



QDROs, QMCSOs, and Spousal Protection Under ERISA

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Overview

- Introduction
- Understanding ERISA Participant and Spousal Protections
- Overview of QDROs – A Practical Approach
- Overview of QMCSOs – A Practical Approach



Helpful Guidance on QDROs and QMCSOs

- Statutes
 - ERISA §206(d); Internal Revenue Code §§ 401(a)(13), 414(p)
- Regulations
 - Treas. Reg. §1.401(a)-13; DOL Reg., 29 C.F.R. §2530.206
- Other Guidance
 - DOL's QDRO publication: <http://www.dol.gov/ebsa/publications/qdros.html>
 - DOL's FAQs on QDROs
 - http://www.dol.gov/ebsa/faqs/faq_qdro.html
 - http://www.dol.gov/ebsa/faqs/faq_qdro2.html
 - http://www.dol.gov/ebsa/faqs/faq_qdro3.html
 - DOL's QMCSO information:
<http://www.dol.gov/ebsa/publications/qmcso.html>
 - PBGC's QDRO publication:
<http://www.pbgc.gov/docs/QDRO.pdf>



Understanding ERISA Protections

- Introduction to ERISA – ERISA and the “Code”
 - ERISA protects participant rights
 - Gives right to sue
 - The federal tax Code protects the tax qualification of a pension/401(k) plan
 - No private right of action to enforce
 - ERISA applies to health/welfare plans too
 - ERISA and Code provisions are mirror but not identical



Understanding ERISA Protections

- The “Anti-Alienation Rule”
 - ERISA and the Code include a broad anti-alienation rule (ERISA §206(d); Code §401(a)(13)
 - Participant’s interest in a pension/401(k) plan may not be assigned or alienated to any creditor
- ERISA’s Broad Preemption Rule; ERISA §514
 - All state laws (including domestic relations laws) are preempted by ERISA and cannot interfere with ERISA plan administration

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Understanding ERISA Protections

- ERISA and Code Spousal Protection Rights
 - Spousal protection rights apply to pension and 401(k) plans (not health & welfare plans) under Code §401(a)(11) and §417; ERISA §205; Treas. Reg. §1.401(a) 20
 - Pension Plan Protections:
 - Distributions must be paid as “qualified joint and survivor annuity” (QJSA) unless participant, with spousal consent, elects otherwise
 - Plans must provide “qualified pre-retirement survivor annuity” (QPSA) in the event of participant death before annuity starting date
 - Plans may impose a one-year of marriage requirement on QJSA and/or QPSA

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Understanding ERISA Protections

- ERISA and Code Spousal Protection Rights
 - Various spousal protection rights apply to pension and 401(k) plans
 - Pension Plan Protections:
 - QJSA is joint and survivor annuity (typically 50% survivor) for married participant/single life annuity for unmarried participant
 - QPSA is survivor annuity based on QJSA (again, typically 50%)
 - Special cases
 - Cash balance plans
 - Optional pre-retirement death benefits

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Understanding ERISA Protections

- ERISA and Code Spousal Protection Rights
 - Various spousal protection rights apply to pension and 401(k) plans
 - 401(k) Plan Protections
 - QJSA/QPSA rules typically do not apply to 401(k) plans
 - Spouse is default beneficiary unless participant, with spousal consent, names an alternate beneficiary
 - Distributions, withdrawals, loans available to participant without spousal consent

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Understanding ERISA Protections

- ERISA and Code Spousal Protection Rights
 - What about “prenuptial” waivers?
 - Not QDROs (they don’t assign); but are they valid?
 - Without actual participant and spousal consent; not likely valid
 - What about the effect of a divorce on pre-divorce beneficiary designation
 - Participant names spouse as beneficiary and is then divorced
 - Upon participant’s death, does spouse remain the “named” beneficiary or did divorce override plan documents
 - General rule: Plan documents control
 - See *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 129 S. Ct. 865 (2009)

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Understanding ERISA Protections

- Overcoming ERISA Protections with a QDRO/ QMCSO
 - QDRO rules are explicit exception to anti-alienation rule
 - QDRO rules are explicit exception to preemption rule
 - QMCSO rules are federal protections in ERISA
 - Spousal protection, unless a QDRO provides otherwise
 - If person is “spouse” as of annuity starting date, they remain so protected
 - If a person is not a spouse as of annuity starting date, they are not protected
 - Only “qualified” orders protect former spouses/children

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QDROs – A Practical Approach

- Only two types of orders – “Qualified” and “Not Qualified”
 - No such thing as a “partially” qualified order or tentatively qualified order
 - Make sure you know what it takes to obtain qualified orders for the plan(s) in question
 - What is “qualified” for one plan might not be “qualified” for another plan of the same type at another company
 - Each plan is supposed to have its own separate procedures

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QDROs – A Practical Approach

- For “qualified” orders, there are only two types
 - Separate Interest
 - What’s yours is yours; what’s mine is mine
 - Split the benefit and each party has separate rights as to his or her part
 - Stream of payments (sometimes called “shared interest”)
 - “If, as, and when an amount is payable to the participant, pay X% to alternate payee”

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QDROs – A Practical Approach

- For “qualified” orders, there are only two types
 - Each type has a separate purpose
 - Separate interest divides property
 - Stream of payments (for a annual payments) is more like alimony
 - Sometimes the facts dictate the type
 - If payments have already commenced, a separate interest order is typically not qualified

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QDROs – A Practical Approach

- The “Seven Question” Approach – Elements of a QDRO
 1. Which plan must pay?
 2. To whom must it pay?
 3. How much must it pay?
 4. When do payments start?
 5. When do payments stop?
 6. What happens when he dies?
 7. What happens when she dies?

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QDROs – A Practical Approach

- Other QDRO Technical Rules
 - A QDRO may not:
 1. Require the plan to provide a type/form of benefit not otherwise provided for under the plan;
 2. Require the plan to provide increased benefits (based on actuarial value);
 3. Require payment of benefits to an alternate payee that are already payable to another alternate payee; OR
 4. Require payments in the form of a joint and survivor annuity for the lives of the alternate payee and a subsequent spouse
 - It is not enough merely to recite the words; the order must be written in a way not to violate these rules

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QDROs – A Practical Approach

- QDRO Administrative Issues
 - ERISA requires plans to maintain QDRO procedures
 - Review them carefully before entering an order
 - Prospective alternate payees have a right to information
 - Consider “hold” procedures and impact on parties
 - Some plans “hold” all (or some activity) pending issuance of a QDRO
 - May need to file a written request for a “hold”
 - Plans often use model QDROs
 - Following plan models may speed up the process and save money; ask for them

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QDROs – A Practical Approach

- QDRO Administrative Issues
 - Once a QDRO is entered
 - Make sure you serve it on the plan administrator
 - Plan administrator not required to follow an order not officially submitted; consider malpractice implications
 - *Layton v. TDS Healthcare Systems Corp.*, 1994 U.S. Dist. LEXIS 6709 (N.D. Calif. 1994)
 - Expenses of preparing a QDRO
 - Plan may charge participant's benefit (DOL Field Assistance Bulletin 2003-3)
 - Direct payment of fees from QDRO may be prohibited

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QDROs – A Practical Approach

- Key Troublesome Terms
 - Definition of “earliest retirement age”
 - QDRO cannot force payment before “earliest retirement age”
 - Defined as EARLIER OF:
 - Date participant entitled to a distribution, OR
 - LATER OF:
 - Participant reaches age 50, or
 - Date participant could get paid if participant separated from employment

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QDROs – A Practical Approach

- Key Troublesome Terms
 - Definition of “earliest retirement age”
 - Defined benefit plans (typical pension plans) tend to stick to the definition
 - Typically, payment can be at participant’s early retirement age if participant meets requirements
 - Defined contribution plans (like 401(k) plans) typically allow for payments before earliest retirement age
 - Do not just parrot the statute – understand the plan and plan procedures on when payment can be made
 - Some plans, regardless of type, will allow immediate lump sum payment to alternate payee



QDROs – A Practical Approach

- Key Troublesome Terms
 - Naming alternate payee as “surviving spouse”
 - Provides alternate payee with statutory rights
 - Participant may not elect anything without spousal consent
 - Status might continue even after payments to alternate payee have been made
 - Consider type of QDRO
 - Stream of Payments – might be helpful to name alternate payee as surviving spouse if parties divorced before payments began



QDROs – A Practical Approach

- Key Troublesome Terms
 - Naming alternate payee as “surviving spouse”
 - Consider type of QDRO
 - Separate Interest
 - Typically not necessary
 - Issue arises if participant dies before alternate payee begins separate interest
 - Will alternate payee’s benefit be forfeited if participant dies before alternate payee commences?
 - Note – alternate payee may divest subsequent spouse of benefits, but not after annuity starting date

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QDROs – A Practical Approach

- Key Troublesome Concepts
 - Valuation Issues
 - Defined benefit plans
 - Issue involves awards of proportionate share (marital share) of benefit subsidies, cost-of-living increases or other special benefits
 - Defined contribution plans
 - Allocating investment funds or after-tax contributions
 - Watch out for loans – can you award alternate payee more than the non-loaned balance in the account?

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QDROs – A Practical Approach

- Key Troublesome Concepts
 - What happens when alternate payee dies?
 - Stream of payments order
 - Reverts to participant, cannot name a non-alternate payee beneficiary
 - Separate interest order
 - DC plans – typically allow alternate payee to name a beneficiary
 - DB plans, typically do not allow pre-retirement death benefits for alternate payees
 - Naming joint and contingent annuities can be an issue for some plans.

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QDROs – A Practical Approach

- Key Troublesome Concepts
 - Joinder
 - DOL view is that joinder actions are preempted by ERISA
 - Typically should not need to join the plan for order to be valid against the plan; again – check with plan administrator

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QMCSOs – A Practical Approach

- Qualified Medical Child Support Orders (QMCSOs)
 - Order that creates or recognizes alternate recipient's right to group health plan coverage
 - Order provides for child support or made under state domestic relations law or enforces state laws on Medicaid
 - "Alternate recipient" is a participant's child who has a right to enrollment under the plan
 - IRS disqualification not an issue; mostly just an ERISA issue
 - Could be an income tax issue in rare case where alternate recipient does not meet tax Code definition of child

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QMCSOs – A Practical Approach

- Qualified Medical Child Support Orders (QMCSOs)
 - Order can be a National Medical Support Notice
 - Standardized medical child support order
 - Used by State child support enforcement agencies to enforce medical child support obligations
 - As long as the NMSN is filled out properly, it is qualified
 - See DOL FAQs on QMCSOs for more detail

<http://www.dol.gov/ebsa/publications/qmcs.html>

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QMCSOs – A Practical Approach

- The “Seven Question” Approach – Elements of a QMCSO
 1. Who must be covered?
 2. Which plan must provide the coverage?
 3. What type or level of coverage must be provided?
 4. Who will pay for the coverage?
 5. How much must be paid for the coverage?
 6. When does coverage start?
 7. When does coverage stop?

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QMCSOs – A Practical Approach

- QMCSO Issues
 - Many employers have multiple plans and different options; try to identify the plan under which coverage is to be provided
 - Some orders mandate coverage even though participant is not covered at that time
 - Wait until open enrollment?
 - Does plan provide QMCSO coverage until open enrollment?
 - Special enrollment opportunity/change in family status possibility?

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QMCSOs – A Practical Approach

- QMCSO Issues
 - Consider COBRA implications at end of QMCSO
 - Consider possible tax implications for certain covered children
 - Consider health care reform implications
 - Health care reform mandates that plans cover dependent children to age 26 (effective for plan years on or after September 23, 2010)
 - Does not mandate that parent elect coverage for the child, however

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Questions

Your questions????

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Speaker



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A PRACTICAL APPROACH TO QDROS, QMCSOS AND OTHER Q-ORDERS – IN ENGLISH

*Adapted from Thompson Publishing Group's
Guide to Assigning & Loaning Benefit Plan Money*

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I. Background and Overview

A. Where do the QDRO rules come from?

1. **Pre-REA Rules.** The Employee Retirement Income Security Act (ERISA) enacted a broad anti-alienation rule under which neither actual plan benefits nor any portion of a participant's interest in a qualified pension plan may be assigned to any creditor. Code §401(a)(13); ERISA §206(d). Despite this broad anti-assignment rule, for years after ERISA, plan administrators received inquiries and court orders related to proposed assignments of benefits for satisfying domestic relations obligations such as alimony or child support. *See* S. Rep. No. 575, 98th Cong., 2nd. Sess., at 18-19 and cases cited therein (1984) ("REA Senate Finance Committee Report"). Some orders were consistent with the participant's wishes. In other cases, participants objected to the proposed alienation of retirement benefits. However, plan administrators were always concerned about turning retirement plan money over to someone other than the participant.
2. **REA Changes.** In response to these uncertainties and to provide protection to former spouses and children in domestic relations disputes, Congress added the QDRO rules. Both the Internal Revenue Code and ERISA now allow for assignments and attachments of benefits pursuant to "qualified domestic relations orders" (QDROs). *See generally* Code §414(p); ERISA §206(d)(3). The QDRO provisions were originally part of the Retirement Equity Act of 1984 (REA), P.L. 98-397, effective January 1, 1985. However, plan administrators may treat orders entered before January 1, 1985, as qualified to the extent the orders are consistent with the REA provisions. *See* REA Senate Finance Committee Report, at 23. Since REA, Congress has amended the QDRO provisions from time to time and the federal agencies that monitor qualified plan matters (the Internal Revenue Service and the Department of Labor) have issued administrative QDRO guidance. Most recently, the DOL issued QDRO regulations based on a directive in the Pension Protection Act of 2006 (PPA) (29 C.F.R. §2530.206, 72 *Fed. Reg.* 10073 (March 7, 2007)).

These regulations address situations where one QDRO is issued after and amends a prior QDRO. They also address issues related to the enforceability of a QDRO issued after a participant's death. These developments have clarified and, in many respects, expanded the benefits available to beneficiaries under those orders.

B. To Which Plans do the QDRO Rules Apply?

1. **Qualified Plans.** The QDRO requirements apply to all tax-qualified pension, profit-sharing and stock bonus plans, including typical defined benefit pension plans, 401(k) plans and employee stock ownership plans.
 - a. **General Rules on Scope of QDRO Requirements.** If a domestic relations order is a QDRO, a qualified plan may pay benefits to the alternate payee designated in the order without violating the anti-assignment rule. Code §401(a)(13)(B); ERISA §206(d)(3). If a state court order is not a QDRO, a qualified plan may risk the plan's qualification by complying with the order. Further, any attempt to force the plan to comply with non-qualifying state court orders is preempted by ERISA. *See* ERISA §514(a); ERISA §514(b)(7). *See also* REA Senate Finance Committee Report, at 19 ("In addition, the committee believes that conforming changes to the ERISA preemption provision are necessary to ensure that only those orders that are excepted from the spendthrift provisions are not preempted by ERISA." Further, a domestic relations order is not considered an assignment or alienation under the plan "if and only if the order is a qualified domestic relations order.")
 - b. **Community Property Laws.** Historically, there was some confusion in the courts about the interplay between community property laws and the QDRO requirements. However, in *Boggs v. Boggs*, 520 U.S. 833 (1997), the U.S. Supreme Court tried to resolve the issue by holding that the Louisiana community property law relating to retirement benefits was preempted in a dispute between children of a first marriage and the second spouse. Also,
 - (i) Congress seemed to contemplate community property laws in drafting the QDRO provisions (*see* Code §414(p)(1)(B)(ii); ERISA §206(d)(3)(B)(ii)(II)), and preempted *all* state laws unless a QDRO is issued.
 - (ii) the DOL, IRS, and other courts have concluded that the QDRO rules preempt the application of community property rules. *See* DOL Advisory Opinion 90-46A

(Dec. 4, 1990) and *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991) (DOL and the court decided that QDRO provisions do not encompass state community property laws that are not related to deciding alimony, property settlements, and similar matters in domestic relations proceedings; any other state court order is pre-empted by ERISA and compliance with any other state court order would violate the anti-assignment rule). *See also* IRS private letter ruling 8735081 (6/2/87) (partition of accrued benefits in community property state is an alienation of benefits under Code §401(a)(13); therefore, voluntary partition of benefits for estate planning purposes is not permissible except through a QDRO).

2. ***Other Retirement Programs.*** Section 403(b) annuity programs, governmental plans and church plans, are not subject to ERISA or its anti-assignment rule. Nevertheless, they are still subject to certain of the QDRO requirements, such as income tax provisions governing distributions. *See* Code §414(p)(9), as amended by the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), P.L. 100-647.
3. ***IRAs.*** QDRO requirements do not apply to individual retirement accounts (IRAs) and other employer-provided fringe benefit plans. Nevertheless, there are special considerations that apply to these programs in a divorce or legal separation context. For example, divorcing parties may divide their IRAs under a special Internal Revenue Code provision unrelated to the QDRO requirements. Code §408(d)(6).
4. ***Life Insurance.*** The Federal Circuit Courts are confused on whether QDRO rules apply to life insurance benefit plans. QDROs, properly understood, only apply to pension benefits, not health and welfare benefits (like life insurance). However, in connection with divorce situations, it is common to see a divorce decree mandate that a participant name a former spouse as the life insurance beneficiary. If a participant fails to do so, the question is whether such a decree overrides the plan terms which generally follow written plan beneficiary designations. The First, Second, Fourth, Sixth, Seventh, and Tenth Circuit Courts of Appeals have held that QDRO rules apply to all plans subject to ERISA, including life insurance plans and have allowed divorce decrees to override plan beneficiary designations. *See Barrs v. Lockheed Martin Corp.*, 287 F.3d 202 (1st Cir. 2002); *Metropolitan Life Ins. Co. v. Bigelow*, 283 F.3d 436 (2d Cir. 2002); *Metropolitan Life Ins. Co. v. Pettit*, 164 F.3d 857 (4th Cir. 1998); *Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997); *Metropolitan Life Ins. Co. v. Wheaton*, 42 F.3d 1080 (7th Cir. 1994) and

Carland v. Metropolitan Life Ins. Co., 935 F.2d 1114 (10th Cir. 1991), *cert. denied*, 502 U.S. 1020 (1991) and *Tolstad v. Tolstad*, 527 N.W.2d 668 (N.D. 1995). *But see Rudolph v. Public Service Co. of Colo.*, 847 F. Supp. 152 (D. Colo. 1994). But the Eleventh Circuit Court of Appeals found that ERISA preempted such orders (*Brown v. Connecticut General Life Ins.*, 934 F.2d 1193 (11th Cir. 1991)). Also, the Eighth Circuit Court of Appeals has held that the QDRO rules do not apply to life insurance plans because they are welfare plans under ERISA. *See Equitable Life Assurance Society of the United States v. Chrysler*, 66 F.3d 944 (8th Cir. 1995).

The view that beneficiary designations in life insurance plans can be overridden by divorce decrees is hard to justify in light of the U.S. Supreme Court decisions on this point. *See Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 129 S. Ct. 865 (2009) where the U.S. Supreme Court held that the plan documents control over a purported beneficiary waiver via a divorce decree. *See also Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), where the U.S. Supreme Court held that a state law invalidating beneficiary designations in the event of a divorce was preempted by ERISA and the plan documentation controls.

Bottom line. The best practice is to make sure that beneficiary designations are updated by plan participants in connection with or immediately after a divorce. Parties should not rely on divorce

5. ***Health Plan Issues.*** Health benefits are frequently the subject of divorce proceedings.

- a. ***Coverage for Spouses and Ex-Spouses.*** Typically, domestic relations orders require health plan participants to maintain group health plan coverage for the benefit of ex-spouses for limited periods. *See* Code §4980B; ERISA §§601–608. *See also Bone v. Bone*, 438 N.W. 2d 448 (Minn. Ct. App. 1989) (court interpreted provisions of divorce decree to require payments of COBRA coverage by former husband for benefit of former wife); *Bricker v. Bricker*, 554 A. 2d 444 (Md. Ct. App. 1989) (court did not require ex-husband to pay health premiums for ex-wife). To benefit from COBRA coverage, however, the plan administrator must be notified of the divorce within 60 days of the event. Merely mandating that the employee-spouse pay for the coverage in a divorce decree is not enough. *See Ludwig v. Carpenters Health & Welfare Fund of Philadelphia & Vicinity*, 2009 WL 3014939 (E.D. Pa. Sept. 18, 2009) (failure to notify of divorce within 60

days meant loss of COBRA rights; decision upheld on appeal to the Third Circuit).

- b. Coverage for Children Under Qualified Medical Child Support Orders.** See part C of this section and Section VI of this outline for discussions of coverage for children under Qualified Medical Child Support Orders.

- 6. Deferred Compensation and Severance Pay Plans.** Deferred compensation and severance pay plans are not subject to the statutory anti-assignment rule, and therefore the QDRO requirements technically do not apply. However, in a typical unfunded deferred compensation plan, participants do not have any interest in any amounts before the time of payment. If they did, the “economic benefit doctrine,” would cause them to be taxed. Under this rule, participants are taxed on deferred benefits if they acquire some economic benefit in the deferrals other than the employer’s unfunded, unsecured promise to pay in the future. This applies even if no amounts are payable under the plan until termination of employment. *See, e.g., Sproull v. Comm’r*, 16 T.C. 244 (1951), *aff’d per curiam*, 194 F.2d 541 (6th Cir. 1952); Rev. Rul. 60-31, Situation 4, 1960-1 C.B. 174. Thus, if the participant’s deferred compensation interest has an economic value that can be divided in a divorce, the participant’s interest might be taxable even if the benefits themselves cannot be paid. To avoid this tax result, plan administrators typically resist orders aimed at deferred compensation plans.

Before enactment of Code section 409A, the IRS allowed for one type of assignment against unfunded deferred compensation plans governed by Code section 457 (for state and local governments). *See* IRS private letter rulings 9237018 (6/12/92); 9145010 (7/31/91). The IRS also allowed for divorce orders that do not accelerate payment under the terms of the plans. Instead, the payments had to be made to ex-spouses when they would otherwise have been made to the participants. However, the IRS did not decide in those rulings whether the participant or the ex-spouse would be taxed on the assigned amounts when they were paid. In another private letter ruling, the IRS ruled that when a baseball club pays unfunded deferred compensation benefits to the former spouse of a ballplayer pursuant to the terms of a divorce decree, the employee-ballplayer is taxed on the amounts. *See* IRS private letter ruling 9340032 (7/6/93).

In Rev. Rul. 2002-22, the IRS ruled that a taxpayer who transfers interests in nonqualified deferred compensation to the taxpayer’s former spouse incident to a divorce is not required to include an amount in gross income upon the transfer and that the former spouse, and not the taxpayer, is

required to include an amount in gross income when the deferred compensation is paid or made available to the former spouse. The same basic rules applied with respect to the exercise of nonqualified stock options. *See also* Rev. Rul. 2004-60 where the IRS ruled that the transfer of interests in nonqualified deferred compensation from the employee spouse to the nonemployee spouse incident to a divorce does not result in a payment of wages for FICA and FUTA tax purposes. (Again, similar rules applied for nonqualified stock options.) The nonqualified deferred compensation also remains subject to FICA and FUTA taxes to the same extent as if the rights to the compensation had been retained by the employee spouse. To the extent FICA and FUTA taxation apply, the wages are the wages of the employee spouse. The employee portion of the FICA taxes is deducted from the wages as and when the wages are taken into account for FICA tax purposes. The employee portion of the FICA taxes is deducted from the payment to the nonemployee spouse. The amounts distributed to the nonemployee spouse from the nonqualified deferred compensation plans are also subject to withholding under 3402. The amounts to be withheld for income tax withholding are deducted from the payments to the nonemployee spouse. The supplemental wage flat rate may be used to determine the amount of income tax withholding. The nonemployee spouse is entitled to the credit allowable for the income tax withheld at the source on these wages. The social security wages, Medicare wages, social security taxes withheld, and Medicare taxes withheld, if applicable, are reportable on a Form W-2 with the name, address, and social security number of the employee spouse. However, no amount is includible in Box 1 and Box 2 of the employee's Form W-2 with respect to these payments. The income with respect to the distributions from the nonqualified deferred compensation plans to the nonemployee spouse are reportable in Box 3 as other income on a Form 1099-MISC with the name, address, and social security number of the nonemployee spouse. Income tax withholding with respect to these payments of wages is included in Box 4, Federal income tax withheld. Income tax withholding on payments to the nonemployee spouse is included on a Form 945 filed by the employer. The social security tax and Medicare tax are reported on the employer's Form 941, and the FUTA tax is reported on the employer's Form 940.

The final Code section 409A regulations adopted a much broader view of assigning nonqualified deferred compensation in connection with a divorce. There, the IRS simply said that a nonqualified deferred compensation plan subject to section 409A may provide for acceleration of the time or schedule of a payment under the plan to an individual other than the employee, or a payment under the plan may be made to an individual other than the employee, "to the extent necessary to fulfill a

domestic relations order (as defined in section 414(p)(1)(B)).” Treas. Reg. §1.409A-3(j)(4)(ii). This exception seems to be quite broad and no longer requires that payments to the nonemployee spouse be made at the same time or in the same form of payment as otherwise would have been paid to the employee spouse.

From an ERISA perspective, in one federal court case, a district court in the Seventh Circuit found that a nonqualified deferred compensation plan was a “plan” subject to ERISA and that a divorce decree meeting the QDRO requirements was enforceable against the plan. *Bass v. Mid-America Co., Inc.*, 1995 U.S. Dist. LEXIS 15719 (N.D. Ill. 1995). In a state court decision, *Westinghouse Credit Corp. v. J. Reiter Sales, Inc.*, 443 N.W. 2d 837 (Minn. Ct. App. 1989), a court ordered that payments be made from an unfunded deferred compensation plan to a third-party judgment creditor (not an ex-spouse). This case did not discuss the income tax consequences to the participant or ex-spouse.

Related issues arise concerning severance pay plans. Employers typically design these plans so they are not “pension plans” within the meaning of ERISA. They simply reflect an employer’s unfunded promise to pay certain benefits under certain conditions if some future contingencies apply. Federal law would not necessarily preclude the application of a state court order to severance pay benefits; however, the benefits may be so speculative at the time of the divorce that they are incapable of valuation.

C. *Qualified Medical Child Support Orders (“QMCSOs”).*

- 1. *Background.*** The Omnibus Budget Reconciliation Act of 1993 (OBRA ‘93), P.L. 103-66, amended ERISA to provide for “qualified medical child support orders” (QMCSOs). QMCSOs were created to address the situation, typically involving divorce or legal separation, where a non-participant spouse might want to force the participant spouse to provide health insurance coverage to their child. Before OBRA ‘93, any state law attempting to force ERISA-covered plans to provide this coverage was preempted by ERISA.
- 2. *Types of Plans Affected.*** The QMCSO requirements apply to all “group health plans” covered by ERISA. ERISA § 609(a)(1). A group health plan is defined as “an employee welfare benefit plan providing medical care (as defined in Internal Revenue Code section 213(d)) to participants or beneficiaries directly or through insurance, reimbursement, or otherwise.” ERISA §607(1).

For a more detailed discussion of QMCSOs see Section VI below.

II. The Practical Approach -- Basic QDRO Elements Applicable to All Plans

A. What is a “QDRO?”

1. **QDRO Technical Definition.** A QDRO is a domestic relations order that creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or part of the benefits payable with respect to a participant under a plan. Code §414(p)(1); ERISA §206(d)(3)(B); IRS private letter ruling 9234014 (5/21/92) (creation of security interest in husband’s pension plan interest is “assignment” subject to the QDRO rules).

- a. The order must be a judgment, decree or order (including the approval of a property settlement) that is made pursuant to a state domestic relations law. A pre-order property settlement that is later incorporated by reference in the divorce decree will meet the requirements for a QDRO (assuming the other QDRO requirements are met); the settlement does not have to be “merged” into the divorce decree. *See Metropolitan Life Ins. Co. v. Drainville*, 2009 U.S. Dist. LEXIS 63613 (D.C. R.I. July 23, 2009); *Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 17 E.B.C. 2380 (E.D. Pa. 1994), *rev’d and remanded on other grounds*, 38 F.3d 107 (3d Cir. 1994). An attempted enforcement of a collateral contingent tax liability did not result in the issuance of a QDRO. *See In re Marshall, Jr.*, 43 Cal. Rptr. 2d 38 (Cal. Ct. App. 1995).

Note that the plan administrator does not have a duty under ERISA to review state court orders to determine whether they were validly issued. DOL Advisory Opinion 99-13A (Sept. 29, 1999). *See also Brown v. Continental Airlines Inc.*, 47 EBC (BNA) 2704, 2009 WL 3365911 (S.D. Tex. 2009) (Continental had no ability under ERISA to recover pension benefits paid to a group of senior pilots who allegedly obtained “sham divorces” to receive pension payments).

According to the Ninth Circuit Court of Appeals, a state court has jurisdiction to determine whether a domestic relations order is a QDRO and an alternate payee does not necessarily have to exhaust administrative remedies under the plan before suing over the enforceability of a QDRO (“administrative exhaustion is a prudential rather than jurisdictional requirement”). *Mack v. Kuckenmeister*, No. 09-15290 (9th Cir., 7/22/10). This ruling directly contradicts the U.S. Department of Labor guidance on QDROs as stated in the DOL’s QDRO guide which states:

Who determines whether an order is a QDRO?

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

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

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.

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

Quoted from the DOL QDRO guide at http://www.dol.gov/ebsa/faqs/faq_qdro.html (as visited on July 23, 2010).

- b.** Also, it must relate 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. Code §414(p)(1)(B); ERISA §206(d)(3)(B)(ii). See DOL Advisory Opinion 90-46A (Dec. 4, 1990) and *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991) (DOL and the court decided that QDRO provisions do not encompass state community property laws that are not related to deciding alimony, property settlements, and similar matters in domestic relations proceedings; any other state court order is pre-empted by ERISA and compliance with any

other state court order would violate the anti-assignment rule). *See also* IRS private letter ruling 8735081 (6/2/87) (partition of accrued benefits in community property state is an alienation of benefits under Code §401(a)(13); therefore, voluntary partition of benefits for estate planning purposes is not permissible except through a QDRO); *Mills v. Mills*, 15 E.B.C. 1583 (S.D. Ohio 1992) (\$2 million judgment in child sex abuse case was not enforceable against a participant's pension plan interest because it was not a QDRO); *Hunter v. Ameritech*, 14 E.B.C. 2117 (N.D. Ill. 1991) (federal court lacks jurisdiction to review QDRO action before issuance of QDRO because only state courts have authority to issue QDROs).

- c. A QDRO is still a valid QDRO even if it amends a prior order or if it is issued after a participant's death. 29 C.F.R. §2530.206. The DOL regulations are not entirely clear on the point of whether an order that is entered after the participant's death had to have been "in the works" prior to the participant's death. In other words, if an order is issued many years after a participant's death, is a plan still obliged to follow it under the DOL's regulation even if it is the first order submitted to the plan (no prior order was submitted for review)? The preamble to the regulations makes it clear that the DOL's view is that an otherwise valid posthumous order does not fail to be a QDRO simply because the plan was not put on notice of the order while the participant was alive. It is not clear how far courts will take this rule in future cases.

- 2. ***QDRO Practicalities.*** One federal district court case highlights the practical considerations that should be followed to ensure that the attempt to obtain a QDRO meets all requirements. In that case, the court determined that an order must be officially submitted to a plan administrator, otherwise it is not a QDRO and the administrator is not responsible for payments made in violation of that order. *See Layton v. TDS Healthcare Systems Corp.*, 1994 U.S. Dist. LEXIS 6709 (N.D. Calif. 1994).

Other practical considerations concern the payment of the alternate payee's attorneys' fees incurred in connection with obtaining a QDRO as well as whether the expenses of reviewing or administering a QDRO can be charged to the plan. One court held that the direct payment of attorneys' fees through a QDRO constituted a prohibited assignment of plan funds. *See AT&T Management Pension Plan v. Tucker*, 902 F. Supp. 1168 (C.D. Calif. 1995).

Separately, the DOL has issued Field Assistance Bulletin 2003-3 in which it indicated that participant accounts could be charged for the payment of QDRO expenses. This represents a change in the DOL's thinking on the issue. Previously, the DOL had issued Advisory Opinion 94-32A (Aug. 4, 1994) in which it concluded that QDRO expenses, if properly chargeable to a plan, could only be charged to the plan as a whole and must be "reasonable" and could not be charged against individual participants' benefits.

3. ***The Two Types of QDROs.*** All QDROs fall into one of the following two generic categories -- Stream-of-Payment QDROs and Separate-Interest QDROs. Once a reviewer knows which type of QDRO is at issue, certain inevitable conclusions follow. Also, certain facts may require that a particular type of QDRO be used. If the parties submit a different type of order, the order is likely not qualified. For example, if defined benefit plan participant is in pay status, the only type of permissible QDRO is a Stream-of-Payment QDRO. If the parties submit a Separate-Interest order, it will not be qualified.

- a. ***Stream-of-Payment QDRO Defined.*** Under a Stream-of-Payment QDRO, all or part of the benefit otherwise payable to the participant is to be paid to an alternate payee. This type of QDRO typically provides that "if, as and when" the participant commences to receive a pension, the alternate payee will receive a certain amount of each monthly payment. The participant makes all decisions (subject to applicable spousal consent rules) concerning when to commence the pension and what form payments will take. Thus, upon the participant's retirement, the plan would issue two checks each pension payment period — one to the participant and one to the alternate payee. A typical Stream-of-Payment QDRO might award to the alternate payee an interest in pension payments as alimony or child support until a specified date when payments stop (*e.g.*, payments made until remarriage, the participant's death or cessation of dependency status).

Generally, if the participant has started receiving defined benefit plan payments at the time a QDRO is to be issued, only a Stream-of-Payment QDRO will be qualified. Why? Because once the form of payment is selected, most defined benefit plans do not allow participants to modify the form of payment. If a Stream-of-Payment QDRO tried to modify the form by awarding a segregated interest to an alternate payee, the order would violate

the rule prohibiting QDROs from requiring payments contrary to plan terms.

- b. *Separate-Interest QDRO.*** Under a Separate-Interest QDRO, an accrued benefit is divided and part of the benefit is awarded to the alternate payee outright. The alternate payee then controls the disposition of that portion, subject to the terms of the QDRO. As distinguished from a Stream-of-Payment QDRO that typically awards alimony or child support interests, a Separate-Interest QDRO is often used to award a separate marital property interest in the participant's benefit. Typically, the alternate payee will be given an opportunity to commence his or her portion any time on or after the participant's earliest retirement age, whether or not the participant has retired or elected to commence his or her pension.

In the defined contribution plan context, a Separate-Interest QDRO is the more common type of QDRO that is used. It is often quite simple to divide a participant's account balance as of a particular date and allocate part of that account to an alternate payee. Admittedly, there are some administrative hurdles to overcome, but dividing an account in a defined contribution plan is generally easier than dividing an accrued benefit under a defined benefit plan.

- 4. *The Seven Key Questions.*** Besides figuring out the type of order submitted, a reviewer must evaluate the technical content of the order to decide whether it is qualified. A *qualified* order must include clear and complete answers to the following seven questions.

THE SEVEN QUESTIONS FOR QUALIFIED ORDERS

1. Which plan must pay?
2. Who must be paid?
3. How much must be paid?
4. When do payments start?
5. When do payments stop?
6. What happens when the participant dies?
7. What happens when the alternate payee dies?

If any of these seven questions cannot be answered, the order cannot be administered properly and should be corrected. These questions simplify the technical QDRO rules that cause unnecessary confusion for even the most experienced QDRO reviewer. Moreover, it is virtually impossible to educate plan participants and their attorneys in how or why the qualification rules work the way they do. Instead, a plain-English formulation will ease the review process and make it easy to find and explain most of the common defects. Other information may also be helpful in administering a QDRO, even though it may not be required for qualification. For example, many QDROs include specific information about which party will invest segregated funds, how certain tax benefits will be apportioned, and other ancillary issues. These issues vary depending on the type of plan involved (i.e., defined benefit or defined contribution) and the options offered under the plan. In all cases, though, if the seven questions cannot be answered, the order has a deficiency that should be fixed.

B. What Information Must be Included in Every QDRO?

For a domestic relations order to be qualified, it must specify the following things.

1. ***Which Plan Must Pay?*** Every QDRO must specifically identify the name of the plan to which the order relates. Code §414(p)(2)(D); ERISA §206(d)(3)(C)(iv). Often, employers may have several qualified plans that go by very similar names. Before a careful plan administrator approves an order that could, if it is improperly followed, disqualify a plan, the administrator should insist on specificity. An order is not qualified if it merely refers to “all pension and savings plans” of the employer. On the other hand, if the plan to which the parties are referring is clear from the order, an administrator may, as a practical matter, have all parties sign a separate document specifying the plan subject to the order.
2. ***Who Must Be Paid?*** A QDRO must include the name and last known mailing address of the participant and alternate payee. Code §414(p)(2)(A); ERISA §206(d)(3)(C)(i). According to the legislative history of the QDRO requirements, an order should not be disqualified merely because it does not include this information, if the plan administrator has reason to know the information independently of the order. REA Senate Finance Committee Report, at 20. Typically, this information is available by examining the plan’s records or the records of other benefit plans (such as a health plan) that will list participant and beneficiary information. Alternatively, plan administrators will simply

have the parties submit this information, along with social security numbers, outside the formal order.

3. ***How Much Must be Paid?*** Every QDRO must specify the amount or percentage of the participant's benefit to be assigned or the manner in which the amount or percentage is to be determined. Code §414(p)(2)(B); ERISA §206(d)(3)(C)(ii). Failure to meet this requirement is probably the most common reason a domestic relations order fails to qualify. A major reason this issue is so hard for parties to deal with is that they do not appreciate the differences between defined benefit plans and defined contribution plans. It is not enough for a potential QDRO to award, for example, 50 percent of a participant's benefit to an alternate payee. The administrator must know how and when to value that 50 percent. In a defined benefit plan, the administrator must know how, if at all, to divide any future subsidies, cost-of-living increases, or pension supplements. It is not enough to provide that these benefits are to be divided on a "pro rata" basis. In a defined contribution plan, the administrator must know how to allocate the 50 percent among the different investment options and among the different types of contributions (*e.g.*, after-tax contributions, pre-tax contributions, matching contributions, etc.). Because the amount to be paid depends on the type of plan subject to the QDRO, the specific issues to address are discussed below.
4. ***When Do Payments Start?*** A QDRO may require that payments be made any time on or after the date the participant attains (or would have attained) "earliest retirement age" (a statutory term, defined below). Code §414(p)(4); ERISA §206(d)(3)(E). A QDRO cannot require that a plan pay any benefits before earliest retirement age. However, a properly amended plan may make pre-earliest retirement age distributions. Thus, depending on the type of QDRO involved, payments under a QDRO may start at the time the participant starts collecting a pension, upon the request of the alternate payee, or at another date specified in the order itself.
5. ***When Do Payments Stop?*** A plan administrator must be able to determine when payments to an alternate payee will stop. In statutory terms, a QDRO must specify the number of payments to be made or the period over which the payments are to be made. Code §414(p)(2)(C); ERISA §206(d)(3)(C)(iii). This requirement is directly tied to the form of benefit available under the plan. If the available forms of benefit are all annuity benefits paid over a designated lifetime, the payments to the alternate payee will be paid in that form (either over the participant's lifetime, under a Stream-of-Payment QDRO, or over the alternate payee's lifetime, under a Separate-Interest QDRO). An order may provide that the alternate payee will be allowed to select from among the benefit options

otherwise available under the plan. However, such a blanket provision may confuse the alternate payee if the plan only includes one form of payment (e.g., single sum payments). That is, the alternate payee may think that he or she will be entitled to other forms of payment as well. To avoid this confusion, the order should be written to provide for only single sum payments in this situation.

6. ***What Happens When the Participant Dies?*** Upon a participant's death, the administrator must know whether benefits will be paid or continue to be paid to an alternate payee and/or another beneficiary. The QDRO rules do not specifically require these issues to be addressed in an order. Technically, therefore, an order could be "qualified" without addressing the participant's death. However, if the plan administrator does not know what to do when the participant dies, it will be of little solace to know that the order could be called "qualified." Thus, a plan administrator should not qualify an order until and unless he or she knows the answers to specific questions such as: (1) What if the participant dies before benefit commencement and before earliest retirement age? Will the alternate payee's rights be forfeited? Will the alternate payee be entitled to a survivorship benefit? and (2) What if the participant dies after benefit commencement? Will the alternate payee's benefit be increased? Will a survivor benefit be paid? Answers to these questions could be found either in the order itself or from the circumstances surrounding the payments under the order.
7. ***What Happens When the Alternate Payee Dies?*** When the alternate payee dies, the administrator must know whether benefits will be paid or continue to be paid to an alternate payee's beneficiary, whether benefits will revert to the participant, or whether the benefit assigned to the alternate payee will be forfeited entirely. As in the case of participant death, the QDRO statutory provisions do not specifically require that this issue be addressed for an order to be "qualified." Nevertheless, the plan administrator will need to know what to do when the alternate payee dies. The specific questions to which answers are needed include: (1) What if the alternate payee dies before benefit commencement and before the participant attains or would have attained earliest retirement age? Will the benefit be forfeited entirely, revert to the participant or be paid to a beneficiary of the alternate payee? and (2) What if the alternate payee dies after benefit commencement? Will the participant's benefit be increased? Will benefits be paid to the alternate payee's beneficiary?

C. *What Information May Not be Included in Any QDRO?*

1. **Basic Requirements.** Under the statutory rules, a *qualified* domestic relations order may not:

- a. require the plan to provide any type or form of benefit or option not otherwise provided under the plan (this does not mean, however, that payments may not be made to an alternate payee before the participant retires, as described below);
- b. require the plan to provide increased benefits (determined on the basis of actuarial value);
- c. require the payment of benefits to an alternate payee that are already required to be paid to another alternate payee under a previously issued QDRO; or
- d. require that payments be made in the form of a joint and survivor annuity for the lives of the alternate payee and his or her subsequent spouse.

See Code §414(p)(3); ERISA §206(d)(3)(D). It is not enough merely to recite these statutory provisions as “boilerplate” language in the order. Moreover, the statute does not require that a QDRO specifically recite any of these provisions. The statements must be factually correct.

2. **Impermissible Forms of Benefit.** The rule that a QDRO may not require payments to be made in any form or under any option not allowed under the terms of the plan is quite confusing. *See* Code §414(p)(3)(A); ERISA §206(d)(3)(D)(i). Read literally, this prohibition would preclude the payment of benefits to an alternate payee under a different form than that selected by the participant. It could also prohibit payments to an alternate payee at a different time than benefits are otherwise to be paid to the participant. However, this prohibition must be read together with the rule that allows payments to be made to an alternate payee on or after the participant’s earliest retirement age even if the participant has not separated from service. *See* Code §414(p)(4)(A)(i), (ii); ERISA §206(d)(3)(E)(i)(I), (II). Also, the Code and ERISA specifically allow for payments to be made to the alternate payee in any optional benefit form permitted to be paid under the plan to the participant (other than a joint and survivor annuity for the lives of the alternate payee and subsequent spouse). Code §414(p)(4)(A)(iii); ERISA §206(d)(3)(E)(i)(III). *See also* 130 Cong. Rec. H8761-8762, example 2 (Aug. 9, 1984) (statement of Rep. Clay, which includes his examples of how the QDRO rules are supposed to work). Thus, ***under the proper facts***, an alternate payee could elect to have his or her benefits paid in one form of benefit under a plan (e.g., a joint and contingent annuity commencing at “earliest retirement age” with

75 percent of the amount paid to the alternate payee continued to the alternate payee's beneficiary upon the alternate payee's death) even though payments are made in another form and at another time to the participant (e.g., single life annuity commencing at the participant's retirement).

Post-QDRO changes in the plan provisions may also affect the available benefit options. A QDRO will still be qualified if the QDRO's required form of payment ceases to be available due to a plan amendment or change in law. However, the alternate payee is given certain rights. According to the QDRO legislative history, *see* S. Rep. No. 313, 99th Cong., 2d Sess., at 1105 (1986); Joint Committee on Taxation, *Explanation of Technical Corrections to the Tax Reform Act of 1984 and Other Recent Tax Legislation*, at 224 (1987) ("TRA '86 Blue Book"), if a plan eliminates the particular form of payment (and the change is not required by law), the alternate payee remains entitled to receive benefits in the form specified in the QDRO unless the alternate payee elects to receive benefits in another form and the election of that other form does not affect the amount or form of benefits payable to the participant. Because of the prohibitions on eliminating optional forms of benefit, *see* Code §411(d)(6); Treas. Reg. §1.411(d)-4, this situation is not likely to arise. The legislative history also indicates that if a benefit option is eliminated by law, the plan must allow the alternate payee to select a form of benefit specified in the plan, provided the option elected does not affect the amount or form of benefits payable to the participant. Congress does not often prohibit various forms of benefit by statute. However, the IRS rules may, in effect, preclude certain forms of benefit from being paid (e.g., to comply with the minimum distribution rules under Code §401(a)(9)).

3. ***Prohibition on Paying Increased Benefits.*** One important QDRO rule is the prohibition on ordering that the plan pay increased benefits. Code §414(p)(3)(B); ERISA §206(d)(3)(D)(ii). A plan cannot be ordered to pay to the alternate payee any more than the participant has to his or her credit under the plan at any particular time. In the defined contribution plan context, this rule is typically simple to apply. The rule can also be simple to apply in a defined benefit plan context. For example, assume an alternate payee requires alimony of \$200 per month and the participant has already commenced his or her pension of \$100 per month. An order will not be a QDRO if it requires the payment to an alternate payee of more than \$100 per month. However, particularly in the defined benefit plan context, it can be very difficult to make sure that the awarded benefits do not exceed the participant's accrued benefit as of any particular date. For example, an order cannot award to an alternate payee both a percentage of

a participant's accrued benefit paid for the alternate payee's life in addition to a survivor annuity (also paid for the alternate payee's life) if the sum of those benefits, on an actuarial basis, would exceed the participant's accrued benefit. If the order attempts to make such an award, it may be time to call in the actuaries for some help.

D. What Other Basic Information or Definitions are Important?

1. **Definition of "Alternate Payee."** An "alternate payee" must be a spouse, former spouse, child or other dependent of a participant under a domestic relations order (and not necessarily a *qualified* domestic relations order) who has a right to receive all or part of the benefits payable under a plan with respect to a participant. Code §414(p)(8); ERISA §206(d)(3)(K). This definition is broad enough to include a situation in which two participants *in the same plan* divorce each other. Each would be an "alternate payee" with respect to the other. Once someone becomes an alternate payee under a QDRO, he or she is treated as a beneficiary under the plan for purposes of ERISA, even though the alternate payee has some rights that are greater than those of ordinary beneficiaries. ERISA §206(d)(3)(J). Note that plan administrators may also need to consider the interests of prospective alternate payees. *See Stephen Allen Lynn, P.C. Employee Profit Sharing Plan and Trust v. Stephen Allen Lynn, P.C.*, 25 F.3d 280 (5th Cir. 1994) (alternate payee allowed to bring a claim based on actions taken before QDRO was issued which tried to limit alternate payee's rights). A plan administrator does not have to independently verify that someone qualifies as an "alternate payee." The administrator may rely on the state authority (court or other entity) that makes these findings for state law purposes. *See* DOL Advisory Opinion 92-17A (8/21/92).
2. **Definition of "Earliest Retirement Age."** Payments under a QDRO may be paid any time on or after the participant attains earliest retirement age. Code §414(p)(4); ERISA §206(d)(3)(E). Further, a plan may allow for payments to be made even before the participant attains earliest retirement age. However, some have argued that pre-earliest retirement age distributions are not allowed. The following discussion explains why pre-earliest retirement age distributions do not violate the statute and are consistent with the relevant legislative history.
 - a. Assume that a plan is amended to allow alternate payees to receive distributions under a QDRO before the participant reaches earliest retirement age and that a QDRO so orders distributions to be made. The argument that the such a QDRO does not violate the Code qualification requirements is as follows:

- (i) Code §414(p)(10) indicates that a plan will not violate any provision of Code §§401(a) or 401(k) solely by making payments to an “alternate payee” [sic] pursuant to a **qualified domestic relations order**;
- (ii) Code §414(p)(1)(A) defines a **qualified domestic relations order** to be one that: (a) recognizes an alternate payee’s rights to benefits under a qualified plan; and (b) **meets the requirements of Code §414(p)(2) and (3)**. There is not much dispute about whether a proposed QDRO that calls for pre-earliest retirement age payments complies with (a); thus, the issue is whether the proposed QDRO complies with Code §414(p)(2) and (3);
- (iii) Code §414(p)(2) requires that a QDRO include certain specific information not relevant to pre-earliest retirement age distributions. Therefore, assume that our proposed QDRO includes all of the required information. It therefore meets Code §414(p)(2);
- (iv) Code §414(p)(3) prohibits a QDRO from ordering certain things. The relevant item of concern here is that, according to Code §414(p)(3)(A), a QDRO may not require a plan “to provide any type or form of benefit, or any option, not otherwise provided under the plan.” Here, we have assumed that the plan has been amended to allow for payments to alternate payees at any time (even before earliest retirement age). Therefore, the payment to an alternate payee before earliest retirement age would not violate Code §414(p)(3) -- it is provided for under the plan.
- (v) Based on the foregoing, it seems that a QDRO ordering pre-earliest retirement age payments is permissible based solely on the statutory provisions, as long as it is allowed under the plan terms. Further, such payments are consistent with the views articulated in the relevant legislative history and in certain IRS private letter rulings. H. Rep. No. 841, 99th Cong., 2nd Sess., at II-858 (1986) (the “TRA ‘86 Conference Committee Report”); *see also* TRA ‘86 Blue Book, at 228; IRS private letter rulings 8744023 (8/3/87) (indicating that plan was amended to allow for pre-earliest retirement age distributions); 8743102 (8/3/87) (same). Moreover, due to Code §414(p)(10), the

QDRO payments will not cause the plan to violate any provision of Code §§401(a) or 401(k).

- b.** Why then is there all the fuss about Code §414(p)(4) and the definition of “earliest retirement age”? If you look at Code §414(p)(4) carefully, all it says is that a domestic relations order will not violate Code §414(p)(3)(A) just because it orders payments to be made to an alternate payee after attainment of earliest retirement age. In other words, an order is still qualified even if a requirement for post-earliest retirement age distributions would violate the plan terms. How could that happen? Remember, under the tax qualification rules, a plan does not have to be amended to even refer to the possibility of QDRO payments. *See* Treas. Reg. §1.401(a)-13(g)(2). In the absence of QDRO provisions, payments to an alternate payee at *any time* would violate the plan terms and appear to violate Code §414(p)(3)(A). However, Code §414(p)(4)(A) would then step in and tell us that, no matter what the plan says, post-earliest retirement age distributions will not be treated as violating the Code §414(p)(3)(A) prohibition on violating plan terms. In other words, a plan cannot be required to allow for *pre*-earliest retirement age distributions, but Code §414(p)(4) assures that all plans will be required to allow for *post*-earliest retirement age distributions.
- c.** Notwithstanding the permissibility of pre-earliest retirement age payments, however, a domestic relations order is not a QDRO if it requires payment before the participant’s earliest retirement age and the plan does not allow for early payments to alternate payees. *See Dickerson v. Dickerson*, 15 E.B.C. 2630 (E.D. Tenn. 1992) (domestic relations order not a QDRO where it required payment 21 years before participant attained earliest retirement age and plan did not allow for pre-earliest retirement age distributions).
- d.** What is the “earliest retirement age” and when should a plan allow for payments to be made before “earliest retirement age?”

EARLIEST RETIREMENT AGE DEFINITION

Earliest Retirement Age is the earlier of:

- (1) the date on which the participant is entitled to a distribution under the plan; or
- (2) the later of —
 - (a) the date the participant attains age 50, or
 - (b) the earliest date on which the participant could begin receiving benefits under the plan if the participant

Given this definition, it is no wonder that attorneys drafting orders often simply provide that the alternate payee may commence benefits any time on or after “earliest retirement age.” That way, it is up to the plan administrator to figure out what the statutory definition means and the attorney drafting the order can be sure that the order does not violate the qualification rules. The problem is that without a clear understanding of these terms, the clients’ wishes may not be met.

In interpreting the definition, consider a profit-sharing plan that allows for payments to be made to a participant when the participant separates from service, but not before then. If the participant is actively employed, a QDRO could require that payments be made to the alternate payee at the participant’s attainment of age 50, even though the participant had not yet separated from service. Why? Because the earliest date on which the participant could begin receiving benefits if he separated from service is *any age*, including ages under age 50. Applying the statutory definition, then, earliest retirement age becomes the earlier of separation from service or the later of age 50 or any age, including ages under age 50.

Now consider the same plan and assume the plan also allows for in-service withdrawals before age 50 of certain contributions (but not pre-tax salary reduction contributions) under certain specified circumstances. Earliest retirement age under such a plan is generally age 50 (under the same reasoning as the prior example). However, to the extent the participant may elect to receive in-service withdrawals of funds before age 50, a QDRO could provide that the alternate payee may be paid an amount up to the amount that the participant may withdraw. Why? Because that date is the earliest date at which the participant could withdraw funds, but only to the extent of the withdrawable amount. Otherwise, earliest retirement age is the earlier of separation from service or attainment of age 50, even if the participant has not separated from service.

Under this reasoning, earliest retirement age under a typical defined benefit plan (*e.g.*, normal retirement age is age 65 and early retirement age is age 55 and completion of 10 years of service) would be the earlier of age 65 unless the participant attains age 55 and has completed 10 years of service.

E. What Information Can be Modified for a Particular QDRO?

Commonly, QDROs will include provisions that either are not required to be in a QDRO or are prohibited from being in a QDRO. Some of these provisions (*e.g.*, allowing the alternate payee to exercise investment control over his or her interest in a contribution plan) relate to the specific type of plan involved. Whatever the type of plan, though, many QDROs include provisions related to “pre-earliest-retirement-age” distributions and naming the alternate payee as the “surviving spouse.”

- 1. Pre-Earliest Retirement Age Payments.*** As noted above, a plan may allow for payments to alternate payees even before the participant attains earliest retirement age. Plan administrators like to pay benefits to alternate payees even before earliest retirement age, if possible, to avoid the administrative burden of keeping track of the alternate payee. This is particularly true if the value of the alternate payee’s interest does not exceed \$5,000 so that it may be cashed out of the plan immediately. *See* Code §411(a)(11); Treas. Reg. §1.411(a)-11(c)(6) (cash-out must be consistent with terms of QDRO). Alternate payees generally like early payouts, particularly as single sum payments, because they can receive cash in hand without having to be subject to the plan administrator’s requirements. The alternate payee then has the flexibility to pay taxes on the money (generally without incurring an early distribution tax) or roll the money over to an IRA or other qualified plan for future use.

Defined contribution plans are more likely to allow for pre-earliest retirement age distributions than are defined benefit plans because there is no cost to a defined contribution plan in making early payments. All that is distributed is the participant’s account balance, or some percentage of the account balance, and often payment is made in a single sum form. In a defined benefit plan context, it is less likely that payments would be made before earliest retirement age. Defined benefit plans typically pay benefits only in annuity form (with cash-outs for single sum payments of benefits where the present value does not exceed \$5,000). Thus, if the plan administrator authorizes pre-earliest retirement age payments, actuarial assumptions would have to be developed and plan costs might increase.

- 2. Naming the Alternate Payee as a “Surviving Spouse.”***

- a. Background Rules.*** Generally, a participant’s spouse is determined as of the earlier of the annuity starting date (the first date for which an amount is paid as an annuity or any other form) or the participant’s death. *See* Code §401(a)(11); Code §417; ERISA §205; Treas. Reg. §1.401(a)-20, Q&A-8, Q&A-10. *See also* Code §417(d); ERISA §205(f); Treas. Reg. §1.401(a)-20,

Q&A-25(b)(2) (special “one-year-of-marriage rule” may apply requiring participant and spouse to have been married for at least one year before the earlier of the annuity starting date or the participant’s death). If a participant is married on his or her annuity starting date, benefits generally must be paid as a qualified joint and survivor annuity, with the spouse as beneficiary, unless the participant, with spousal consent, elects otherwise. *See* Code §417; ERISA §205; Treas. Reg. §1.401(a)-20. If the participant is not married on his or her annuity starting date, but gets married after the annuity starting date, no survivor annuity is required to be made available to his or her surviving spouse (and most plans would not provide one voluntarily). *See* Treas. Reg. §1.401(a)-20, Q&A-25; Treas. Reg. §1.417(e)-1(b). If a participant is married on the date of death before payments commence, the surviving spouse is entitled to a qualified preretirement survivor annuity. *See* Code §401(a)(11); ERISA §205(a); Treas. Reg. §1.401(a)-20, Q&A-8.

- b. *Applying the Spousal Protection Rights to QDROs.*** Under the QDRO rules, if a participant is married to a spouse as of an annuity starting date (under the rules described above), the spouse remains the relevant spouse for all survivor annuity rules, unless a QDRO provides otherwise. *See* Treas. Reg. §1.401(a)-20, Q&A-25; REA Senate Finance Committee Report, at 15-16, 20-21. Typically, a QDRO would not take away survivor annuity protection to which an alternate payee is already entitled under the law. Under a second legal presumption, if a participant is not married to a spouse as of an annuity starting date or date of death, that former spouse has no survivor annuity protection and is not treated as the participant’s beneficiary, unless the QDRO provides otherwise. *Id.* *See Kahn v. Kahn*, 15 E.B.C. 2425 (S.D.N.Y. 1992). Many QDROs provide for this surviving spouse protection under a QDRO rule that allows a former spouse to be named a current spouse (or surviving spouse) as to all or part of the participant’s pension. *See* Code §414(p)(5); ERISA §206(d)(3)(F); Treas. Reg. §1.401(a)-13(g)(4).

Although the parties divorce and an ex-spouse loses survivorship rights, the participant may still (deliberately or inadvertently) provide beneficiary rights to the ex-spouse. If the ex-spouse is listed as a beneficiary before the divorce and the participant never changes the beneficiary designation form, the ex-spouse could still be treated as the proper beneficiary for payment purposes. *See Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 129 S. Ct. 865 (2009) where the U.S. Supreme Court held

that the plan documents control over a purported beneficiary waiver via a divorce decree. *See also Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), where the U.S. Supreme Court held that a state law invalidating beneficiary designations in the event of a divorce was preempted by ERISA and the plan documentation controls. Nevertheless, the ex-spouse's declination (by virtue of the divorce) might be enough to override a beneficiary designation form, particularly if there is some succeeding designation or indication that the participant intended to change the beneficiary designation. *See Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003) (permitting the application of federal common law to give effect to a document with independent significance under state law; but general waiver in divorce decree is not specific enough).

- c. ***Treating an Alternate Payee as a "Surviving Spouse."*** A former spouse who is an alternate payee under a QDRO may be treated as a current spouse solely as to the benefits accrued through the date of divorce. Alternatively, he or she could be treated as a current spouse as to all of the benefits accrued through the participant's retirement. Concerning the ability to obtain the benefit of future benefit accruals under a qualified plan, *see, e.g.*, S. Rep. No. 313, 99th Cong., 2nd Sess., at 1104 (1986) and TRA '86 Blue Book, at 223 (describing "current law" Blue Book indicates that future benefit accruals are not taken into account, "unless specifically provided under the domestic relations order"); REA Senate Finance Committee Report, at 21 (allowing recalculation of alternate payee's benefits if participant becomes entitled to subsidized early retirement benefits after the divorce); 130 Cong. Rec. H8761-8762, example 2 (Aug. 9, 1984) (statement of Rep. Clay, which includes his examples of how the QDRO rules are supposed to work; indicating that alternate payee would be entitled to post-divorce increases in participant's accrued benefit). If the former spouse is treated as the current spouse as to all of the participant's pension, the participant's subsequent spouse, if any, will generally not be entitled to any survivor annuity protection. If the alternate payee dies before the annuity starting date, then any actual current spouse is treated as the current spouse, unless the QDRO provides otherwise (consistent with the applicable plan terms).

If a former spouse is treated as a current spouse for a part of the participant's pension, the rules become quite complicated. *See* Treas. Reg. §1.401(a)-13(g)(4). First, assuming the plan is subject to the survivor annuity requirements (*e.g.*, it is a defined benefit

plan), the alternate payee's consent would be required for the participant to elect to have benefits paid in any form other than a qualified joint and survivor annuity with the alternate payee named the surviving spouse to the extent of the QDRO interest. As a practical matter, then, the participant is stuck with a joint and survivor annuity unless both the alternate payee *and* any subsequent spouse agree to waive spousal annuity protection. Theoretically, the subsequent spouse could waive the survivor annuity as to that spouse's interest; however, the plan is unlikely to bifurcate the participant's interest to accommodate different benefit options. Where a plan must pay more than one person a survivor annuity attributable to one participant's benefit (*i.e.*, because neither the alternate payee nor the subsequent spouse waived survivor annuity coverage), the plan may limit the total amount to be paid on a survivor basis to the amount that would have been paid had there only been one surviving spouse. The regulations do not explain which spouse's life is to be used to measure that amount.

3. *Plan Administrative Procedures/The 18-Month Rule.*

- a. *Administrative Procedures -- Holding a Benefit.*** Based on the QDRO legislative history, if a defined contribution plan administrator knows that the parties are seeking a QDRO, the plan administrator may suspend any future investment fund transfer, withdrawal or loan activity in the participant's account. *See* TRA '86 Conference Committee Report, at II-858; TRA '86 Blue Book, at 224-225. Presumably, a similar rule would apply to defined benefit plans. That is, the administrator could hold the payment of a participant's pension benefit pending a soon-to-be-issued QDRO. *Id.* However, for a hold to be valid, it must be provided for in the plan or plan administrative procedures and those plan procedures must be followed. Otherwise, a fiduciary could be liable for losses that occur due to the failure to follow plan procedures. *See Schoonmaker v. The Employee Savings Plan of Amoco Corp. and Participating Subsidiaries*, 987 F.2d 410 (7th Cir. 1993) (holding that a plan administrator could be liable for losses that occur after a "hold" was placed on participant's account; "hold" was placed due to oral notice that a QDRO was being sought and plan procedures only provided for a hold upon receipt of written proposed QDRO).
- b. *Administrative Procedures -- The 18-Month Rule.*** Once a plan administrator receives a domestic relations order, the administrator must follow certain procedures and notify the parties of receipt of

the order. Code §§414(p)(6), (7); ERISA §§206(d)(3)(G), (H). *See also*, TRA '86 Conference Committee Report, at II-858; TRA '86 Blue Book, at 224-225. Also, the parties must be sent copies of the plan's procedures for determining whether an order is qualified. Within a reasonable time after receiving the order, the plan administrator must then decide whether the order is qualified and notify the parties of the decision. There are no fixed rules on how long it should take to review an order for QDRO compliance. Some view the statutory 18-month period, described below, as a benchmark for the review period. In fact, it should never take a full 18 months to review an order. It may take that long (or even longer) for the parties to fix an order, but the initial review should not take more than 60 to 75 days, depending upon the level of complexity and the other things an administrator must do.

If a plan administrator is reviewing a domestic relations order and, during that review period, an amount becomes payable, a statutory 18-month review period applies. Code §414(p)(7); ERISA §206(d)(3)(H). *See also* TRA '86 Conference Committee Report, at II-858; TRA '86 Blue Book, at 224-225. *See also Brown v. Connecticut General Life Insurance Co.*, 934 F.2d 1193 (11th Cir. 1991); *Sladek v. Bell Syst. Management Pension Plan*, 880 F.2d 972 (7th Cir. 1989). This statutory review period is commonly misunderstood. The *only* time the period applies is if, during an administrator's review of the order, an amount would otherwise be payable to the alternate payee, if the order were found to be qualified. During the review period, the administrator must separately account for the amounts that would have been paid to the alternate payee had the order been a QDRO. This separate accounting could apply for as long as 18 months. The 18-month period begins on the date that the first payment would have to be made under the order, if it were qualified. If, at the time the order is received, nothing is immediately payable to the alternate payee, the period does not begin on the date that the order is received by the plan administrator. Instead, it begins on the first date after the order is received that amounts would be paid to the alternate payee. If, within the 18-month review period, the plan administrator determines that the order (including any modifications of the order) is a QDRO, the administrator should pay the segregated amounts (including any interest) according to the terms of the QDRO. If, within the 18-month review period, the plan administrator determines that the order (including any modifications of the order) is *not* qualified, or if he or she cannot decide whether the order is qualified, then the administrator should

pay the segregated amounts (including any interest) to the individual entitled to payment, as if there had been no order. If the plan administrator determines that the order is a QDRO and the determination is made after the end of the 18-month review period, the QDRO may be applied prospectively only. The implication of this prospective application rule is that if a plan administrator finds that an order is not qualified during the 18-month period and pays the disputed benefits to the participant, the alternate payee might be able to obtain a modification of that order to make it qualified during the 18-month period and force the plan to make double payment. To avoid this problem, administrators may wish to delay final determinations until they are satisfied that no further modifications to the order will be sought. Note that if a qualified order is not obtained until after the 18-month period and after amounts are paid to someone other than the alternate payee, an alternate payee may have a claim against the *participant* for back payments, even though the plan may be protected from claims for retroactive payments.

III. Special QDRO Considerations for Defined Benefit Plans

A. How Much Must Be Paid?

- 1. State Law Issues.*** It is often very difficult to calculate the value or amount of the pension to be paid to an alternate payee under a Separate-Interest QDRO. First, the parties must figure out, as a matter of state law, what portion of the pension is a “retirement” benefit rather than a non-retirement benefit not subject to division. *See, e.g., Berrington v. Berrington*, 17 E.B.C. 2394 (Pa. S.Ct. 1994) (non-employee spouse’s marital share of employee spouse’s pension distribution must be based on employee’s salary at time of marital separation); *Dolan v. Dolan*, 14 E.B.C. 2114, 78 N.Y. 2d 463, 577 N.Y.S. 2d 195, 583 N.E. 2d 908 (Ct. App. N.Y. 1991) (lower court properly apportioned disability pension into retirement-type benefits based on service (marital property) and disability benefits based on injury (non-marital property)). The parties must then decide what portion of that pension is attributable to the marriage within the meaning of local law. *See, e.g., Humble v. Humble*, 805 S.W. 2d 558 (Tex. Ct. App. 1991); *In re Cope*, 805 S.W. 2d 303; 13 E.B.C. 1700 (Mo. Ct. App. 1991); *In re Marriage of White v. White*, 18 E.B.C. 2257 (Minn. Ct. App. 1994). In some states, the parties cannot obtain an order that applies to future contingent rights under the pension plan (*e.g.*, plant shutdown benefits or early retirement benefits). *See, e.g., In re Keedy*, 14 E.B.C. 1103 (Sup. Ct. Mont. 1991) (present value cannot assume future contingencies will occur; spouse given choice between present accrued

benefit and future payment when contingencies occur); *Hodowal v. Hodowal*, 18 E.B.C. 1500 (Ind. Ct. App. 1994) (participant's right to a future early retirement subsidy not marital property that can be awarded in a QDRO). In other jurisdictions, an award of future contingent rights may be permissible. *See, e.g., Laing v. Laing*, 741 P.2d 649; 8 E.B.C. 2542 (Alaska Sup. Ct. 1987) (contingent benefits are part of marital estate, but QDRO cannot be entered until contingencies are satisfied). The participant's entire pension benefit is subject to attachment pursuant to a QDRO, not just his monthly retirement income. *In re Rife*, 529 N.W.2d 280 (Iowa 1995).

2. ***Valuation Issues.*** A QDRO directed to a defined benefit plan must specifically indicate the date as of which the participant's accrued benefit and the alternate payee's share of the accrued benefit are to be determined. A typical date to include in the order is the date of divorce. The parties must then figure out how much of that accrued benefit will be assigned to the alternate payee. Some QDROs award the alternate payee a fixed percentage (*e.g.*, 50 percent) of the accrued benefit as of the relevant determination date. Other QDROs divide the benefit by awarding a certain percentage of the participant's total accrued benefit that was accrued during the marriage (in other words, the portion that was "attributable to the marriage"). To do that, the participant's total accrued benefit as of the applicable measuring date would be multiplied by a fraction, the numerator of which is the number of years of the parties' marriage and the denominator of which is the participant's years of employment through the measuring date. Which method is appropriate will depend on the wishes of the parties as well as what applicable state law will allow to be allocated. *See Maslen v. Maslen*, 14 E.B.C. 2105 (Idaho Sup. Ct. 1991) (upholding division of benefits based on difference in value between date of marriage and date of divorce and not on basis of years of marriage and years of employment). A QDRO should also indicate whether the benefit is to be recalculated to take into account future accruals, such as early retirement subsidies, plant shutdown benefits, or other contingent accruals under the plan.
3. ***Section 415 Limitations.*** Code section 415 prescribes limitations on the annual benefit payable under a defined benefit plan and the annual additions to a defined contribution plan. If benefits are assigned to an alternate payee under a QDRO, the parties do not have separate benefit limitations. All of the participant's benefits are aggregated, including benefits assigned under a QDRO, and count in applying the limitations. *See* Treas. Reg. §1.401(a)-13(g)(4)(iv). QDROs should anticipate problems created by these rules. For example, if the defined benefit limitation would be exceeded, which benefit will be cut back to comply?

If the employer maintains an excess benefit plan for excess section 415 amounts, should the employee's qualified plan benefit always be reduced before the alternate payee's?

4. ***PBGC Premium Payments.*** A qualified defined benefit plan must pay premiums to the Pension Benefit Guaranty Corporation (PBGC) based on the number of participants covered by the plan at a particular time. Although alternate payees are treated as beneficiaries under ERISA, a defined benefit plan does not owe a separate premium payment for the alternate payee. ERISA §206(d)(3)(J).

B. What Happens When the Participant or Alternate Payee Dies?

The parties to QDROs often neglect to provide for what will happen when the participant or alternate payee dies. However, it is essential for administrators to know what to do when deaths occur. Sometimes orders address what will happen when the participant dies before benefit commencement. In other cases, orders address what happens if the alternate payee dies before benefit commencement. But very few orders address all of the possibilities on the first submission.

1. What Happens When the Participant Dies?

- a. ***Stream-of-Payment QDROs.*** Upon the participant's death, any current benefit payments to the alternate payee under a Stream-of-Payment QDRO stop. The plan then determines, based on the form of payment elected and the availability of any death benefit, who is entitled to any death benefits under the plan. If the alternate payee is the spouse or former spouse of the participant, technical rules apply to determine whether the alternate payee will be treated as the participant's "surviving spouse" for survivor annuity payments, as described above.
- b. ***Separate-Interest QDROs.*** Payments are not typically in pay status to participants when Separate-Interest QDROs are issued. Therefore, this type of QDRO will commonly name an alternate payee who is the spouse or former spouse of a participant as the "surviving spouse" for all or a part of the participant's benefit. One reason for this is to provide the alternate payee with survivorship rights as to the participant's benefit remaining after the assignment *in addition to* the benefit that has already been assigned outright to the alternate payee. However, many parties to a Separate-Interest QDRO name the alternate payee as a surviving spouse without meaning to provide additional survivorship protection. Typically, they fear that the alternate payee's separate interest will disappear when the participant dies. Sometimes, the

parties fear that even after the alternate payee commences a benefit under a Separate-Interest QDRO, the payment would stop if the participant were to die before the alternate payee. This is not necessarily true. Under a Separate-Interest QDRO, the alternate payee is given the right to elect to have his or her portion of the benefit paid in any form permitted under the plan. If the alternate payee elects to have that benefit paid as a single life annuity, payments will, under the terms of the plan, continue for the alternate payee's lifetime, despite the participant's death. In any event, the order could be written clearly to provide that if the participant were to die before the alternate payee, the portion assigned to the alternate payee remains payable to the alternate payee. This would eliminate the need to name the alternate payee as the survivor for a survivor annuity. If the parties want to provide additional survivorship protection under a Separate-Interest QDRO, they could then name the alternate payee as the surviving spouse for all or part of the participant's remaining benefit, after the assignment to the alternate payee.

2. *What Happens When the Alternate Payee Dies?*

- a. *Stream-of-Payment QDRO.*** If the alternate payee under a Stream-of-Payment QDRO dies before the participant, the participant's benefit payments typically return to the level they were at before the QDRO was issued. Sometimes, however, an alternate payee would like to have the ability in a Stream-of-Payment QDRO to name a beneficiary upon his or her death before the participant's death. This is extremely difficult to do with Stream-of-Payment QDRO. The nature of the alternate payee's interest in this type of QDRO is limited to a right to payments. The alternate payee does not have a separate interest that could be left to a beneficiary. Therefore, if the parties wish to consider beneficiary designations under a Stream-of-Payment QDRO, they should reconsider the type of order they really want to obtain.
- b. *Separate-Interest QDRO.*** If a Separate-Interest QDRO is issued, the parties intend for a separate interest to be awarded to the alternate payee. That interest is intended to be payable to the alternate payee without regard to when or whether the participant elects to commence benefits. When the alternate payee dies, therefore, the parties need to know what happens to that interest — will it be paid to the alternate payee's beneficiary or estate or will it revert to the participant or the participant's beneficiary or estate?

- (i) ***Benefits in Pay Status.*** If payments under a Separate-Interest QDRO had commenced at the alternate payee's death, the form of payment will dictate what happens. For example, if the alternate payee elected to be paid as a single life annuity and died after payments started, nothing further would be paid from the plan out of that alternate payee's interest. Also, the participant would not get that interest back. On the other hand, if the alternate payee elected to have benefits paid as a 10-year term-certain and life annuity, payments could continue to the alternate payee's beneficiary without violating the terms of the plan. *See, e.g.,* 130 Cong. Rec. H8761-8762, example 2 (Aug. 9, 1984) (statement of Rep. Clay, which includes his examples of how the QDRO rules are supposed to work).
- (ii) ***Benefits Not in Pay Status.*** If benefits are not in pay status under a Separate-Interest QDRO at the time of the alternate payee's death, there is some disagreement over what should happen. For example, assume that, under a Separate-Interest QDRO, an alternate payee elected to have benefits paid as a single life annuity benefit. If the alternate payee were to die before starting annuity payments, could payments be made to the alternate payee's beneficiary? The most logical approach is to treat the alternate payee as a single participant. If the plan would not pay a pre-retirement death benefit to a single participant's beneficiary, nothing would be payable to an alternate payee's beneficiary. Further, because the interest was assigned outright to the alternate payee, the participant's benefit would not necessarily be increased due to the alternate payee's death. Instead, the alternate payee's benefit would be forfeited under the plan, just as the benefit of a single participant who died before payments started would be forfeited. To avoid this forfeiture, the QDRO could have provided that the alternate payee's interest would be contingent upon the alternate payee's survival until either party started benefit payments.
- (iii) ***Payments to an Alternate Payee's Beneficiary — Other Views.*** Many practitioners dispute whether an alternate payee may name a beneficiary (particularly a non-alternate payee beneficiary) under a Separate-Interest QDRO. Under the literal statutory provisions, the only type of benefit

assignment in the domestic relations context is one to an “alternate payee” under a QDRO. There is an example in the legislative history to the original QDRO provisions where payments are made to an alternate payee’s son, but the son could clearly have been an alternate payee in his own right. *See* 130 Cong. Rec. H8761-8762, example 2 (Aug. 9, 1984) (statement of Rep. Clay, which includes his examples of how the QDRO rules are supposed to work). Therefore, it could be argued that a reasonable reading of the statute and legislative history is that a QDRO can only allow for payments to beneficiaries who are also alternate payees. A more logical approach is to allow alternate payees to be treated as single participants with their own plan interests. That way, once benefits are assigned to alternate payees under Separate-Interest QDROs, they could name beneficiaries just as other single plan participants. This type of outright division of a pension benefit is permissible under the statutory terms — a QDRO is an order that “creates or recognizes the existence of an alternate payee’s right to ... receive all or a portion of the benefits payable with respect to a participant.” Code §414(p)(1)(A)(i); ERISA §206(d)(3)(B)(i)(I). As interpreted by the IRS regulations, this includes a segregated interest of an alternate payee. *See, e.g.*, Treas. Reg. §1.401(a)-13(g); Prop. Treas. Reg. §1.401(a)(9)-1, Q&A H-4; Prop. Treas. Reg. §1.401(a)(9)-2, Q&A-11. IRS regulations also provide that an alternate payee’s right to name a beneficiary under a QDRO cannot be greater than the participant’s right to name a beneficiary with respect to the participant’s benefit. Treas. Reg. §1.401(a)-13(g)(4)(iii)(B). The inference from this regulation is that it is permissible to give the alternate payee the *same* right to name a beneficiary as the participant. Finally, the alternate payee’s separate interest has an economic value that formed an integral part of the economic division of assets that occurred on the divorce. If that value is returned to the participant, the alternate payee (or the alternate payee’s estate) would lose the benefit of that property division.

IV. Special QDRO Considerations for Defined Contribution Plans

A. How Much Must Be Paid?

1. ***Stream-of-Payment QDRO.*** Stream-of-Payment QDROs are not often issued against defined contribution plans if the participant's payments are not in pay status because the amount in a participant's account will vary over time with investment experience. If the participant assigns an interest in 50 percent of the plan payments, "if, as, and when" the participant receives payment, the alternate payee will never know how much was awarded.
2. ***Separate-Interest QDRO.*** Separate-Interest QDROs are commonly issued in the defined contribution context.
 - a. ***Valuation Issues.*** To obtain a proper valuation, the parties must select one of the plan's valuation dates. Many QDROs award a certain percentage to the alternate payee "as of the date of divorce." A problem will arise if the date of the divorce is not a plan valuation date. Many plans now value benefits daily; however, many plans value benefits less frequently (*e.g.*, monthly or quarterly).
 - b. ***Allocation of Funds.*** Once the alternate payee's interest is assigned and valued, the administrator must figure out how to allocate the funds to the alternate payee. Under Code section 72(m)(10), after-tax employee contributions are allocated on a *pro rata* basis between the parties. There is no clear guidance on how to allocate other funds. Often, plans will include pre-tax elective contributions under Code section 401(k), matching employer contributions, and other non-elective contributions. These amounts may be subject to varying withdrawal restrictions and/or investment restrictions, depending on the nature of the contributions. Plans must anticipate how QDRO-assigned funds will be allocated to alternate payees. Lacking a QDRO provision on this point, the plan should adopt administrative presumptions dictating how the funds will be allocated.
 - c. ***Investment of Funds.*** Generally, QDROs are not as specific as they should be concerning how the alternate payee's funds will be invested, pending distribution to the alternate payee. As a technical matter, nothing in the Code or ERISA requires that alternate payees be given investment control over assigned funds. However, if the participant continues to invest the alternate payee's benefits after the divorce, the participant might be considered a fiduciary under ERISA with respect to the alternate payee's funds (*i.e.*, one who exercises discretionary authority over investment of plan assets, as defined in ERISA section 3(21)(A)).

B. *Timing of Distributions Under Separate-Interest QDROs/When will Payments Start?*

1. ***General Rules.*** A Separate-Interest QDRO will typically provide that payments to the alternate payee will begin any time elected by the alternate payee on or after the *participant's* attainment of earliest retirement age, regardless of whether the participant has then retired or separated from service. *See* Code §414(p)(4); ERISA §206(d)(3)(E). Some QDROs provide that the alternate payee cannot begin receiving payments until the participant begins. The QDROs may even go further and restrict the alternate payee's form of payment. If so, the plan may commence payment to the alternate payee in the form specified in the QDRO without obtaining the alternate payee's consent to the distribution (subject to proper notifications under the mandatory withholding rules applicable to QDRO payments). *See* Treas. Reg. §1.411(a)-11(c)(6). Otherwise, consent may be required under Code section 411(a)(11) if the value of the benefit exceeds \$5,000. Regardless of the time of payment, the qualification rules governing plan distributions are not violated solely because payments are made under a QDRO even when they could not otherwise be made to the participant. Code §414(p)(10). For example, the prohibitions on distributing pre-tax elective contributions in a section 401(k) plan are not applicable to QDRO payments.
2. ***Application of "Earliest Retirement Age" Definition in Defined Contribution Plan Context.*** As noted above, if a defined contribution plan allows participants to obtain in-service distributions under certain circumstances, the earliest retirement age is the earliest age at which the *participant* could receive a distribution under those circumstances. If part of the participant's benefit is available due to financial hardship, the literal "earliest retirement age" definition would require that the *participant* incur the financial hardship so the *alternate payee* could obtain the distribution. Contrary to this literal reading, many plans interpret the rule to mean that the hardship withdrawal standards are applied by reference to the alternate payee's facts.

C. *What Happens When the Participant or Alternate Payee Dies?*

As indicated above, when either of the parties to the QDRO dies, the plan administrator needs to know what to do in many different situations. What if the alternate payee dies before the participant and before benefit commencement? What if the participant had commenced benefits but not the alternate payee? What if the alternate payee had commenced benefits but not the participant? These and other concerns should be carefully planned for in a properly designed QDRO.

1. ***What Happens When the Participant Dies?*** If a Separate-Interest QDRO is directed to a defined contribution plan, there is rarely, if ever, a need to name the alternate payee as a surviving spouse. Usually in a QDRO directed to a defined contribution plan, the parties are simply trying to award a particular sum of money to the alternate payee that is payable currently. The account represents a single “pot” of money that they are dividing, almost like a bank account. They usually mean to split the interest in two and to have each control the separate portion. Naming an alternate payee as a surviving spouse contradicts that principle. The term “surviving spouse” gives the person so designated certain legal rights. *See* Code §414(p)(5); Treas. Reg. §1.401(a)-13(g)(4). For example, a participant may not name a beneficiary other than a surviving spouse without the surviving spouse’s written consent. If a Separate-Interest QDRO names the alternate payee as the surviving spouse, the participant could not name anyone else as a beneficiary even as to the participant’s portion of the benefit. Further, upon the participant’s death, the alternate payee would have a right, as the surviving spouse, to all or part of the remaining participant’s account. If the parties to a QDRO do not intend to provide for those rights, they should not use (or misuse) the term “surviving spouse.”
2. ***What Happens When the Alternate Payee Dies?*** If a Separate-Interest QDRO is issued, that means that the parties intend for a separate interest to be awarded to the alternate payee. That interest is usually intended to be payable to the alternate payee without regard to when or whether the participant elects to commence benefits. When the alternate payee dies, therefore, the parties need to know what happens to the alternate payee’s separate interest — will it be paid to the alternate payee’s beneficiary or estate, or will it revert to the participant or the participant’s beneficiary or estate? As indicated above, the issue of whether an alternate payee may name a beneficiary is not entirely clear. In particular, it is not clear whether an alternate payee may name a non-alternate payee beneficiary. As a practical matter, however, defined contribution plans will typically allow alternate payees to name beneficiaries for their interests if a Separate-Interest QDRO has been issued. This right is generally treated as the same as that of a single plan participant.

V. Federal Income Tax Considerations for QDROs

A. Income Tax Consequences of QDRO Payments.

If QDRO payments are made to a non-spouse alternate payee (i.e., a child or other dependent of the participant), the amounts are includable in the participant’s income for federal income tax purposes. *See* IRS Notice 89-25, 1989-1 C.B. 662,

Q&A-3; Code §402(e)(1)(A). According to IRS regulations, non-spousal distributees of QDRO payments are not permitted to roll over the distributed amounts; therefore, mandatory 20 percent income tax withholding under Code section 3405 does not apply to the distributions. Treas. Reg. §1.402(c)-2, Q&A-12(b). Instead, the amounts are subject to voluntary federal income tax withholding under Code section 3405 and are taxable to the participant. If QDRO payments are made to an alternate payee who is the spouse or former spouse of the participant, the payments are taxable to the alternate payee and not the participant. See Code §402(e)(1)(A); Treas. Reg. §1.402(c)-2, Q&A-12(a); IRS Notice 89-25, 1989-1 C.B. 662. See also IRS private letter ruling 8944045 (8/9/89) (Code §402(a)(9) overrides community property rules); IRS private letter ruling 8907062 (11/28/88); IRS private letter ruling 8511099 (12/21/84). Thus, if the distribution otherwise qualifies as an “eligible rollover distribution” under Code section 402(c), the taxable portion of the distribution is subject to the mandatory federal income tax withholding requirements, unless the alternate payee elects to make a direct rollover contribution. If the distribution does not qualify as an “eligible rollover distribution,” voluntary withholding would apply and the alternate payee could elect not to have federal income tax withholding applied.

Plan administrators should also remember that because these rollover rules apply to alternate payees, administrators are required to provide alternate payees with a notice describing their rights. If an administrator fails to provide that notice and an alternate payee is damaged, the alternate payee might sue. Generally, this claim is not allowed under ERISA. See *Fraser v. Lintas*, 56 F.3d 722 (6th Cir. 1995). But there might be state law fraud claims in cases involving material misrepresentations. See *Farr v. U.S. West*, 58 F.3d 1361 (9th Cir. 1995).

B. Early Distribution Tax.

Code section 72(t) imposes a 10 percent additional income tax on early distributions from qualified plans. The tax generally applies to pre-age 59½ distributions. Under a special exception, though, the 10 percent tax does not apply to any payments made pursuant to a QDRO. Code §72(t)(2)(C). If the alternate payee rolls over a distribution to an IRA, the early distribution tax exception for QDRO payments will not apply to subsequent IRA distributions. See Code §72(t)(3)(A). This point was “clarified” by TAMRA. See S. Rep. No. 445, 100th Cong., 2nd Sess., at 178 (1988).

VI. Qualified Medical Child Support Orders (“QMCSOs”)

A. What is a “QMCSO?”

- 1. QMCSO Technical Definition.*** A QMCSO is a medical child support order that creates or recognizes the existence of an alternate recipient’s

right to, or assigns to an alternate recipient the right to, receive benefits for which a participant or beneficiary is eligible under a group health plan. ERISA §609(a)(2).

- a.* The order must be a judgment, decree or order (including the approval of a settlement agreement) issued by a court of competent jurisdiction. ERISA §609(a)(2)(B).
- b.* The order must be one of two kinds of orders:
 - (i) an order that provides for child support with respect to a group health plan participant's child or provides for health benefit coverage for such a child; is made pursuant to a state domestic relations law (including a community property law) and relates to benefits under the group health care plan; or
 - (ii) an order that enforces state laws relating to Medicaid benefits. ERISA §609(a)(2)(B).

- 2. ***Definition of Alternate Recipient.*** An “alternate recipient” means the child of a participant in the group health plan who is recognized under a medical child support order as having a right to enrollment under a group health care plan. ERISA §609(a)(2)(C). The QMCSO provisions do not specifically define the term “child” for these purposes. However, other related provisions suggest a broad interpretation of the term. *See* Social Security Act §1908(a)(1), 42 U.S.C. §1396g-1(a)(1) (Medicaid provision); ERISA §609(c).

Once a child qualifies as an alternate recipient, the child is treated as a participant under an ERISA plan for purposes of reporting and disclosure obligations. ERISA §609(a)(7)(B). The purpose of this designation is to require the plan to provide the alternate recipient with all of the required disclosures under the health plan that are otherwise only provided to “participants.” *See, e.g.* DOL Reg. §2520.104b-1(a). Thus, alternate recipients (or their representatives) should be provided with copies of summary plan descriptions and other related information just as the plan would provide to a participant.

B. General QMCSO Requirements

- 1. ***Order of Court of Competent Jurisdiction.*** ERISA §609(a)(2)(B) requires that the proposed order must be issued by a court of competent jurisdiction. A QMCSO can not be issued by administrative agency. If a document issued by a state court is signed or sealed by a judge and the

jurisdiction of the state court is apparent from the case caption or a particular paragraph of the order, most administrators will take it for granted that the order was made pursuant to state domestic relations law. Plan administrators are not required to verify that a state authority correctly identified an individual as a spouse, former spouse, child, other dependent or surviving spouse. The state authority may be relied on. *See* DOL Advisory Opinion 92-17A (Aug. 21, 1992).

Similar but separate rules apply to National Medical Support Notices (NMSNs). The NMSN is a standardized medical child support order that is to be used by State child support enforcement agencies to enforce medical child support obligations. The Department of Labor and the Department of Health and Human Services adopted regulations on December 27, 2000, implementing the NMSN provisions of the Child Support Performance and Incentive Act of 1998 (CSPIA). (These regulations appear at 29 CFR § 2590.609-2 and 45 CFR § 303.32.) CSPIA also requires plans sponsored by churches and State and local governments to provide benefits in accordance with the requirements of an appropriately completed notice. Agencies generally had to start using these notices on October 1, 2001. NMSNs are standardized forms and this should make it easier to review than a QMCSO – if all the parts are filled out correctly, the order is deemed qualified.

2. *Items That Must Be Included in Every QMCSO.*

- a. *Who Must Be Covered?*** A qualified order must include the name and last known mailing address of the participant and alternate recipient. ERISA §609(a)(3)(D). According to the legislative history of the QDRO requirements, a QDRO affecting a pension plan should not be disqualified merely because it does not include this information, if the plan administrator has reason to know the information independently of the order. S. Rep. No. 575, 98th Cong., 2nd Sess., at 20. A similar rule ought to apply in the QMCSO context even though QMCSO legislative history did not include the same specific statement.

THE SEVEN KEY QUESTIONS FOR A QMCSO

1. Who must be covered?
2. Which plan must provide coverage?
3. What type or level of coverage must be provided?
4. Who will pay for coverage?
5. How much must be paid for the coverage?
6. When does coverage start?
7. When does coverage stop?

The administrator should also be certain the order names the responsible party for the child, since the plan administrator will be required to forward all plan information and claims information to the responsible party on behalf of the child.

- b. *Which Plan Must Provide Coverage?*** Every QMCSO must specifically identify the name of the plan to which the order relates. ERISA §609(a)(3)(D). Proposed orders should be rejected if they do not specify which plan and type of coverage will be required, particularly where employers might offer several different types of options, such as HMOs, PPOs or indemnity coverage options.
- c. *What Type or Level of Coverage Must Be Provided?*** Even if the specific employer plan has been identified, the parties need to consider what level of coverage will be made available. Some plans might have several different coverage options (*e.g.*, high-option coverage versus low-option coverage). If the covered participant is under one type of coverage under the plan, will the QMCSO require that the child be covered under the same option or a different option? To be qualified, the QMCSO must *clearly specify* “a reasonable description of the type of coverage to be provided by the plan. . . or the manner in which such type of coverage is to be determined.” ERISA §609(a)(3)(B).
- d. *Who Will Pay for Coverage?*** The QMCSO provisions are silent on the issue of who must pay for an alternate recipient’s coverage under the plan. One reasonable assumption is that the legislators who drafted this provision anticipated that the QMCSO would require that the participant pay for the coverage. After all, the plan is being ordered by a court to provide coverage for a participant’s child. This could have arisen, because, absent the order, the participant is unwilling to provide for the coverage.

However, under some orders, it might be that the custodial parent has to pay for the coverage even though the only coverage available is through the non-custodial parent’s employer. In these situations, the order should anticipate how the premium payment will be made.

- e. *How Much Must Be Paid for Coverage?*** If a plan provides for payment, it may allow for payments to be made only on an after-tax basis. Alternatively, the plan may be part of a cafeteria plan that allows employees to pay for their health coverage on a pre-tax basis.

Note that plans probably cannot charge alternate recipients the full cost of medical coverage if the employee is otherwise covered by the plan. Rather, the plan is probably limited to the charge for additional dependent coverage, if any. Although there is no specific rule on this in the statute or legislative history, such a rule may be inferred from the clear intent behind the requirement of providing coverage for which the participant is otherwise eligible under the plan.

If there is no additional charge for the child's coverage, the plan may simply have to amend its records to reflect the child's QMCSO coverage.

f. When Does Coverage Start? Most QMCSOs require coverage to be provided upon receipt of the order. However, a plan administrator will have to take time to analyze the order to make sure it complies with the QMCSO rules and other plan provisions governing health coverage. In these cases, plans must be prepared to deal with the possibility of extending coverage - including retroactive coverage if necessary - for a period prior to a final determination of an order's qualified status. This same issue could arise where the proposed medical child support order, by its terms, expressly applies retroactively.

g. When Does Coverage Stop? For an order to be a QMCSO, the plan administrator must also be able to determine when payments to the alternate recipient will stop. Under the statutory ERISA provisions, that means that the order must clearly specify "the period to which such order applies." ERISA §609(a)(3)(C). For example, coverage might only be required for as long as the participant is employed, or if earlier, until the child reaches age 18. Once the child reaches age 18, the plan could stop providing coverage under the QMCSO provisions, subject to the alternate recipient's ability to continue coverage under the COBRA continuation rules.

3. *Items That May Not Be Included in a QMCSO.* There is one basic requirement concerning provisions that may not be included in a qualified order. Under ERISA, a QMCSO cannot "require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan, except to the extent necessary to meet the requirements of a law relating to medical child support described in [Section 1908]." ERISA §609(a)(4). Under a Medicaid-related order issued under the Section 1908 legislation, a QMCSO may only require enrollment under family health

coverage for which the employee is otherwise eligible. Social Security Act §1908(a)(3)(A), 42 U.S.C. §1396g-1(a)(3)(A). There is no similar express prohibition against a Section 1908 order requiring something not otherwise allowed under the plan. However, such a prohibition may reasonably be inferred. After all, the intent of the QMCSO provisions is merely to provide coverage that is otherwise available under the plan to participants' children who are not otherwise covered.

4. *Miscellaneous QMCSO Issues*

- a. *What is the Interplay Between the ERISA Pre-emption Rules and the QMCSO Requirements?*** There is an exception to ERISA pre-emption for QMCSOs. ERISA §514(b)(7). However, Congress was very specific in delineating provisions of state law that are—and are not—preempted. For example, OBRA '93 mandated that states adopt conforming legislation under the Medicaid rules to allow for enrollment of certain children under private employer group health plans. (At least 17 states have enacted these laws.) State laws which are enacted as part of this requirement are preempted by ERISA. However, court orders enforcing these laws—that is, QMCSOs—are not preempted. ERISA §502(a)(7). Thus, states may require ERISA-covered group health plans to comply with state court orders enforcing Medicaid related QMCSOs even though plans technically do not have to comply with those rules in the absence of a court order.
- b. *How do a Plan's Late Enrollment Provisions Relate to QMCSO Coverage?*** It is unclear whether a plan could impose a restriction on coverage, such as an evidence of insurability requirement. The Section 1908 legislation provisions may permit such a restriction and ERISA appears to contain some contradictory language on the issue. *See* Social Security Act §1908(a)(3)(A), 42 U.S.C. §1396g--(a)(3)(A) and ERISA §609(a)(4). But it may not be worth the trouble of trying to exclude coverage for otherwise eligible children as in any lawsuit a judge would be likely to resolve the ambiguity in favor of the child.
- c. *What are the Income Tax Consequences of Providing Coverage Under a QMCSO?*** Generally, the coverage provided as well as the benefits paid to or on behalf of an alternate recipient are not taxable, just as is the case with other employer-provided health coverage to participants and their dependents. There is, however, one notable exception. QMCSOs issued under Section 1908 legislation may extend specifically to children who cannot be

claimed as dependents on a parent's federal income tax return as well as children born out of wedlock. These children may not qualify as dependents under the Code requirements. Code Section 152. If a QMCSO requires a plan to provide coverage to a child who does not qualify as a dependent under the Code, the coverage provided is generally taxable to the participant. *See, e.g.*, IRS private letter ruling 9109060 (Dec. 6, 1990). This means that the participant cannot provide for the coverage on a pre-tax basis under a cafeteria plan and that the participant must be taxed on the value of the coverage. Although this seems like a harsh result, especially since a court is ordering that coverage be provided, the only guidance on similar issues provides that the coverage is taxable.

d. How do the COBRA Continuation Coverage Requirements Relate to the QMCSO Rules? There is a great deal of interaction between the COBRA rules and the QMCSO rules. Under COBRA, participants, covered spouses, and dependent children are entitled to continue group health coverage for certain periods after the occurrence of certain "qualifying events." *See* ERISA §§601-608; Code §4980B. If the event is an employee's termination or reduction in hours of employment, the COBRA coverage period is generally up to 18 months from the event. If the event is an employee's divorce or legal separation or a dependent child ceasing to be a dependent child under the generally applicable plan terms, the period of coverage is generally up to 36 months from the event. There are many technical notice and other requirements associated with the COBRA rules that are beyond the scope of this discussion. Nevertheless, any time a QMCSO is issued, plan administrators and the parties involved should carefully review the various issues that could arise.

(i) *Is an alternate recipient under a QMCSO treated like all other dependent children?* Because QMCSO rules and requirements become part of the generally applicable requirements of the plan, courts will likely consider alternate recipients to be the same as other dependent children who are otherwise covered under the plan. This status becomes significant in situations where after a QMCSO is entered, the participant is terminated. In that situation, the participant and the alternate recipient both have a right to continue coverage. But presumably, even though the QMCSO would require a longer term, the right

to continued coverage would expire for both parties at the end of the 18-month COBRA period.

Another relevant aspect of the alternate recipient's status as a dependent child for COBRA purposes occurs when the QMCSO expires by its terms and the child loses coverage under the plan. The child's loss of coverage could be viewed as arising due to the child's ceasing to be eligible under the plan terms—a qualifying event. This is probably most relevant if the child loses eligibility after a participant terminates employment. Under the COBRA multiple qualifying event rules, the 18-month COBRA period is extended to 36-months if another event occurs during the original 18-month period. ERISA §602(2)(A)(ii).

- (ii) ***If a QMCSO is issued in connection with a divorce or legal separation, is the QMCSO coverage in lieu of or in addition to COBRA coverage?*** One approach would require the alternate recipient choose COBRA coverage or waive that coverage in favor of QMCSO-based coverage. Another approach would allow the alternate recipient to take the better of the two and when that ran out, continue with the other if it was still in force. Which alternative is the proper approach is unclear and will have to await judicial or administrative interpretation. Until that time, plan administrators should consult with their advisors in determining the proper approach to take.
- (iii) ***Are alternate recipients better off taking QMCSO coverage or COBRA coverage?*** To determine whether to take QMCSO coverage or COBRA coverage there are a number of factors to consider. The alternate recipient should consider the restrictions under COBRA concerning cost and duration of the coverage. But the alternate recipient should also be aware that a COBRA enrollment may be retroactive while QMCSO coverage may not. These various concerns must be weighed carefully in the context of the overall family relationship controversy before attorneys try to obtain child support orders for children in lieu of COBRA coverage.

C. Practical Considerations for Alternate Recipients or Participants.

The following practical suggestions can help reduce misunderstanding where the alternate recipient thinks that a QMCSO will provide a certain type of benefit and

the order either does not or cannot deliver on that promise. (These issues should also be considered in preparing QDROs for pension and 401(k) plans.)

1. ***Ask About the Facts.*** Before obtaining a medical child support order against a plan, verify certain facts about the plan and the various rights and limitations on coverage. These facts include finding out what type of plan is involved and determining the basic plan and benefit information. It is also advisable to put the plan administrator on notice that a QMCSO is being sought. That way, the administrator will know to look for the order and the alternate recipient's right to coverage can be protected as soon as possible after the QMCSO is submitted and approved.
2. ***Be Able to Explain in Plain English What the QMCSO is Trying to Accomplish.*** Once the particular facts concerning the participant and the participant's health benefits have been determined, the most important practical suggestion that could be followed in preparing a qualified order is for the parties to explain *in plain English*, not legalese, what they want to accomplish by a QMCSO. At the earliest stages of obtaining an order directed to a health plan, the attorney representing the alternate recipient should decide what the order is supposed to do, without regard to whether the law would authorize the order. The legal requirements come next. But if the parties do not know what they want to do with a QMCSO, it will be nearly impossible to address all of the legal concerns.
3. ***Find Out if What the Parties Want to Do Can Be Done.*** Once the basic plan information has been identified and the parties know what they want to do, the next step is to see if, in fact, it can be done. At this point, it is essential to know what legal requirements will apply. For example, a custodial parent might want the alternate recipient to be covered without a deductible. But a plan cannot be required under the law to provide such a benefit under a QMCSO if it is not otherwise available under the plan.
4. ***Submit Proposed Orders in Draft Form to the Plan Administrator for Approval.*** It is always a good idea to submit a proposed order in advance to the plan administrator for approval. Once an order has been issued by a court, it may be very difficult or time-consuming (and expensive) to get the court to amend the order. If a plan administrator has already approved an order as to form, there will be no need to go to court a second time.
5. ***Have the Order Entered as Soon as Possible After the Administrator Has Approved the Form.*** Once a plan administrator has granted preliminary approval of an order, there should be as little delay as possible in having the order entered by the court and submitted for the plan administrator's formal approval. This is particularly important if medical coverage is needed immediately. Also, there may be some delay after an

order is submitted to a plan administrator for it to be reviewed. For example, many plans make QMCSO determinations at regularly scheduled administrative committee meetings. If an order is submitted in January, it may not even be considered until the following March or April administrative committee meeting. Therefore, a prompt submission will likely yield a prompt response.

6. ***Communicate With the Plan Administrator.*** The final suggestion to keep in mind is that the parties seeking a QMCSO should communicate with the plan administrator. Every plan administrator must be concerned about keeping its exposure to significant medical claims under control. At the same time, no plan administrator wants to get bogged down in endless legal proceedings over a QMCSO.

D. Practical Considerations for Plan Administrators.

Plan administrators must understand that the ultimate goals of QMCSO procedures are to resolve QMCSO determinations on a timely basis and to minimize the extent to which the plan and the plan administrator become involved in a domestic relations or child support dispute.

1. ***Preparing Plan Provisions.*** A plan administrator should make sure that the operative plan provisions allow for QMCSO administration. ERISA requires plans to include QMCSO provisions, but many plans have not been updated to include these rules. There are no specific penalties for a health plan's failure to include the QMCSO provisions. Nevertheless, to avoid having QMCSO ambiguities resolved against a plan without QMCSO provisions, it is strongly advisable to amend the plan.

Two types of QMCSO procedures should be established by every plan. First, the plan must establish procedures that are communicated externally to those seeking qualified orders. Second, the plan must establish internal review procedures for handling QMCSO determinations and issuing qualified orders.

- a. ***External Plan Procedures.*** The first step in considering any medical child support order is to send the plan procedures to the parties involved. ERISA requires that as soon as practicable after receipt of an order, the administrator must send a copy of the QMCSO procedures to each of the parties. ERISA §609(a)(5). These procedures need not be sent along with an immediate decision as to an order's qualified status. Rather, QMCSO procedures basically inform the parties of the type of things that the administrator will look for in any order to determine whether it is qualified. Even if an order is submitted in proposed form, a

good set of procedures will help focus the parties on the essential items that must be in a qualified order.

- b. *Internal Review Procedures.*** QMCSO administration often involves more individuals than just the plan administrator who receives the order. Other individuals who the plan administrator might need to communicate with include, the life insurance plan administrator, a paying agent (such as an insurer, third party administrator, or trustee), and possibly legal counsel.
- c. *QMCSO Review Period.*** There are no fixed rules on how long it should take to review an order for QMCSO compliance. The statutory 18-month review period for QDROs does not apply to QMCSO determinations. Instead, the QMCSO rules merely require that a determination be made within a reasonable period of time. ERISA §609(a)(5)(A)(ii).

- 2. *Communicating Essential Information.*** The plan administrator should be in a position to facilitate the communication of essential information. Because the plan administrator knows what type of provisions it will take to qualify or disqualify an order, he or she should explain all of the necessary information as clearly and fully as possible. Certainly, the plan administrator does not want to prefer one party over the other. But if an order does not qualify, the plan administrator should be as specific as possible about what is wrong and what it will take to fix the order.

In a nutshell, the purpose of all communication from the plan administrator should be to answer questions that are asked in a complete and accurate manner, review the order or proposed order on a timely basis, indicate errors where they exist and administer a QMCSO in accordance with its terms. The plan administrator should address all communications concerning the order to the participant, and the alternate recipient's representative.

- 3. *Finding Alternative Solutions.*** Sometimes an order is submitted to the plan administrator and, except for a few minor points, the order is qualified. The parties might then indicate that the court will not entertain any modifications of the order. Or, the circumstances may be such that it is impracticable to obtain a modification. Nevertheless, all sides agree that they intend for the order to be issued and they agree on all terms. Depending on the nature of the violation, the plan administrator could fix these minor defects by having all of the parties sign a letter of agreement as to their understanding of the order. Another alternative solution that could be used in appropriate circumstances would be for the plan

administrator to seek a court's declaratory judgment order to explain certain QMCSO provisions.

4. ***Keeping Records of Determinations.*** Once a determination as to an order's qualification has been made, the plan administrator should record the decisions that were made and the conclusions reached. If the administrator's determination is challenged (typically where an order is determined to be non-qualified and the parties refuse to change the order), the administrator will need to set the record before the judge. Presumably, this benefit determination, like all benefit determinations, will be reviewed under a standard where the decision is upheld unless it is arbitrary and capricious. It will be more likely to be upheld under this standard if the administrator can establish the "record" behind a decision