



Best of the FAMLAWESQ List Serve

Question:

I know QDROs have been discussed extensively on list but cannot find that thread right now. I haven't done many QDROs, but heretofore have never had a problem getting a 401k split with a letter requesting it accompanied by a certified Decree of Divorce. I now have a company that is requesting one (based on my client's request to them, I hadn't sent the letter and Divorce Decree). Before I proceed to either prepare the QDRO or send my normal letter + Decree, I want to know whether or not the QDRO is now legally necessary to split the account or if I am merely dealing with the account administrator's preferences or rules or ???

Any comments would be appreciated. Thanks in advance.

Linda Quinton-Burr Ph.D.

Responses:

Response 1

Linda:

I don't know what your prior experience has been of course, but things should not be as you indicate (perhaps you were thinking of IRAs?) From my Introduction to ERISA, REA, and the Wacky World of QDROs:

.....
A "pension plan" is . . . A plan providing for retirement benefits or deferred income, extending to or beyond the end date of covered employment. See 29 U.S.C. § 1002(2)(A). This includes pension plans, profit sharing plans, "401(k)" plans, and some employee stock ownership plans. It does not include any kind of government plans – Civil Service, Military, state or local government, etc. It also does not include certain other types of private-employer benefits, such as severance pay benefits and vacation plans, or IRAs or SEP-IRAs, which are governed by other laws.

.....
ERISA provided that pension benefits may not be "assigned or alienated." This created a dilemma in jurisdictions recognizing that retirement benefits constituted valuable community or marital property rights. Many courts found a common law exception for domestic relations orders, but the legal landscape was confused until the passage of the Retirement Equity Act ("REA"), which provided that certain domestic relations orders, containing specific terms, must be accepted and honored by ERISA-qualified pension plans.[FN 7]

FN 7-- Pub. L. 98-397, 98 Stat. 1426 (Aug. 23, 1984).

.....
In other words, 401(k) plans should all be ERISA-qualified plans, and all ERISA-qualified plans should require QDROs for division. But such cash plans are the easiest sorts of QDROs to do, and probably the cheapest to have someone else do for you, if you wish.

Marshal S. Willick, Esq.
Las Vegas, Nevada

Response 2

A QDRO is absolutely necessary for a 401k but the question is whether the divorce decree will qualify on its own. It appears from the plan administrator that the decree does not contain sufficient information to qualify. (A Qualified Domestic Relations Order is simply an order that qualifies under the plan's rules, so the decree could if the right info was in it).

I would suggest that you contact the plan administrator for model documents and consider referring the work out to counsel with the expertise. Might be good risk management.

Joseph W. Booth, JD MDiv, FAAML
Lenexa, Kansas

Response 3

2 reasons you need to use a QDRO:

1. 401(k) is controlled by an independent trustee under ERISA. Since the plan is not controlled by the owner, you need a QDRO to get the trustee to make the transfer.
2. A QDRO allows the income taxes to transfer to the alternate payee.

Susan L. Jeffries, J.D., LL.M.(tax)
Alameda, California

Response 4

"I would suggest that you contact the plan administrator for model documents and consider referring the work out to counsel with the expertise. Might be good risk management."

There is no plan administrator for an IRA because the money in an IRA is owned and controlled by the account holder or spouse, not by the employer who set up a IRC section 401(a) qualified plan. The IRA need not be joined to the disso action because the person who legally owns and controls the account is the spouse and is already subject to the court proceeding.

I have been able to accomplish a simple "roll over" of IRA funds. If the bank holding the funds will not simply roll the money over into another qualified retirement account, then you might have to draft a Qualified Domestic Relations Plan and Order.

*Algera M. Tucker
Oakland, California*

Response 5

A 401K is a "qualified plan" under ERISA and the Internal Revenue Code. In order to avoid violating the "anti-assignment " rule and risk disqualifying the plan, a QDRO is required.

Here is an excerpt from the Department of Labor's website at <http://www.dol.gov/ebsa/publications/qdros.html>

1-2: What is a "domestic relations order"?

To be recognized as a QDRO, an order must be a "domestic relations order." A domestic relations order is:

- * A judgment, decree, or order (including the approval of a property settlement)
- * That is made pursuant to state domestic relations law (including community property law)
- * That relates to the provision of child support, alimony payments, or marital property rights for the benefit of a spouse, former spouse, child, or other dependent of a participant

A state authority, generally a court, must actually issue a judgment, order, or decree or otherwise formally approve a property settlement agreement before it can be a "domestic relations order" under ERISA. 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 domestic relations order.

There is no requirement that both parties to a marital proceeding sign or otherwise endorse or approve an order. It is also not necessary that the pension plan be brought into state court or made a party to a domestic relations proceeding for an order issued in that proceeding to be a "domestic relations order" or a "qualified domestic relations order." Indeed, because state law is generally preempted to the extent that it relates to pension plans, the department takes the position that pension plans cannot be joined as a party in a domestic relations proceeding

pursuant to state law. Moreover, pension plans are neither permitted nor required to follow the terms of domestic relations orders purporting to assign pension benefits unless they are QDROs.

Reference: ERISA §§ 206(d)(3)(B)(ii), 514(a), 514(b)(7); IRC § 414(p)(1)(B)

1-3: Must a "domestic relations order" be issued by a state court?

No. A domestic relations order may be issued by any state agency or instrumentality with the authority to issue judgments, decrees, or orders, or to approve property settlement agreements, pursuant to state domestic relations law (including community property law).

Reference: ERISA § 206(d)(3)(B)(ii); IRC § 414(p)(1)(B)

1-4: Who can be an "alternate payee"?

A domestic relations order can be a QDRO only if it creates or recognizes the existence of an alternate payee's right to receive, or assigns to an alternate payee the right to receive, all or a part of a participant's benefits. For purposes of the QDRO provisions, an alternate payee cannot be anyone other than a spouse, former spouse, child, or other dependent of a participant.

Reference: ERISA § 206(d)(3)(K), IRC § 414(p)(8)

1-5: What information must a domestic relations order contain to qualify as a QDRO under ERISA?

QDROs must contain the following information:

- * The name and last known mailing address of the participant and each alternate payee
- * The name of each plan to which the order applies
- * The dollar amount or percentage (or the method of determining the amount or percentage) of the benefit to be paid to the alternate payee
- * The number of payments or time period to which the order applies

Reference: ERISA § 206(d)(3)(C)(i)-(iv); IRC § 414(p)(2)(A)-(D)

1-6: Are there other requirements that a domestic relations order must meet to be a QDRO?

Yes. There are certain provisions that a QDRO must not contain:

- * The order must not require a plan to provide an alternate payee or participant with any type or form of benefit, or any option, not otherwise provided under the plan
- * The order must not require a plan to provide for increased benefits (determined on the basis of actuarial value)
- * 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 another order previously determined to be a QDRO
- * The order must not require a plan to pay benefits to an alternate payee in the form of a qualified joint and survivor annuity for the lives of the alternate payee and his or her subsequent spouse

Reference: ERISA §§ 206(d)(3)(D)(i)-(iii), 206(d)(3)(E)(i)(III); IRC §§ 414(p)(3)(A)-(C), 414(p)(4)(A)(iii)

1-7: May a QDRO be part of the divorce decree or property settlement?

Yes. There is nothing in ERISA or the Code that requires that a QDRO (that is, the provisions that create or recognize an alternate payee's interest in a participant's pension benefits) be issued as a

separate judgment, decree, or order. Accordingly, a QDRO may be included as part of a divorce decree or court- approved property settlement, or issued as a separate order, without affecting its "qualified" status. The order must satisfy the requirements described above to be a QDRO.

Reference: ERISA § 206(d)(3)(B); IRC § 414(p)(1)

Dalma C. Grandjean
Dayton, Ohio

Response 6

I've actually never split a 401(k) without a QDRO. It seems to be a common law requirement in Illinois, rather than statutory. [For certain pensions, we enter QILDRO's.] In every case, I have the employee request preferred formats and/or requirements from their benefits administrators, so I can tailor the Order and smooth out the acceptance process. Most companies/unions have such info at hand.

Roberta K. Kanabay
Schaumburg, IL

Response 7

Thanks for all the helpful comments. I had already obtained information from the employer but the administrator person is out of town for a few weeks so cannot review it before then. I've always had QDROs reviewed by the administrator before obtaining the Court's approval -- but, I guess I've been lucky or something because I've only had to do QDROs for pension plans and such. Guess I'll get to work on it and then see if there is anyone else that reviews these and can look at it before the regular reviewer gets back.

This list is so great – everyone so willing to jump in and help.

Thanks again.
Linda Quinton-Burr

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