001-06A (*see* Footnotes/Appendices)

1-4: Who can be an "alternate payee"?

A domestic relations order can be a QDRO only if it creates or recognizes the existence of an alternate payee's right to receive, or assigns to an alternate payee the right to receive, all or a part of a participant's benefits. For purposes of the QDRO provisions, an alternate payee cannot be anyone other than a spouse, former spouse, child, or other dependent of a participant.

Reference: ERISA § 206(d)(3)(K), IRC § 414(p)(8)

1-5: What information must a domestic relations order contain to qualify as a QDRO under ERISA?

QDROs must contain the following information:

- The name and last known mailing address of the participant and each alternate payee
- The name of each plan to which the order applies
- The dollar amount or percentage (or the method of determining the amount or percentage) of the benefit to be paid to the alternate payee, and
- The number of payments or time period to which the order applies

Reference: ERISA § 206(d)(3)(C)(i)-(iv); IRC § 414(p)(2)(A)-(D)

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1-6: Are there other requirements that a domestic relations order must meet to be a QDRO?

Yes. There are certain provisions that a QDRO must *not* contain:

- The order must *not* require a plan to provide an alternate payee or participant with any type or form of benefit, or any option, not otherwise provided under the plan
- The order must *not* require a plan to provide for increased benefits (determined on the basis of actuarial value)
- The order must *not* require a plan to pay benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO
- The order must *not* require a plan to pay benefits to an alternate payee in the form of a qualified joint and survivor annuity for the lives of the alternate payee and his or her subsequent spouse

Reference: ERISA §§ 206(d)(3)(D)(i)-(iii), 206(d)(3)(E)(i)(III); IRC §§ 414(p)(3)(A)-(C), 414(p)(4)(A)(iii)

1-7: May a QDRO be part of the divorce decree or property settlement?

Yes. There is nothing in ERISA or the Code that requires that a QDRO (that is, the provisions that create or recognize an alternate payee's interest in a participant's retirement benefits) be issued as a separate judgment, decree, or order. Accordingly, a QDRO may be included as part of a divorce decree or court- approved property settlement, or issued as a separate order, without affecting its "qualified" status. The order must satisfy the requirements described above to be a QDRO.

Reference: ERISA § 206(d)(3)(B); IRC § 414(p)(1)

1-8: Must a domestic relations order be issued as part of a divorce proceeding to be a QDRO?

No. A domestic relations order that provides for child support or recognizes marital property rights may be a QDRO, without regard to the existence of a divorce proceeding. Such an order, however, must be issued pursuant to state domestic relations law and create or recognize the rights of an individual who is an "alternate payee" (spouse, former spouse, child, or other dependent of a participant).

An order issued in a probate proceeding begun after the death of the participant that purports to recognize an interest with respect to retirement benefits arising solely under state community property law, but that doesn't relate to the dissolution of a marriage or recognition of support obligations, is not a QDRO because the proceeding does not relate to a legal separation, marital dissolution, or family support obligation.

Reference: ERISA § 206(d)(3)(B); IRC § 414(p)(1); Advisory Opinion 90-46A (*see* Footnotes/Appendices); see Egelhoff v. Egelhoff, 121 S.Ct. 1322, 149L. Ed. 2d 264 (2001); see Boggs v. Boggs, 520 U.S. 833, 117 S.Ct. 1754 (1997)

1-9: Will a domestic relations order fail to be a QDRO solely because of the timing of issuance?

No, not if it otherwise meets the QDRO requirements under ERISA. A domestic relations order issued after the participant's death, divorce, or annuity starting date, or subsequent to an existing QDRO, will not fail to be treated as a QDRO solely because of the timing of issuance. For example, a subsequent domestic relations order between the same parties which revises an earlier QDRO does not fail to be a QDRO solely because it was issued after the first QDRO. Likewise, a subsequent domestic relations order between different parties which directs a portion of the participant's previously unallocated benefits to a second alternate payee, does not fail to be a QDRO solely because of the existence of a previous QDRO. Further, a domestic relations order requiring a portion of a participant's annuity benefit payments be paid to an alternate payee does not fail to be a QDRO solely because the domestic relations order was issued after the annuity starting date.

Reference: 29 C.F.R. 2530.206; *see* section 1001 of the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780 (Aug. 17, 2006)

1-10 : May a QDRO provide for payment to the guardian of an alternate payee?

Yes. If an alternate payee is a minor or is legally incompetent, the order can require payment to someone with legal responsibility for the alternate payee (such as a guardian or a party acting *in loco parentis* in the case of a child, or a trustee as agent for the alternate payee).

Reference: See Staff of the Joint Committee on Taxation, Explanation of Technical Corrections to the Tax Reform Act of 1984 and Other Recent Tax Legislation, 100th Cong., 1st Sess. (Comm. Print 1987) at 222.

1-11: Can a QDRO cover more than one plan?

Yes. A QDRO can assign rights to retirement benefits under more than one retirement plan of the same or different employers as long as each plan and the assignment of benefit rights under each plan are clearly specified.

Reference: ERISA § 206(d)(3)(C)(iv); IRC § 414(p)(2)(D)

1-12: Must all QDROs have the same provisions?

No. Although every QDRO must contain certain provisions, such as the names and addresses of the participant and alternate payee(s) and the name of the plan(s), the specific content of the rest of the QDRO will depend, as explained in more detail in Chapter 3, on the type of retirement plan, the nature of the participant's retirement benefits, the purposes behind issuing the order, and the intent of the drafting parties.

1-13: Who determines whether an order is a QDRO?

Under Federal law, the administrator of the retirement plan that provides the benefits affected by an order is the individual (or entity) initially responsible for determining whether a domestic relations order is a QDRO. Plan administrators have specific responsibilities and duties with respect to determining whether a domestic relations order is a QDRO. Plan administrators, as plan fiduciaries, are required to discharge their duties prudently and solely in the interest of plan participants and beneficiaries. Among other things, plans must establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions pursuant to qualified orders. Administrators are required to follow the plan's procedures for making QDRO determinations. Administrators also are required to furnish notice to participants and alternate payees of the receipt of a domestic relations order and to furnish a copy of the plan's procedures for determining the qualified status of such orders. See Chapter 2 for a detailed discussion of the duties and responsibilities of plan administrators in making QDRO determinations.

It is the view of the Department of Labor that a state court (or other state agency or instrumentality with the authority to issue domestic relations orders) does not have jurisdiction to determine whether an issued domestic relations order constitutes a "qualified domestic relations order." In the view of the Department, jurisdiction to challenge a plan administrator's decision about the qualified status of an order lies exclusively in Federal court.

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Reference: ERISA §§ 206(d)(3)(G)(i) and (ii), 404(a), 502(a)(3), 502(e), 514; IRC § 414(p)(6)(A)(ii)

1-14: Who is the "administrator" of the plan?

The "administrator" of an employee benefit plan is the individual or entity specifically designated in the plan documents as the administrator. If the plan documents do not designate an administrator the administrator is the employer maintaining the plan, or, in the case of a plan maintained by more than one employer, the association, committee, joint board of trustees, or similar group representing the parties maintaining the plan. The name, address, and phone number of the plan administrator is required to be included in the plan's summary plan description. The summary plan description is a document that the administrator is required to furnish to each participant and to each beneficiary receiving benefits. It summarizes the rights and benefits of participants and beneficiaries and the obligations of the plan.

Reference: ERISA §§ 3(16), 102(b), 29 CFR § 2520.102-3(f); IRC § 414(g), Treas. Reg. § 1.414(g)-1

1-15: Will the Department of Labor issue advisory opinions on whether a domestic relations order is a QDRO?

No. A determination of whether an order is a QDRO necessarily requires an interpretation of the specific provisions of the plan or plans to which the order applies and the application of those provisions to specific facts, including a determination of the participant's actual retirement benefits under the plan(s). The Department will not issue opinions on such inherently factual matters.

Reference: See ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976)(Appendix B)

Administration of QDROs: Determining Qualified Status and Paying Benefits

This chapter describes the duties of a plan administrator in determining the qualified status of domestic relations orders and administering distributions under QDROs. The following areas are addressed:

- What are the plan administrator's responsibilities in furnishing information to a participant and alternate payee?
- What measures must a plan administrator take to protect the plan participant's benefits upon receipt of a domestic relations order?
- What procedures must a plan administrator follow in determining whether a domestic relations order is a QDRO?

ERISA imposes a number of responsibilities on the plan administrator relating to the handling of domestic relations orders. As a plan fiduciary, the administrator is required to discharge these responsibilities prudently and solely in the interest of the plan's participants and beneficiaries. It is the view of the Department that the prudent discharge of a fiduciary's responsibilities with respect to the handling of domestic relations orders, like other areas of plan administration, requires plan administrators to take steps to avoid unnecessary and excessive administrative burdens and costs to the plan. The Department believes that the adoption of procedures and policies designed to facilitate, rather than impede, the timely processing and perfection of domestic relations orders generally will serve to minimize plan burdens and costs attendant to QDRO determinations.

The following questions and answers are intended to provide guidance on the discharge of an administrator's obligations under the QDRO and fiduciary responsibility provisions of ERISA.

2-1: What information is an administrator required to provide a prospective alternate payee before the administrator

receives a domestic relations order?
Congress conditioned an alternate payee's right to an assignment of a participant's retirement benefit on the prospective alternate payee's obtaining a domestic relations order that satisfies specific informational and other requirements. It is the view of the Department that Congress therefore intended prospective alternate payees -- spouses, former spouses, children, and other dependents of a participant who are involved in a domestic relations proceedings -- to have access to plan and participant benefit information sufficient to prepare a QDRO. Such information might include the summary plan description, relevant plan documents, and a statement of the participant's benefit entitlements.

The Department believes that Congress did not intend to require prospective alternate payees to submit a domestic relations order to the plan as a prerequisite to establishing the prospective alternate payee's rights to information in connection with a domestic relations proceeding. However, it is the view of the Department that a plan administrator may condition disclosure of such information on a prospective alternate payee's providing information sufficient to reasonably establish that the disclosure request is being made in connection with a domestic relations proceeding.

It is the Department's understanding that many domestic relations orders fail initially to qualify when submitted to the plan because they fail to take into account the plan's provisions or the participant's actual benefit entitlements. Affording prospective alternate payees access to plan and participant information in a timely manner will, in the view of the Department, help drafters avoid making such obvious errors in preparing orders and, thereby, facilitate plan administration. See Question 2-5.

Reference: ERISA §§ 206(d)(3)(A) - (C), 404(a); IRC § 414(p)(1) - (3)

2-2: What are the duties of a plan administrator upon receipt of a domestic relations order by the plan?
Upon receipt of a domestic relations order, the plan administrator is required to promptly notify the affected participant and each alternate payee named in the order of the receipt of the order and to provide a copy of the plan's procedures for determining whether a domestic relations order is a QDRO. Notification should be sent to the address included in the domestic relations order.

The administrator is required to determine whether the order is a QDRO within a reasonable period of time after receipt of a domestic relations order and to promptly notify the participant and each alternate payee of such determination. See Question 2-10.

Reference: ERISA § 206(d)(3)(G)(i); IRC § 414(p)(6)(A)

2-3: Is a plan required to have procedures for determining whether a domestic relations order is qualified?
Yes. Every retirement plan is required to establish written procedures for determining whether domestic relations orders are QDROs and for administering distributions under QDROs.

Reference: ERISA § 206(d)(3)(G)(ii); IRC § 414(p)(6)(B)

2-4: What requirements must a plan's QDRO procedures meet?
The QDRO procedures must:

- Be in writing
- Be reasonable
- Provide that each person specified in a domestic relations order received by the plan as entitled to payment of benefits under the plan will be notified (at the address specified in the domestic relations order) of the plan's procedures for making QDRO determinations upon receipt of a domestic relations order, and
- Permit an alternate payee to designate a representative for receipt of copies of notices and plan information that are sent to the alternate payee with respect to a domestic relations order.

[ERISA § 206(d)(3)(G)(ii); IRC § 414(p)(6)]

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2-5: Are there *other* matters that should be addressed in a plan's QDRO procedures?
Yes. It is the view of the Department of Labor that a plan's QDRO procedures should be designed to ensure that QDRO determinations are made in a timely, efficient, and cost-effective manner, consistent with the administrator's fiduciary duties under ERISA. The Department believes that unnecessary administrative burdens and costs attendant to QDRO determinations and administration can be avoided with clear explanations of the plan's determination process, including:

- An explanation of the information about the plan and benefits that is available to assist prospective alternate payees in preparing QDROs, such as summary plan descriptions, plan documents, individual benefit and account statements, and any model QDROs developed for use by the plan (See Questions 2-1, 2-7)
- A description of any time limits set by the plan administrator for making determinations
- A description of the steps the administrator will take to protect and preserve retirement assets or benefits upon receipt of a domestic relations order (for example, a description of when and under what circumstances plan assets will be segregated or benefit payments will be delayed or suspended) (See Questions 2-12, 2-13)
- A description of the process provided under the plan for obtaining a review of the administrator's determination as to whether an order is a QDRO

It is the view of the Department that the plan administrator's adoption and use of clear QDRO procedures, coupled with the administrator's provision of information about the plan and benefits upon request, will significantly reduce the difficulty and expense of obtaining and administering QDROs by minimizing confusion and uncertainty about the process.

Reference: ERISA §§ 206(d)(3)(G), 206(d)(3)(H), 404(a); IRC §§ 414(p)(6), 414(p)(7)

2-6: May a plan administrator charge a participant or alternate payee for determining the qualified status of a domestic relations order?
The Department has taken the position that in the context of a defined contribution plan, an administrator may assess reasonable expenses attributable to a QDRO determination against the individual account of the participant who is a party to the domestic relations order. The document of the plan should be reviewed to determine how plan expenses are allocated.

Reference: ERISA § 404(a); see Field Assistance Bulletin 2003-3 (*see* Footnotes/Appendices)

2-7: May plan administrators provide parties with a model form or forms to assist in the preparation of a QDRO?
Yes. Although they are not required to do so, plan administrators may develop and make available "model" QDRO forms to assist in the preparation of a QDRO. Such model forms may make it easier for the parties to prepare a QDRO and reduce the time and expenses associated with a plan administrator's determination

of the qualified status of an order. Examples of sample language that may be included in such forms are provided in Appendix C.

Plan administrators are required to honor any domestic relations order that satisfies the requirements to be a QDRO. In the view of the Department, therefore, a plan may not condition its determinations of QDRO status on the use of any particular form.

2-8: In determining the qualified status of a domestic relations order, is the administrator required to determine the validity of the order under state domestic relations law?

No. A plan administrator is generally not required to determine whether the issuing court or agency had jurisdiction to issue an order, whether state law is correctly applied in the order, whether service was properly made on the parties, or whether an individual identified in an order as an alternate payee is in fact a spouse, former spouse, child, or other dependent of the participant under state law.

Reference: See Advisory Opinion 99-13A; Advisory Opinion 92-17A (*see* Footnotes/Appendices)

2-9: Is a plan administrator required to reject a domestic relations order as defective if the order fails to specify factual identifying information that is easily obtainable by the plan administrator?

No. In many cases, an order that is submitted to a plan may clearly describe the identity and rights of the parties, but may be incomplete only with respect to factual identifying information within the plan administrator's knowledge or easily obtained through a simple communication with the alternate payee or the participant. For example, an order may misstate the plan's name or the names of participants or alternate payees, and the plan administrator can clearly determine the correct names, or an order may omit the addresses of participants or alternate payees, and the plan administrator's records include this information. In such a case, the plan administrator should supplement the order with the appropriate identifying information, rather than rejecting the order as not qualified.

Reference: ERISA §§ 206(d)(3)(C), 206(d)(3)(I); IRC § 414(p)(2); see S. Rep. 575, 98th Cong., 2d Sess. at 20

2-10: How long may the plan administrator take to determine whether a domestic relations order is a QDRO?

Plan administrators must determine whether a domestic relations order is a QDRO within a reasonable period of time after receiving the order. What is a reasonable period will depend on the specific circumstances. For example, a domestic relations order that is clear and complete when submitted should require less time to review than an order that is incomplete or unclear. See Question 2-12.

Plans are required to adopt reasonable procedures for determining the qualified status of domestic relations orders. Compliance with such procedures should ensure that determinations of the qualified status of an order take place within a reasonable period of time. Procedures that unduly inhibit or hamper the QDRO determination process will not be considered reasonable procedures. See Question 2-4.

Reference: ERISA § 206(d)(3)(G)(i)(II); IRC § 414(p)(6)(A)(ii)

2-11: What must the plan administrator do during the determination process to protect against wrongly paying retirement benefits to the participant that would be paid to the alternate payee if the domestic relations order had been determined to be a QDRO?

During any period in which the issue of whether a domestic relations order is a QDRO is being determined (by a plan administrator, by a court of competent jurisdiction, or otherwise), ERISA requires that the plan administrator separately account for the amounts that would be payable to an alternate payee under the terms of the order during such period if the order had been determined to be qualified. These amounts are referred to as "segregated amounts." During the period in which the status of a domestic relations order is being determined, the plan administrator must take steps to ensure that amounts that would have been payable to the alternate payee, if the order were a QDRO, are not distributed to the participant or any other person.

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The plan administrator's duty to separately account for and to preserve the segregated amounts is limited in time. ERISA provides that the plan administrator must preserve the segregated amounts for not longer than the end of an "18-month period." This "18-month period" does not begin until the first date (after the plan receives the order) that the order would require payment to the alternate payee.

It is the view of the Department that, in order to ensure the availability of a full 18- month protection period, the 18 months cannot begin before the plan receives a domestic relations order. Rather, the "18-month period" will begin on the first date on which a payment would be required to be made under an order *following receipt by the plan*. See Questions 2-12 and 2-13, which discuss how benefits should be treated when determinations on qualified status are made either before or after the beginning of the "18-month period."

Reference: ERISA §§ 206(d)(3)(H), 404(a); IRC § 414(p)(7)

2-12: What are an administrator's duties with respect to a domestic relations order received by the plan before the beginning of the "18-month period"?

As explained in Question 2-10, a plan administrator must determine whether a domestic relations order is a QDRO within a reasonable period following receipt. In the view of the Department, the "18-month period" during which a plan administrator must preserve the "segregated amounts" (See Question 2-11) is not the measure of the reasonable period for determining the qualified status of an order and in most cases would be an unreasonably long period of time to take to review an order.

It is further the view of the Department that, during the determination period, the administrator, as a plan fiduciary, may not permit distributions to the participant or any other person of any amounts that would be payable to the alternate payee if the domestic relations order were determined to be a QDRO. If the domestic relations order is determined to be a QDRO before the first date on which benefits are payable to the alternate payee, the plan administrator has a continuing duty to account for and to protect the alternate payee's interest in the plan to the same extent that the plan administrator is obliged to account for and to protect the interests of the plan's participants. The plan administrator also has a fiduciary duty to pay out benefits in accordance with the terms of the QDRO.

The Department understands that orders that are initially rejected by the plan administrator as not qualified are frequently revised and resubmitted within a short period of time. The Department also recognizes that in some instances plan administrators who reject an order may receive requests from participants for immediate distribution of benefits under circumstances that suggest that the rejected order is being revised and will shortly be resubmitted to the plan. In such circumstances, the plan administrator may be subject to conflicting claims for either paying the benefit or failing to pay the benefit. The Department suggests that plan administrators may wish to consider the establishment of a process for providing preliminary or interim review of orders, and postponing final determinations for limited periods, to permit parties to correct defects within the 18-month segregation period. Such a process would reduce the likelihood of conflicting claims.

Reference: ERISA §§ 206(d)(3)(H), 404(a)

2-13: What are an administrator's duties with respect to a domestic relations order received on or after the date on which benefits would be payable to an alternate payee under the order?

Upon receipt of a domestic relations order, the administrator must separately account for and preserve the amounts that would be payable to an alternate payee until a determination is made with respect to the status of the order. See Questions 2-11, 2-12. If, within the "18-month period" -- beginning with the

date (after receipt of the order by the plan) on which the first payment would be required to be made to an alternate payee under the order -- the plan administrator determines that the order is a QDRO, the plan administrator must pay the segregated amounts to the alternate payee in accordance with the terms of the QDRO. If, however, the plan administrator determines within the "18-month period" that the order is not a QDRO, or if the status of the order is not resolved by the end of the "18-month period," the plan administrator must pay out the segregated amounts to the person or persons who would have been entitled to such amounts if there had been no order. If the order is later determined to be a QDRO, the order will apply only prospectively; that is, the alternate payee will be entitled only to amounts payable under the order after the subsequent determination. See Question 2-12.

Reference: ERISA §§ 206(d)(3)(H), 404(a); IRC § 414(p)(7); but see H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-858 (describing 1986 amendments to the Retirement Equity Act of 1984, including clarification of the procedures to be followed during the 18-month segregation period for QDRO determinations)

2-14: What kind of notice is required to be provided by a plan administrator following a QDRO determination?

The plan administrator is required to notify the participant and each alternate payee of the administrator's determination as to whether the order constitutes a QDRO. This notice should be in writing and furnished promptly following a determination.

In the case of a determination that an order is not qualified, the notice should include the reasons for the rejection. It is the view of the Department that, in most instances where there has been a reasonable good faith effort to prepare a qualified domestic relations order, the parties will attempt to correct any deficiencies in the order and resubmit a corrected order for the plan administrator to review. The Department believes that, where a reasonable good faith effort has been made to draft a QDRO, prudent plan administration requires the plan administrator to furnish to the parties the information, advice, and guidance that is reasonably required to understand the reasons for a rejection, either as part of the notification process or otherwise, if such information, advice, and guidance could serve to reduce multiple submissions of deficient orders and therefore the burdens and costs to plans attendant on review of such orders.

The notice of the plan administrator's determination should be written in a manner that can be understood by the parties. Multiple submissions and unnecessary expenses may be avoided by clearly communicating in the rejection notice:

- The reasons why the order is not a QDRO;
- References to the plan provisions on which the plan administrator's determination is based;
- An explanation of any time limits that apply to rights available to the parties under the plan (such as the duration of any protective actions the plan administrator will take); and
- A description of any additional material, information, or modifications necessary for the order to be a QDRO and an explanation of why such material, information, or modifications are necessary.

Reference: ERISA §§ 206(d)(3)(G)(i)(II), 206(d)(3)(I);IRC § 414(p)(6)(A)(ii)

2-15: What effect does an order that a plan administrator has determined to be a QDRO have on the administration of the plan?

The plan administrator must act in accordance with the provisions of the QDRO as if it were a part of the plan. In particular, if, under a plan, a participant has the right to elect the form in which benefits will be paid, and the QDRO gives the alternate payee that right, the plan administrator must permit the alternate payee to exercise that right under the circumstances and in accordance with the terms that would apply to the participant, as if the alternate payee were the participant.

Reference: ERISA §§ 206(d)(3)(A), 206(d)(3)(E)(i)(III); IRC §§ 401(a)(13)(B), 414(p)(4)(A)(iii)

Cited in Anderson v. Suburban Teamsters, No. 07-15952 archived on December 11, 2009

2-16: What disclosure rights does an alternate payee have under a QDRO?

ERISA provides that a person who is an alternate payee under a QDRO generally shall be considered a beneficiary under the plan for purposes of ERISA. Accordingly, the alternate payee must be furnished, upon written request, copies of a variety of documents, including the latest summary plan description, the latest annual report, any final annual report, and the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated. The administrator may impose a reasonable charge to cover the cost of furnishing such copies. It is the view of the Department that, at such time as benefit payments to the alternate payee commence under the QDRO, the alternate payee must be treated as a "beneficiary receiving benefits under the plan" and automatically furnished the summary plan description, summaries of material plan changes, and the plan's summary annual report.

Reference: ERISA §§ 104, 105, 206(d)(3)(J), 404(a); 29 CFR § 2520.104b-1 et seq.

2-17: What happens to the rights created by a QDRO if the plan to which the QDRO applies is amended, merged into another plan, or is maintained by a successor employer?

The rights of an alternate payee under a QDRO are protected in the event of plan amendments, a plan merger, or a change in the sponsor of the plan to the same extent that rights of participants or beneficiaries are protected with respect to benefits accrued as of the date of the event.

Reference: ERISA §§ 204(g), 206(d)(3)(A), 403(c)(1); IRC §§ 401(a)(13)(B), 411(d)(6); see Staff of the Joint Committee on Taxation, Explanation of Technical Corrections to the Tax Reform Act of 1984 and Other Recent Tax Legislation, 100th Cong., 1st Sess. (Comm. Print 1987) at 224

2-18: What happens to the rights created by a QDRO if a plan is terminated?

In the view of the Department, the rights granted by a QDRO must be taken into account in the termination of a plan as if the terms of the QDRO were part of the plan. To the extent that the QDRO grants the alternate payee part of the participant's benefits, the plan administrator, in terminating the plan, must provide the alternate payee with the notification, consent, payment, or other rights that it would have provided to the participant with respect to that portion of the participant's benefits.

Reference: ERISA §§ 206(d)(3)(A), 403(d)

2-19: What happens to the rights created by a QDRO if a defined benefit plan is terminated and the Retirement Benefit Guaranty Corporation becomes trustee of the plan?

The Retirement Benefit Guaranty Corporation (PBGC) is a Federal agency that insures retirement benefits in most private-sector defined benefit retirement plans. It is important to note that not all plans are insured by PBGC and not all plans that terminate become trusteed by PBGC. For example, defined contribution plans (including 401(k) plans) are generally not covered by PBGC's insurance. In addition, most defined benefit plans that terminate have sufficient assets to pay all benefits. PBGC does not trustee these plans. See Question 3-4 for a discussion of these basic types of retirement plans.

When an insured plan terminates without enough money to pay all guaranteed benefits, PBGC becomes trustee of the terminating plan and pays the plan benefits subject to certain limits. For instance, PBGC does not pay certain death and supplemental benefits. In addition, benefit amounts and the forms of benefit PBGC pays are limited. PBGC has special rules that apply these guarantee limitations to QDROs. PBGC's booklet, Qualified Domestic Relations Orders & PBGC.

For information about a specific domestic relations order or QDRO affecting a plan trusteed by PBGC, write to:

PBGC QDRO Coordinator
P.O. Box 151750
Alexandria, VA 22315-1750

For information about terminated retirement plans that PBGC has trusteed, benefit information with respect to a participant in a PBGC-trusteed plan, or to request a copy of PBGC's booklet, call PBGC's Customer Service Center at 1.800.400.PBGC (7242). The booklet is also available on PBGC's Web site.

Drafting QDROs

This chapter provides guidance for the process of drafting domestic relations orders that qualify as QDROs. The following areas are addressed:

- What are the most common and useful ways of dividing retirement benefits?
- What are survivor benefits, and why are they important?
- When can an alternate payee receive the benefits assigned by a QDRO?
- In what form will the alternate payee receive the assigned benefits?

Although domestic relations orders that involve retirement plans are issued under and governed by state law, Federal law (ERISA and the Code) and the terms of the relevant retirement plan determine whether these orders can be QDROs. This chapter discusses how to draft orders that will qualify as QDROs while accomplishing the purposes for which the retirement benefits are being divided.

This chapter also discusses the most common methods of dividing retirement benefits under the two separate types of retirement plans: defined benefit plans and defined contribution plans. The following questions and answers emphasize the importance of understanding the nature of a participant's retirement benefits and of making decisions about the assignment of any survivor benefits payable under the retirement plan.

3-1: What is the best way to divide a participant's retirement benefits in a QDRO?

There is no single "best" way to divide retirement benefits in a QDRO. What will be "best" in a specific case will depend on many factors, including the type of retirement plan, the nature of the participant's retirement benefits, and why the parties are seeking to divide those benefits.

In deciding how to divide a participant's retirement benefits in a QDRO, it is also important to consider two aspects of a participant's retirement benefits: the benefit payable under the plan directly to the participant for retirement purposes (referred to here as the "retirement benefit"), and any benefit that is payable under the plan on behalf of the participant to someone else after the participant dies (referred to here as the "survivor benefit"). These two aspects of a participant's retirement benefits are discussed separately in this booklet only in order to emphasize the importance of considering how best to divide retirement benefits.

The following four questions and answers introduce the basic concepts that should inform decisions about drafting QDROs. Question 3-2 explains the scope of assignment permitted by the QDRO provisions; Questions 3-3 and 3-4 relate primarily to the retirement benefit; Question 3-5 describes survivor benefits. Later questions present more specific information about how to draft QDROs.

Cited in Anderson v. Suburban Teamsters, No. 07-10532 and Denied on December 4, 2009

3-2: How much can be given to an alternate payee through a QDRO?

A QDRO can give an alternate payee any part or all of the retirement benefits payable with respect to a participant under a retirement plan. However, the QDRO cannot require the plan to provide increased benefits (determined on the basis of actuarial value); nor can a QDRO require a plan to provide a type or form of benefit, or any option, not otherwise provided under the plan (with one exception, described in Questions 3-9 and 3-10, for an alternate payee's right to receive payment at the participant's "earliest retirement age"). The QDRO also cannot require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another QDRO already recognized by the plan.

Reference: ERISA §§ 206(d)(3)(B)(i)(I), 206(d)(3)(D), 206(d)(3)(E); IRC §§ 414(p)(1)(A)(i), 414(p)(3), 414(p)(4); Advisory Opinion 2000-09A (*see* Footnotes/Appendices)

3-3: Why are the reasons for dividing the retirement benefits important?

Generally, QDROs are used either to provide support payments (temporary or permanent) to the alternate payee (who may be the spouse, former spouse or a child or other dependent of the participant) or to divide marital property in the course of dissolving a marriage. These differing goals often result in different choices in drafting a QDRO. This answer describes two common different approaches in drafting QDROs for these two different purposes.

One approach that is used in some orders is to "split" the actual benefit payments made with respect to a participant under the plan to give the alternate payee part of each payment. This approach to dividing retirement benefits is often called the "shared payment" approach. Under this approach, the alternate payee will not receive any payments unless the participant receives a payment or is already in pay status. This approach is often used when a support order is being drafted after a participant has already begun to receive a stream of payments from the plan (such as a life annuity).

An order providing for shared payments, like any other QDRO, must specify the amount or percentage of the participant's benefit payments that is assigned to the alternate payee (or the manner in which such amount or percentage is to be determined). It must also specify the number of payments or period to which it applies. This is particularly important in the shared payment QDRO, which must specify when the alternate payee's right to share the payments begins and ends. For example, when a state authority seeks to provide support to a child of a participant, an order might require payments to the alternate payee to begin as soon as possible after the order is determined to be a QDRO and to continue until the alternate payee reaches maturity. Alternatively, when support is being provided to a former spouse, the order might state that payments to the alternate payee will end when the former spouse remarries. If payments are to end upon the occurrence of an event, notice and reasonable substantiation that the event has occurred must be provided for the plan to be able to comply with the terms of the QDRO.

Orders that seek to divide a retirement benefit as part of the marital property upon divorce or legal separation often take a different approach to dividing the retirement benefit. These orders usually divide the participant's retirement benefit (rather than just the payments) into two separate portions with the intent of giving the alternate payee a separate right to receive a portion of the retirement benefit to be paid at a time and in a form different from that chosen by the participant. This approach to dividing a retirement benefit is often called the "separate interest" approach.

An order that provides for a separate interest for the alternate payee must specify the amount or percentage of the participant's retirement benefit to be assigned to the alternate payee (or the manner in which such amount or percentage is to be determined). The order must also specify the number of payments or period to which it applies, and such orders often satisfy this requirement simply by giving the alternate payee the right that the participant would have had under the plan to elect the form of benefit payment and the time at which the separate interest will be paid. Such an order would satisfy the requirements to be a QDRO.

Federal law does not require the use of either approach for any specific domestic relations purpose, and it is up to the drafters of any order to determine how best to achieve the purposes for which retirement benefits are being divided. Further, the shared payment approach and the separate interest approach can

each be used for either defined benefit or defined contribution plans. See Question 3-4 for a discussion of the two basic types of retirement plans. However, it is important in drafting any order to understand and follow the terms of the plan. An order that would require a plan to provide increased benefits (determined on an actuarial basis) or to provide a type or form of benefit, or an option, not otherwise available under the plan cannot be a QDRO. See Questions 3-4, 3-6, and 3-7 for further information on dividing retirement benefits under defined benefit and defined contribution plans.

In addition to determining whether or how to divide the retirement benefit, it is important to consider whether or not to give the alternate payee a right to survivor benefits or any other benefits payable under the plan. See Question 3-5 for a discussion of survivor benefits.

Reference: ERISA § 206(d)(3)(C)(ii) - (iv); IRC § 414(p)(2)(B) - (D)

3-4: In deciding how to divide the participant's retirement benefits, why is understanding the type of retirement plan important?

Understanding the type of retirement plan is important because the order cannot be a QDRO unless its assignment of rights or division of retirement benefits complies with the terms of the plan. Parties drafting a QDRO should read the plan's summary plan description and other plan documents to understand what retirement benefits are provided under the plan.

Retirement plans may be divided generally into two types:

- Defined benefit plans
- Defined contribution plans

A defined benefit plan promises to pay each participant a specific benefit at retirement. This basic retirement benefit is usually based on a formula that takes into account factors like the number of years a participant works for the employer and the participant's salary. The basic retirement benefit is generally provided in the form of periodic payments for the participant's life beginning at what the plan calls "normal retirement age." This stream of periodic payments is generally known as an "annuity." A participant's basic retirement benefit under a defined benefit plan may increase over time, either before or after the participant begins receiving benefits, due to a variety of circumstances, such as increases in salary or the crediting of additional years of service with the employer (which are taken into account under the plan's benefit formula), or through amendment to the plan's provisions, including some amendments to provide cost of living adjustments.

Defined benefit plans may promise to pay benefits at various times, under certain circumstances, or in alternative forms. Benefits paid at those times or in those forms may have a greater actuarial value than the basic retirement benefit payable by the plan at the participant's normal retirement age. When one form of benefit has a greater actuarial value than another form, the difference in value is often called a "subsidy." See Appendix C for further discussion of the benefits provided under defined benefit plans.

A defined contribution plan, by contrast, is a type of retirement plan that provides for an individual account for each participant. The participant's benefits are based solely on the amount contributed to the participant's account and any income, expenses, gains or losses, and any forfeitures of accounts of other participants that may be allocated to such participant's account. Examples of defined contribution plans include profit-sharing plans (like 401(k) plans), employee stock ownership plans (ESOPs), and money purchase plans. A participant's basic retirement benefit in a defined contribution plan is the amount in his or her account at any given time. This is generally known as the participant's "account balance." Defined contribution plans commonly provide for retirement benefits to be paid in the form of a lump sum payment of the participant's entire account balance. Defined contribution plans by their nature do not offer subsidies.

It should be noted, however, that some defined benefit plans provide for lump sum payments, and some defined contribution plans provide for annuities.

Reference: IRS Notice 97-11, 1997-2 IRB 49 (Jan. 13, 1997) (Appendix C)

Cited in Anderson v. Suburban Teamsters, No. 07-15532 archived on December 4, 2009

3-5: What are "survivor benefits," and why should a QDRO take them into account?

Federal law requires all retirement plans, whether they are defined benefit plans or defined contribution plans, to provide benefits in a way that includes a survivor benefit for the participant's spouse. The provisions creating these protections are contained in section 205 of ERISA and sections 401(a)(11) and 417 of the Code. The type of survivor benefit that is required by Federal law depends on the type of retirement plan. Plans also may provide for survivor (or "death") benefits that are in addition to those required by Federal law. Participants and alternate payees drafting a QDRO should read the plan's summary plan description and other plan documents to understand the survivor benefits available under the plan.

Federal law generally requires that defined benefit plans and certain defined contribution plans pay retirement benefits to participants who were married on the participant's "annuity starting date" (this is the first day of the first period for which an amount is payable to the participant) in a special form called a "qualified joint and survivor annuity" (QJSA) unless the participant elects a different form and the spouse consents to that election. When benefits are paid as a QJSA, the participant receives a periodic payment (usually monthly) during his or her life, and the surviving spouse of the participant receives a periodic payment for the rest of the surviving spouse's life upon the participant's death. See Appendix C for a description of the QJSA. Federal law also generally requires that, if a married participant with a non-forfeitable benefit under one of these types of plans dies before his or her "annuity starting date," the plan must pay the surviving spouse of the participant a monthly survivor benefit. This benefit is called a "qualified preretirement survivor annuity" (QPSA). Appendix C also describes the QPSA.

Those defined contribution plans that are not required to pay retirement benefits to married participants in the form of a QJSA or QPSA (like most 401(k) plans) are required by Federal law to pay any balance remaining in the participant's account after the participant dies to the participant's surviving spouse. If the spouse gives written consent, the participant can direct that upon the participant's death any balance remaining in the account will be paid to a beneficiary other than the spouse, for example, the couple's children. Under these defined contribution plans, Federal law does not require a spouse's consent to a participant's decision to withdraw any portion (or all) of his or her account balance during the participant's life.

If a participant and his or her spouse become divorced before the participant's annuity starting date, the divorced spouse loses all right to the survivor benefit protections that Federal law requires be provided to a participant's spouse. If the divorced participant remarries, the participant's new spouse may acquire a right to the Federally mandated survivor benefits. A QDRO, however, may change that result. To the extent that a QDRO requires that a former spouse be treated as the participant's surviving spouse for all or any part of the survivor benefits payable after the death of the participant, any subsequent spouse of the participant cannot be treated as the participant's surviving spouse. For example, if a QDRO awards all of the survivor benefit rights to a former spouse, and the participant remarries, the participant's new spouse will not receive any survivor benefit upon the participant's death. If such a QDRO requires that a defined benefit plan, or a defined contribution plan subject to the QJSA and QPSA requirements, treat a former spouse of a participant as the participant's surviving spouse, the plan must pay the participant's benefit in the form of a QJSA or QPSA unless the former spouse who was named as surviving spouse in the QDRO consents to the participant's election of a different form of payment.

It should also be noted that some retirement plans provide that a spouse of a participant will not be treated as married unless he or she has been married to the participant for at least a year. If the retirement plan to which the QDRO relates contains such a one-year marriage requirement, then the QDRO cannot treat the alternate payee as a surviving spouse if the marriage lasted for less than one year.

In addition, it is important to note that some retirement plans may provide for survivor benefits in addition to those required by Federal law for the benefit of

the surviving spouse. Generally, however, the only way to establish a former spouse's right to survivor benefits such as a QJSA or QPSA is through a QDRO. A QDRO may provide that a part or all of such other survivor benefits shall be paid to an alternate payee rather than to the person who would otherwise be entitled to receive such death benefits under the plan. As discussed above (See, e.g., Question 3-3), a spouse or former spouse can also receive a right to receive (as a separate interest or as shared payments) part of the participant's retirement benefit as well as a survivor's benefit.

Reference: ERISA §§ 205, 206(d)(3)(F); IRC §§ 401(a)(11), 414(p)(5), 417; Advisory Opinion 2000-09A (*see* Footnotes/Appendices)

3-6: How may the participant's retirement benefit be divided if the retirement plan is a defined contribution plan?

An order dividing a retirement benefit under a defined contribution plan may adopt either a "separate interest" approach or a "shared payment" approach (or some combination of these approaches). See Question 3-3 for a discussion of these two approaches. Orders that provide the alternate payee with a separate interest, either by assigning to the alternate payee a percentage or a dollar amount of the account balance as of a certain date, often also provide that the separate interest will be held in a separate account under the plan with respect to which the alternate payee is entitled to exercise the rights of a participant. Provided that the order does not assign a right or option to an alternate payee that is not otherwise available under the plan, an order that creates a separate account for the alternate payee may qualify as a QDRO.

Orders that provide for shared payments from a defined contribution plan should clearly establish the amount or percentage of the participant's payments that will be allocated to the alternate payee and the number of payments or period of time during which the allocation to the alternate payee is to be made. A QDRO can specify that any or all payments made to the participant are to be shared between the participant and the alternate payee.

In drafting orders dividing benefits under defined contribution plans, parties should also consider addressing the possibility of contingencies occurring that may affect the account balance (and therefore the alternate payee's share) during the determination period. For example, parties might be well advised to specify the source of the alternate payee's share of a participant's account that is invested in multiple investments because there may be different methods of determining how to derive the alternate payee's share that would affect the value of that share. The parties should also consider how to allocate any income or losses attributable to the participant's account that may accrue during the determination period. If an order allocates a specific dollar amount rather than a percentage to an alternate payee as a shared payment, the order should address the possibility that the participant's account balance or individual payments might be less than the specified dollar amount when actually paid out.

Reference: ERISA §§ 206(d)(3)(C); IRC § 414(p)(2)

3-7: How may the participant's retirement benefit be divided if the retirement plan is a defined benefit plan?

As indicated earlier, an order may adopt either the shared payment or the separate interest approach (or a combination of the two) in dividing retirement benefits in a defined benefit plan. See Question 3-3 for a discussion of these two approaches.

If shared payments are desired, the order should specify the amount of each shared payment allocated to the alternate payee either by percentage or by dollar amount. If the order describes the alternate payee's share as a dollar amount, care should be taken to establish that the payments to the participant will be sufficient to satisfy the allocation, and the order should indicate what is to happen in the event a payment is insufficient to satisfy the allocation. The order must also describe the number of payments or period of time during which the allocation to the alternate payee is to be made. This is usually done by specifying a beginning date and an ending date (or an event that will cause the allocation to begin and/or end). If an order specifies a triggering event that may occur outside the plan's knowledge, notice of its occurrence must be given to the plan before the plan is required to act in accordance with the order. If the intent is that all payments made under the plan are to be shared between the participant and the alternate payee, the order may so specify.

As discussed in Appendix C, a defined benefit plan may provide for subsidies under certain circumstances and may also provide increased benefits or additional benefits either earned through additional service or provided by way of plan amendment. A QDRO that uses the "shared payment" method to give the alternate payee a percentage of each payment may be structured to take into account any such future increases in the benefits paid to the participant. Such a QDRO does not need to address the treatment of future subsidies or other benefit increases, because the alternate payee will automatically receive a share of any subsidy or other benefit increases that are paid to the participant. If the parties do not wish to provide for the sharing of such subsidies or increases, the order should so specify.

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If a separate interest is desired for the alternate payee, it is important that the order be based on adequate information from the plan administrator and the plan documents concerning the participant's retirement benefit and the rights, options, and features provided under the plan. See Question 2-1. In particular, the drafters of a QDRO should consider any subsidies or future benefit increases that might be available with respect to the participant's retirement benefit. The order may specify whether, and to what extent, an alternate payee is to receive such subsidies or future benefit increases. See Appendix C for a discussion of subsidies and possible future increases in a participant's benefits in a defined benefit plan.

Reference: ERISA §§ 206(d)(3)(C), 206(d)(3)(D); IRC §§ 414(p)(2), 414(p)(3)

3-8: May the QDRO specify the form in which the alternate payee's benefits will be paid?

A QDRO that provides for a separate interest may specify the form in which the alternate payee's benefits will be paid subject to the following limitations:

- The order may not provide the alternate payee with a type or form of payment, or any option, not otherwise provided under the plan
- The order may not provide any subsequent spouse of an alternate payee with the survivor benefit rights that Federal law requires be provided to spouses of participants under section 205 of ERISA (See Question 3-5)
- For any tax-qualified retirement plan, the payment of the alternate payee's benefits must satisfy the requirements of section 401(a)(9) of the Code respecting the timing and duration of payment of benefits. In determining the form of payment for an alternate payee, an order may substitute the alternate payee's life for the life of the participant to the extent that the form of payment is based on the duration of an individual's life. As discussed in Appendix C, however, the timing and forms of benefit available to an alternate payee under a tax-qualified plan may be limited by section 401(a)(9) of the Code.

Alternatively, a QDRO may (subject to the limitations described above) give the alternate payee the right that the participant would have had under the plan to elect the form of benefit payment. For example, if a participant would have the right to elect a life annuity, the alternate payee may exercise that right and choose to have the assigned benefit paid over the alternate payee's life. However, the QDRO must permit the plan to determine the amount payable to the alternate payee under any form of payment in a manner that does not require the plan to pay increased benefits (determined on an actuarial basis).

A plan may by its own terms provide alternate payees with additional types or forms of benefit, or options, not otherwise provided to participants, such as a lump-sum payment option, but the plan cannot prevent a QDRO from assigning to an alternate payee any type or form of benefit, or option, provided generally under the plan to the participant.

Reference: ERISA §§ 206(d)(3)(A), 206(d)(3)(D), 206(d)(3)(E)(i)(III); IRC §§ 401(a)(9), 401(a)(13)(B), 414(p)(3), 414(p)(4)(A)(iii)

3-9: When can the alternate payee get the benefits assigned under a QDRO?

A QDRO that provides for shared payments must specify the date on which the alternate payee will begin to share the participant's payments. Such a date, however, cannot be earlier than the date on which the plan receives the order. With respect to a separate interest, an order may either specify the time (after

the order is received by the plan) at which the alternate payee will receive the separate interest or assign to the alternate payee the same right the participant would have had under the plan with regard to the timing of payment. In either case, a QDRO cannot provide that an alternate payee will receive a benefit earlier than the date on which the participant reaches his or her "earliest retirement age," unless the plan permits payments at an earlier date. Question 3-10 describes how to determine this "earliest retirement age," which is often a date earlier than the earliest date on which the participant would be entitled to receive his or her retirement benefit.

The plan itself may contain provisions permitting alternate payees to receive separate interests awarded under a QDRO at an earlier time or under different circumstances than the participant could receive the benefit. For example, a plan may provide that alternate payees may elect to receive a lump sum payment of a separate interest at any time. As discussed in question 3-8 and in Appendix C, section 401(a)(9) of the Code may affect when benefits must be paid under tax-qualified retirement plans.

Reference: ERISA §§ 206(d)(3)(C), 206(d)(3)(D), 206(d)(3)(E); IRC §§ 401(a)(9), 414(p)(2), 414(p)(3), 414(p)(4)

3-10: What is "earliest retirement age," and why is it important?

For QDROs, Federal law provides a very specific definition of "earliest retirement age," which is the earliest date as of which a QDRO can order payment to an alternate payee (unless the plan permits payments at an earlier date). The "earliest retirement age" applicable to a QDRO depends on the terms of the retirement plan and the participant's age. "Earliest retirement age" is the earlier of two dates:

- The date on which the participant is entitled to receive a distribution under the plan, or
- The later of either
- The date the participant reaches age 50, or

The earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service with the employer.

Drafters of QDROs should consult the plan administrator and the plan documents for information on the plan's "earliest retirement age." The following examples illustrate the concept of "earliest retirement age."

Example 1 - The retirement plan is a defined contribution plan that permits a participant to make withdrawals only when he or she reaches age 59½ or terminates from service. The "earliest retirement age" for a QDRO under this plan is the earlier of:

- When the participant actually terminates employment or reaches age 59½, or
- The later of the date the participant reaches age 50 or the date the participant could receive the account balance if the participant terminated employment.

Since the participant could terminate employment at any time and thereby be able to receive the account balance under the plan's terms, the later of the two dates described above is "age 50." The "earliest retirement age" formula for this plan can be simplified to read the earlier of:

- Actually reaching age 59½ or terminating employment or
- Age 50

Since age 50 is earlier than age 59½, the "earliest retirement age" for this plan will be the earlier of age 50 or the date the participant actually terminates from service.

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Example 2 - The retirement plan is a defined benefit plan that permits retirement benefits to be paid beginning when the participant reaches age 65 and terminates employment. It does not permit earlier payments. The "earliest retirement age" for this plan is the earlier of:

- The date on which the participant actually reaches age 65 and terminates employment, or
- The later of age 50 or the date on which the participant reaches age 65 (whether he or she terminates employment or not).

Because age 65 is later than age 50, the second part of the formula can be simplified to read "age 65" so that the formula reads as follows: the "earliest retirement age" is the earlier of

- The date on which the participant reaches age 65 and actually terminates or
- The date the participant reaches age 65

Under this plan, therefore, the "earliest retirement age" will be the date on which the participant reaches age 65.

Reference: ERISA § 206(d)(3)(E); IRC § 414(p)(4)

Footnotes/Appendices

1. The Department of Labor has jurisdiction to interpret the QDRO provisions set forth in section 206(d)(3) of ERISA and section 414(p) of the Code (except to the extent provided in section 401(n) of the Code) and the provisions governing fiduciary duties owed with respect to domestic relations orders and QDROs. This booklet was developed in consultation with the Department of the Treasury and the Internal Revenue Service.
2. As used in this booklet, the term "retirement plan" refers to plans defined in section 3(2) of ERISA and means generally any plan established or maintained by an employer or an employee organization (or both) that provides retirement income to employees or results in the deferral of income by employees for periods extending to the termination of covered employment or beyond.
3. Advisory Opinion 90-46A (not available on the internet)
4. Advisory Opinion 92-17A
5. Advisory Opinion 99-13A
6. Advisory Opinion 2000-09A
7. Advisory Opinion 2001-06A
8. Advisory Opinion 2002-03A
9. Advisory Opinion 2004-02A

10. Field Assistance Bulletin 2003-3
11. ERISA Advisory Opinion Procedure
12. IRS Sample Language for a QDRO

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