

**PENSIONS AND QDROS 101:**  
**AN ASSOCIATE'S GUIDE TO**  
**DRAFTING DEFINED BENEFIT AND**  
**DEFINED CONTRIBUTION PLAN QDROS**



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## I. Introduction to Advanced QDRO Issues:

For divorce lawyers, the most important area of technical expertise involves pension plans. Nearly all divorce lawyers understand the difference between the basic types of pension plans – defined benefit and defined contribution plans. Perhaps more than any other area, the drafting of a QDRO is an advocacy tool. The QDRO can be drafted to favor your client – or not.

Your key reading source to learn about QDROs should be [\*Qualified Domestic Relations Order Handbook\*](#), *Fourth Edition* by Gary Shulman. It is expensive (\$705) but well worth the price of admission! Reading the important chapters of the book provides an excellent discussion of the issues necessary to draft and negotiate QDROs. It even provides model QDROs covering all of the standard situations that we encounter in our day-to-day practice.

Many good divorce lawyers will say, “I don’t do QDROs.” These lawyers look for some place to ship out QDROs. There are even lawyers, including in Illinois, whose entire practice is devoted to drafting QDROs. If this is your approach, my advice is to hire the lawyer to assist with the QDRO drafting well before the MSA is drafted.

When lecturing for the American Academy of Matrimonial Lawyers and other groups, I realized that many of the lawyers try to assign QDRO drafting to an associate. Alternatively, they simply ship out the drafting of a QDRO to a non-lawyer drafting service. The down-side of this approach is that you cannot insulate yourself from liability by assigning a lawyer’s job to a non-lawyer (actuary, economist or the like).

## II. Types of Plans: There are four general types of plans you will encounter:

- A. **Defined Benefit Plans:** Qualified Annuities: The first type is generally called a pension plan and the employee will receive an annuity at retirement, that is, as a general rule he will receive **monthly payments for the duration of his life** although there may be several other payment options. Such payment options may include a 10 year certain option. This type of plan is called a defined benefit plan. Generally, there are no account balances for defined benefit plans.
- B. **Defined Contribution Plans:** WYSWYG (What you see is what you get): The other type of retirement benefits is an individual account for each employee. The value of the retirement benefit is the account balance. You will not see a statement showing a monthly payment amount. Instead, you will see a statement showing the account balance. There are a few exceptions to the rule that a defined contribution plan will only have an account balance (money purchase pension plan).
  - 1. May be divided into pre-tax and after tax portions;
  - 2. There may be a plan loan.
- C. **Hybrid Plans: Cash Balance Plans:** A type of defined benefit plan that includes some elements that are similar to a defined contribution plan because the benefit

amount is computed based on a formula using contribution and earning credits, and each participant has a hypothetical account. Cash balance plans are more likely than traditional defined benefit plans to make lump sum distributions.

D. **IRAs:** A frequent question is whether QDROs apply to IRAs. The answer is no. Individual Retirement Accounts: An IRA is not an ERISA governed retirement program. While it is a retirement vehicle, a QDRO is not required to effectuate a distribution. Unfortunately, many IRA administrators still request a QDRO before dividing a participant's IRA account. Before drafting the MSA contact the IRA administrator to determine whether they are misguidedly insisting upon the entry of a QDRO to divide an IRA. Shulman states, "In the long run, you will save yourself and your client great time and expense if you just do the QDRO." I disagree. My experience is that after educating whoever is insisting upon a QDRO that the issue goes away. I have not had to draft more than one letter plus one follow-up telcon.

E. **Other Plans You will Encounter:**

1. **State Plans:** May or may not be subject to QDROs.
2. **Federal Plans:** Court Orders Acceptable for Processing:  
Two Systems:
  - a. FERS - Federal Employees Retirement System
  - b. CSRS - Civil Service Retirement System.

III. **Basic QDRO Issues:**

A. **Plan Administrator:** The plan administrator is the person who administers the plan. The plan administrator's cooperation is key to approval of the Qualified Domestic Relations Order. Not only is the administrator in charge of fulfilling the responsibilities of any QDRO, but the administrator is also in charge of determining the qualified status of the domestic relations order and interpreting the provisions of the Qualified Domestic Relations Order. The interpretation of the same qualified domestic relations order may differ from Administrator to Administrator.

The negotiation and drafting of a Qualified Domestic Relations Order is a significant and highly technical part of a marital settlement agreement. The Qualified Domestic Relations Order must be **pre-approved** by the plan administrator before the conclusion of a case. We have found that it is much more expensive to try to obtain the approval of the plan administrator regarding the Qualified Domestic Relations Order after the divorce -- when the pressure is off.

B. **Pre-Approval:** The qualification of the domestic relations order by the administrator of the plan is only done after the order is entered, that is, upon the entry of divorce judgment. However, most plan administrators will "pre-approve" the Qualified Domestic Relations Order, and it is The Gitlin Law Firm's policy to have the plan administrator pre-approve the order in every case

where the plan administrator will do so. Once an order is determined to be qualified by the plan administrator, then the plan administrator is required to make payments to the Alternate Payee as provided by the Qualified Domestic Relations Order. If the order is not determined to be qualified, the plan administrator is under no legal obligation to pay the Alternate Payee.

C. **Authorization for Release of Information:** I have found that the most economical way to approach a QDRO is if the Plan Participant authorizes the plan administrator to provide information to me while the Alternate Payee's divorce case is pending. Without an authorization for release of information, many plan administrators will not provide any information to the Alternate Payee's counsel. The process of subpoenaing the required information is expensive. This is the reason that we will seek the Participant's authorization for release of information. An alternative is to request the information directly from the plan administrator once you obtain sufficient information. I enclose copies of a form letter to the administrator which cites the Department of Labor white paper. The DOL's position is that information such as the SPDs, the plan document, the benefits statements and the written plan procedures should be made available on written request without a subpoena.

#### IV. **Defined Contribution Plan Issues:**

A. **Loan:** Often parties overlook the possibility of a settlement via a loan from the defined contribution plan. [Defined contribution plans generally allow a loan up to one-half of the value of the account or \\$50,000, whichever is less.](#)

The advantage for the Participant is that he or she will be able to repay the loan and pay the interest back into the defined contribution plan. A disadvantage from the Participant's perspective is the required repayment in after tax dollars. While the advantage from the Alternate Payee's perspective is that distribution is not a taxable event.

If the Participant is purchasing (acquiring, constructing or rehabilitating a principal residence) a house at the same time, the Participant may be able to pay off the loan in a 30-year period. Otherwise, the period for loan pay-off is usually five years.

And keep in mind that the CARES Act has new provisions for who is eligible for special distribution and loans: An eligible or qualified individual is an individual:

- (1) who is diagnosed with COVID-19;
- (2) whose spouse or dependent is diagnosed with COVID-19; or
- (3) who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to lack of childcare due to COVID-19, closing or reducing hours of a business owned or operated by the individual due to COVID-19, or other factors as determined by the Treasury Secretary.

Those individuals are eligible for loans up to \$100,000 or 100% of the balance (whichever is lesser). Therefore, lawyers need to be especially careful regarding new loans that may have been taken prior to September 23, 2020 (the end of the 180 grace period).

The CARES Act provides for a special “coronavirus-related distribution” to COVID-19 eligible individuals that waives the 10% early withdrawal penalty for distributions up to \$100,000 from IRA’s and qualified retirement plans for coronavirus-related purposes made on or after January 1, 2020 to December 31, 2020. In addition, income attributable to such distributions would be subject to tax over three years, and the participant may re-contribute the funds to an eligible retirement plan within three years without regard to that year’s cap on contributions. The “coronavirus-related distribution” is not subject to the 20% mandatory federal withholding.

B. **Recommended Approach:** Assume the Alternate Payee is going to receive 50% of the value of the Participant's defined contribution plan. My approach regarding the Participant's defined contribution plan is as follows:

1. If the Participant agrees to take a loan for one-half the current accrued value of the account, the Alternate Payee should consider agreeing to this. The advantage to this approach from the Alternate Payee's perspective is that the Alternate Payee will have to pay no taxes on the amount the Alternate Payee receives. The advantage of this from the Participant's perspective is that he will be able to re-pay the loan and can deduct the interest he pays. The only significant disadvantage from the Participant's perspective to this approach is in that the Participant has to repay his loan in after-tax dollars.
2. If the Participant will not agree to obtain a loan for half the value of his account, the Alternate Payee should consider rolling over what is received directly into an individual retirement account for the sake of simplicity.
  - a. If the Alternate Payee is not financially sophisticated and the defined contribution plan has significant value, consider the account segregation approach.

C. **Quick-Summary re Options:**

1. Loan with Offset;
2. Lump sum distribution subject to income tax withholding via a cash payment;
3. Roll-over with the Alternate Payee executing the appropriate form at time of submission of domestic relations order to plan administrator.
4. Account segregation subject to certain requirements.

D. **Options of Receiving Benefits Under QDRO:**

1. **Options:**

a. **Direct roll-over into another qualified plan:** The Alternate Payee's choice should be made up front to avoid 20% withholding and complications with regard to filing taxes. There is a 60-day requirement for roll-over.

- (1) New or existing individual Retirement Account;
- (2) Existing Defined contribution plan such as 401(k) plan;

The qualified domestic relations order must contain adequate information about the individual retirement account or other qualified plan that will receive a direct rollover of the taxable portion of the plan that is eligible for rollover distribution. Such information includes the name and account number of such individual retirement account or other qualified plan.

b. **Direct Payment:**

- (1) Receive only 80% of the taxable portion of the payment because the plan administrator is required to withhold 20% of the taxable payment and send it to the IRS as income tax withholding to be credited against taxes.
- (2) Roll over the taxable portion of payment received to IRA or another qualified plan within 60 days of receiving payment.
- (3) Not all or nothing proposition. May roll over only a portion to provide for such things as payment of attorney's fees, temporary expenses, etc.

c. **Account Segregation:** Often overlooked.

- (1) **Advantage:** Alternate Payee has to do no work. Plan administrator usually better at investing than spouse in dissolution of marriage proceedings.
- (2) **Secondary Advantage:** May be able to justify interest from date of qualified domestic relations order. Significant advantage if long delay in processing.

## V. **Defined Benefit Plan Issues:**

### A. **Do's and Don'ts:**

1. **Entry of QDRO after Divorce:** Do not prove-up marital settlement agreement and provide that defined benefit plan QDRO will be entered later. There are too many unknowns.

2. **Preapproval:** Do seek to have QDRO pre-approved by plan administrator. Most will do so.
3. **Form QDROs:**
  - a. Do ask if the plan administrator has a form.
  - b. Do not rely on any form QDRO regarding defined benefit plan. They often favor the participant.
  - c. Do use model form provided by the administrator as your starting place. The administrator will more quickly approve the form if the order is styled the same as their form even if it contains new or different paragraphs.

B. **Beyond the Basics – Subsidies, Formula Approach and Shared Versus Separate Interest QDROs:**

1. **Early Retirement Subsidies:** The qualified domestic relations order should indicate that the Alternate Payee is entitled to share pro rata in any employer-provided early retirement subsidies granted to the Participant. The Alternate Payee then shares in the early retirement subsidies.
2. **Formula Approach Versus Fixing:** There are two methods to allocate the amount to be paid via the qualified domestic relations order.
  - a. **Fixing Approach:** The qualified domestic relations order could provide that the Alternate Payee is to receive a portion of the accrued benefit (not necessarily 50%) as of the date of the entry of the judgment of dissolution of marriage.
  - b. **Formula Approach:** Alternatively, the qualified domestic relations order could award to the Alternate Payee a certain percentage of only the portion of the Participant's total accrued benefit at actual retirement that was accrued during the marriage. To do this, the Participant's total accrued benefit is multiplied by a fraction, the numerator of which is the number of years of accrued benefits during the parties' marriage and the denominator is the Participant's total years of accrued benefits. Occasionally, this method of allocating value is referred to as the "fractional" approach although I usually term it the "traditional coverture fraction."

The *Qualified Domestic Relations Order Handbook* offers an excellent discussion of the merits of using the formula approach. The fair

approach is the formula approach, especially with an employee who is receiving only moderate cost of living type raises. On the other hand, with an employee who will be subject to very substantial increases in income, the Alternate Payee will argue that the formula approach allowed the spouse to ride along with his/her post-decree good fortune. The difference in the two approaches may be very substantial.

In a defined benefit plan, each Participant's benefit is expressed as a defined annual benefit payable at normal retirement age. Many plans take into consideration the final average "x" years of employment as well as the number of years of service. Other plans take into consideration a career average benefit.

The difference between these two methods can be substantial. Consider the following hypothetical:

The Husband's accrued benefit as of the date of the divorce is \$1,000 per month commencing at age 65. The Husband and wife were married for 15 years during which there was participation to the Plan. The Husband continues to work for another 15 years after the divorce at which time he retires. At that time the Husband's accrued benefits are \$4,000 per month.

Under what I will call an "dollar certain" qualified domestic relations order, the Wife would receive a \$500 per month annuity. Under what I call the traditional coverture fraction the Wife would receive \$1,000 per month annuity.

Assuming mortality of 25 years and without reducing for present value, the difference is \$125,000.

Since a plan often takes into consideration the high five years of income, the above hypothetical is quite possible with a highly compensated employee.

- C. **Survivorship Coverage:** Usually you will be drafting what may be considered a "separate interest" QDRO.
1. **Separate Interest QDRO:** Under a separate interest QDRO the payments to the alternate payee will be paid over her lifetime and are actuarially reduced based upon her life expectancy. In such cases, there is no need to provide for additional survivorship coverage (with the exception of the pre-retirement survivorship annuity.)



As is discussed below, from the participant's perspective the downside to using a separate interest QDRO is that should the alternate payee predecease the participant (after the administrator actuarially adjusts the alternate payee's benefits based upon her own lifetime) there will be no reversion of this portion of the benefits.

2. **Shared Interest QDRO**: If there is what is sometimes called a shared interest or shared payment QDRO, you will have to specify both components of survivorship coverage, pre-retirement and post-retirement survivorship benefits. Under what I call the shared interest QDRO, the alternate payee must commence benefits at the same time as the participant. Generally, she cannot elect to receive benefits prior to the earlier of the participant's actual retirement or his normal retirement age. From the participant's perspective the trade-off for the reversionary rights is the fact that the participant will be required to elect benefits in the form of a reduced joint and survivor annuity thus providing for survivorship protection to the alternate payee.
3. **Qualified Pre-Retirement Survivorship Annuity (QPSA)**: This is a form of benefit normally paid under a defined benefit plan to the surviving spouse of an employee who dies before the commencement of retirement benefits. However, following a divorce, a spouse is **usually** not automatically entitled to such benefits unless they are provided in the QDRO. Thus, preretirement survivor annuity benefits, provided in a QDRO, begin if the participant predeceases the alternate payee **prior** to payments to the alternate payee going into pay status.

Include language that provides the alternate payee with a preretirement survivor's annuity benefits if the participant predeceases her prior to the benefit commencement date. Remember, the only way in most plans to secure the alternate payee's ownership right to a portion of the benefit is to provide such protection. Otherwise, her right to an equitable share of the benefit will be lost should participant predecease the alternate payee before retirement. Note, however, that in a few plans, they use what may be called the "totally severed approach" under which there is no need to provide for QPSA benefits explicitly. However, when representing the Alternate Payee, automatically include such language in the order but when representing the Participant do not include such language.

- a. **Options Re Extent of Protection**: The QDRO must state the extent of pre-retirement survivorship protection.

- (1) **All QJSA Benefits Awarded:** The QDRO could provide that all of such QJSA benefits could be awarded to the alternate payee. This is generally not considered an equitable approach but may be considered if the participant is in poor health and near retirement age.
- (2) **All QJSA Benefits Only if Participant Single:** The QDRO could provide that if the participant is **not** remarried on the date of his death, then she (the alternate payee) would receive all of the QJSA benefits, but if the participant is remarried on the date of his death, then the alternate payee would receive only her assigned interest.

Query: Does such a provision violate the requirement that the QDRO state the amount or percentage of the benefits assigned?

- (3) **Usual Clause – QJSA Benefits to Extent of Assigned Interest:** The QDRO could provide that the alternate with a QPSA to the extent of her assigned interest, that is, the marital portion of the benefits is only to be payable to the alternate payee and then any remaining preretirement death benefits could be provided to a subsequent spouse of the participant.

- Notes:
- (a) To effectively negotiate such a provision it is important to determine whether the pre-retirement survivorship protection is fully subsidized as it is with most plans.
  - (b) Especially with a shared interest QDRO when representing the participant make certain to include a provision that the payment of any QJSA benefits are in lieu of any other benefits under the plan to allow for survivorship protection to a new spouse.

4. **Survivorship Benefits Other than Preretirement Survivor's Annuity:** This is known as a Qualified Joint and Survivorship Annuity (QJSA). The surviving spouse annuity is payable should the participant predecease his spouse **after** his benefit commencement date, that is, after benefits go into what is known as pay status. This is the usual automatic form of benefit should participant be married on his retirement date, the form of benefit can be provided in QDRO just as with QPSA. A QDRO that provides for a QJSA effectively forces the participant to select this actuarially reduced form of pension annuity at his retirement date to provide the alternate payee with a post-retirement death benefit.

- a. **Shared Interest QDRO -- Actuarial Reduction Based upon Life of alternate payee:** The employer's benefits statement will almost always be based upon the participant's lifetime only. The QDRO may state that the alternate payee is to receive her share of benefits on an "actuarially adjusted basis to reflect her own life expectancy." If the participant then predeceases the alternate payee after her benefit commencement date, his death will have no effect upon her continued entitlement to her share of the annuity. Generally provide for this in lieu of other benefits such as QJSA benefits. This is considered the "equitable approach."

Note: If the participant is significantly older than the alternate payee, from the participant's perspective it makes sense to opt for a separate interest QDRO.

- b. **QJSA Benefits:** As with QPSA benefits, the QDRO must state the extent of QJSA benefits. The usual situation in which additional QJSA benefits will be awarded is when there is a shared interest QDRO.

Again, the next issue is the extent to which such survivorship benefits will be provided:

**Options:**

- (1) The QDRO could provide QJSA benefits **to the extent or her assigned interest**. Using this approach the survivorship benefits would be allocated between the alternate payee and the potential new spouse. This is generally considered the equitable approach.
- (2) The QDRO could provide the alternate payee with **all** of the post-retirement survivorship benefits. This provision would exclude a new spouse from receiving survivorship benefits.
- (3) The QDRO could provide a **combination** of the two providing full postretirement survivorship protection (usually under the 50% QJSA) if the Participant is not married when the plan goes into pay status and only to the extent of assigned interest if Participant not married. This provision would have no "cost" to the Participant but provides a potential benefit to the Alternate Payee.

Notes: It is suggested that with short or medium term marriages it is not equitable to provide "full" survivorship protection. However, in long term marriages where the participant is very near his normal

retirement age, it may be equitable to provide full survivor's benefits when drafting a shared interest QDRO.

--If the participant is older than the alternate payee, from the participant's perspective it makes sense to opt for a shared interest QDRO with additional QJSA benefits.

D. **Do's and Don'ts Based Upon Above – When representing the alternate payee:**

1. **Preretirement Survivorship Benefits (QPSA):** With a standard separate interest QDRO include a specific provision for pre-retirement survivorship annuity benefits. Some administrators may infer such benefits were granted. Shulman calls this a “totally severed plan.” Most will not.
2. **Do Not Fix Benefits:** Do not agree upon the dollar amount to be included in a QDRO - instead use language which provides the alternate payee with the actuarial equivalent of 50% of the marital portion of the participant's accrued benefits.
3. **Provide for Early Retirement Subsidy:** Do include language regarding early retirement subsidies with separate interest QDRO. If so, however, counsel client regarding adjustments due to taking benefits early -- especially if spouse chooses not to place benefits into pay status before his normal retirement age.
4. **COLA:** Examine whether the plan provides for cost of living adjustments and consider including appropriate language in the QDRO if the plan has a COLA provision.
5. **Life Expectancy:**
  - a. If the alternate payee has a **shorter** life expectancy, the alternate payee should use a **separate interest** QDRO.
  - b. If the alternate payee has a **longer** life expectancy, the alternate payee should use a **shared interest** QDRO.

E. **When representing the participant:**

1. **Fix Benefits or Offsetting Award:** Fix Benefits or Negotiate for Offsetting Property Award: Consider attempting to fix the alternate payee's share of the benefits as of the date of the divorce although concede that the more equitable approach is to a) negotiate for an offsetting property award; or b) use standard formula approach.

2. **Life Expectancy:**

- a. If the alternate payee is in **poor health** (or otherwise has a significantly **shorter** life expectancy), consider negotiating for a **shared interest QDRO**. As discussed below, I refer to a shared interest QDRO as one in which there is no actuarial adjustment of the benefits based upon the lifetime of the alternate payee and where there is additional survivorship awarded -- thus guaranteeing benefits for the lifetime of the proposed alternate payee.

*Note that in discussions with the Department of Labor representatives, they referred to a shared interest QDRO as simply one where the alternate payee's benefits are not actuarially adjusted and generally her benefits go into pay status at the same time as the participant's benefits. Neither the I.R.S. nor the Department of Labor considered the fact that the only equitable way to provide for reversionary rights in the standard QDRO which allows for a property distribution is to provide additional survivorship protection -- requiring the participant to elect benefits under a reduced joint and survivor annuity when he retires.*

- b. Alternatively, if the alternate payee has a **longer** life expectancy, do not attempt to negotiate for a shared interest QDRO. Instead, negotiate for the "standard" separate interest QDRO.

3. **Disability Benefits:** Do determine if there is a separate disability plan which would supersede benefits under the defined benefit plan. If the participant becomes disabled, the judgment of dissolution of marriage may be non-modifiable and the alternate payee could receive nothing. Include language in your retention of jurisdiction clause so that the court retains jurisdiction if payments are made from another plan which supersede the payments in the plan covered by the order. Most model forms will not address this situation.

VI. **DOL Booklet:** The Department of Labor's booklet regarding qualified domestic relations orders is titled QDROs: *The Division of Pensions Through Qualified Domestic Relations Orders*. See: <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/qdros.pdf>

Some of the significant portions of this booklet are included and paraphrased:

- A. **Including QDRO Only in MSA:** May a Qualified Domestic Relations Order be issued as part of a marital settlement agreement incorporated into a judgment of dissolution of marriage? Yes. Q 1-7.

B. **QDROs for Support Enforcement, Etc.:** Must a domestic relations order dealing with retirement benefits be issued as part of a divorce proceeding to be a QDRO? No. A domestic relations order that provides for child support or recognizes marital property rights may be a QDRO whether or not it is part of a divorce decree. Thus, a qualified domestic relations order could be entered to enforce a child support arrearage if there is a defined contribution plan which allows for lump-sum distributions. Remember, however, the proposed Alternate Payee would have to pay tax on the distribution. Q 1-8

C. **One QDRO for Multiple Plans:** Can one QDRO cover more than one plan? Yes. Q 1-11.

D. **Who determines whether an order is a QDRO?:** The Department of Labor's booklet entitled: *QDROs: The Division of Pensions Through Qualified Domestic Relations Order* states:

Under Federal law, the administrator of the pension plan that provides the benefits affected by an order is the individual (or entity) initially responsible for determining whether a domestic relations order is a QDRO. Plan administrators have specific responsibilities and duties with respect to determining whether a domestic relations order is a QDRO. Plan administrators, as plan fiduciaries, are required to discharge their duties prudently and solely in the interest of plan participants and beneficiaries. Among other things, plans must establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions pursuant to qualified orders.

Administrators are required to follow the plan's procedures for making QDRO determinations. Administrators also are required to furnish notice to Participants and Alternate Payees of the receipt of a domestic relations order and to furnish a copy of the plan's procedures for determining the qualified status of such orders.

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

E. **Information from Plan administrator Absent Subpoena or Consent:** What information is the plan administrator required to provide to a prospective Alternate Payee before the administrator receives a domestic relations order? The Department of Labor's booklet states: "It is the view of the Department that Congress therefore intended prospective Alternate Payees... to have access to plan and participant benefit information sufficient to prepare a QDRO. Such information might include the

summary plan description, relevant plan documents and a statement of the participant's benefit entitlements." Q 2-1.

- F. **Plan Procedures:** Since each plan is required to have plan procedures detailing whether a domestic relations order is qualified, what sort of information should be addressed in these procedures? Each plan is required to have procedures for determining whether a QDRO is qualified. However, often the document in this regard is too general to be helpful with the detailed issues that arise as to whether a domestic relations order will be qualified. The Department of Labor's position is:

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

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

It is the view of the Department that the plan administrator's adoption and use of clear QDRO procedures, coupled with the administrator's provision of information about the plan and benefits upon request, will significantly reduce the difficulty and expense of obtaining and administering QDROs by minimizing confusion and uncertainty about the process. Q 2-3 and 2-5.

- G. **Model Forms**: May a plan administrator require the parties to use a model form or to use certain paragraphs in a model form? No. While the plan administrator may provide a model form, the plan administrator must approve a QDRO if properly drafted even if it does not follow the model form. Beware of model forms. Often, they favor the plan participant. Q 2-7.
- H. **Consideration of State Divorce Law**: May the plan administrator consider State divorce law and reject an order because it is the administrator's belief that the order is contrary to state divorce law? No. The plan administrator may only reject the order if it is contrary to the applicable Federal law. Q 2-8.
- I. **Rejection of a QDRO if it Fails to Specify Factual Identifying Information that is Easily Obtainable by the Plan Administrator**: Should the plan administrator reject a QDRO if it provides a very small mistake such as misstating "the plan" name, or the names of the participants or Alternate Payees, provided the plan administrator can clearly determine the correct names and the plan administrator's records include this information? No. The plan administrator should accept such an order. Q 2-14.
- J. **Notice upon Rejection of Qualified Domestic Relations Order**: If a QDRO is rejected, should the notice of rejection include the reason for the rejection? Yes. Where there has been a reasonable good faith effort to draft a Qualified domestic relations order, the plan administrator should furnish the parties with the information, advice and guidance that is reasonably required to understand the reasons for a rejection, either as part of the notification process or otherwise. The DOL's Handbook states:

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

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

Q 2-14.



- K. **Disclosure Rights of Alternate Payee under a QDRO:** Once a QDRO is accepted, what rights does the proposed Alternate Payee have to benefit information? The Alternate Payee must be provided upon written request with copies of a variety of documents, including the latest summary plan description, the latest annual report, any final report, and the bargaining agreement, trust agreement, contract or other instrument under which the plan is established and operated. The plan administrator may impose a reasonable charge. Upon qualification of a QDRO, inform your client, the Alternate Payee, of these rights. Q 2-16.
- L. **What happens to the rights created by a QDRO, if the plan is amended, merged into another plan or maintained by a successor employer?** The rights of an Alternate Payee are protected if there is such a change. However, I suggest in drafting a qualified domestic relations order language be included so that the plan administrator may not request a new QDRO to be entered in such event. Q 2-17.

VII. **Pension and QDRO Links:**

- A. PBGC Rates: <https://www.pbgc.gov/prac/interest/monthly.html>  
These rates are used by many valuator to determine the present value of defined benefit plans.
- B. Divorce Orders and the PBGC: <https://www.pbgc.gov/sites/default/files/qdro.pdfh>
- C. Department of Labor Resources:
1. [Types of Retirement Plans](#): *A good general explanation of the types of retirement plans.*
  2. [Department of Labor's Publication: What You Should Know About Your Retirement Plan](#) *This is not specific to QDRO issues but contains a very good overview, both for lawyer and for the sophisticated client.*
- D. [U.S. Department of Labor: QDROs: The Division of Pensions Through Qualified Domestic Relations Order](#)
- E. General Life Tables: NVSR:  
[https://www.cdc.gov/nchs/products/life\\_tables.htm](https://www.cdc.gov/nchs/products/life_tables.htm)
- F. Form 5500 / 5500-SF Filing Search:  
<https://www.efast.dol.gov/portal/app/disseminate?execution=e1s1>  
Note goto line 8a of the 5500 Form that states, "If the plan provides pension benefits, enter the applicable pension feature codes from the List of Plan Characteristics Codes in the instructions."

Then goto:

<https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500/2019-instructions.pdf>

See: <http://freerisa.benefitspro.com/static/popups/legends.aspx>

These will help one recognize via the 5550 Form the general type of plan involved.

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