



The
ERISA
Industry
Committee

May 7, 2007

Attention: QDRO Regulation
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W., Room N-5669
Washington, D.C. 20210

Ladies and Gentlemen:

The ERISA Industry Committee (“ERIC”) is pleased to submit these comments in response to the Department of Labor’s interim final rule relating to the time and order of issuance of domestic relations orders.

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

ERIC is concerned that the interim final rule promulgated by the Department does not recognize many of the complex situations large employers routinely find themselves confronted with when determining how to respond to domestic relations orders. Further guidance from the Department that clarifies when a domestic relations order fails to serve as a qualified domestic relations order (“QDRO”) can help set clear rules for both plan participants and plan sponsors, reducing the need for costly litigation.

The Department should modify the rule’s preamble to clarify that a QDRO cannot extinguish or modify a benefit vested in a third party or reestablish a benefit that has already lapsed due to a participant’s death. ERIC believes that the rule should make clear that once a benefit has vested in a third party or has lapsed due to a participant’s death, that benefit cannot be changed by a subsequent domestic relations order and that any order submitted to the plan would fail to qualify as a QDRO.

In addition, ERIC is concerned that the Department’s Example (1) in §2530.206(c)(2) could be misconstrued to allow a QDRO to be effective if it is first submitted to the plan after a participant’s death when the participant's death extinguished all claims for benefits under the terms of the plan (*e.g.*, when a participant in a traditional defined benefit plan dies with no spouse or other beneficiary to whom a death benefit or surviving spouse annuity is payable). To address this concern, ERIC proposes the following Example (4) be added to §2530.206(d)(2):

“Example (4). Additional benefits. Participant and Spouse divorce and agree in a property settlement agreement to submit a QDRO to the plan, but a domestic relations order is not submitted to the plan administrator at that time. Thereafter, Participant dies while actively employed. A domestic relations order is subsequently submitted to the plan. The order does not fail to be treated as a QDRO solely because it is issued after the death of Participant, but the order would fail to be a QDRO under section 206(d)(3)(D) and paragraph (d)(1) of this section for two reasons. First, since there was no beneficiary to whom a death benefit or surviving spouse annuity was payable at the time of Participant’s death, the order would fail to be a QDRO under section 206(d)(3)(D)(i) and paragraph (d)(1) of this section because the order requires the plan to provide a benefit not otherwise provided under the plan. Second, the order also would fail to be a QDRO under section 206(d)(3)(D)(ii) and paragraph (d)(1) of this section because the order requires the plan to provide increased benefits.”

ERIC is also concerned that the Department’s Example (1) in §2530.206(c)(2) could be misconstrued to allow a post-death QDRO to extinguish a benefit that has vested in a third-party beneficiary under the terms of the plan (e.g. a surviving spouse or child from a previous marriage). To avoid this misinterpretation, ERIC proposes the following new Example (5) be added to §2530.206(d)(2) to make clear that an order is not a QDRO if it requires a plan to provide a benefit that is not otherwise provided under the plan and extinguishes a vested benefit:

“Example (5). Beneficiary’s Benefit is Vested. Participant and Spouse divorce and agree in a property settlement agreement to submit a QDRO to the plan, but a domestic relations order is not submitted to the plan administrator at that time. The Plan specifies that death benefits under the plan be paid to the children of the participant in the absence of a specific designation of beneficiaries by the Participant. The Participant subsequently dies and a domestic relations order is submitted to the plan post-death. The order does not fail to be treated as a QDRO solely because it is issued after the death of Participant, but the order would fail to be a QDRO under section 206(d)(3)(D) and paragraph (d)(1) of this section because the order would require the plan to provide a benefit to someone other than the beneficiary identified by the plan whose benefit vested immediately upon the death of the participant.”

In addition, ERIC is concerned that the Department’s Example (3) in §2530.206(c)(2) could be misconstrued to allow a QDRO to change the form of the benefit selected after an annuity begins. ERIC proposes that a new Example (6) be added to §2530.206(d)(2) to make clear that an order is not a QDRO if it requires a plan to provide a benefit that is not otherwise provided under the plan:

“Example (6). Order changing the form of distribution. Participant retires and commences benefit payments in the form of a straight life annuity with the consent of Spouse who waives the surviving spousal rights provided under the plan and section 205 of ERISA. Participant and Spouse divorce after Participant’s annuity starting date and present the plan with a domestic relations order providing for (1) a reannuitized joint and survivor form of distribution equivalent to the current value of the straight life annuity; (2)

Spouse, as alternate payee, to receive half of the benefit payments made to Participant after the conversion; and (3) Spouse designated as the survivor annuitant under the modified form of benefit payment. The order does not fail to be treated as a QDRO solely because it is issued after the annuity starting date, but, in the absence of a plan provision accommodating modifications of distribution elections, the order would fail to be a QDRO under section 206(d)(3)(D) and paragraph (d)(1) of this section. The order requires the plan to provide a benefit not otherwise provided under the plan because the Participant and Spouse elected a straight life annuity and the domestic relations order seeks to change that election.”

ERIC appreciates the opportunity to submit these comments. We continue to look into the QDRO issues presented by the Department and will supplement our comments in an effort to assist you. If the Department has any questions about our comments, or if we can otherwise be of assistance, please let us know.

Sincerely,

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President
The ERISA Industry Committee

cc: Robert Doyle, Director, Office of Regulations and Interpretations
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