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QDROs: How An Acronym Can Affect Your Retirement Benefits

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Mr. and Mrs. Jones were divorced in 1995 and a qualified domestic-relations order (QDRO) was entered dividing Mr. Jones's pension benefits. Subsequently in 2003, when Mr. Jones died before beginning to draw any retirement benefits, imagine Mrs. Jones's surprise when she realized that as a result of the failure of her QDRO to award her survivor benefits, she is entitled to nothing from her former husband's plan. In New York State, the Court of Appeals has recently held that in this scenario Mrs. Jones would in fact not be entitled to any benefits. Regardless of the intention of Mr. and Mrs. Jones during their divorce, a fundamental lack of understanding of the complicated arena of employee benefits prevented Mrs. Jones from obtaining what she expected. This is one of many stories that have resulted from an inexperienced approach to the division of retirement benefits in the drafting of QDROs.

QDROs were created in 1984 when Congress passed the Retirement Equity Act, amending the Employee Retirement Income Security Act (ERISA). The primary purpose of ERISA is to protect the retirement benefits of employees. All ERISA qualified plans must include an anti-alienation provision making retirement benefits largely non-attachable by creditors. QDROs are a notable exception to ERISA's anti-alienation clause, and are generally used by divorcing spouses as a means of dividing retirement-plan assets, but may also be used to pay child support and alimony arrearages.

The product of a melding of family law and employee-benefits law, QDROs can be a tricky area of practice requiring the assistance of an experienced ERISA attorney. Because QDROs can be time-consuming, costly, and complex, it becomes critical that plan administrators and employers understand the proper use

of QDROs and their statutory limitations. Furthermore, individuals involved in a divorce may find themselves in a situation such as Mrs. Jones if they do not act promptly to divide retirement assets after divorce.

ERISA provides a laundry list of information that must be included in a QDRO. Additionally, an order is not a QDRO if it requires the plan to provide any type or form of benefit, or any option, not otherwise provided under the plan; requires the plan to provide increased benefits; or requires the plan to pay benefits to an alternate payee when the plan is already under an obligation to pay benefits to another alternate payee. A plan must adopt and follow written procedures for the review of QDROs, which should include specific timelines for action.

The main players involved in a QDRO matter are the plan participant, the alternate payee (a spouse, former spouse, or dependent who is entitled to a portion of the plan participant's benefits), and the plan administrator.

The plan administrator has the legal obligation to determine whether a domestic-relations order is in fact a QDRO. Employers often believe that the third-party administrators they have hired to handle the recordkeeping for the plan are the plan administrators and therefore have the legal responsibility for processing and handling QDROs. However, this is generally not the case. Most employers would find upon review of their plan document that the employer is in fact the plan administrator.

The failure of the plan administrator to appropriately handle court orders can result in not only liability to the plan administrator, but can also disqualify the plan in whole as a result of the unauthorized payment of plan benefits. Problems arise: (1) when plan administrators do not follow the plan's written QDRO procedures and timelines; (2) when plan administrators receive draft orders improperly naming a plan or grouping to-

gether two plans into a single QDRO; (3) where there is lack of recordkeeping, as often occurs when one or more plans have merged together; (4) where there is a significant delay in time between the divorce and the QDRO, which can make the allocation of benefits difficult; or (5) when the plan administrator fails to segregate accounts or freeze loan activity upon notice of a pending QDRO. The experienced eye of an ERISA attorney can be a useful tool for plan administrators in these situations.

Be proactive — make a checklist

- Make sure that your plan has adopted written QDRO procedures.
- Consider preparing a sample QDRO for use by alternate payees that operates within the confines of your plan document.
- Maintain appropriate records.
- Discuss the above information with an ERISA attorney who can guide you through the statutory pitfalls in drafting your QDRO procedures and sample QDRO, as well as review court orders submitted to the plan administrator.

Another way to avoid problems that often plague the employer and plan administrator is to educate employees on the QDRO issues affecting them and their spouses in the event of a divorce. QDROs are often considered the less important piece of a divorce, coming after issues of child support, custody, and property division. The failure to plan for the division of the retirement benefits during the property settlement phase and to obtain a QDRO and submit it for approval in a timely fashion can mean that an alternate payee loses the opportunity to obtain benefits. □

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