



THE WAGNER
LAW GROUP

QUALIFIED DOMESTIC RELATION ORDERS

Presented by:

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Introduction

- ◆ Qualified Domestic Relations Orders (“QDROs”) for Retirement Plans
 - Defined Benefit and Defined Contribution Plans
 - ERISA and NonERISA Plans
 - Qualified and Nonqualified Plans
- ◆ QDROs for
 - Life Insurance Plans
 - Split Dollar Plans

Retirement Plan Basics

- ◆ **Defined Contribution Plans**
 - Contributions are allocated to individual accounts.
 - Lump sum equal to account balance is typical benefit.
- ◆ **Defined Benefit Plans**
 - Benefit formula is based on service and compensation.
 - Lifetime annuity is typical benefit.
- ◆ **Fundamental Difference: Investment Risk**

ERISA v. NonERISA Plans

- ◆ ERISA applies to most plans.
- ◆ NonERISA Plans
 - Governmental Plans and
 - Nonelecting Church Plans
 - Excess Plans
 - IRAs
 - Solo 401(k)
- ◆ Top Hat Plans
 - Are ERISA plans, but
 - Are exempt from virtually all ERISA requirements

Qualified Plans

- ◆ Favorable tax treatment
- ◆ Funded
- ◆ Minimum standards
- ◆ Maximum benefit and contribution limits
- ◆ Nondiscrimination rules

Nonqualified Plans

- ◆ Unfunded
- ◆ Substantial risk of forfeiture
- ◆ Tax treatment:
 - Employer deduction delayed.
 - Employee taxation delayed until deferred comp is:
 - paid (unfunded plan) or
 - vested (funded plan).
 - 457(f) plans are special case.

Nonqualified Plans (cont'd)

- ◆ Section 409A restricts:
 - Initial election to defer receipt
 - Subsequent election:
 - to further defer receipt, or
 - to accelerate receipt.

QDROs: Background

- ◆ Retirement benefits may not be assigned or alienated.
- ◆ Was there an implied exception for domestic relations orders?

QDROs: Background (cont'd)

- ◆ Retirement Equity Act of 1984 creates explicit exception for QDROs.
 - ◆ ERISA § 206(d)(1) and (3)
 - ◆ Code § 401(a)(13)(B) and § 414(p)
- ◆ Definitions:
 - ◆ QDRO
 - ◆ Alternate Payee

Regulatory Guidance

- ◆ IRS: 26 CFR 1.401(a)-13(g) [1988]
- ◆ IRS: Notice 89-25 (withholding)
- ◆ IRS: Notice 97-11 (sample QDRO language)
- ◆ Notice 2014-19 (same sex marriage)

Regulatory Guidance (cont'd)

- ◆ DOL: Booklet and FAQ (2014)
- ◆ PBGC: Booklet (2019)
- ◆ DOL: 29 CFR 2530.206 (2010)

2020 Government Accountability Office (GAO) Report

- ◆ August 28, 2020 GAO Report on QDROs made two recommendations for review and qualification of domestic relations orders.
 - DOL should explore ways to collect information on fees charged to participants or alternate payees.
 - Generally only defined contribution plans charge fees for QDRO review because of concern about tax qualification issues with charging fees under defined benefit plans.
 - DOL should take steps to ensure that information regarding requirements for QDROs is available and easily accessible for participants and alternate payees.

QDRO Procedures

- ◆ In Writing and Reasonable
 - Notice must be provided to participant and alternate payee of procedures.
 - Alternate payee can designate representative.
- ◆ DOL QDRO Booklet
 - Explains requirements for procedures.
 - Allows default provisions if QDRO is silent.
- ◆ Before drafting a QDRO, review plan's written procedures, if any.

QDRO Essential Requirements

- ◆ Name and address of participant and alternate payee.
- ◆ Name of each plan subject to DRO.
- ◆ Alternate payee's amount or percentage of participant's benefit.
- ◆ Number of payments to alternate payee.

QDRO Essential Requirements

- ◆ QDRO cannot force the plan to:
 - pay benefits being paid to another alternate payee;
 - increase benefits payable under the plan (determined actuarially); or
 - provide a type or form of benefit not available under the plan.

QDRO Essential Requirements (cont'd)

- ◆ Before drafting a QDRO, review
 - at least the plan's SPD if not the plan document;
 - relative value notice for defined benefit plan.

QDRO Drafting Issues

Shared Payments v. Separate Interests

- ◆ Shared payments:
 - Divide benefit payments.
 - Only method for benefits in pay status.
- ◆ Separate interests:
 - Divide participant's interest in plan.
 - Method preferred by most practitioners.

Shared Payments QDRO: Drafting Issues

- ◆ Specify when payments end.
- ◆ Address survivor benefits, if any.
- ◆ Investment control is not an issue.

Separate Interest QDRO: DB Plan Drafting Issues

- ◆ Benefit Increases
- ◆ Early Retirement Subsidies
- ◆ Risky Assumption
- ◆ Alternate Payee Understanding

Separate Interest QDRO: DC Plan Drafting Issues

- ◆ Plan Loans
- ◆ Specific Dollar Awards
- ◆ Valuation and Division Dates
- ◆ Future Vesting and Contributions
- ◆ Investment Instructions

Timing

- ◆ Massachusetts law does not have statute of limitations for submitting a DRO to a plan administrator.
- ◆ With respect to defined benefit plans, because distributions may not be available to alternate payee for years, there may be a significant delay in submitting a DRO to plan administrator.
- ◆ Some QDRO procedures impose an internal statute of limitations.

Timing

- Internal statutes of limitation are generally permissible under ERISA.
- Enforceability of internal statutes of limitation for QDROs an open issue.
 - *Marker v. Northrop Gruman Space and Mission Systems Corp. Salaried Pension Plan*, 2006 US Dist LEXIS 75507 (N.D. Ill. 2006).
 - *Castanon v. UPS/UBT Full Time Employees Pension Plan*, 2017 WL 4863238 (N.D. Ga. 2017).

Timing

- ◆ If plan administrator sends letter indicating that DRO does not satisfy the requirements of a QDRO, that will be the date the claim accrued for statute of limitations purposes.
- ◆ There are no claims procedures for denied QDRO procedures.
- ◆ Some QDROS provide that courts retain jurisdiction to modify an order, including nunc pro tunc.

Timing

- ◆ Most circuit courts recognize posthumous nunc pro tunc orders.
- ◆ In *Garcia Tatupu v. Bert Bell NFL Players Retirement Plan*, 2019 WL 181315 (1st Cir. 2019).
 - “We do not opine upon the circumstances in which a nunc pro tunc state domestic relations order entered after the death of a beneficiary may be treated as a QDRO.”

Timing

- ◆ Scope of nunc pro tunc orders may vary under state law, but generally limited in scope to correcting clerical errors.
 - If survivor benefits were not initially provided under a DRO, that omission cannot be corrected under a nunc pro tunc order.
 - Nunc pro tunc order can not be used to reset a statute of limitations.
 - A posthumous reassignment of surviving spouse annuity benefits to a prior spouse is inapplicable.

NonERISA Qualified Plans

- ◆ State law applies to plans.
- ◆ Code Section 414(p)(11) treats any DRO as QDRO for income tax purposes.
- ◆ MA Governmental Plan Example:
 - MGL c. 32 governs MA retirement system for public employees.
 - MGL c. 208, Section 34 authorizes courts to divide retirement benefits.
 - *Contributory Retirement Bd. of Arlington v. Mangiacotti* (1989) confirms division possible.

NonERISA Qualified Plans

- ◆ Mass. Teachers Retirement System: QDRO booklet includes:
 - Overview on dividing retirement: benefits under MGL c. 32 and Code.
 - Annotated sample QDRO.

Nonqualified Plans

- ◆ Excess Plans:
 - QDRO rules don't apply.
 - Simple DROs under state law apply.
- ◆ Top Hat Plans:
 - ERISA does not preempt QDROs.
- ◆ Code Section 409A Accommodation
- ◆ Follow QDRO rules in drafting DROs for excess plans.

Chapter 77 of Acts of 2016

- ◆ Signed by Governor Baker April 13, 2016.
- ◆ Applies to “benefits first granted on or after July 1, 2016.”
- ◆ Benefits refers to both accidental death benefits and 662/3 benefits pursuant to a QDRO.
 - Purpose-to protect the interest of long-term former spouses with QDRO.
- ◆ Applicable in very limited circumstances.

Nonqualified Plans

- ◆ Deferred compensation and nonstatutory stock options.
- ◆ Revenue Ruling 2002-22
 - Executive not taxed on transfer of interest to spouse.
 - Spouse taxed when deferred comp is paid or option exercised.
- ◆ Revenue Ruling 2004-60:
 - Payroll tax treatment follows Rev. Rul. 2002-22.

Stock Options

- ◆ Rev. Rul. 2002-22 does not apply to unvested options.
- ◆ If transfer made pursuant to a qualified stock option arrangement, favorable tax treatment is lost.
- ◆ Qualified stock option arrangements preclude transfer.
 - Alternative solutions for qualified stock arrangements include deferred distribution of profits and equitable ownership.
 - *Baccanti v. Morton*, 434 Mass. 787, 752 N.E 2d 718 (2001).

Stock Options

- ◆ SEC response to stock option transfer similar to REACT.
 - Removal of prohibition on direct transfer under 16(b)-3 (1996).
 - Rule 16a-12 transfers meeting ERISA definition of DRO-not required to be reported .
- ◆ State court issue—Will prohibition against transfer be narrowly construed?
 - Nothing in federal law enforces prohibition on assignment.
 - See *DeNadai v. Preferred Capital Management*, 272 B.R. 21 (D.Mass. 2001)—IRC 422(b)(5) does not prohibit involuntary transfer to creditors.

Life Insurance

- ◆ ERISA generally preempts state law that would assign life insurance to spouse.
- ◆ Issue: Does ERISA preemption exception for QDROs apply to life insurance plans?
 - ◆ No: 5th and 8th Cir.
 - ◆ Yes: 1st, 2nd, 3rd, 4th, 6th, 7th, and 10th Cir.
- ◆ Thus, QDRO trumps conflicting beneficiary designation in 1st Cir.

Split Dollar Plan

- ◆ Whole life insurance
 - ◆ Employer entitled to cash value.
 - ◆ Employee designates beneficiary for death benefit in excess of cash value.
- ◆ QDRO issue: Split dollar plans
 - ◆ are not retirement plans under ERISA or qualified plans under Code, but
 - ◆ are life insurance plans.
- ◆ Thus, QDRO trumps conflicting beneficiary designation under plan.

Split Dollar Plan (cont'd)

- ◆ Tax issues: Split dollar plans—by now—
 - should have been amended to avoid or comply with Code Section 409A.
 - If so, no tax issues should arise from transferring employee rights to spouse.

QUESTIONS?



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