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## When is a Domestic Relations Order a Qualified Domestic Relations Order?

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One of the often overlooked important responsibilities of plan administrators is determining whether domestic relations orders (orders or DROs) are *qualified* domestic relations orders (QDROs).

**E**RISA and the Internal Revenue Code do not permit plan benefits to be assigned or alienated. One limited exception to this rule provides for the assignment of benefits through QDROs. A QDRO is a domestic relations order that creates or recognizes the right of someone other than a participant to receive all or part of the participant's plan benefits. The non-participating party is usually the former spouse of the participant, but it can also be the current spouse, child or other dependent of the participant. These individuals are called "alternate payees."

Plans are neither permitted nor required to follow the terms of domestic relations orders purporting to assign plan benefits unless they are QDROs. Upon receiving a DRO, the administrator must determine its *qualified* status. Every qualified plan is required to establish written procedures for determining whether domestic relations orders are QDROs and for administering distributions under QDROs. There are many statutory requirements, all of which must be met for an order to be *qualified*.

The summary that follows addresses the main reasons why a DRO is, or is not, a QDRO. A more comprehensive QDRO checklist addressing many of the principles relating to QDROs appears at the end of this article. This checklist has been reproduced from *The ERISA Outline Book, 2008 Edition* by Sal L. Tripodi and includes Code references as well as references to other sections in *The ERISA Outline Book* where more detailed information can be found.

- The order must relate to child support, alimony or marital property rights. While an order must meet federal requirements to be a QDRO, the



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order must be issued by a state court (or other appropriate state authority) with the jurisdiction to issue judgments, orders, decrees or to approve property settlement agreements, pursuant to state domestic relations law (including community property law). That seems straightforward; however, we often see agreements from attorneys and signed by both marital parties, but not issued by any of the above entities. This state issuance requirement is perhaps the most important aspect of a QDRO. The mere fact that a property settlement is agreed to and signed by the parties will not, in and of itself, cause the agreement to be a QDRO.


- A QDRO can apply to multiple plans of the same or different employers, as long as each plan and the assignment of benefit rights under each plan are clearly specified.
- A QDRO may be part of the divorce decree or court-approved property settlement. There is nothing in ERISA or the Code that requires a QDRO to be issued as a separate judgment, decree or order.

*An incorrect determination could cause a violation of the anti-assignment and alienation rules, which could result in disqualification of the plan and fiduciary liability under ERISA with respect to the improper payment of benefits.*

- There is no requirement that both parties and/or the judge in a marital proceeding sign or otherwise endorse or approve an order. A DRO stamped by a circuit judge with a stamped date, but no signature or court seal, may be acceptable. If there is any doubt as to the legal sufficiency of the order, the plan administrator should contact the clerk of the court to determine if it is valid without a signature.
- The plan administrator is not required to determine whether the issuing court or agency had jurisdiction to issue an order, whether state law is correctly applied in the order, whether service was properly made on the parties or whether an individual identified in an order as an alternate payee is in fact a spouse, former spouse, child or other dependent of the participant under state law.
- A QDRO must contain the name and address of the participant and alternate payee, the amount or percentage of benefits that the plan is to pay the alternate payee and the manner in which the amount or percentage is to be determined, the number of payments or period time and each plan to which the order applies.
- An incorrect plan name is very common. It is especially troublesome when the participant is covered by more than one of the employer's plans and the plan name in the order is a combination of two plan names. However, incorrect or incomplete plan, participant and alternate payee(s) names subject to the order do not necessarily cause the order to be invalid. The plan administrator does not have to reject such an order as defective if the correct names are within the plan administrator's knowledge or easily obtainable by the administrator. Likewise, addresses of participants or alternate payees may be missing, but such data may be retrieved by the administrator's records. In such a case, the plan administrator should supplement the order with the appropriate information, rather than rejecting the order as not qualified.
- A QDRO must not require the plan to provide additional benefits not otherwise provided in the plan. We have seen orders requiring lump sums from defined benefit plans that don't permit lump sum payouts, even for QDROs. Such a DRO must be rejected. A QDRO must not require the plan to pay an amount greater than the participant's accrued benefit. (This situation could happen due to recent investment losses, recent distributions or a partially vested balance.) Such a QDRO is not valid. Furthermore, the asset valuation date should be clearly defined; otherwise the order is vague and ambiguous.
- The order must not require a plan to pay benefits to an alternate payee that are required to be paid to another alternate payee under a previously issued QDRO.
- A QDRO may provide for payment to the guardian of an alternate payee. If an alternate payee is a minor or is legally incompetent, the order can require payment to someone with legal responsibility for the alternate payee.
- An order for a participant with a designated Roth account in a salary deferral plan should say how the Roth account is to be divided, for the plan to correctly account for the basis (Roth contributions) included in the alternate payee's benefit. Note that the basis must be allocated in the same manner as the designated Roth account. In other words, the regulations mandate the proportionate allocation of the basis, even if the parties would prefer to do otherwise.

If the DRO meets all of the above requirements, it is a bona fide QDRO. Anything less must be rejected in order for the plan to conform to the assignment/alienation exception.

In conclusion, under Federal law, the plan administrator of a plan that provides benefits affected by a domestic relations order is responsible for determining whether the order is a QDRO. An incorrect determination could cause a violation of the anti-assignment and alienation rules, which could result in disqualification of the plan and fiduciary liability under ERISA with respect to the improper payment of benefits. Furthermore, since an in-service distribution can only be made under the terms of the plan document, an erroneous QDRO distribution could violate those terms, providing another potential reason for disqualification. To be recognized as a QDRO, an order must be inspected very carefully for the above criteria and according to the plan's written procedures.

In the checklist that follows you will also find other issues relevant to the implementation of QDROs under a qualified plan. 

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