

Administration of Qualified Domestic Relations Orders Under ERISA

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.10 Introduction

The Employee Retirement Income Security Act of 1974 specifies the requirements that plan sponsors and fiduciaries must meet in the design, implementation, and administration of employee benefit plans in order for plans to be considered qualified plans under the Internal Revenue Code. Among those requirements is a provision that prohibits a plan participant's retirement benefits from being assigned or alienated in favor of a third party.¹ This requirement is further bolstered by ERISA's broad preemption provisions which state that ERISA "supersede(s) any and all State laws insofar as they may . . . relate to any employee benefit plan."²

Because ERISA's anti-assignment provisions would have harsh results in domestic situations, *i.e.*, retirement plan benefits would not be able to be assigned to the spouse, former spouse, or dependent of a plan participant, the Retirement Equity Act of 1984 established an exception to ERISA's anti-alienation provisions in the case of qualified domestic relations orders, or QDROs.³ Later, Congress adopted the Small Business Job Protection Act of 1996, which in part directed the Secretary of the Treasury to develop sample language for a QDRO form that meets the requirements of ERISA and I.R.C. §414(p).⁴ Accordingly, the Internal Revenue Service and the Treasury Department issued guidance in the form of I.R.S. Notice 97-11, containing such sample language. They also issued Notice 97-10 containing sample language pertaining to the provision of Qualified Joint and Survivor Annuity ("QJSA") coverage and/or Qualified Preretirement Survivor Annuity ("QPSA") coverage to a former spouse through a QDRO.

The Labor Department's Employee Benefits Security Administration provides on its website compliance assistance for retirement plans regarding QDROs. EBSA provides an overview of QDROs in a question and answer format, with further information about determining qualified status and paying benefits, and drafting QDROs.⁵

Section 1001 of the Pension Protection Act of 2006 required the DOL to "clarify" by issuing regulations that a domestic relations order otherwise meeting the requirements to be a QDRO, including the requirements of §206(d)(3)(D) of ERISA and §414(p) of the Internal Revenue Code, shall not fail to be treated as a QDRO solely because (A) the order is issued after, or revises, another domestic relations order or QDRO; or (B) of the time that it

¹ ERISA §206(d)(1).

² ERISA §514(a).

³ ERISA §206(d)(3); I.R.C. §414(p).

⁴ Small Business Job Protection Act of 1996, §1457(a)(2).

⁵ Available at http://www.dol.gov/ebsa/faqs/faq_qdro.html, http://www.dol.gov/ebsa/faqs/faq_qdro2.html, and http://www.dol.gov/ebsa/faqs/faq_qdro3.html.

was issued. On June 10, 2010, EBSA issued final regulations that clarified these issues,, through examples showing that:

- subsequent DROs received after an already approved QDRO, regarding the same or a new alternate payee, could amend or be accepted in addition to the prior QDRO, and
- orders issued after the death of the participant cannot be disqualified solely because they are issued post-mortem.⁶

.20 QDRO Requirements

Initially it will be helpful to define some of the terms associated with this area of pension administration.

A *Domestic Relations Order* (DRO) is any judgment, decree, or order (including the approval of a property settlement) that is made by a state domestic relations court and 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, and made pursuant to state domestic relations law (including community property law).⁷

A *Qualified Domestic Relation Order* is a DRO 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 pension plan, and that includes certain information and meets certain other requirements under ERISA and the tax code.⁸

A DRO 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.

Most important among the requirements of a qualified domestic relations order are the following:

.20.10 Plan Must Have Written Procedures

Each plan must establish reasonable procedures so that the plan administrator can determine the qualified status of DROs and administer distributions under those qualified orders.⁹ Model QDRO procedures for a defined benefit plan may be found in the Practice Aids.

.20.20 Required Information

QDROs must contain the following information:

- the name and last known mailing address of the participant and the name and mailing address of each alternate payee;¹⁰
- the dollar amount or percentage (or the method of determining the amount or percentage) of the benefit to be

⁶ 29 C.F.R. §2530.206

⁷ ERISA §206(d)(3)(B)(i); I.R.C. §414(p)(1)(B).

⁸ ERISA §206(d)(3)(B)(i); I.R.C. §414(p)(1)(A).

⁹ ERISA §206(d)(3)(K), I.R.C. §414(p)(6)(B).

¹⁰ ERISA §206(d)(3)(K), I.R.C. §414(p)(8).

paid to the alternate payee;¹¹

- the number of payments or time period to which the order applies;¹² and
- the name of each plan to which the order applies.¹³

.20.30 Prohibited Provisions

There are certain provisions that a QDRO may not contain. Specifically, it may not:

- require a plan to provide an alternate payee or participant with any form of benefit, or any option, not otherwise provided under the plan;
- require a plan to provide for increased benefits (determined on the basis of actuarial value); or
- 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.¹⁴

.20.40 Exceptions For Certain Benefits Made After Earliest Retirement Age

Payments to an alternate payee may be made according to the following constraints:

- If the alternate payee elects to retire prior to the date that the plan participant retires, the alternate payee's benefit commencement date must be on or after the date on which the participant attains (or would have attained) the earliest retirement age;
- The benefit payable to the alternate payee is determined as if the participant had retired on the date on which such payment is to begin under the order (but taking into account only the present value of the benefits actually accrued and not the present value of any employer subsidy for early retirement); and
- The benefits payable to the alternate payee are in any form in which benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).¹⁵

In determining the actuarial equivalent benefit options, the interest rate assumption used in determining the present value is the interest rate specified in the plan or, if no rate is specified, 5 percent.¹⁶

.20.50 Earliest Retirement Age

The term "earliest retirement age" means the earlier of the date on which the participant is entitled to a distribution

¹¹ ERISA §206(d)(3)(C)(i), I.R.C. §414(p)(2)(A).

¹² ERISA §206(d)(3)(C)(ii), I.R.C. §414(p)(2)(B).

¹³ ERISA §206(d)(3)(C)(iii), I.R.C. §414(p)(2)(C).

¹⁴ ERISA §206(d)(3)(D); I.R.C. §414(p)(3).

¹⁵ ERISA §206(d)(3)(E)(i); I.R.C. §414(p)(4)(A).

¹⁶ *Id.*

under the plan,¹⁷ or the later of:

- the date the participant attains age 50, or
- the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.¹⁸

However, the plan's written QDRO procedures can always contain a more generous definition of earliest retirement age. (*See* QDRO Administration Issues, below, for a more detailed discussion.)

.20.60 Treatment of Former Spouse for Surviving Spouse Benefits

To the extent provided in any QDRO, a participant's former spouse is treated as the surviving spouse of the participant for purposes of I.R.C. §§401(a)(11) and 417 (and a current spouse of the participant is not treated as the participant's spouse for these purposes.)¹⁹ If married for at least one year, the surviving former spouse is treated as meeting the requirements of §417(d).²⁰

.20.70 Notice and Determination by Administrator

When a plan receives a DRO, the plan administrator must promptly notify the participant and each alternate payee of the receipt of the order and the plan's procedures for determining the qualified status of DROs. Within a reasonable time after receiving the order, the plan administrator must determine whether the order is a QDRO and notify the participant and each alternate payee of the determination.²¹

.20.80 Procedures for Period During Which Determination is Being Made

While the issue of whether a DRO is a QDRO is being considered (by the plan administrator, by the court, or otherwise), the plan administrator must separately account for the amounts (referred to as the "segregated amounts") which would have been payable to the alternate payee during the period if the order had been determined to be a QDRO.²²

If, within 18 months from the date the first payment would have to be made under the DRO, the order is determined to be a QDRO, the plan administrator must pay the segregated amounts, including interest, to the persons entitled to them.²³ If the order is determined not to be a QDRO within that 18 months, or its status is not resolved, the plan administrator must pay the segregated amounts, including interest, to the persons who would have been entitled to those amounts if there had been no order.²⁴ Any determination that an order is a QDRO that is made

¹⁷ ERISA §206(d)(3)(E)(ii); I.R.C. §414(p)(4)(B)(i).

¹⁸ ERISA §206(d)(3)(E)(ii); I.R.C. §414(p)(4)(B)(ii).

¹⁹ ERISA §206(d)(3)(F)(i); I.R.C. §414(p)(5)(A).

²⁰ ERISA §206(d)(3)(F)(ii); I.R.C. §414(p)(5)(B).

²¹ ERISA §206(d)(3)(G)(i); I.R.C. §414(p)(6)(A).

²² ERISA §206(d)(3)(H)(i); I.R.C. §414(p)(7)(A).

²³ ERISA §206(d)(3)(H)(ii); I.R.C. §414(p)(7)(B).

²⁴ ERISA §206(d)(3)(H)(iii); I.R.C. §414(p)(7)(C).

after the end of the 18-month period is applied prospectively.

.20.90 Impact of Defense of Marriage Act

The Defense of Marriage Act, a federal law that defines marriage,²⁵ states:

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

In accordance with DOMA, a same-sex spouse is not a recognized "spouse" for purposes of being named as an alternate payee under a QDRO. However, because an alternate payee may be a spouse, former spouse, child, or other dependent of the participant,²⁶ to the extent a same-sex former spouse qualifies as a "dependent" of the participant, the individual may be named as an alternate payee under a QDRO. That said, a same-sex spouse does not qualify as a "spouse" for purposes of QJSA and QPRSA coverage under the tax code, and therefore, such coverage cannot be afforded a former same-sex spouse pursuant to a QDRO.

.30 QDRO Administration Issues

.30.10 Types of QDROs

Separate Interest QDRO. If the QDRO is a separate interest QDRO, then payments under the alternate payee's separate interest usually are not affected by the participant's death. If the QDRO so provides, the alternate payee may receive a pre-retirement survivor benefit and/or a post-retirement survivor benefit, whichever the case may be, determined with respect to the participant's benefit that has not been assigned to any alternate payee.

Occasionally a plan may indicate that upon the death of the participant, before the alternate payee's assigned interest commences the alternate payee's otherwise assigned interests terminate and are replaced by the pre-retirement surviving spouse benefits provided by the plan. Care should be taken to determine whether the survivor benefits assigned are based on only the marital portion of the accrued pension benefit or the entire accrued benefit.

If the QDRO is silent as to the treatment of the alternate payee as the participant's surviving spouse for purposes of pre-retirement survivor benefit or a post-retirement survivor benefit eligibility, then the participant's unassigned interest under the plan usually is payable to the participant's estate or as otherwise provided in the governing plan document.

Shared Interest QDRO. A shared interest QDRO is one that assigns a retirement benefit or a portion of the benefit determined after the benefit has commenced. Conceptually, an alternate payee who is assigned a shared interest receives a share of the stream of payments received by the participant. (For this reason shared interest QDROs are also referred to as "stream of payment" QDROs.) Moreover, the alternate payee's shared interest is subject to the terms and conditions of payment as elected by the participant at benefit commencement.

Example: If the participant elects a single life annuity form of payment, and the alternate payee is assigned 50 percent of the monthly benefit under this form of payment, payment of benefits to the alternate payee from the plan ceases upon the participant's death (*i.e.*, receipt of payments by the alternate payee interest based on a single life, namely, the participant's.)

The shared interest approach must be used if the assignment occurs after benefits have commenced to the participant. The shared interest approach is often not the preferred approach when assigning an interest in a benefit that has yet to commence, because the participant ultimately controls the time and form of payment under this approach.

²⁵ 28 U.S.C. §1738C (1996).

²⁶ ERISA §206(d)(3)(C)(i)-(iv); I.R.C. §414(p)(2)(A)-(D).

Unless named a surviving spouse for purposes of the qualified pre-retirement spouse annuity (or benefit with respect to a defined contribution plan) under the QDRO, the alternate payee will not receive a benefit under the plan should the participant die prior to benefit commencement. For this reason, it is critical that the attorney representing an alternate payee to a shared interest QDRO make sure that the QDRO names the alternate payee as the surviving spouse for purposes of pre-retirement surviving spouse benefits.

It is important that the QDRO define the accrued benefit to which the alternate payee will have survivorship interests. Normally the pre-retirement survivorship interest assigned to the alternate payee is based on the marital portion of the accrued benefit on the date of divorce. Assignments of this type allow the participant to name a subsequent spouse to pre-retirement survivor interests on the portion of the accrued benefits that are not considered a marital asset of the alternate payee and the participant.

If the QDRO is silent as to the treatment of the alternate payee as the participant's surviving spouse, then the participant's unassigned interest under the plan is payable to the participant's estate or as otherwise provided in the governing plan document.

.30.20 Definition of a Domestic Relations Order

In its published guidance DOL states that a domestic relations order must be a judgment or decree issued by a state court, and that it is not necessary for both parties to sign or approve an order: "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.²⁷

According to DOL, a domestic relations order does not need to be a separate order: "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 pension 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."²⁸

A judgment, decree, or order may assign all or part of a participant's benefit to an alternate payee. But it may not provide for a form of benefit that is not provided under the terms of the plan, require the distribution of benefits to the alternate payee prior to the participant's attainment of early retirement age, or assign to an alternate payee a benefit that was previously assigned to another alternate payee.²⁹

A plan administrator is not required to determine whether the issuing court had the authority to issue the judgment, decree, or order, whether state domestic relations law was correctly applied, or whether the alternate payee is in fact a spouse, former spouse, child, or dependent.³⁰

²⁷ U.S. Department of Labor, "FAQs About Qualified Domestic Relations Orders," at http://www.dol.gov/ebsa/faqs/faq_qdro.html, citing ERISA §§206(d)(3)(B)(ii), 514(a), 514(b)(7); I.R.C. §414(p)(1)(B).

²⁸ *Id.*, citing ERISA §206(d)(3)(B); I.R.C. §414(p)(1).

²⁹ *Id.*, citing ERISA §§206(d)(3)(D)(i)-(iii), 206(d)(3)(E)(i)(III); I.R.C. §§414(p)(3)(A)-(C), 414(p)(4)(A)(iii).

³⁰ U.S. Department of Labor, "FAQs About Qualified Domestic Relations Orders," at

In an illustrative case, United Airlines sought an advisory opinion from DOL regarding its obligation to determine whether domestic relations orders it received were properly executed and issued by a state court.³¹ United maintained an employee stock ownership plan that allowed an immediate lump sum distribution of benefits assigned to an alternate payee; otherwise the ESOP provided for lump sum distributions only upon an employee's termination of employment. United received 16 DROs that it believed were suspicious in nature, in that five of the orders were prepared by the same attorney, they all covered employees within the same facility, and none of them had a provision for the assignment of other qualified plan benefits.

United sought an opinion from DOL as to its responsibility to determine whether the DROs were qualified. DOL stated that United was not required by ERISA §206(d)(3) to review the authority of the state court to issue a domestic relations order. However, DOL noted that if United had concerns regarding the orders it could contact the state court to determine their validity. If it did not receive a response from the court within a reasonable time, DOL advised, United could not independently determine that the orders were not valid domestic relations orders, but rather would need to review the orders to determine whether they met the requirements for a QDRO.

In another case, *Blue v. UAL Corporation*³² the plan administrator received several domestic relations orders that it determined to be QDROs and made distributions to the alternate payee. The participant claimed that the DROs were in violation of state domestic relations laws, and filed an action in federal court claiming that the plan administrator had to determine not only that the DROs met the qualifications for a QDRO, but also whether each order was correct. The court decided in favor of the plan administrator and said that the administrator is not responsible for determining whether an order meets the state domestic law requirements. The court stated: "ERISA's allocation of functions—in which state courts apply state law to the facts, and pension plans determine whether the resulting orders adequately identify the payee and fall within the limits of benefits available under the plan—is eminently sensible. Pension plan administrators are not lawyers, let alone judges, and the spectacle of administrators second guessing state judges' decisions under state law would be repellent."

And in *Fortmann v. Avon Products, Inc.*,³³ a participant filed an action in federal court claiming that the plan administrator's distribution of plan assets to the alternate payee was not made pursuant to a qualified domestic relations order. The plan administrator received a copy of a judgment and a property agreement that was incorporated into the judgment and determined that both documents met the requirements for a QDRO. The participant presented an Agreed Qualified Domestic Relations Order that was issued by the state court when the judgment was issued, but the Agreed QDRO was not presented to the plan administrator. Since the Agreed QDRO differed from the judgment and property agreement, the participant claimed that the plan administrator was obligated to review the domestic relations proceedings when reviewing the judgment and property agreement. The court held that the plan administrator did not have an obligation to review the state court action and the plan administrator's approval of the judgment and property agreement as a QDRO was appropriate. The court stated that "ERISA does not require a pension fund to look beneath the surface of a QDRO. Put another way, any domestic relations order that satisfies the statutory conditions shall be paid."³⁴

.30.30 Written QDRO Procedures³⁵

http://www.dol.gov/ebsa/faqs/faq_qdro2.html, citing Advisory Opinions 99-13A, 92-17A.

³¹ DOL Advisory Opinion 99-13A.

³² *Blue v. UAL Corporation*, 160 F.3d 383, 22 EBC 1941 (7th Cir. 1998).

³³ *Fortmann v. Avon Products, Inc.*, No. 97 C 5286, 1999 US Dist. LEXIS 3451 (N.D. Ill. March 3, 1999).

³⁴ *Id.*

³⁵ For an example, see Model QDRO Procedures for Defined Benefit Plans in the Practice Aids.

As indicated above, each plan must establish reasonable written procedures to determine the qualified status of DROs and to administer distributions under those qualified orders.³⁶ The written procedures usually detail the steps followed by the plan administrator during each of the following stages:

Request for Information. Requests for benefit information are usually provided only pursuant to written authorization from the participant or a properly served subpoena. Information that is typically requested includes the current monthly accrued benefit for defined benefit pension plans or the current account balance for defined contribution plans. In addition, a copy of the plan's summary plan description, QDRO procedures, and model QDROs are also often requested.

Receipt of the Order. Some plan administrators will only accept a court executed order, because if the order is not executed by the court it is not a domestic relations order and therefore cannot satisfy the requirements to be considered a QDRO. However, many plan administrators will accept draft orders that are submitted seeking advice as to whether the other provisions of the order meet the QDRO requirements. The decision to preapprove orders usually results in reduced costs to the alternate payee and participant, and typically, reduced administrative time and expense for the plan. The plan administrator must send a notice of receipt of the order to the participant, alternate payee, and their attorneys. (A sample initial receipt letter is found in the Practice Aids.)

Disbursement Restriction. If the plan administrator receives a written notice of a pending domestic relations matter, a temporary restriction should be placed upon the participant's account so that no amounts will be paid from the plan for a period of 60 to 90 days. The QDRO procedures should set forth the time frame for placing an administrative hold on an account. The restriction is removed at the end of the 60-90 day period unless the plan administrator receives a court executed document that prohibits the removal of the restriction. Some plans will only put a restriction on distributions if the order is court executed. If the plan administrator receives a restraining order, joinder to action, or a court executed DRO, a restriction must be placed on the participant's account for a period up to 18 months.

While administrative holds prevent participants from withdrawing or borrowing plan assets, they should not prevent the participant from changing the allocation of assets held in the participant's account between the various available asset classes. In *Schoonmaker v. Employee Savings Plan of Amoco Corp.*,³⁷ the plan's written QDRO procedures required that an administrative hold be placed on a participant's account balance upon the plan's receipt of a DRO. However, the plan also had an unwritten QDRO procedure that indicated that when the plan was informed that a divorce had occurred and that the issuance of a QDRO was imminent, the plan also would put a hold on the participant's ability to change how his account was invested. The Seventh Circuit held that the "unwritten" procedure did not conform to the written QDRO procedures and that the plan was liable to the participant for the investment loss he suffered because the written QDRO procedures required by ERISA §206(d)(3)(G)(ii) were not followed.

Review of the Order. This process usually takes 30-60 days or longer to complete, depending upon the experience of the attorney drafting the order. Common problems that occur that may delay the approval process include:

- requesting an account balance as of a date prior to the time that the current recordkeeper was retained (typically the historical information pertaining to the account balances is lost upon changing recordkeepers);
- not clearly indicating what happens to the alternate payee's assigned interest if the alternate payee predeceases the participant; and
- not clearly indicating how the alternate payee's assigned interest is impacted by the death of the participant.

Issuance of Approval/Rejection Letter. After determining whether the order meets the QDRO requirements, the plan administrator should either draft a letter to the plan participant and the alternate payee, with copies to their attorneys, advising that the order is approved, or alternatively, write the drafting attorney, with copies to the participant, alternate payee, and opposing attorney, indicating the areas where the order is deficient. (A sample

³⁶ ERISA §206(d)(3)(K), I.R.C. §414(p)(6)(B).

³⁷ *Schoonmaker v. Employee Savings Plan of Amoco*, 987 F.2d 410, 16 EBC 1646 (7th Cir 1993).

qualification letter and disqualification letter may be found in the Practice Aids). The letter should include as a minimum the plan administrator's interpretation as to:

- the benefit amount assigned to the alternate payee;
- the impact on the alternate payee's assigned interest upon the death of the participant; and
- what happens to the alternate payee's assigned interest upon the death of the participant.

For account balance plans, we recommend that the methodology of allocating investment income credited to the participant's account during the period between the assignment date and the segregation date between the participant and alternate payee should be disclosed. Although some plans may use daily valuations, it may be extremely difficult and expensive for the plan's recordkeeper to allocate the investment earnings between the participant and alternate payee using such an exact methodology. As a result, many of the major recordkeepers use approximate methods to allocate the investment earnings between the participant and alternate payee. Thus, it is advisable for the plan administrator to disclose the methodology to avoid misunderstandings and possible lawsuits against the plan.

Appeal Period. The letter of approval or rejection should contain language stating that the participant or alternate payee may appeal the decision of the plan administrator. The stated appeal period is usually 30 to 60 days. Waivers are usually included with the approval letter allowing either party to waive his or her right to appeal the plan administrator's decision. If signed and notarized waivers are received from both the participant and alternate payee before the end of the appeal period, the plan administrator's determination is considered final.

Removal of Disbursement Restriction. The disbursement restriction should remain on the participant's benefits until any of the following occur:

- the qualification of the order and establishment of a record in the alternate payee's name;
- the receipt of a court order vacating a previously received order;
- the rejection of an order followed by the expiration of the appeal period;
- for an order pertaining to a participant in pay status, the earlier of the end of the 18-month period following the receipt of the order or the final determination by the plan administrator as to the qualified status of the order. All suspended benefits should be released to the participant at that time.

Payment of Benefits to Alternate Payee. The alternate payee should be provided with a letter with information about the available payment options. If the lump sum value of the assigned benefits is less than \$5,000, a plan may provide for the mandatory cash-out of the alternate payee's benefit. If the lump sum value of the alternate payee's benefit is \$1,000 or less, the plan administrator may direct that it be paid directly to the alternate payee. If the lump sum value is between \$1,000 and \$5,000, the plan administrator may make a direct payment to the alternate payee if the alternate payee consents to the lump sum distribution. If the alternate payee does not consent, then the amount of the lump sum distribution must be rolled over to an individual retirement account for the benefit of the alternate payee.³⁸

Some plans allow the alternate payee to elect a lump sum cash-out of her/his assigned interest as long as the amount is less than some predetermined value, such as \$25,000. The rationale in these cases is that the plan administrator does not want the additional administrative expenses associated with maintaining records and trying to locate alternate payees that may be many years away from the participant's earliest retirement age.

An interesting situation presents itself when alternate payees in a defined benefit plan are currently eligible to have their monthly benefits commence and the plan contains early retirement subsidies. The alternate payee has to decide whether to receive an immediate actuarially reduced benefit or wait until the participant retires. The plan's QDRO procedures could provide for the recalculation of the alternate payee's benefit when the participant subsequently retires and provide the alternate payee a pro-rata portion of the early retirement subsidy, if any. However, some plans refuse to recalculate the benefit payable to alternate payees if they elect early commencement of their benefits,

³⁸ I.R.C. §§411(a)(11) and 417(a),(e), IRS Notice 2005-5.

but the participant has not elected early retirement. In those cases the alternate payee's portion of the early retirement subsidy could be included in the benefit paid to the participant or forfeited to the plan as an actuarial gain.

.30.40 Required Information

A domestic relations order must contain the following information in order to be classified as a QDRO:

The name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee.³⁹ A domestic relations order should not reject an order as not qualified simply because certain basic information is not included in the domestic relations order. Such basic information as the participant's mailing address and the correct spelling of the names of the participant and/or alternate payee can be obtained from the plan administrator's records or by communication with the parties.⁴⁰

The dollar amount or percentage (or the method of determining the amount or percentage) of the benefit to be paid to the alternate payee.⁴¹ If the plan is a defined benefit plan, the DRO should indicate whether the alternate payee is assigned a shared interest or a separate interest. If the alternate payee is assigned a shared interest, the DRO should state the dollar amount or percentage of the benefit to be paid to the alternate payee and indicate when the payments are to cease. If a separate interest, the order should state whether the alternate payee may elect to commence benefits as of the participant's early retirement date, and whether the alternate payee will be entitled to any early retirement subsidies or cost of living adjustments that are paid to the participant, and if so, how the assigned amount is to be allocated.

If the plan is a defined contribution plan, the DRO should state the dollar amount or the percentage of the participant's account assigned to the alternate payee; the date the assigned amount is to be determined; and whether the assigned amount is to participant in investment earnings, and any investment gains and/or losses from the assignment date to the date of distribution.

The number of payments or time period to which the order applies.⁴² If the assignment to the alternate payee is a shared interest in a defined benefit plan benefit, the order should indicate when payments are to commence, the amount of each payment the alternate payee is to receive (either a percentage or dollar amount), and the date or event at which payments to the alternate payee are to cease.

If the assignment to the alternate payee is a separate interest in a defined benefit plan, the order should indicate whether the alternate payee is entitled to commence benefit payments upon the participant's attainment of early retirement age, or whether the alternate payee's separate interest is to commence when the participant elects to commence benefit payments.

The name of each plan to which the order applies.⁴³ If the employer maintains multiple plans with similar names, the order should identify the plan affected by the order. This is significant in situations where the employer maintains both a defined benefit plan and a defined contribution plan with similar names, since the QDRO requirements for these types of plan are different.

.30.50 Allocation of Investment Income after Assignment Date

The amount assigned under a defined contribution plan is typically a percentage of the participant's account balance

³⁹ ERISA §206(d)(3)(K), I.R.C. §414(p)(8).

⁴⁰ U.S. Department of Labor, "FAQs About Determining Qualified Status And Paying Benefits," at http://www.dol.gov/ebsa/faqs/faq_qdro2.html, citing ERISA §§206(d)(3)(C), 206(d)(3)(l); I.R.C. §414(p)(2).

⁴¹ I.R.C. §414(p)(2)(A).

⁴² I.R.C. §414(p)(2)(B).

⁴³ I.R.C. §414(p)(2)(C).

as of the date of divorce. Usually the alternate payee's assigned interest is adjusted for the investment experience from the award date to the segregation date. However, occasionally the amount awarded is a specific amount without any adjustment for investment experience. Sometimes the QDRO submitted for the plan administrator's review is in conflict with the divorce decree on this issue. Although the plan administrator is only responsible for determining whether the order submitted can be classified as a QDRO, notifying the participant and alternate payee and their respective attorneys that an order has been received will enable either party to inform the plan administrator if the order was a court issued order that is being appealed. The following case law provides helpful background on this issue.

In *Baker v. Baker*,⁴⁴ the issue was whether a QDRO was consistent with a final decree of divorce. The divorce decree assigned the former wife 50 percent of the former husband's profit-sharing account balance at the date of agreement. The QDRO stated that the wife's assigned interest would receive "gains and losses" allocated to that amount from the date of the agreement. The husband contended that the agreement was that the wife would receive a specific amount as of a specific date and did not provide for an adjustment for future investment earnings. The trial court awarded the wife the future investment earnings and the husband appealed the decision.

The appellate court reversed and remanded to the trial court for entry of a QDRO consistent with the final divorce decree, and indicated that the trial judge's power to modify a final decree of divorce after the expiration of a 21-day period is limited. The appellate court referenced earlier case law indicating that when a trial court affirms, ratifies, and incorporates a property settlement agreement into a final decree of divorce, that agreement becomes, "for all purposes . . . a term of the decree . . . enforceable in the same manner as any provision of such decree."⁴⁵

.30.60 Problems in Determining Amount of Assigned Interest

Some of the typical issues faced by plan administrators include the following:

Change of Recordkeeper. A common problem for defined contribution plans arises when the plan sponsor decides to change recordkeepers and the historical information is not transferred from the prior recordkeeper to the new recordkeeper. The DRO may indicate that the alternate payee is to be assigned 50 percent of the participant's account as of a date prior to the time the new recordkeeper has account information. Sometimes the previous recordkeeper will provide prior account information for a number of years, but all too often the plan administrator must advise that the DRO requests an assignment of benefits that the administrator cannot determine based on the information available. The plan administrator usually has no option but to inform the drafting attorney that the administrator cannot determine the assigned amount and that the order must be amended to state the amount or percentage of the current account balance that should be assigned.

Determination of Marital Portion of Account Balance. Some orders assign a percentage of the marital portion of an account balance as of a date where historical records are not available, or the initial date of participation is not known by the plan administrator. In such a case the plan administrator must inform the drafting attorney that the administrator cannot determine the assigned amount and that the order must be amended to state the amount or percentage of the current account balance that should be assigned.

Change in Plan Provisions. A common problem occurs when a traditional defined benefit pension plan is changed to a cash balance plan. The order may use terminology that was appropriate for the prior plan provisions, but whose application is unclear under the cash balance plan. There are several model orders available that may assist the drafting attorney to develop the necessary language to assign the benefits desired.

Survivor Benefits. Some orders assign the alternate payee a separate interest in 50 percent of the participant's accrued benefits as of the date of divorce, and also indicate that the alternate payee should be considered as the surviving spouse for all survivor benefits paid by the plan, without indicating:

- whether the previously assigned benefits terminate upon the death of the participant and are replaced by the survivor benefits provided by the plan;

⁴⁴ *Baker v. Baker*, 564 S.E.2d 164 (Va. App. 2002). *See also*, *Hastie v. Hastie*, 528 S.E.2d 145, 147 (2000): "It is well settled that [such an] equitable distribution [decree] become[s] final within twenty-one days of entry."

⁴⁵ *Id.*, citing *Campbell v. Campbell*, 528 S.E.2d 145, 147 (2000).

- whether the alternate payee is to be named the surviving spouse only for benefits associated the marital portion of the participant's accrued pension or with the participant's unassigned portion of the accrued benefit at the date of divorce; or
- what happens in the event of a cash balance plan, where the surviving spouse usually is awarded the participant's entire cash balance account and the alternate payee's otherwise assigned interest was to be equal to 50 percent of the participant's accrued benefit.

.30.70 Earliest Retirement Age

"Earliest retirement age" is the earliest age at which a participant payee may commence benefit distributions. A domestic relations order may provide that an alternate payee may commence benefits payments upon the participant's attainment of early retirement age. A DRO may not provide for the distribution of benefits to an alternate payee prior to the participant's early retirement age. However, a plan may provide for an earlier distribution of benefits to an alternate payee.

The Department of Labor has issued the following definition and examples of the earliest retirement age:⁴⁶ "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 pension plan and the participant's age. 'Earliest retirement age' is the earlier of two dates:

(1) the date on which the participant is entitled to receive a distribution under the plan, or (2) the later of either (a) the date the participant reaches age 50, or (b) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service with the employer.

Example 1. The pension plan is a defined contribution plan that permits a participant to make withdrawals only when he or she reaches age 59 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 59, or the later of (a) the date the participant reaches age 50, or (b) 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 in above is age 50. The earliest retirement age formula for this plan can be simplified to read the earlier of: (a) actually reaching age 59 or terminating employment, or (b) age 50. Since age 50 is earlier than age 59, the earliest retirement age for this plan will be the earlier of age 50 or the date the participant actually terminates from service.

Example 2: The pension 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: (a) the date on which the participant actually reaches age 65 and terminates employment, or (b) 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."

In *Scott v Bunge Corporation*,⁴⁷ the former spouse obtained a domestic relations order that assigned 50 percent of the participant's account balance to the former spouse and required the plan administrator to make a lump sum distribution as soon as administratively possible. The plan administrator refused to enforce the order as a QDRO since it required a distribution of plan assets prior to the participant's early retirement age and required a form of distribution that was not available under the terms of the plan. The early retirement age as defined in the plan was the attainment of age 65 and the only lump sum distribution available under the plan was an automatic lump sum distribution for a terminated participant where the lump sum value was \$3,500 or less. The court sustained the plan administrator's denial on the basis that the DRO provided for a distribution in violation of ERISA §§206(d)(3)(D)

⁴⁶ U.S. Department of Labor, Drafting Qualified Domestic Relations Orders, at http://www.dol.gov/ebsa/faqs/faq_qdro3.html; ERISA §206(d)(3)(E); I.R.C. §414(p)(4).

⁴⁷ *Scott v. Bunge Corporation*, 800 F. Supp. 567 (E.D. La. 1992).

and 206(d)(3)(E) and I.R.C. §414(p).

In *Dickerson v Dickerson*,⁴⁸ the former spouse obtained a DRO that directed the plan administrator to distribute to the former spouse a lump sum benefit of \$8,000 from the participant's interest in his retirement plan benefit as soon as administratively possible following the entry of the final decree of divorce. The plan administrator refused to honor the DRO as a QDRO since it required a distribution of benefits prior to the participant's attainment of early retirement age and in a form of distribution not provided by the plan. The former spouse brought an action in federal court to enforce the terms of the DRO. The court sustained the plan administrator's refusal to honor the order since it provided for a distribution to the former spouse prior to the plan's stated early retirement age and provided for a lump sum distribution that was not available to a participant.

.30.80 Exceptions For Certain Benefits Made After Earliest Retirement Age

Plan's Definition of Earliest Retirement Age. Some plans allow distributions before the dates that are strictly defined in I.R.C. §414(p)(4). The plan's QDRO procedures should define "earliest retirement age" if a more liberal definition is desired. For example, under many cash balance plans the alternate payee can receive a lump sum payment of the assigned interest as soon as the order is approved and the appeal period has expired. However, if the QDRO defines the earliest retirement age as it is defined in I.R.C. §414(p)(4), then normally the alternate payee could not receive a distribution before the participant turns age 50.

Early Retirement Subsidies. If the participant is eligible for an early retirement subsidy and the QDRO provides that benefits to an alternate payee begin (whether automatically or at the election of the alternate payee) prior to the participant's benefit commencement date, the benefit payable to the alternate payee should be calculated as if the participant had retired on the date payment is to begin to the alternate payee, and should be reduced actuarially to reflect the early start of payment. However, pursuant to I.R.C. §414(p)(4), the alternate payee's interest under the plan should be calculated without regard to the participant's early retirement subsidy unless the participant has actually retired and commenced his/her benefits under the plan, and is eligible for an early retirement subsidy as of the date the alternate payee commences his/her benefit under the plan. If the DRO so provides, the alternate payee's benefit, once commenced, may be recalculated to reflect a share in any early retirement subsidy that the participant may subsequently receive upon his/her commencement of benefits under the plan, but only to the extent that the alternate payee has not elected or received a partial or full lump sum payment under the plan.

The actuarial adjustment will involve three steps:

- the benefit payable at the participant's normal retirement age will be reduced actuarially for the number of years that the alternate payee's benefit is to commence prior to the participant's normal retirement age;
- the benefit will be further actuarially adjusted to reflect the difference in the age of the alternate payee and the participant; and
- the benefit will finally be adjusted actuarially to reflect the benefit form elected by the alternate payee.

.30.90 Treatment of Former Spouse for Surviving Spouse Benefits

Same Sex Marriage. Federal courts have exclusive jurisdiction to determine whether an issued domestic order is a QDRO.⁴⁹ However, it is not clear at this time how a plan administrator would handle a domestic partner/same-sex spouse seeking a QDRO as a dependent of the employee.

Section 414(p) of the tax code indicates that an alternate payee cannot name a new spouse as the contingent annuitant under a joint and survivor annuity form of plan benefit. The Defense of Marriage Act states that the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. Thus, while the alternate payee could not name his/her opposite sex spouse as a contingent annuitant, he/she could name his/her same sex domestic partner as

⁴⁸ *Dickerson v. Dickerson*, 803 F. Supp. 127, 15 EBC 2630 (E.D. Tenn. 1992).

⁴⁹ ERISA §206(d)(3)(D)(i)-(iii), 206(d)(3)(E)(i)(III); I.R.C. §§414(p)(3)(A)-(C), 414(p)(4)(A)(iii).

a contingent annuitant, since the same sex spouse would not be deemed a "spouse" for purposes of I.R.C. §414(p) under the DOMA.⁵⁰

Survivor Benefits Not Explicitly Defined. Problems develop when the DRO defines the amount of the alternate payee's assigned interest, but does not indicate what happens upon the death of the alternate payee or the participant.

Benefit Assigned is Unclear. The DRO should state the "as of" date when assigning the alternate payee survivorship benefits and state whether the survivorship benefit is for entire marital portion of the accrued benefit or an amount not to exceed the otherwise assigned interest.

Cash Balance Plans. Unique problems exist for cash balance plans where pre-retirement survivorship benefits are assigned. Most QDROs indicate that the alternate payee should be treated as the surviving spouse for survivorship benefits payable under I.R.C. §§401(a)(11) or 417(a)(3). However, most cash balance plans provide the alternate payee the larger of the minimum required benefit under the above code sections and the vested portion of the participant's cash balance account. Thus, when the divorce decree is intended to provide the alternate payee with only 50 percent of the marital portion of the cash balance account, care should be taken to properly define this assigned benefit.

.30.100 Notice and Determination by Administrator When Should a Participant's Account Be Frozen?

The plan and its QDRO procedures should define the conditions under which a participant's plan benefits will be frozen. The QDRO procedures should state when a participant's account in a defined benefit plan will be frozen to protect the interest of the alternate payee, *i.e.*, upon the receipt of a draft domestic relations order, upon receipt of a copy of an executed decree of divorce, or upon receipt of a restraining order from the appropriate state court.

The Department of Labor, in discussing the plan administrator's obligation to withhold benefit payments, has stated: "The Joint Committee on Taxation further indicated that Congress intended to permit a plan administrator to honor a State court's restraining order, even if the order does not constitute a QDRO. The Joint Committee on Taxation stated: 'Notice of issuance of a stay during the time an appeal is pending is deemed to be notice that the parties are attempting to cure deficiencies in a domestic relations order. Further, the Congress intends that a plan administrator will honor a restraining order prohibiting the disposition of a participant's benefits pending resolution of a dispute with respect to a domestic relations order.' Staff of Joint Committee on Taxation, 99th Cong., 2d Sess., Explanation of Technical Corrections to the Tax Reform Act of 1984 and Other recent Tax Legislation 224-25."

What Constitutes a "Prompt" Notification?

DOL and IRS have not issued regulations or administrative notices addressing what constitutes prompt notification. Generally, the plan administrator should notify the participant, alternate payee, and their respective representatives within a reasonable period of time after receipt of a draft or executed DRO. A notice sent within 30 days of receipt of a draft or executed DRO should be adequate notice.

Failure to Follow Written Procedures Regarding an Account Freeze.

A plan administrator's failure to follow written plan procedures regarding the conditions under which a participant's account may be frozen may allow the participant or alternate payee to recover any income or investment losses resulting from the failure to follow the written procedures.

In *Day v. Philip Morris Deferred Profit-Sharing Plan*,⁵¹ the plan administrator's QDRO procedures stipulated that a separate account would not be established for an alternate payee until the plan administrator received an executed QDRO. Contrary to the plan's QDRO procedures the plan administrator established a separate account for an alternate payee pursuant to the terms of a draft DRO. Shortly thereafter, the alternate payee received a distribution

⁵⁰ Alden J. Bianchi, "Employment and Benefits Involving Same-Sex Marriages in Massachusetts: An Employer's Guide," May 2004.

⁵¹ *Day v. Philip Morris Deferred Profit-Sharing Plan*, 112 F.Supp. 2d 833 (E.D. Wis. 2000).

from the plan. The draft DRO was not executed until several years after the distribution was made. When the executed QDRO was submitted to the plan administrator, the alternate payee's attorney claimed that the distribution pursuant to the terms of the draft DRO was void. Since the market value of the participant's account would have been higher but for the prior distribution, the alternate payee requested that the plan administrator make up the difference in the value of the account between the date of the draft DRO and the date of the executed QDRO. The plan administrator refused to make up the difference. The alternate payee sued and the court decided in favor of the alternate payee. In its decision, the Court stated: "An ERISA plan may be required to add money to a participant's account where the deficit was caused by the plan's failure to comply with its own written procedures."

In *Fortmann v. Avon Products, Inc.*,⁵² a participant sued the employer and plan seeking recovery of benefits that were paid to his former spouse, alleging that the employer and plan breached their fiduciary duties when: (1) the plan made distributions to the alternate payee pursuant to the terms of a DRO that was not a QDRO, and (2) the plan failed to have written procedures regarding the distribution of plan benefits, in violation of ERISA. The plan sought a summary judgment to dismiss the claim for failure to have written QDRO procedures. In denying the summary judgment motion, the court stated: "(A) claim to recover benefits based on a plan's alleged failure to maintain appropriate QDRO procedures is enforceable pursuant to §1132(a)(1)(B). See *Schoonmaker v Employee Savings Plan of Amoco Corp.*, 987 F. 2d 410, 414 & n. 5 (7th Cir. 1993). Therefore, this Court will consider whether Fortman's claim regarding the maintenance of QDRO procedures raises an issue of fact precluding summary judgment."

What is a "Reasonable Period" for Reviewing the DRO?

According to DOL,⁵³ "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."

.30.110 Tax Issues

If the alternate payee is the spouse or former spouse, the alternate payee is responsible for the payment of federal income taxes on distributions the alternate payee receives.⁵⁴ Payment to a non-spouse alternate payee such as a child or other dependent is taxable to the participant, as such payments are treated as support.

If the alternate payee is the spouse or former spouse, the participant's tax basis in plan benefits is shared by the participant and the alternate payee.⁵⁵ The alternate payee may roll over all or part of a distribution to an individual retirement account ("IRA") or to a qualified retirement plan.⁵⁶ Any portion of a distribution that is paid directly to the alternate payee will be subject to mandatory 20 percent income tax withholding and will be taxed to the alternate

⁵² *Fortmann v. Avon Products, Inc.*, No. 97 C 5286, 1999 US Dist. LEXIS 3451 (N.D. Ill. March 3, 1999).

⁵³ U.S. Department of Labor, "FAQs About Determining Qualified Status And Paying Benefits, *citing* ERISA §§206(d)(3)(H), 404(a); I.R.C. §414(p)(7), at http://www.dol.gov/ebsa/faqs/faq_qdro2.html. *See also* the dissenting opinion in *United States v. Taylor*, 338 F. 3d 947 (8th Cir. 2003).

⁵⁴ I.R.C. §402(e)(1)(A).

⁵⁵ I.R.C. §72(m)(2).

⁵⁶ I.R.C. §402(e)(1)(B).

payee as ordinary income.⁵⁷ A payment from a plan to an alternate payee pursuant to a QDRO is exempt from the 10 percent early distribution penalty on withdrawals prior to age 59 1/2.⁵⁸

.30.120 Federal Income Tax Liens

Under I.R.C. §401(a)(13), "a trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefit provided under the plan may not be assigned or alienated." There are exceptions to this provision, such as voluntary assignments not to exceed 10 percent of any benefit payments, assignments due to the issuance of a QDRO, and participant plan loans. Sections 1.401(a)(13)(b)(2)(i) and (ii) of the tax regulations create an exception for the enforcement of a federal tax levy made pursuant to §6331 and the collection by the United States on a judgment resulting from an unpaid tax assessment.

In *Cooper Industries v. Compagnoni*,⁵⁹ an IRS notice of tax levy filed after an alternate payee submitted a domestic relations order to a plan administrator for approval as a QDRO did not have priority over the DRO even though the plan administrator initially rejected the DRO as a QDRO. Under ERISA the rejected DRO could be perfected within 18 months of being submitted to the plan administrator. The court held that under ERISA, as long as the DRO is approved as a QDRO within 18 months of being submitted to the plan administrator, the DRO has priority over the IRS tax lien.

In *United States v. Taylor*,⁶⁰ the alternate payee obtained a divorce and a court issued a DRO that was sent to the plan administrator. The plan administrator determined that the order did not qualify as a QDRO. Shortly after the submission of the DRO the IRS filed a tax lien. Through the issuance of a *nunc pro tunc* order (see discussion below), the domestic relations order was approved as a QDRO within 18 months of its initial submission to the plan administrator. However, IRS claimed that its tax lien had priority since the plan administrator initially refused to accept the domestic relations order as a QDRO. The employer filed an interpleader and the lower court decided in favor of IRS. The court of appeals reversed, indicating that the alternate payee's lien was perfected within the 18-month period and, therefore, had priority.

.30.130 Nunc Pro Tunc

Nunc pro tunc, which means "now for then," is an attempt to retroactively correct a previous QDRO or court order. These QDROs are typically used by the court to correct an administrative error or to clarify the intent of the settlement agreement. For example, they may be used to secure survivor benefits from a plan that was concealed during discovery. Although it appears clear that *nunc pro tunc* orders may be used while the parties to the order are living, there is a split among the courts as to whether a *nunc pro tunc* order may be issued after the death of the participant.

The following are examples of cases where courts have ruled that a post-mortem *nunc pro tunc* order could be issued:

In *Patton v. Denver Post Corp.*,⁶¹ eleven months after the death of her former husband, the former wife learned that the husband had been a participant in a second pension plan, which had not been disclosed as a marital asset when the state court granted the parties' divorce. The former wife obtained a DRO from the state court granting her a 50 percent surviving spouse benefit in the omitted pension plan *nunc pro tunc* to the date of their divorce eleven years prior to the husband's death. The DRO was submitted to the plan administrator, who refused to honor the DRO

⁵⁷ I.R.C. §3405(c).

⁵⁸ I.R.C. §72(t)(2)(C).

⁵⁹ *Cooper Industries v. Compagnoni*, 162 F. Supp. 2d 702, 26 EBC 2575 (D.C. Texas 2001).

⁶⁰ *U.S. v. Taylor*, 338 F. 3d 947 (8th Cir. 2003.)

⁶¹ *Patton v. Denver Post Corp.*, 179 F. Supp. 2d 1232, 27 EBC 1353 (D. Colo. 2002).

since it was issued after the death of the participant and increased benefits payable to an alternate payee. The former wife filed suit in federal court seeking a declaration that the DRO issued by the state court was a QDRO. The court granted the wife's motion for summary judgment, indicating that under state law the state court had continuing jurisdiction over the domestic matter at issue and that the DRO was issued to correct an inadvertent omission of assets in the parties' divorce.

In *IBM Savings Plan v. Price*,⁶² a divorce decree indicated that the spouse would receive 50 percent of the increase in value of the participant's account balance during the period of the marriage. The spouse's attorney prepared a QDRO and submitted it to the employer for review. However, before the QDRO was approved, the participant died. The employer informed the spouse that the plan would not honor the QDRO because it had not been approved by the court. The spouse's attorney then submitted the order to the court and the court approved it *nunc pro tunc*. However, the children of the deceased participant also submitted a claim for payment, claiming that the QDRO approved by the court after the death of the participant was invalid. The spouse prevailed, as the court ruled that as long as a QDRO meets the other statutory requirements of ERISA, it can be issued *nunc pro tunc*.

In *Files v. ExxonMobil Pension Plan*,⁶³ prior to the death of the plan participant, a property settlement agreement setting forth the division of pension benefits was mailed to the plan. Before a QDRO was prepared the participant died. A *nunc pro tunc* QDRO was prepared and mailed to the plan administrator after the participant's death. The plan administrator refused to honor the *nunc pro tunc* QDRO and the alternate payee appealed. The lower court decided in favor of the plan administrator. On appeal to the Third Circuit, the court held that the property settlement agreement constituted a QDRO pursuant to the process contemplated within 29 U.S.C. §1056(d)(3), and directed the plan administrator to honor the *nunc pro tunc* QDRO that provided the alternate payee with a survivor annuity.

Would a plan administrator provide an alternate payee with retroactive benefit payments? A review of the case law indicates that a *nunc pro tunc* order is submitted as clarification of a previously submitted domestic relations order that was not accepted by the plan administrator as a QDRO or as a clarification of an decree of divorce that was submitted to the plan administrator to be reviewed as a QDRO. In those instances, if the participant is receiving a benefit the plan administrator would be required to withhold payment of the amount due to the alternate payee for the 18-month period or until the plan administrator determines whether the *nunc pro tunc* order is a QDRO. Where the *nunc pro tunc* order is submitted as a clarification of the alternate payee's right to a pre- or post-retirement survivor annuity, the plan should pay the benefit to the alternate payee from the date of the participant's death. If a participant dies and a prior DRO did not provide for a survivor annuity, a *nunc pro tunc* order cannot create or establish a survivor annuity for an alternate payee that was not contained in the QDRO.

The following are examples of cases where the courts ruled that a post-mortem *nunc pro tunc* order could **not** be issued. Had the EBSA regulations issued June 10, 2010, clarifying PPA been in place, the cases probably would have been decided differently because, while the scenarios differed somewhat, the key point in all three decisions was that orders were issued after the death of the participant.

The Third Circuit has held that a domestic relations order executed after the death of the participant that assigns a new benefit to the alternate payee or modifies a prior DRO so the alternate payee will receive an increased benefit cannot be approved as a QDRO. In *Samaroo v. Samaroo*,⁶⁴ when the participant and alternate payee were divorced in 1984, the divorce decree provided that the alternate payee would receive \$1,358 from participant's monthly benefit at the time he retired. The participant died in 1987 prior to retirement. The alternate payee requested survivor annuity payments from the plan and the plan administrator refused, since the divorce decree did not provide for the payment of a survivor annuity. The alternate payee obtained a *nunc pro tunc* amendment to the divorce decree that created the alternate payee's entitlement to a survivor annuity. The court held that the entitlement to a survivor annuity was to be determined as of the date of the participant's death and that the subsequent attempt to amend the original divorce decree would increase benefits to be paid from the plan, since the original divorce decree did not provide for a survivor annuity.

⁶² *IBM Savings Plan v. Price*, 349 F.Supp. 2d 854, 34 EBC 1518 (D. Vt. 2004).

⁶³ *Files v. ExxonMobil Pension Plan*, 428 F.3d 478, 36 EBC 1005 (3rd Cir. 2005).

⁶⁴ *Samaroo v. Samaroo*, 193 F.3d 185, 23 EBC 1761 (3rd Cir. 1999).

In *Sanzo v. NYSA-ILA Pension Trust Fund*,⁶⁵ the participant and alternate payee were divorced in 1997. A QDRO provided that the alternate payee would receive a stated amount from the participant's monthly pension benefits once the participant retired. The participant died prior to retirement. After the participant's death the alternate payee asked why she was not receiving benefits, and the plan administrator stated that since the participant died prior to commencing benefit payments the alternate payee was not entitled to benefit payments. The alternate payee subsequently obtained an amended domestic relations order that provided her with a survivor annuity and directed the plan to pay her a larger amount, *i.e.*, 50 percent of the participant's monthly benefit at the time of death. The court held that the alternate payee was not entitled to a survivor annuity because the originally approved QDRO did not provide for a survivor annuity and the amended domestic relations order increased the alternate payee's benefits after the participant died.

In *In re Marriage of Norfleet*,⁶⁶ a property settlement agreement provided that the former spouse would receive a certain amount from the husband's individual retirement account. The husband died when approximately 50 percent of the IRA had been distributed to the former spouse. After the death of the husband, the former spouse sought a DRO that would entitle her to receive an interest in the husband's 401(k) retirement plan. The DRO was submitted to the plan administrator, who refused to approve the order. The alternate payee appealed the decision of the plan administrator and the state appeals court affirmed the decision of the plan administrator. The court held that since the former spouse did not have an interest in the 401(k) retirement plan prior to her husband's death, a DRO issued after the date of death could not be used to create a new lien on the husband's 401(k) plan benefits.

.30.140 Effect of Plan Termination on QDROs

In the view of DOL, 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.⁶⁷

When an insured plan terminates without sufficient assets to cover all guaranteed benefits, the Pension Benefit Guaranty Corporation 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 the PBGC pays are limited.⁶⁸

.30.150 Fees for Processing QDROs

EBSA Field Assistance Bulletin 2003-3 allows the reasonable allocation of expenses associated with the determination of whether a DRO qualifies as a QDRO. Reasonable fees are also applicable to the review of Qualified Medical Child Support Orders. FAB 2003-3 reversed the view expressed in DOL Advisory Opinion 94-32A that prohibited the assessment against the account of a participant or a distribution to an alternate payee for the review of a DRO submitted for review as a QDRO. The fee authorized in FAB 2003-3 applies to defined contribution plans and not defined benefit plans.

.30.160 Impact of Loan Provision on Defined Contribution QDROs

QDRO procedures provided to the participant and alternate payee should indicate whether plan loans are available and, if available, provide instructions as to how the plan loan affects the participant's account. If a participant has an

⁶⁵ *Sanzo v. NYSA-ILA Pension Trust Fund*, 36 EBC 2263 (D.C. N.J. 2005) (unpublished).

⁶⁶ *In Re: Marriage of Norfleet*, 612 N.E. 2d 939, 16 EBC 2833 (Ill. App. 1993).

⁶⁷ ERISA §206(d)(3)(A), 403(d).

⁶⁸ Department of Labor, "FAQs About Determining Qualified Status And Paying Benefits," at http://www.dol.gov/ebsa/faqs/faq_qdro2.html.

outstanding plan loan, the amount assigned to the alternate payee in a DRO should indicate whether or not the value of the outstanding loan is to be included in determining the amount of the benefit to be assigned to the alternate payee.

Most plans consider the participant's loan as part of the participant's total plan assets. Thus, if a participant has plan assets totaling \$50,000, which includes a \$10,000 outstanding loan balance, a QDRO that assigns the alternate payee 50 percent of the participant's "total" account balance would typically be interpreted as assigning the alternate payee \$25,000. However, many plans have QDRO procedures that would not actually include any portion of the plan loan in the actual assets that are assigned to the alternate payee. Thus, the alternate payee's net account would consist of \$40,000 and the alternate payee would be assigned \$20,000, which is 50 percent of the net account balance.

If a plan permits a DRO to assign all or part of a plan loan to an alternate payee, the participant is still obligated to make loan repayments to the plan trustee. Loan repayments made by the participant should be credited to the alternate payee's account. The loan repayments credited to the alternate payee's account may be invested as directed by the alternate payee or distributed to the alternate payee in accordance with the terms of the DRO.

Normally, participant plan loans are repaid through payroll withholding, although some plans allow participants to make loan repayments using coupon payments. In Advisory Opinion 2002-2A DOL indicated that loan repayments withheld by an employer should be treated as a plan asset similar to an employer's withholding of a participant's contribution to a qualified plan and must be deposited with the trustee within a specified time.

30.160 Use of Model QDROs

Providing model QDRO language to drafting attorneys should save review time and avoid orders that do not address important provisions. The Employee Benefits Security Administration approves of the use of model orders even though plan administrators are not required to provide model orders. DOL has stated that a plan cannot require the use of a model order; instead, the plan administrator must honor any DRO that meets the requirements of a QDRO.⁶⁹ The use of models should also be a help to the drafting attorney as unique plan provisions can be handled appropriately in this manner. Model orders should not favor the plan participant to the detriment of the alternate payee, and should provide information as to the availability of benefits such as early retirement subsidies and cost of living increases.

There are three major types of model QDROs:

- *Multiple Models*: Under this approach the attorney selects the model most appropriate for the particular situation. This approach is a good alternative when there have been significant changes in the plan's benefit structure since the assignment date. The practical problem is that quite often the wrong model is selected and numerous changes would be required to correct the order as submitted.
- *One Model with Alternative Wording*: Alternative wording for various sections of the order is indicated at the end of the order. This approach works well if there are not too many alternatives from which to choose and the plan's benefit structure has not changed significantly. The options included in the main text of the model would represent the provisions most commonly included.
- *Check Box*: Here the attorney selects the optional provision by placing a check mark in the appropriate box. This is the simplest approach to use, as long as the attorney understands the language next to the option box. If accompanied by a well written set of QDRO procedures that explains the options available, this should be the easiest approach to administer. The disadvantage is that it may not provide the drafting attorney with the flexibility needed.

.30.170 Domestic Relations Orders for IRAs

Because an Individual Retirement Account (IRA) is not a qualified plan, it is not subject to the rules governing QDROs. There are several types of IRAs, such as a traditional IRA, rollover IRA, SEP-IRA or Roth IRA. The transfer of assets from one IRA must be to another IRA of the same type.

⁶⁹ *Id.*

Most IRA custodians require the information listed below be supplied in addition to a certified copy of a court order assigning the benefits from one party to the other. The court order can take the format of a QDRO, but typically a divorce decree or separation agreement would be sufficient. A separate domestic relations order may be appropriate where there are several IRA accounts or other marital assets involved and the divorce decree or separation agreement only indicates that the marital property should be divided equally. In these cases, a single IRA account might be used to transfer marital assets from one spouse to the other and the domestic relations order indicates the net value to be transferred.

Letter of Acceptance From the Party Accepting the Assets: The IRA custodian must receive a letter from the party who is accepting the IRA assets from his/her spouse or former spouse. In the letter, the accepting party must clearly state the following:

- Conditions under which he/she is accepting the assets—divorce or legal separation;
- The amount he/she is accepting. The amount stated by the recipient must match the amount stated in the relinquishing party's letter. If the amounts do not match, the request will not be processed;
- Whether he/she intends to transfer assets to his/her own IRA and take a cash distribution immediately. If he/she is taking a cash distribution immediately he/she should acknowledge responsibility for all tax consequences. (Note: the party accepting the distribution usually must open an account with the same IRA custodian for the distribution to take place).

Letter of Instruction From Party Relinquishing Assets: The IRA custodian must receive a letter from the individual who is relinquishing IRA assets under the terms of a separation agreement or divorce settlement agreement indicating:

- that he/she is transferring assets to his/her former spouse due to divorce or legal separation;
- account numbers, name of security positions that are to be transferred and the amounts to be transferred;
- that he/she wants to transfer specific amounts or percentage.

Signature Guarantee: If the amount to be transferred exceeds a certain amount, typically \$100,000, a signature guarantee must be obtained from a bank, broker, a dealer or a savings association. A notary public cannot provide a signature guarantee.

Most IRA custodians have standard forms that are available on their websites or at their local offices that can be used to provide this information.