

Basics of Qualified Domestic Relations Orders: QDROs

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1) What is a Qualified Domestic Relations Order?

- a) In general, ERISA and the Internal Revenue Code do not permit a participant to assign or alienate the participant's interest in a retirement plan to another person. A limited exception to the anti-assignment and anti-alienation rule is provided for assignments of retirement benefits through qualified domestic relations orders (QDROs).
- b) 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."
- c) A Qualified Domestic Relations Order is:
 - (1) A domestic relations order
 - (2) 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.
- d) ERISA only applies to private-sector Employee Benefit Plans, it does not apply to government retirement and pension plans such as KPERS. However, KPERS and other government plans often have Qualified Domestic Relations Order statutes and regulations similar to ERISA. Check relevant law for each government plan.

2) TERMS:

- a) **Domestic Relations Order** - A judgment, decree, or order (including the approval of a property settlement),
 - (1) That is made pursuant to state domestic relations law (including community property law), and
 - (2) 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.
 - (3) 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).
- b) **Participant** – is “any employee or former employee of an employer, or member or former member of an employee organization (usually a union) who is or may become eligible to receive a benefit of any type from an Employee Benefit Plan . . . or whose beneficiaries may be eligible to receive any such benefit.” 29 USC § 1002(7).

- c) **Beneficiary** – is “a person designated by a Participant or by the terms of an Employee Benefit Plan, who is or may become entitled to [receive] a benefit thereunder.” 29 USC § 1002(8).
 - d) **Alternate Payee** – is any spouse, former spouse, child or “other dependent” of a Participant who is recognized by a Domestic Relations Order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such Participant. See 29 USC § 1056(d)(3)(K).
 - (1) Under the *Defense of Marriage Act (DOMA)*, a marriage under “any Act of Congress” of a marriage “means only a legal union between one man and one woman as man and wife, and the word “spouse” refers only to a person of the opposite sex who is husband and wife.” 1 USC § 7(1996). Therefore, a same-sex spouse under certain laws is not a “spouse” under ERISA and is not eligible to receive a QDRO as a “spouse.”
 - (2) QUERY : The meaning of the term “other dependent” is not clear. Can a same-sex spouse or ex-spouse receive a QDRO as an “other dependent?”
 - (3) NOTE: An Alternate Payee is a “Beneficiary” of the Plan.
 - e) **Defined Contribution Pension Plan or Individual Account Plan** – a pension plan that creates an individual account for each participant and provides benefits based solely on the amount contributed to that Participant’s account – together with any income and any forfeitures. Includes:
 - (1) Money Purchase Pension Plans
 - (2) Profit-sharing plans
 - (3) 401 (k) plans
 - (4) Stock Bonus Plans
 - (5) ESOPs
 - f) **Defined Benefit Pension Plan** – a pension plan under which an employer promises to pay a certain level of benefit – a defined benefit – to each participant upon retirement. The benefit is determined by a formula set forth in the plan and the summary plan description (SPD). Benefit is often paid as either a “single life annuity” or a “joint life annuity.”
 - g) **Plan Administrator** – 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.
- 3) Four items of basic information needed for every QDRO
- a) Name & current address of both the Participant and the Alternate Payee

- b) Social Security Number for both the Participant and the Alternate Payee – However, be aware of rules restricting the use of personal information in court-filed documents.
 - c) Exact name of the plan to which the DRO applies.
 - (1) This not as easy as it may seem. Large employers often have several plans that may sound alike: e.g. *XYZ Corporation Hourly Employees 401(k) Profit-Sharing Plan*, and *XYZ Corporation Salaried Employees 401(k) Profit-Sharing Plan*, are probably two entirely different plans sponsored by the same employer. Your Participant, who works for XYZ Corporation may participate in one, both, or neither of these plans.
 - (2) Don't confuse the plan name with the name of the 3rd party administrator who administers the plan (e.g. TPA Corp. Inc.), or the investment firm that invests the participant's account (e.g. American Century, Fidelity).
 - (3) Odds are neither the Participant nor the Alternate Payee know the name of the Plan.
 - (4) Good probability opposing counsel will not know the name of his client's plan.
 - d) Benefits Information:
 - (1) Amount of Benefits available under the plan.
 - (2) 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
 - (a) Lump sum,
 - (b) Annuities, or
 - (c) Something else
 - (3) The form and timing of benefits, including the number of payments or time period to which the order applies.
 - (a) Alternate payee can only get benefits when Participant retires, or
 - (b) Alternate payee can get actuarial equivalent benefits at a date Alternate payee chooses.
- 4) There are certain provisions that a QDRO must **not** contain:
- a) 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.
 - b) The order must **not** require a plan to provide for increased benefits (determined on the basis of actuarial value).
 - c) 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.
 - d) 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.

- 5) Document you NEED to help you draft or prepare to draft a DRO or QDRO:
- a) Summary Plan Description - The summary plan description (SPD) 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, forms of benefits, and when benefits may begin.
 - b) The Participant's most recent Annual Benefits Statement
 - (1) Name & SSN of Participant.
 - (2) A statement as of a certain recent date of lump sum or monthly benefits.
 - c) Plan's Written QDRO procedures, 29 USC § 1056(d)(3)(G)(ii)
 - (1) Must be in writing
 - (2) Must provide for notification of each Participant and Alternate Payee about the Procedures promptly after the plan receives a DRO.
 - (3) Must permit an Alternate Payee to designate a representative to whom all copies of all notices concerning the DRO must be sent by the plan.
 - d) The written Plan is probably something you do not want or need – too big and too technical.
 - e) Try to get these documents as soon as possible
- 6) Who should draft and qualify the DRO? – The attorney for the Alternate Payee.
- 7) Steps in Drafting and qualifying the DRO
- a) When negotiating the division of benefits as part of property settlement negotiations, make certain whatever you negotiate is possible under the terms of the pension plan.
 - b) Check Plan's QDRO procedures or contact the Plan administrator and see if the plan has a recommended format. If so and it is appropriate to the division of benefits, use it as much as possible.
 - c) Draft DRO, run by your client and opposing counsel/party for approval.
 - d) Submit proposed DRO to plan administrator for pre-approval before sending to judge – not required but recommended.
 - e) Get judge's signature.
 - f) Send CERTIFIED COPY of the DRO to Plan administrator. Ask that Plan Administrator send you notification of qualification of the DRO (now it is a QDRO).

- g) If DRO rejected by Plan Administrator, find out WHY and WHAT needs to be changed.
 - h) Repeat steps c, d, e & f.
- 8) Administrative fees – US DOL Field Assistance Bulletin 2003-3 (May 19, 2003) allows **defined contributions plans** to charge the Participant and/or the Alternate Payee “reasonable expenses attendant to QDRO or QMSCO determinations.”
- a) However, “plans are required to include in the [SPD] a summary of any provisions that may result in the imposition of a fee or charge on a participant or beneficiary, or the individual account thereof, the payment of which is conditioned to the receipt of benefits under the plan.” The Bottom line, check the SPD before paying any administrative fees for processing a QDRO.
 - b) For more information See: http://www.dol.gov/ebsa/regs/fab_2003-3.html
 - c) Consider who pays the administrative fees when negotiating the terms of the QDRO.
- 9) For more information generally on QDROs see the US DOL publication: *QDROs: The Division of Retirement Benefits through Qualified Domestic Relations Orders*. This can be found online at: <http://www.dol.gov/ebsa/publications/qdros.html#Administration>

The following is from that publication.

- a) **What is the best way to divide a participant's retirement benefits in a QDRO?**
 - (1) 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.
 - (2) 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.
- b) **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.

c) How may the participant's retirement benefit be divided if the retirement plan is a defined contribution plan?

- (1) 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.
- (2) 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.
- (3) 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.

d) How may the participant's retirement benefit be divided if the retirement plan is a defined benefit plan?

- (1) 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.
- (2) 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.

- (3) 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.
- (4) 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.

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