**Protecting Spousal Rights in Divorce**

**ERISA Covered Qualified Retirement Plans**

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When advising a spouse of a plan participant regarding spousal rights in connection with a divorce proceeding, you should be familiar with both the requirements for a Qualified Domestic Relations Order (QDRO) and other legal requirements that affect spousal rights.

The requirements in ERISA §206(d)(3) must be satisfied if a domestic relations order (DRO) is to be a Qualified Domestic Relations Order (QDRO). It is important to be thoroughly familiar with the requirements of ERISA §206(d)(3) and the guidance by DOL in the form of regulations, Q&As and opinion letters. It is also important to understand, or know where to find, rules that affect and/or protect spousal rights such as rules for survivor benefits.

**This presentation will primarily address issues involving DROs and spousal rights in both defined contribution (DC) and defined benefit (DB) qualified plans subject to ERISA. We will also review plan differences to help you identify what type of plan is involved and therefore what rules apply.**

**PART I: What you need to know about the plan to advise your client**

1. **Why the plan classification matters[[1]](#footnote-1)**

Many of the rules regarding spousal rights in divorce including provisions in a DRO depend on the nature of the plan involved and rules it has adopted. These plan classifications determine what plan provisions are legally required or permitted and how these provisions might affect your client’s spousal rights including the terms of a DRO, for example, whether the plan is subject to ERISA or some other rules involving the division of retirement benefits in divorce. In the case of ERISA covered plans, whether the plan is DC or DB, and specific rules of the plan will affect spousal rights such as the availability of a survivor annuity as well as payment options, payment timing and provisions to be included in a DRO

Plans may be classified in different ways. The following are details regarding the most common ways to classify plans:

1. **ERISA covered or not ERISA covered**--plans may be subject to ERISA (both DRO requirements and preemption) or not subject to ERISA (subject to other rules regarding allocation of pension marital property). **ERISA covered plans are subject to ERISA DRO rules and preemption. Some but not all nonqualified plans are subject to ERISA DRO rules and preemption.**

Non-ERISA covered plans and retirement assets are subject to other rules in the event of a divorce. Governmental plans will be governed by laws and regulations in the applicable state or municipality. Federal government and military pensions are governed by federal law specific to those plans. Retirement programs such as non-ERISA Code §403(b) annuities (i.e., government or church plans), Code §457 plans and IRAs are subject to different rules.

**Plans subject to ERISA must comply with the QDRO rules in ERISA §206(d)(3) and preemption applies. When preemption applies, the ONLY rules regarding QDROs that such plan is required to follow are those in ERISA and not state or local rules. State and local rules regarding division of property in a divorce that do not conflict with federal law will not disqualify a DRO, but the ERISA covered plan must follow only federal rules.[[2]](#footnote-2)**

1. **Qualified v non-qualified**--plans may be either “qualified” (subject to IRS minimum standards) or “nonqualified”. Nonqualified plans may have tax benefits but are not subject to detailed qualified plan rules. **All qualified plans are ERISA covered but not all ERISA covered plans are qualified.**

Qualified plans subject to Code §401(a) must satisfy IRS “minimum standards” in the Internal Revenue Code (Code)) and IRS regulations. Minimum standards include rules that affect spousal rights such as survivor benefits. Some provisions are required, some are permissive and some have options. The required and permissive provisions vary depending on whether the plan is a DC or DB plan; type of DC plan, employer/employee funded or both. Qualified plans provide tax benefits to both employers and employees.

Two kinds of DC plans are NOT qualified plans but provide similar tax benefits. Code §403(b) plans must be sponsored by an educational, religious, government or charitable employer. Some, but not all, §403(b) plans are subject to ERISA (sponsored by private educational and charitable organizations). Code §457 plans must be sponsored by a governmental entity or a non-profit and are generally not covered by ERISA.

1. **Defined contribution[[3]](#footnote-3) v defined benefit[[4]](#footnote-4)** – DC plans may be qualified or non-qualified and ERISA covered or not ERISA covered. DB plans are typically qualified, and ERISA covered. DC plans describe the accrued benefit as an account. DB plans describe the accrued benefit as a stream of payments. DB plans may have varied benefit accrual formulae and may have many distribution options. But DC plans differ widely as well. Some DC plans are required to have distribution rules that are like DB plans. Some DC plans are solely employer funded, some are solely employee funded, and some are both employer and employee funded. Some DB plans require employee contributions.

Although plans are divided into these two broad structures in ERISA, there are variations of each. There are also plans referred to as “hybrid” plans that may have characteristics of both DC and DB plans.

1. **Plan sponsor—**
   * **Government plans** have separate rules regarding allocation of pension assets in divorce.
   * **Private employer plans** --most, but not all, private plans are covered by ERISA. Private plans may be qualified or not qualified, defined contribution or defined benefit.
   * **Single-employer v multiemployer** – multiemployer plans may be either defined contribution or defined benefit; are typically qualified and ERISA covered. Single employer plans may be either defined contribution or defined benefit. Single employer plans may be qualified or qualified and ERISA covered or not ERISA covered depending on the type of employer (i.e., government plan, church plan, charitable organization, other private employer).

**One can determine much information about the classification of a plan (qualified/non-qualified, ERISA covered or not, DC/DB; employer or employee funded or both), from the plan documents. Many plans make their documents available online. Plan documents will also explain the plan distribution options and other provisions you will consider when advising your client or drafting the DRO.**[[5]](#footnote-5)

1. **Descriptions of DC and DB Plan Structures**
2. **Defined Contribution Plans (DC plans)**: All DC plans provide for an individual account for each participant and for benefits based solely on the balance in the individual account which consists of contributions plus income and investment gains minus expenses and investment losses allocated to the account. There are several types of DC plans that have specific legal requirements – profit-sharing plan (PSP) including those with and without a §401(k) feature, a stock bonus plan, money purchase plan (MPP), Employee Stock Ownership Plan (ESOP), §403(b) plan (nonqualified) and §457 plan (nonqualified). DC plans may, but are not required to, permit participants and beneficiaries to exercise control over investments in the account.[[6]](#footnote-6)

The plan document will not only identify the DC plan structure (e.g., PSP, MPP) but will describe plan distribution options. Although benefits from a DC plan are most often paid as a lump sum, some qualified DC plans are required by the Code to provide benefits as a qualified joint and survivor annuity (QJSA) unless waived with spousal consent. DC plans often offer benefit distribution options. Plan distribution rules will also determine what is the “earliest retirement age” for purposes of QDRO distributions in ERISA §206(d)(3)(E)(ii). **It is a mistake to view all DC plans as one design.**

1. **Profit Sharing Plan** (PSP)/including a PSP with a §401(k) feature is a DC plan under which the plan may provide, or employer determine, how much will be contributed to the plan (out of profits or otherwise). The plan must contain a formula or method for allocating to each participant a portion of each annual contribution. **PSPs, including those with and without a §401(k) feature, and stock bonus plans, are “qualified plans”, and subject to ERISA including the DRO provisions and preemption.**

* A PSP may, but is not required to, include a §401(k)(cash or deferred) feature. A cash or deferred feature permits participants to elect to defer otherwise taxable compensation into the plan.
* A PSP may, but is not required to, provide for plan loans, hardship distributions and/or participant direction of investments pursuant to ERISA §404(c).
* A **stock bonus plan** is a PSP to which employers contribute company stock.
* Vesting is 100% at 3 years of service or 2–6-year graded vesting as provided in the plan.
* The plan documents must formally designate the plan as a PSP.

1. **Employee Stock Ownership Plan** (ESOP) is a DC plan in which the investments are primarily in employer stock.[[7]](#footnote-7) **It is a qualified plan and covered by ERISA including the QDRO and preemption provisions.[[8]](#footnote-8)**

* Vesting is 100% at 3 years of service or 2–6-year graded vesting as provided in the plan.
* The plan documents must formally designate the plan as an ESOP. An ESOP may be part of a plan that is a qualified pension, profit-sharing or stock bonus plan.

1. **Money Purchase Pension Plan** (MPP) is a DC plan that requires the employer to contribute a definitely determinable amount or percentage of an employee’s salary each year. **A MPP is a qualified plan and subject to ERISA including the QDRO and preemption provisions.**

* Like a DB plan, a MPP establishes a Normal Retirement Age but may permit early distribution upon early retirement, severance, disability or death.
* Also like a DB plan, in-service distributions are limited. Therefore, hardship distributions are not permitted but loans may be provided.
* The normal form of benefit payment is a QJSA for a married participant unless waived with spousal consent.[[9]](#footnote-9)
* While definitely determinable employee contributions may be required, employee contributions may not be elective.
* Vesting is 100% at 3 years of service or 2-6 year graded vesting as provided in the plan.
* The plan documents must formally designate the plan as a MPP.

1. Code §403(b) plan (also known as a tax sheltered annuity (TSA)) is a nonqualified tax favored retirement plan that may be offered by public schools and Code §501(c)(3) tax-exempt organizations such as charities and religious organizations.[[10]](#footnote-10)

* A §403(b) plan may permit employee elective deferrals (including designated Roth deferrals), employee after tax voluntary contributions, nonelective employer contributionsincluding matching contributions, discretionary contributions and certain mandatory contributions made by the employer.
* A §403(b) plan may, but is not required to, provide for plan loans and hardship distributions.
* The §403(b) plan is not a qualified plan and **some §403(b) plans** (governmental plans and church plans) are not subject to ERISA **and NOT subject to QDRO and preemption provisions.** **A §403(b) plan of a tax-exempt organization is subject to ERISA including the QDRO and preemption provisions**.[[11]](#footnote-11)
* In the case of a §403(b) plan not subject to ERISA, the Code permits distributions pursuant to a marital property division under relaxed rules.[[12]](#footnote-12) DROs for such plans not subject to ERISA are subject to applicable state law regarding the division of marital property since ERISA preemption does not apply.

1. A Code §457 Plan, whether “eligible” (§457(b)) or “ineligible (§457(f)) is not a qualified plan and is generally NOT subject to ERISA including the QDRO and preemption provisions.[[13]](#footnote-13)

* Contributions to a §457 plan are typically elective deferrals although employers may make contributions.
* Benefits from an “eligible” §457(b) plan are taxable when paid. Benefits from an “ineligible” §457(f) plan are taxable when there is no substantial risk of forfeiture and are typically reserved for a select group of highly compensated or management employees.
* The Code permits distributions pursuant to a marital property division under relaxed rules.[[14]](#footnote-14) DROs for a §457 plan would be subject to applicable state law regarding the division of marital property since ERISA preemption does not apply.
* See IRS chart comparing §457(b) and §457(f) plans.[[15]](#footnote-15)

2. **Defined Benefit Plans (DB plans)**: ERISA §3(35) states that a pension plan that is a DB plan is not an individual account plan but other rules in ERISA and the Code are considerably more detailed. A DB plan must have a “definitely determinable” benefit formula by which a participant’s accrued benefit is calculated. Some examples of formula are—

* A specified percentage of final average pay (the number of years to determine the final average may vary);
* A specified amount per year of credited service;
* A percentage of contributions made on the participant’s behalf during a specified period.
* Some types of “hybrid” DB plans may have benefit formula that fluctuate or are based on a notional account but are still based on a specified, definitely determinable index or formula.

The accrued benefit in a DB plan is expressed as an **annual benefit** commencing at Normal Retirement Age (NRA) for the lifetime of the recipient.[[16]](#footnote-16) “Normal Retirement Age” may vary and must be defined in the plan document. The plan document will also describe any early retirement benefits, including possible early retirement subsidies, and the various ways (i.e., benefit options) in which benefits may be paid. These plan distribution rules will determine what is the “earliest retirement age” for purposes of QDRO distributions in ERISA §206(d)(3)(E)(ii).

The benefit payment options are important when preparing a DRO or advising a party in a divorce. Benefits paid in one of the benefit options may have greater actuarial value than the “normal form” of benefit paid to a recipient. Benefit payment options present opportunities for a client. Failure to consider benefit payment options may disqualify the DRO if it is not consistent with plan payment rules.[[17]](#footnote-17)

A DRO for a DB plan divides a payment stream not an account balance. There are two common ways to divide the benefit which will be discussed in more detail later. (These methods of dividing a participant’s benefit also apply to DC plans but the difference may not be as obvious as for DB plans.)

The benefit that may be divided by a DRO is not limited to the accrued pension benefit. Ancillary benefits such as life insurance/death benefits may be divided.[[18]](#footnote-18)

Some DB plans have what are referred to as “hybrid” formulas that may resemble a defined contribution plan. For hybrid DB plans, a DRO must divide the accrued benefit or the payment stream.

* A **“cash balance”** plan is a qualified DB plan that defines the promised benefit in terms of a notional account balance. A typical cash balance plan credits a participant's “account” each year with a "pay credit" (such as a percentage of compensation) and an "interest credit" which may be either a fixed rate or a variable rate linked to a public index. The participant’s benefit is not directly affected by increases/decreases in the value of the plan's investments. The investment risks are borne solely by the employer.[[19]](#footnote-19)
* A **Variable Defined Benefit Plan (also called a Variable Annuity Pension Plan or VAPP)** is a qualified DB plan in which benefits fluctuate based on the return of the plan's assets.[[20]](#footnote-20) A VAPP often establishes a conservative assumed investment return called a “hurdle rate”. If the plan's investment returns equal the hurdle rate, the plan functions like a traditional DB plan. But if the plan's investments earn more or less than the hurdle rate in a plan year, benefits earned in prior years are adjusted up or down by the difference between the actual investment return and the hurdle rate. Some plans only adjust prospective benefits. Some plans have a floor and/or cap that limits the amount of benefit fluctuation. VAPPs used to be rare but have become more popular in recent years. The potential for benefit fluctuation will impact both participant and alternate payee.
* A **Pension Equity Plan** is a DB plan that defines the benefit based on a participant's final average pay and total years of service. Employees accumulate percentage credits for each year of service. At retirement, the sum of these percentages is multiplied by the employee's final average salary to determine the benefit. While the plan is a DB plan and pays benefits as a lifetime payment stream, plans may permit employees to elect to receive lump sum benefits.[[21]](#footnote-21)

**SUMMARY: Information about the plan structure will affect advice to the client and the provisions of the DRO. This information includes whether the DRO divides an account or a payment stream, the payment options available, the survivor benefit provisions and whether the plan is subject to ERISA including the QDRO and preemption provisions or is subject to state law rules.**

**PART II: Plan provisions regarding payment options, distributions, and benefits affect spousal rights and DRO**

1. **Payment Options**

Both DB and DC plans, may offer a variety of payment options including early retirement and options for joint and survivor benefits in addition to the Qualified Joint and Survivor Annuity (QJSA) required by the Code. However, the default option for a participant with a spouse on the participant’s annuity starting date in a DB plan and in some DC plans[[22]](#footnote-22) is the designated QJSA. The QJSA may be waived by the participant and spouse but if the parties divorce after retirement with a QJSA in effect the former spouse remains the surviving spouse for the QJSA. IRS Regulations detail the requirements for the QJSA, QPSA, disclosures and waiver.[[23]](#footnote-23)

The Code and ERISA require survivor annuity benefits be paid, unless validly waived, by qualified DB plans, qualified DC plans subject to minimum funding requirements (*i.e.*, money purchase plans), and other DC plans that do not satisfy the exception.[[24]](#footnote-24) **To avoid the survivor annuity requirements, profit-sharing plans, §401(k) plans, and stock bonus plans typically satisfy the exception -- do not provide annuities, provide for payment to surviving spouses of vested account balances upon the death of the participant.**

A variety of payment options may be available from a plan in addition to the required survivor benefits. DB plans may offer more than one survivor annuity (e.g., 100%, 75% survivor annuity). Other common payment options provide for a guaranteed number of payments either to the recipient or a designated beneficiary. Some plans offer a “pop up” in which the actuarial reduction for a benefit option is eliminated if the beneficiary dies before the recipient. Some benefit payment options may be subsidized so that the actuarial cost of the option is fully or partially paid by the plan. Plans must provide information concerning the relative values of benefit payment options so that the recipient is aware of the terms of the options, any actuarial reductions and any subsidies. Some options may be actuarially more valuable than others. DC Plans may offer similar options through the purchase of an annuity. In addition, DC plans may offer an installment payment option.

There are two common methods to allocate the participant’s benefit and these methods affect the benefit options that may be available to the alternate payee. These methods apply equally to DC and DB plans and will be discussed in more detail later. One method, known as the “shared payment” method, awards to the alternate payee a portion of each payment made to the participant at the same time and in the same benefit option paid to the participant. This may be described in a DRO as payment to the alternate payee “if, as and when” payment is made to the participant. The other method, known as the “separate interest” method, creates two benefit streams, one for the participant and one for the alternate payee. In this method, the benefits to the alternate payee and the participant may be paid at different times and in different payment options. For example, in a separate interest DRO for a DC plan, a portion of the account may be distributed in a lump sum to the participant and the alternate payee’s portion distributed later in installments. Or the alternate payee’s portion may be distributed when the participant attains “earliest retirement age” even if the participant does not qualify for a distribution. If the DRO is entered after the participant’s annuity starting date, the order must use the shared payment method unless the plan permits the participant to change the benefit payment option after retirement. DB plans typically do not permit the participant to change the benefit option elected at retirement. Since, DC plan distributions are most often made in a lump sum, a post-retirement shared payment DRO may have little application to a DC plan because the participant’s benefits would likely have been distributed at retirement. Otherwise, both methods apply to DC and DB Plans.

**SUMMARY: Payment options provide value and flexibility. In the case of a DB plan, some options may be subsidized. The DRO must be consistent with plan payment options. A shared payment DRO ties the alternate payee’s distribution to the participant’s time of distribution and benefit option. A separate interest DRO permits the alternate payer to receive benefits at a different time and/or different benefit option than the participant.**

**If the DRO is being prepared after the participant’s benefit commencement date (called “annuity starting date” or ASD) in a DB plan, a payment option will already be in place that most likely cannot be changed. Depending on elections made at the time of the participant’s retirement, the alternate payee may or may not be the surviving spouse for purposes of the QJSA. If another benefit option was elected at retirement, the alternate payee may be the designated beneficiary and/or may have the right to consent to any change in beneficiary designation.**

**A post-retirement shared payment DRO, is less likely to be of importance in the case of a DC plan since benefits are most often distributed as a lump sum. But DC plans do provide payment options including installment payments and QJSA so this may be relevant.**

**If the DRO is being prepared before the participant’s ASD, the DRO could provide that the alternate payee may elect a payment option. Do not exclude all joint and survivor options; the statute only excludes a joint and survivor annuity with an alternate payee’s subsequent spouse and the plan might offer joint and survivor annuities with other beneficiaries that are not prohibited by statute such as children.**

1. **Some important qualified plan rules that affect spousal rights**
   * + 1. **Qualified Joint & Survivor Annuity ("QJSA")**

A QJSA is an annuity for the life of the participant with a survivor annuity for the life of the surviving spouse in an amount not less than 50% or more than 100% of the monthly amount payable during the joint lives of the participant and spouse.[[25]](#footnote-25) The plan must designate the QJSA if the plan has two or more actuarially equivalent joint and survivor benefits. A QJSA is typically actuarially adjusted. If there are multiple survivor options, some may be subsidized and be more valuable than others.

In the case of DC plans subject to the QJSA requirement and other DC plans that provide this option, the lifetime benefit is provided by the purchase of an annuity with all or part of the account balance.

The plan has the option but is not required to provide that a participant and spouse must be married for at least one year before the participant’s death for the surviving spouse to qualify for the QJSA.[[26]](#footnote-26)

**SUMMARY: In addition to the information described above, if the DRO is being prepared before the participant’s ASD, consider whether to provide for a QJSA if it is available. A QJSA can be awarded in addition to a separate interest but based only on the portion of the participant’s benefit (or account) not allocated to the alternate payee as a separate interest.**

**A separate interest DRO can provide that in the event the participant dies before the participant’s and/or alternate payee’s benefits have commenced and the plan forfeits the separate interest, the alternate payee will receive a QJSA.**

* + - 1. **Qualified Preretirement Spouse Annuity ("QPSA")**

DB plans and some DC plans are also required to provide a QPSA. Other DC plans may offer a QPSA as well.[[27]](#footnote-27) Plans are permitted to charge for this protection and if a plan does charge, participants may waive the QPSA as early as their 30’s.[[28]](#footnote-28)

A QPSA in a DC plan is an annuity for the life of the surviving spouse, the actuarial equivalent of which is not less than 50% of the participant's vested account balance at the time of the participant's death.[[29]](#footnote-29) The participant may waive the QPSA, with spousal consent.

Plans have some flexibility how to structure the QJSA and QPSA and other payment options, so it is important to review plan provisions if this is relevant to your client. Although not as common as in DB plans, DC plans may offer, or be required to offer, survivor options. The regulations explain what is required and what is permitted.[[30]](#footnote-30)

* + - 1. **Spousal Consent**

If a participant has a spouse, or an alternate payee required to be treated as a spouse, on the participant’s ASD, the benefit must be paid as a QJSA unless waived by the participant with spousal consent or in the QDRO.[[31]](#footnote-31) The QPSA may also be waived with spousal consent. If relevant to a client, review the rules that apply to spousal consent which describe the timing and required disclosures.

A prenuptial agreement is not an effective spousal waiver of beneficiary rights under a plan because the person waiving is not a spouse at the time of waiver.[[32]](#footnote-32)

The United States Supreme Court has considered how a state law or provision in a divorce decree may interact with plan rules. The Court held that ERISA preempts a state statute that automatically revoked the designation of a spouse as the beneficiary of a pension benefit upon divorce.*[[33]](#footnote-33)* The Court also determined that waiver of death benefits in a divorce decree was not sufficient. The beneficiary had not been changed in accordance with plan rules and the benefit was properly paid in accordance with plan documents.[[34]](#footnote-34)

Forged or Suspicious Spousal Consents: ERISA §205(c)(6) provides that if a plan administrator acts in accordance with ERISA’s fiduciary obligations in obtaining spousal consent to a waiver of the QJSA/QPSA, the plan is discharged from liability “to the extent of payments made.” A plan administrator cannot ignore obvious warning signs that suggest an obligation to inquire about spousal consent. If the Plan is notified of a claimed forgery, the plan has a duty to inquire as to the validity of the notarized spousal consent form.[[35]](#footnote-35)

* + - 1. **Annuity Starting Date (“ASD”)**

The “**annuity starting date” (ASD)**[[36]](#footnote-36) determines whether a benefit is subject to QPSA or QJSA requirements. QPSA applies until the ASD. ASD also impacts benefit option elections; if a participant and spouse elect a benefit payment option but the participant dies before the ASD, the option election typically will not be effective and the QPSA will apply. Other benefit provisions may also be tied to a participant’s ASD. For example, a change in plan rules may apply to participants with an ASD on or after a specified date.

If a participant’s ASD is prior to Normal Retirement Age (NRA) and then the participant returns to covered employment, additional accruals are not subject to the benefit option election made as of the initial ASD. Instead, additional accruals are subject to a new election and a new ASD. **If a participant’s marital status has changed since the initial retirement/ASD, the participant’s marital status as of the new ASD applies to the additional accruals.[[37]](#footnote-37)**

Most plans provide that once a benefit option has been selected at ASD it may not be changed. Obviously, a DC Plan that has distributed the entire accrued benefit could not change the option, but DC Plans may offer distributions in installments or annuities. Plans are permitted to provide that benefit option elections may be changed. While a plan may not take away the QJSA survivor benefit from a divorced spouse, it could permit a post-retirement waiver by both parties or a revocation of consent by the Spouse.[[38]](#footnote-38)

DB plans, but not DC plans, are permitted but not required to adopt provisions for a **Retroactive Annuity Starting Date (RASD)**.[[39]](#footnote-39) Some of the permitted provisions could affect the spousal waiver and the identity of the spouse who must provide that waiver.

* The regulations include a special spousal consent rule. If the QJSA as of the date the written explanation is provided would be greater than the QJSA as of the RASD, the participant cannot elect a RASD unless the spouse consents to the retroactive date. This applies even if the distribution as of the RASD is a QJSA which ordinarily would not require spousal consent.[[40]](#footnote-40)
* The spouse who gives the consent is the spouse at the time benefit payments commence, not the spouse as of the RASD **unless otherwise required by a QDRO.[[41]](#footnote-41)**

**SUMMARY: Is the DRO being prepared before or after the ASD? If a divorce decree has been entered before the DRO is drafted, the participant is not required by ERISA to obtain the consent of the alternate payee to a benefit election or account distribution. The participant could submit a retirement application and make a benefit election or withdraw the account balance before a DRO is finalized. This could result in loss of access to the account in a DC plan or significantly change the benefit options available to the alternate payee in a DB plan. This risk can be mitigated by prompt preparation of the DRO or a provision in the divorce decree or other court order limiting the ability of the participant to make a benefit election or account distribution to the detriment of the alternate payee.**

**If the participant has retired (has an ASD), has returned to work and earned additional benefits, those additional benefits may be subject to a separate benefit election that might benefit either or both parties.**

**Some plans permit the benefit option to be changed after the ASD. Determine if this is the case as it may provide more flexibility to either or both parties.**

* + - 1. **IRS Regulations on assignment or alienation of benefits, 26 CFR §1.401(a)-13(g) — special rules that affect spousal rights and QDROs.**

Includes important information about coordination with Code regarding survivor annuity requirements including how to split the accrued benefits between participant and alternate payee or between former spouse or current spouse; spousal consent.[[42]](#footnote-42)

States that QDRO cannot provide alternate payee with a greater right to designate a beneficiary for alternate payee’s benefit than plan provides to participant.[[43]](#footnote-43)

###### **PART III: Requirements for a Qualified Domestic Relations Order (QDRO)**

The way in which a DRO satisfies ERISA §206(d)(3) requirements to be a QDRO is affected by the type and structure of plan and the provisions of that plan regarding benefit options and distributions. This section will review the ERISA requirements for a QDRO and show how the type and structure of the plan and available benefit options should be taken into account.

ERISA and the Code provide that pension plan benefits cannot be assigned or alienated.[[44]](#footnote-44) ERISA also preempts any and all state laws insofar as they relate to employee benefit plans.[[45]](#footnote-45) ERISA §206(d)(3) creates an exception to the anti‑alienation and preemption provisions to require a plan to pay benefits to a non-participant if required by a QDRO, a state court order that meets specified requirements. Therefore, provisions in a DRO inconsistent with plan rules, except as provided by ERISA §206(d)(3) are preempted and ineffective.

**A. Resources and Important Definitions**

**1. Resources.**

See Appendix for Resources such as DOL Guidance, IRS Regulations, PBGC Models and Legislative History. These help to clarify the statute.

1. **Important Definitions**

*Domestic Relations Order (DRO):* A QDRO is a **“domestic relations order”** that meets statutory requirements. But the order must first be a DRO. Some plan obligations arise upon receipt of a DRO before a QDRO determination. A DRO is “any judgment, decree, or order **(including approval of a property settlement agreement)**," which "is made pursuant to a State domestic relations law," that “relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant.”[[46]](#footnote-46)

This is a broad functional definition. The DRO need not be separate from the divorce decree. The divorce decree or court approved property settlement agreement can be a DRO and therefore a QDRO if it satisfies the statutory requirements.[[47]](#footnote-47) **A plan’s obligation to process an order and provide a copy of its procedures is triggered by the receipt of a DRO whether or not that DRO is a QDRO.[[48]](#footnote-48) The escrow requirement and ability to modify an order is triggered by the plan’s receipt of a DRO.[[49]](#footnote-49) Therefore, a DRO, even one that could not be approved as a QDRO, provides some limited protection to a spouse.**

**In contrast, a draft order that has not been signed or entered by the court is NOT a DRO and has ZERO legal effect.**  Plans are not required to review draft orders although many do. Even if a plan determines that a draft order would be a QDRO **if signed,** neither draft order nor the plan’s determination affects the parties’ benefit rights until the order is signed/entered and submitted as a DRO instead of a draft.

*Alternate Payee:* A QDRO creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan.[[50]](#footnote-50) An “alternate payee” is a spouse, former spouse, child or other dependent of a participant recognized by a DRO as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.[[51]](#footnote-51)

**B. Requirements for a Qualified Domestic Relations Order**

A DRO must contain and **clearly specify** certain information to be a QDRO.

* The name and last known mailing address of the participant and each alternate payee covered by the order.
* The amount or percentage of the participant's benefits to be paid by the plan to each alternate payee or the manner by which that amount or percentage is to be determined.
* The number of payments or the period to which the order applies; and
* Each plan to which the order applies.

1. **What does it mean to “clearly specify”?**

Despite the requirement that a QDRO must clearly specify certain information, courts have held that substantial compliance with the QDRO requirements is sufficient, relying on legislative history indicating that Congress did not intend to require absolute strict compliance with the procedures.[[52]](#footnote-52)

DOL states in its QDRO Publication that a plan is not required to reject an order that “clearly describes the identity and rights of the parties but may be incomplete only with respect to factual identifying information within the plan administrator’s knowledge or easily obtained through a simple communication with the alternate payee or the participant”. The publication mentions address information that may be in the records of the plan or available from the parties. The name of the plan may be misstated but clear to which plan it refers. Based on Legislative History, DOL stated its view that in this case, the plan should supplement the order with the appropriate identifying information, rather than rejecting the order as not qualified.[[53]](#footnote-53)

**However, a plan is not required to accept incomplete or unclear information as suggested. Best practice is to “clearly specify” the stated information unless plan procedures explicitly state that the plan will accept less.**

1. **Amount or Percentage:**

A QDRO can award to an alternate payee a percentage or specific amount, up to 100%, of any benefit under the plan with respect to a participant. Two common methods to allocate the participant’s benefit are known as the “shared payment” method and the “separate interest” method. Both methods apply to DC and DB plans.

1. *Shared Payment:* The “shared payment” method allocates to the alternate payee a portion of each actual benefit payment made with respect to the participant under the plan. This is often described in a DRO as “if, as and when”. The following are characteristics of this method:

* The alternate payee will not receive any payment unless the participant receives a payment. A portion of the participant’s monthly pension benefit or a portion of a distribution from the participant’s account is paid to the alternate payee. Thus, it is important for the shared payment DRO to specify when the alternate payee’s right to share the payments begins and ends. (Number of payments or time period to which the order applies.)
* The alternate payee’s rights end upon the earlier of the death of the participant (when payments cease) or the death of the alternate payee unless the order names a successor alternate payee[[54]](#footnote-54) or the alternate payee has a right to survivor benefits.
* The alternate payee’s payments also end if the participant returns to work and the participant’s benefits are suspended by a DB plan.[[55]](#footnote-55)
* Shared payment method is used if the participant’s benefit payments from a DB plan or installment payments from a DC plan have already started unless the plan permits a benefit option to be changed once elected.
* A shared payment order is also used if benefits are being paid to children of the participant for past due child support from a DB plan since DB plans pay lifetime benefits and a fixed amount would disqualify the order.

1. *Separate Interest:* The “separate interest” DRO awards the alternate payee a separate right to a portion of the accrued benefit to be paid at a time and/or in a benefit option different from that selected by the participant.

* A separate interest DRO must specify the amount or percentage of the participant’s accrued benefit awarded to the alternate payee (or the manner in which such amount/percentage is to be determined).
* It is important to specify the date for the division of accrued benefits (e.g., benefit/account balance at the time of divorce, separation, retirement, or another date chosen by the parties). A DRO may provide the alternate payee the right to elect both the benefit option and/or the time at which the benefit will be paid[[56]](#footnote-56). Separate interest orders for DC plans, may establish a separate account under the plan with respect to which the alternate payee may exercise the rights of a participant.
* A separate interest DRO should also address the alternate payee’s right to share in any early retirement subsidies or future benefit increases that might be available with respect to the participant’s retirement benefit under a DB plan. In the case of a DC plan, the DRO should address the alternate payee’s right to direct investments and manage the alternate payee’s account.
* A separate interest DRO should address what happens if the participant dies before the participant’s and alternate payee’s separate interest commences. **The Code and IRS Regulations permit a plan to forfeit a benefit derived from employer contributions except survivor benefits upon death.[[57]](#footnote-57)**

It is important that a “separate interest” DRO is based on adequate information from the plan administrator, plan documents concerning the participant’s retirement benefit and the rights, options, and features provided under the plan[[58]](#footnote-58).

1. **Number of Payments or Time Period:** Typically defined by the benefit option or the right to elect the commencement date and benefit option.
2. **Name of Plan:** Some plans take the position that the name needn’t be exact so long as the plan can be identified with precision. Be aware that plans of the same or related plan sponsors may have similar names. Therefore, identifying the plan as “Defined Contribution Plan of XYZ Employer” may not be sufficient if the employer sponsors more than one DC plan.
3. **A QDRO cannot:[[59]](#footnote-59)**

* Require the plan to provide any type or form of benefit, or any option, not otherwise provided under the plan.
  + DRO does not violate this prohibition solely because it requires payment of benefits before a participant has separated from service on or after the date on which the participant attains (or would have attained) the “earliest retirement age” as if the participant had retired on the date payment is to begin under the order but based only on the actuarial value of the accrued benefit without any subsidy for early retirement.
  + Such benefit may be paid in any payment option under the plan other than a joint and survivor annuity with the alternate payee and his or her subsequent spouse.
* Require the plan to pay increased benefits determined on the basis of actuarial value.
* Require the plan to pay benefits to an alternate payee that are required to be paid to another alternate payee under a previously determined QDRO.[[60]](#footnote-60)

1. **Type or Form of Benefit:** A QDRO cannot require the plan to pay a type or form of benefit, or an option not available to the participant under the plan[[61]](#footnote-61), although a QDRO may permit an alternate payee to elect a different benefit option available under the plan from that selected by the participant. DOL has stated that DRO is invalid if it requires benefit to a former spouse married to the participant less than one year if plan has a one year marriage rule.[[62]](#footnote-62)
2. **When the Alternate Payee’s Benefits May Commence--Earliest Retirement Age: Subsidies:** An alternate payee need not wait to receive benefits from plan until the participant has reached normal retirement age or benefits have commenced. If **QDRO so provides**, payments may begin on or after date the participant reaches the "earliest retirement age.”[[63]](#footnote-63) If alternate payee receives payments from DB plan before retirement of participant, the payments are based on the “present value” of a normal retirement benefit, disregarding any early retirement subsidy.[[64]](#footnote-64) If participant subsequently becomes eligible for an early retirement subsidy upon retirement, the QDRO may provide for an adjustment to the alternate payee’s benefit or a court may modify a prior QDRO to account for early retirement subsidy.[[65]](#footnote-65) **This adjustment will not happen automatically; the QDRO must provide for it.**

“Earliest retirement age” for DC plan is earlier of (1) the date the participant is entitled to a distribution under the plan or (2) the later of the date the participant attains age 50 or could begin receiving benefits from the plan if the participant terminates employment.[[66]](#footnote-66) However, plan documents may permit immediate payment of an alternate payee's interest.

c. **Increased benefits**: Examples. Benefits paid for life of participant or alternate payee are actuarially adjusted for life expectancy unless subsidized. Provisions modifying plan rules regarding actuarial adjustments and subsidies could run afoul of this rule. If the DRO shifts the allocation of actuarial adjustments or modifies them, be certain it is done correctly. Some modifications could be rejected because they create a benefit form or option not otherwise provided.

**C. Timing Issues Including Post-Death QDROs: DOL Regulations**

DOL Regulations[[67]](#footnote-67) resolved many issues regarding post-death QDROs and other timing issues. Regulations confirmed positions based on the statutory language, prior DOL guidance and case law. The examples in the regulations and Preamble are useful.

* + - 1. **Subsequent Domestic Relations Orders:[[68]](#footnote-68)**A DRO will not fail to be qualified solely because the order is issued after or revises another DRO or QDRO.

1. *Subsequent DRO between the same parties:* In example a second DRO reduces the allocation of participant’s benefits to alternate payee. The second DRO does not fail to be treated as a QDRO solely because the second order is issued after and reduces the prior assignment in the first order. The result would be the same if the second order increased the assignment in the first order.

This is consistent with prior DOL guidance that a subsequent DRO may modify a previous DRO for same parties, if DRO, as modified, continues to satisfy statutory requirements.[[69]](#footnote-69) Example does not address the situation in which second DRO terminates award to alternate payee established in the first DRO (reduces award to zero). In this case, revised DRO is not a QDRO as defined in ERISA because it does not award to an alternate payee a portion of the participant’s benefits and is preempted.

1. *Subsequent DRO between different parties:* Confirms that DRO may assign to a subsequent spouse benefits remaining to the **participant** after a prior QDRO has assigned a different portion of participant’s benefits to a prior spouse.
   * + 1. **Timing:** DRO will not fail to be QDRO solely because of time it is issued.
2. *Orders issued after death:* Examples in regulation answer some but not all questions. The example addresses an initial defective DRO before the participant’s death and a corrected DRO issued after death with no subsequent spouse. The result would be the same even if no order had been issued before the participant’s death.

Other examples affect this issue.[[70]](#footnote-70) A DRO issued after death (or after ASD) may be limited by other rules. If participant has remarried, a post-death initial DRO would still be ineffectual if the current spouse has an ASD following the participant’s death. Examples state that DRO after ASD cannot require a plan to “reannuitize” (modify) the existing benefit option. This would also apply to the extent that the participant died with a non-spouse beneficiary[[71]](#footnote-71).

1. *Orders issued after divorce:* DRO issued after divorce may require former spouse to be treated as surviving spouse.
2. *Orders issued after annuity starting date:* DRO does not fail to be a QDRO solely because it is issued after the ASD. But if DRO required a change in the elected benefit option, it “would fail to meet the requirements of section 206(d)(3)(D)(i) of ERISA (unless plan otherwise permits such a change after participant’s annuity starting date). See 29 CFR 2530.206(d)(2), Example (4).”
   * + 1. **Requirements and Protections:** DRO must satisfy requirements under ERISA §206(d)(3) to be a QDRO.
3. *Type or form of benefit:* DRO is not QDRO under ERISA §206(d)(3)(D)(i) and (d)(1) of regulations if DRO requires plan to pay benefits to an alternate payee in a benefit form or option plan does not offer.
4. *Segregation of payable benefits:* Clarifies application of segregation period to different DROs.
5. *Previously assigned benefits:* DRO fails to be QDRO if it assigns to alternate payee all or a portion of participant’s benefits that are already assigned to another alternate payee by a prior QDRO.
6. *Type or form of benefit:* DRO is not QDRO if plan does not allow reannuitization (as explained in §1.401(a)-20, Q&A-10(b)) and DRO requires the plan to provide a benefit option other than option elected by participant. DRO could require all or portion of participant’s future payments under the elected benefit option to be paid to alternate payee during participant’s lifetime (shared payment).

**D. QDRO issues and how to address them**

**Issue: Plan is not willing to provide documents or information or concern that P might seek benefit distribution before order can be prepared.**

Submit divorce decree/property settlement even if it would not satisfy QDRO requirements. So long as order is a DRO (see definition), it triggers plan obligation to provide QDRO Procedures and escrow requirements.

Order prohibiting distribution pending draft of detailed order would be a DRO if it “relates” to the marital property rights of former spouse and is issued by a domestic relations court.

**Issue: Limited information about benefit payment options offered by plan.**

Provide that AP may elect to commence benefit at any time after the P has attained the “earliest retirement age” and may elect payment in any benefit option available except for a J&S annuity with a subsequent spouse of AP. Don’t exclude all J&S Annuities because some plans provide J&S with any beneficiary. General election provision reduces chance of inconsistency with plan terms.

**Issue: Terminology—inconsistent terms, lack of clarity in DRO**

Pension plans are highly regulated, and words matter. Terms used in the order should be consistent with the plan and/or statute. Draft precisely to avoid DRO from being rejected because it was unclear. For example, explicitly state the formula for allocation of the benefit. A plan in another state may not be familiar with, and is not required to search for, the meaning of “coverture fraction” or the name of a case identifying an allocation formula. Plans may refuse a DRO providing AP with both a separate interest and survivor benefits unless the order is explicit that survivor benefits are based solely on benefits remaining to P. If survivor benefits are an alternative to separate interest in the event of forfeiture, clearly state which benefit will be paid under what circumstances.

Include all dates and other information necessary to calculate the APs awarded portion. The plan has no obligation to search for information that is not in plan records.

**Issue: DRO Provisions not required by ERISA §206(d)(3) but important to include**

What happens when P and/or AP die. Can include survivor benefits as alternative if plan forfeits separate interest upon pre-ASD death. Can include successor alternate payee if AP dies prior to ASD and plant does not provide for beneficiary designation.

If AP has separate interest order for DC plan, provide rights to manage account if not distributed immediately. Benefit may not be distributable immediately (before earliest retirement age) or AP may choose to retain account for later distribution because of low fees and/or professional account managers.

**Issue: Understanding disability benefits v disability pension**

Plans may provide a pre-retirement disability benefit (not a pension) or an early retirement benefit (typically subsidized) that requires disability. One is a pension; the other is not. These are very different benefits and require different language.

The nature of the benefit may be determined based on when the option election/consent to distribution is made. In the case of a disability **pension**, the option election is made at the time disability benefits commence (ASD) and a surviving spouse would receive a QJSA if the P died while receiving these benefits. In the case of a pre-retirement disability benefit (not a pension), there are typically no options. A consent to distribution is not required. If the P dies while receiving such a benefit, the surviving spouse receives a QPSA. The option election is typically made when P attains Normal Retirement Age and the disability benefit converts to a normal retirement age pension.

If the disability benefit is a pension, it may be subsidized. But the AP could share in the subsidy because benefits have commenced, and the P has therefore attained earliest retirement age. See ERISA §206(d)(3)(E)(ii).

**Issue: Increases and decreases in DB benefits.**

DROs typically address if and how to allocate benefit increases but do not address what to do if benefits decrease. Benefits can decrease in a hybrid Variable DB plan after retirement. Multiemployer plans may also decrease benefits pursuant to a PPA Rehabilitation Plan. Single employer benefits may decrease if the plan terminates or is taken over by PBGC. Orders should address these fact patterns to the extent potentially relevant.

**E. Common problems that disqualify a DRO or prejudice spousal rights.**

These problems often result from using model language or a prior order that does not fit the current circumstances or failing to review plan provisions.

* Awarding benefit inconsistent with type of plan, i.e., awarding a portion of an account in a DB plan.
* Name of plan so unclear that it cannot be identified.
* Order provides that AP may designate a beneficiary to succeed to benefit if AP dies before ASD, but plan does not permit pre-retirement designation of beneficiary. Need successor AP.
* Order combines elements of shared payment and separate interest orders in a way that cannot be administered by the plan.
* Inconsistent provisions that cannot be administered, for example, stating that AP may choose when benefits commence and also providing that benefits commence when P’s benefits commence.
* Order awards a separate interest, and a survivor benefit based on the same portion of the Ps benefit.
* Order states AP’s benefits will commence when provided by the Plan, but plan does not state when benefits will begin under QDRO.
* Order awards a DB lifetime benefit that stops after child support arrears is paid.
* Order awards to AP a portion of payments to a beneficiary after Ps death.
* Order requires APs benefit to commence when P retires. Plan not required to and will typically not contact AP to advise when P retires or requests a distribution; benefit commencement to AP requires information from AP that may not have been provided. Some plans will disqualify DRO. DRO should provide that AP benefits will commence after AP submits such forms as plan may require.
* Delay by counsel that prejudices AP. For example, unsigned separate interest DRO submitted and “approved” by plan but signed DRO not submitted for long period during which P retires with subsequent spouse rendering draft DRO not qualified. Or revised DRO not submitted in time to claim escrowed benefits for AP.
* Signed DRO submitted to plan has been substantially changed from draft order pre-approved by plan.
* Divorce order does not mention the plan and there is no subsequent order. Divorce order is submitted when P retires. Follow up reveals plan was not disclosed or considered in divorce.

**APPENDIX**

**Resources:**

These resources help clarify the requirements of the statute--ERISA §206(d)(3) and Code §414(p)

**DOL publications and Guidance:**

“QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders”[[72]](#footnote-72)

DOL FAQs.[[73]](#footnote-73)

DOL Final Rule Relating to Time and Order of Issuance of Domestic Relations, §2530.2006, 75 Fed. Reg. 32846 (June 10, 2010). Preamble is useful.

DOL Advisory Opinions

Adv. Op. 1990-46A and 47A – order in probate proceeding is not a DRO.

Adv. Op.1992-17A – DRO may award survivor benefits in annulment if so determined under state law.

Adv. Op. 1999-13A – when plan has a duty to investigate a DRO; sham divorces.

Adv. Op. 2000-09A – all benefits payable under plan may be awarded in DRO.

Adv. Op. 2001-06A – child support enforcement order may be a DRO but must satisfy statutory requirements for QDRO.

Adv. Op. 2002-03A -QDRO may name child support enforcement agency as person to whom payments are to be made.

Adv. Op. 2004-02A – DRO that modifies prior order may be a QDRO if order, as revised, still satisfies statutory requirements.

Adv. Op. 2011-03A -tribal court may issue DRO if its authority to do so is recognized by law of a state that could issue a valid DRO.

**PBGC – explanatory booklet with models.** Useful information for DB plans.[[74]](#footnote-74)

**IRS Regulations (a sampling of important regulations; not exhaustive)**

Treas. Reg. §1.401(a)-11 – Qualified joint and survivor annuities; spousal consent.

Treas. Reg. §1.401(a)-13 (g) Assignment or alienation of benefits, Special rules for qualified domestic relations orders.

Treas. Reg. §1.401(a)-20 Requirements of qualified joint and survivor annuity and qualified preretirement annuity; the definition of “annuity starting date” is the same for surviving spouses, beneficiaries and alternate payees as for participants. (Treas. Reg. §1.401(a)-20, Q&A 10(b)(5).

Treas. Reg. §1.411(a)-4(b)(1) -benefits forfeitable upon death.

Treas. Reg. §1.411(a)-11(c)(6) – The consent requirements of Code §411(a)(11) do not apply to payments to an alternate payee except as provided in a QDRO.

Treas. Reg. §1.417(e)-1 – consent to distribution requirements for participants.

**Legislative History:** Not exhaustive.

**H.R. Rept. 98-655, 98th Cong., 2d Sess. Part 1 (April 5, 1984), pp. 40-41**.- plan procedures may, but are not required to provide that issues involving DROs are subject to appeal.

**H.R. Rept. 98-655, 98th Cong., 2d Sess. Part 1 (April 5, 1984), pp. 40-41** – plan QDRO procedures. “In general, the bill simply directs the plan to adopt reasonable procedures to deal with qualified domestic relations orders. Certain basic requirements are imposed on plans; however, the plan must pay benefits in accordance with the qualified domestic relations order. Plan procedures must be in writing. Participants and alternate payees must be provided with copies of such procedures as soon as the order is received by the plan. The Committee intends that the fact that the burden is on the alternate payee to notify the plan of any change of address will be highlighted in the written plan procedures.

The Committee also intends that the plan procedures clearly explain the process by which the plan determines whether a particular court order is a qualified domestic relations order, the timing of that determination, how and if appeals may be heard, the payment options which will be provided and the timing of any decision about payment options.”

**S. Rep. 575, 98th Cong., 2d Sess. at 20, reprinted in 1984 U.S. Code Cong. & Admin. News 2547, 2566** – DRO may be supplemented to satisfy statutory requirements.

**H. R. Rept. 99-841, 99th Cong., 2d Sess., Conference Report, Tax Reform Act of 1986, pp. 873-874.**

* In the case of benefits payable as an annuity, annuity starting date is the first day of the first period for which an amount is payable as an annuity regardless whether payment is actually made. In the case of benefits not payable as an annuity, the annuity starting date is the date on which all events have occurred which entitle the participant to a benefit (e.g., separation from service, applicable consent to payment). P. 873.
* Definition of “earliest retirement age” –“For example, in the case of a plan which provides for payment of benefits upon separation from service (but not before then), the earliest date on which a QDRO can require payments to an alternate payee to begin is the date the participant attains age 50, even if the participant has not then separated from service. The amount payable under a QDRO following the participant’s earliest retirement age cannot exceed the amount which the participant is (or would be) entitled to receive at such time. For example, assume that a profit-sharing plan provides that a participant may withdraw some, but not all, of the participant’s account balance before separation from service. A QDRO may provide for payment to an alternate payee up to the amount which the participant may withdraw.

A plan may provide for payment to an alternate payee prior to the earliest retirement age as defined under the conference agreement.”

* Delay of payment by plan –“The conference agreement adopts the provisions in the Senate amendment with regard to procedures during the 18-month period. If a plan administrator determines that a domestic relations order is defective before the expiration of the 18-month suspension period, the conference committee intends that the plan administrator may delay payment of a participant’s benefit until the expiration of the 18-month period if the plan administrator has notice that either party is attempting to rectify any deficiencies in the order.

Similarly, the committee intends that the plan administrator may delay payment of benefits for a reasonable period of time if the plan administrator receives notice that a domestic relations order is being sought. For example, a participant in a profit-sharing plan which is exempt from the survivor benefit rules requests a lump sum distribution from the plan. Before distribution is made, the plan administrator receives notice that the participant’s spouse is seeking a domestic relations order. The plan administrator may delay payment of benefits.” P. 874.

**Legislative History of the 1986 Technical Corrections to the Retirement Equity Act, P.L. 99-514, October 22, 1986.**

* Restraining Order: "The committee intends that a plan administrator will honor a restraining order prohibiting the disposition of a participant's benefits pending resolution of a dispute with respect to a domestic relations order."
* Increased Benefits: “An order does not require a plan to provide increased benefits if the order does not provide for the payment of benefits in excess of the benefits to which the participant would be entitled in the absence of the order.”
* To what plans do QDRO provisions apply: “The bill clarifies that the qualified domestic relations provisions do not apply to any plan to which the assignment or alienation restrictions do not apply.”
* Change in the available benefit forms: “…an order will not fail to be a qualified domestic relations order even if the form of the benefit does not continue to be a form permitted under the plan on account of (1) a plan amendment or (2) a change of law. In the case of a plan amendment, an alternate payee remains entitled to receive benefits in the form specified in the order unless the alternate payee elects to receive benefits in another form and the election of such alternate form does not affect, in any way, the amount or form of benefits payable to the participant. In the case of a change of law, which makes the form specified in the order impermissible, the committee intends that the plan is to permit the alternate payee to select a form of benefit specified in the plan, provided the selection of an alternative form by the alternate payee does not affect, in any way, the amount or form of benefits payable to the participant.”
* Legal status of the Alternate Payee under the Plan: “Under the bill, an alternate payee is treated as a beneficiary for all purposes under the plan.” Only one PBGC premium is paid for participant and alternate payee together.

**Explanation of Technical Corrections to the Tax Reform Act of 1984 and other recent tax legislation 72-502 (Title XVIII OF H.R. 3838, 99TH Congress; P.L. 99-514).**

* Missing spouse—" In addition, the Congress intends that a participant will be treated as having no spouse, if the participant has been abandoned (within the meaning of local law) by the spouse, even if the participant knows where the spouse is located. The Congress intends that the spousal consent requirement may be waived, however, only if the participant has a court order specifying that the participant has been abandoned within the meaning of local law. Of course, a participant could provide a qualified domestic relations order specifying that the participant has been abandoned.” Pp. 218-219.
* Restraining order – “Further, the Congress intends that a plan administrator will honor a restraining order prohibiting the disposition of a participant's benefits pending resolution of a dispute with respect to a domestic relations order.

**Comparison of Plan Types**

**Traditional Defined Benefit, Variable Defined Benefit,**

**Money Purchase Individual Account, Profit-Sharing Individual Account**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Traditional DB** | **Variable DB** | **Money Purchase IA** | **Profit-Sharing IA** |
| Tax Status | Code §401(a)[[75]](#endnote-1) | Code §401(a) | Code §401(a) | Code §401(a) |
| Benefit | Benefit is definitely determined by formula | Benefit is definitely determined by formula[[76]](#endnote-2) | Benefit is the Account Balance | Benefit is the Account Balance |
| Automatic Lifetime Benefit/ QJSA/QPSA  (unless waived) | Yes, provided by plan | Yes, but amount is variable as provided by plan | Yes, purchased from insurance company with account balance | Permitted but not required. Purchased with account balance |
| PBGC Guarantee | Yes | Yes | No | No |
| Pool Longevity Risk | Yes | Yes | No | No |
| Plan Loans[[77]](#endnote-3) | Permitted but not typical | Permitted but not typical | Permitted and common | Permitted and common |
| Hardship Distributions | No | No | No | Yes |
| In service Distributions |  | Very limited | Very limited | Permitted with limits[[78]](#endnote-4) |

1. [Types of Retirement Plans | U.S. Department of Labor](https://www.dol.gov/general/topic/retirement/typesofplans) [↑](#footnote-ref-1)
2. “Although domestic relations orders that involve retirement plans are issued under and governed by state law, Federal law (ERISA and the Code) and the terms of the relevant retirement plan determine whether these orders can be QDROs.” [QDROs The Division of Retirement Benefits Through Qualified Domestic Relations Orders 2020](https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/qdros.pdf), p. 27. [↑](#footnote-ref-2)
3. ERISA §3(34). [↑](#footnote-ref-3)
4. ERISA §3(35). [↑](#footnote-ref-4)
5. See [QDROs The Division of Retirement Benefits Through Qualified Domestic Relations Orders 2020](https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/qdros.pdf), Q 3-4. [↑](#footnote-ref-5)
6. See ERISA §404(c). [↑](#footnote-ref-6)
7. [Employee stock ownership plans (ESOPs) | Internal Revenue Service](https://www.irs.gov/retirement-plans/employee-stock-ownership-plans-esops) [↑](#footnote-ref-7)
8. See ERISA §407(d)(6), Code §4975(e)(7), 29 CFR §2550.407d-6. [↑](#footnote-ref-8)
9. [When can a retirement plan distribute benefits? | Internal Revenue Service](https://www.irs.gov/retirement-plans/plan-participant-employee/when-can-a-retirement-plan-distribute-benefits) [↑](#footnote-ref-9)
10. [Retirement plans FAQs regarding 403(b) tax-sheltered annuity plans | Internal Revenue Service](https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-403b-tax-sheltered-annuity-plans); [Publication 571 (01/2025), Tax-Sheltered Annuity Plans (403(b) Plans) | Internal Revenue Service](https://www.irs.gov/publications/p571) [↑](#footnote-ref-10)
11. See DOL Field Assistance Bulletin (FAB) 2009-2, DOL Regs. 29 C.F.R. § 2510.3-2(f), [Reporting and Coverage for 403(b) Plans | U.S. Department of Labor](https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/reporting-and-coverage-for-403b-plans); Advisory Opinion Nos. 94-30A, 83-23A, and 80-11A; Treas. Regs. 26 CFR §§1.403(b)-1 to 1.403(b)-11. [↑](#footnote-ref-11)
12. Code §414(p)(11) states: “For purposes of this title, a distribution or payment from a governmental plan (as defined in subsection (c)) or a church plan (as described in subsection (e)) or an eligible deferred compensation plan (within the meaning of section 457(b)) shall be treated as made pursuant to a qualified domestic relations order if made pursuant to a domestic relations order which meets the requirement of clause (i) of paragraph (1)(A).”

    Paragraph §414(p)(1)(A)(i) states: The term “qualified domestic relations order” means a domestic relations order (i) which creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, ….” [↑](#footnote-ref-12)
13. [IRC 457(b) deferred compensation plans | Internal Revenue Service](https://www.irs.gov/retirement-plans/irc-457b-deferred-compensation-plans#:~:text=Plans%20of%20deferred%20compensation%20described,plan%20include%20designated%20Roth%20accounts?) [↑](#footnote-ref-13)
14. See note 12. The same Code rules apply to §403(b) and §457 plans. [↑](#footnote-ref-14)
15. [Comparison of tax-exempt §457(b) plans and governmental 457(b) plans | Internal Revenue Service](https://www.irs.gov/retirement-plans/comparison-of-tax-exempt-457b-plans-and-governmental-457b-plans) [↑](#footnote-ref-15)
16. ERISA §3(24); Code §411(a)(8); Treas. Reg. §1.401(a)-1(b)(2). [↑](#footnote-ref-16)
17. Examples: DRO requiring a non existent benefit form will fail. But a DRO may include a joint and survivor benefit with a beneficiary other than a subsequent spouse of the alternate payee IF such an option is offered by the plan since ERISA §206(d)(3)(E)(i)(III) only prohibits a joint and survivor benefit with a subsequent spouse. [↑](#footnote-ref-17)
18. ERISA §206(d)(3)(B)(i)(I) states that a DRO assigns the “right to receive all or a portion of the benefits payable with respect to a participant under a plan”. [↑](#footnote-ref-18)
19. [Fact Sheet: Cash Balance Pension Plans | U.S. Department of Labor](https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/cash-balance-pension-plans) [↑](#footnote-ref-19)
20. With Rev Rul 185, 1953-2, the IRS confirmed in 1953 that a plan "which provides benefits that vary with the increase or decrease in the market value of the assets from which such benefits are payable" satisfies the Internal Revenue Code 's requirement that defined benefit plans provide "definitely determinable benefits." [↑](#footnote-ref-20)
21. See description of Pension Equity Plans at [Microsoft Word - pens equity appendx.DOC](https://www.eric.org/forms/uploadFiles/2FF600000016.filename.pens_equity_appendx.pdf) [↑](#footnote-ref-21)
22. The survivor annuity requirements also apply to other types of defined contribution plans (in addition to money purchase plans) unless all of the following requirements are met—

    The plan provides that the Participant’s non-forfeitable accrued benefit is payable in full upon the Participant’s death to the surviving spouse unless the Participant and Spouse have waived the spousal benefit in favor of another beneficiary. The Participant waiver and spousal consent must satisfy IRS requirements.

    The Participant does not elect payment of benefits in the form of a life annuity; and

    The Plan is not a transferee or offset plan.

    In addition, the benefit must be available to the Participant’s Spouse within a reasonable time after the Participant’s death. Generally, the benefit must be available within 90 days. See §1.401(a)-20, Q&A 3(b). The benefit must also be adjusted for gains and losses occurring after the Participant’s death. [↑](#footnote-ref-22)
23. Treas. Reg. §§1.401(a)-11 and 1.401(a)-20. [↑](#footnote-ref-23)
24. Code §401(a)(11)(B)(i)-(iii); ERISA §205(b)(1) [↑](#footnote-ref-24)
25. Code §417(b)(1); ERISA §205(d)(1). [↑](#footnote-ref-25)
26. Code §§401(a)(11)(D) and §417(d)(1); ERISA §§205(b)(4) and (f). [↑](#footnote-ref-26)
27. See FN 22. [↑](#footnote-ref-27)
28. Treas. Reg. §1.401(a)-20, Q&A 18-21, 33-35. [↑](#footnote-ref-28)
29. Code §417(c)(2); ERISA §205(e)(2). [↑](#footnote-ref-29)
30. Treas. Reg. §1.401(a)-20. [↑](#footnote-ref-30)
31. Treas. Reg §1.401(a)-11(a). [↑](#footnote-ref-31)
32. Treas. Reg §1.401(a)-20, Q&A 28. [↑](#footnote-ref-32)
33. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) [↑](#footnote-ref-33)
34. *Kennedy v Dupont Savings and Investment Plan*, 555 U.S. 285 (2009) [↑](#footnote-ref-34)
35. *See* *Rice v. Rochester Laborers’ Annuity Fund*, 888 F. Supp. 494 (W.D.N.Y. 1995); *See* *Lombardo v. United Technologies Corp*., 1997 U.S. Dist. LEXIS 7651 (D. Conn. 1997). [↑](#footnote-ref-35)
36. Treas. Reg. §1.401(a)-20, Q&A 10. [↑](#footnote-ref-36)
37. Treas. Reg. §1.401(a)-20, Q&A 10(d)(2) [↑](#footnote-ref-37)
38. Treas. Reg. §1.401(a)-20, Q&A 30. [↑](#footnote-ref-38)
39. Treas. Reg. §1.417(e)-1. [↑](#footnote-ref-39)
40. Treas. Reg. §1.417(e)-1(b)(3)(v)(A). [↑](#footnote-ref-40)
41. Treas. Reg. §1.417(e)-1(b)(3)(iv)(C). [↑](#footnote-ref-41)
42. Treas. Reg. 1.401(a)-13(g)(4). [↑](#footnote-ref-42)
43. Treas. Reg. 1.401(a)-13(g)(4)(iii) [↑](#footnote-ref-43)
44. ERISA §206(d)(1); Code §401(a)(13). [↑](#footnote-ref-44)
45. ERISA §514(a). [↑](#footnote-ref-45)
46. ERISA §206(d)(3)(B)(ii); [↑](#footnote-ref-46)
47. Adv. Op. 2001-06A (Income withholding notice issued by a state or county child support enforcement agency is a “domestic relations order” within the meaning of ERISA Section 206(d)(3)(B)(ii). ERISA Section 206(d)(3(B)(ii) does not require a “domestic relations order” within the meaning of ERISA Section 206(d)(3) to be issued by a court.); DOL QDRO Booklet Q. 1-2 and Q. 1-3; a restraining order could be a DRO, See Senate Explanation, 2. Determination by Plan Administrator. Technical Corrections to Retirement Equity Act, P.L. 99-514, October 22, 1986; DOL has determined that an income withholding notice issued by a state or county child support enforcement agency is a “domestic relations order” within the meaning of the statute (Adv. Op.2001-06A) [↑](#footnote-ref-47)
48. See ERISA § 206(d)(3)(G) that instructs plans what to do “in the case of any domestic relations order received by a plan. [↑](#footnote-ref-48)
49. ERISA §206(d)(3)(G) and (H). [↑](#footnote-ref-49)
50. ERISA §206(d)(3)(B)(i)(I). [↑](#footnote-ref-50)
51. ERISA §206(d) (3) (K). [↑](#footnote-ref-51)
52. *See, e.g.*, *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143 (9th Cir. 2000) (reversing district court’s rejection of marital dissolution order as QDRO for failure to include alternate payee’s mailing address or the number of payments to be made where the order awarded the marital residence—the address of which was included in the order—to the ex-spouse and the plan fiduciaries, in fact, knew the address). *But see* *Belfer v. Zee*, 166 F.3d 1204 (3d Cir. 1998) (finding a settlement agreement was not a QDRO where it failed to set forth requisite number of payments and the period affected by the order). [↑](#footnote-ref-52)
53. DOL QDRO Booklet, Q 2-9; see S. Rep. 575, 98th Cong., 2d Sess. at 20, reprinted in 1984 U.S. Code Cong. & Admin. News 2547, 2566. [↑](#footnote-ref-53)
54. Nothing in the statute permits an alternate payee to designate a beneficiary for the portion of the participant’s benefit awarded to the alternate payee unless the plan permits such designation, or the benefit form elected by the alternate payee provides for payment to a beneficiary. A QDRO may designate a successor alternate payee but may not alter the provisions of the plan by providing that the alternate payee may designate a beneficiary. To do so would require the plan to provide a type/form of benefit or option not otherwise provided by the plan and would disqualify the order. ERISA §206(d)(3)(D)(i). See also Treas. Reg. §1.401(a)-13(g)(4)(iii)(B). [↑](#footnote-ref-54)
55. The circumstances under which a participant’s benefits may be suspended will also be described in the plan documents. [↑](#footnote-ref-55)
56. For example, the following would, in my view, satisfy the requirement to specify the number of payments and period to which it applies for a DB or DC plan: “The alternate payee may elect to receive his/her benefits in any form of payment in which benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his/her subsequent spouse). The alternate payee may, upon submission of such information as the plan may require, choose to begin receiving his/her portion of the participant’s benefit at any time on or after the date on which the participant attains (or would have attained) the earliest retirement age as defined in ERISA §206(d)(3)(E)(ii).” [↑](#footnote-ref-56)
57. A plan could provide that the APs separate interest benefit is lost if the AP dies before the APs annuity starting date. Some plans view the APs separate interest as derivative of the Ps benefit and provide that the APs separate interest is forfeited if the P dies before either the P or AP establish an annuity starting date. Code §411(a)(3)(A); Treas. Reg. §1.401(a)-20, Q&A 10(b)(4); Treas. Reg. §1.401(a)-20, Q&A 13; Treas. Reg. §1.411-4(b)(1) -benefits forfeitable upon death. [↑](#footnote-ref-57)
58. DOL QDRO Booklet states that Congress intended prospective alternate payees to have access to plan documents and participant benefit information sufficient to prepare a QDRO. Q 2-1. Many plans provide plan documents and even model QDROs on the plan website. Many plans provide assistance to participants, alternate payees and their respective representatives during the QDRO process. [↑](#footnote-ref-58)
59. ERISA § 206(d)(3)(D). [↑](#footnote-ref-59)
60. ERISA §206(d)(3)(D) [↑](#footnote-ref-60)
61. ERISA §206(d)(3)(E)(III). [↑](#footnote-ref-61)
62. QDRO Booklet, Q 3-5. [↑](#footnote-ref-62)
63. ERISA §206(d)(3)(E) [↑](#footnote-ref-63)
64. ERISA §206(d)(3)(E)(II). [↑](#footnote-ref-64)
65. *Gearhart v. Gearhart*, 23 EBC 2256 (Ohio Ct. App. 1999) [↑](#footnote-ref-65)
66. ERISA §206(d)(3)(E); For plans that permit benefits to be distributed at any age upon separation from service, the earliest retirement age would be 50. [↑](#footnote-ref-66)
67. 29 CFR § 2530.206. [↑](#footnote-ref-67)
68. 29 CFR § 2530.206(b). [↑](#footnote-ref-68)
69. *See* DOL Adv. Op. No. 2004-02A. [↑](#footnote-ref-69)
70. See 29 CFR § 2530.206(c)(3) and (d)(4). [↑](#footnote-ref-70)
71. DOL Final RuleRelating to Time and Order of Issuance of Domestic Relations Orders, 75 Fed. Reg. 32846,32848, column 3:

    With regard to the principle, expressed above, that a domestic relations order issued after the annuity starting date does not violate the requirements of section 206(d)(3)(D)(i) merely because the order requires the allocation of some or all of the participant’s determined monthly benefit payment to an alternate payee, the Department, based on its review of sections 206 and 205 of ERISA, the case law, and other relevant guidance, is of the view that such principle does not apply to a domestic relations order that is received after the annuity starting date and that requires an allocation to an alternate payee of some or all of the death benefit that, under the form of benefit in effect, is payable to another beneficiary.\* An example of this is a plan’s receipt of a domestic relations order after the annuity starting date of a QJSA that assigns to the participant’s former spouse a shared payment of the participant’s current spouse’s survivor benefits under the QJSA. [↑](#footnote-ref-71)
72. [QDROs The Division of Retirement Benefits Through Qualified Domestic Relations Orders 2020 (dol.gov)](https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/qdros.pdf) [↑](#footnote-ref-72)
73. [FAQs about Qualified Domestic Relations Orders (dol.gov)](https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/qdro-overview.pdf); [FAQs about Determining Qualified Status and Paying Benefits (dol.gov)](https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/qdro-determining-qualified-status-and-paying-benefits.pdf); [FAQs Drafting Qualified Domestic Relations Orders (dol.gov)](https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/qdro-drafting.pdf) [↑](#footnote-ref-73)
74. [Qualified Domestic Relations Orders (QDRO) and PBGC](https://www.pbgc.gov/sites/default/files/qdro.pdf) [↑](#footnote-ref-74)
75. Plans exempt under IRS Code 401(a) are “qualified” pension plans and provide tax benefits to employers and participants. [↑](#endnote-ref-1)
76. Variable plans use different formulas. Some are characterized by a floor benefit that may not be reduced and a portion of the benefit that adjusts based on the plan’s investment returns. Others are fully variable even after retirement. See IRS Rev. Rul. 53-185. [↑](#endnote-ref-2)
77. DB plans rarely provide loans although a loan program may be structured.

    iv Profit-sharing plans may permit in-service distributions of employer contributions after a fixed period (defined as contributions and earnings accumulated for at least 2 years (Rev. Rul. 71-295) or all employer contributions if the employee has participated in the plan for at least 5 years (Rev. Rul. 68-24)); attainment of a stated age (Rev. Rul. 80-276) or upon event such as “layoff, illness, disability, retirement, death or severance of employment.” §1.401-1(b)(1)(ii). [↑](#endnote-ref-3)
78. [↑](#endnote-ref-4)