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Review Your QDRO – Winter 2017 and 2018

A Qualified Domestic Relations Order (QDRO) is the documentation created under ERISA to divide marital pension assets between Working and Non-working Spouses in a marital dissolution. Non-ERISA plans have their own DRO formats, e.g., Illinois requires a QILDRO for State sponsored plans. Retirement benefits are either an accrued pension benefit from a defined benefit plan, or an account balance from a defined contribution plan, both credited for service during the marriage. We offer these comments in an administrative support capacity apart from prevailing legal advice from an attorney.

QDRO preparation may not receive proper attention for a number of reasons:

- Anyone can complete a sample QDRO provided by an employer. The proper division of marital pension assets is considerably more complicated than completing blanks in a QDRO format. See our Spring 2013 Newsletter, QDRO Strategies, available on our website.

- Employers tend to favor the Working Spouse at the expense of the Non-working Spouse; and, may assign lower level clerks in their human resources departments to answer requests for information. The information they provide is often inadequate and out of date.

- Plan administrators, actuaries, accountants, and all other advisors should communicate through each Spouse's attorney to preserve the sanctity of evidence. Centralizing information focuses critical thinking skills, and helps avoid external influences.

- Non-working Spouses frequently lack the financial resources to enforce their QDRO rights. Often, a Non-working Spouse will put his or her trust in the hands of the attorney representing the opposing Spouse with predictable results. Each marital partner should engage a separate, independent attorney.

- Despite no training in pension matters, the attorney representing a Spouse may feel capable of determining accrued benefit values and their actuarial present values assignable from a defined benefit plan. Marital partners should question results not provided by a qualified pension actuary.

- Many advisors do not read the plan document, and do not request plan documentation with formal benefit calculations to support their recommendations. This leads to incorrect plan interpretations and an incorrect division of marital pension assets to greatly disadvantage one of the Spouses.

- If both marital parties are employed, i.e., both are Working Spouses, one or the other's pension benefit may be overlooked to forfeit a substantial offset to the other Spouse's benefits assigned under a QDRO, or in an exchange for other marital property. Many employees do not realize they are covered by a tax qualified retirement plan from past or current employment, including self-employment, subject to QDRO requirements despite the required ERISA disclosures to plan participants.

- Allocations of pre-marital account balances for defined contribution plan accounts may fail to properly credit investment earnings to the pre-marital portion of the account balance.

- Some QDROs are not administrable by the plan sponsor despite the Court's and the employer's prior approvals. This leads to benefit payment delays or no benefits payable to a Non-working Spouse. Both employers and attorneys should review their existing QDROs for adequacy and accuracy.

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A former marital partner can file an amended QDRO with the Court that entered the original QDRO if there are problems. The plan sponsor can require an amended QDRO any time before QDRO benefits are payable if the QDRO is not administrable or conflicts with plan provisions. QDRO benefits are payable at the earliest date benefits are payable to the Working Spouse even if the Working Spouse does not elect benefit payments. Filing an amended QDRO requires all the same steps as preparation of the original QDRO, and may reallocate pension assets between the former marital partners.

Following are steps to help assure proper QDRO preparation for a new or amended QDRO:

1. Obtain all plan documents with their amendments, Summary Plan Descriptions (SPDs), and the latest benefit calculations for all retirement plans covering the Working Spouse from the current and all past employers where benefits were credited during the marriage. For an amended QDRO, or formation of a missed QDRO, documentation applicable at the time of the dissolution should be obtained to represent benefit amounts at that date. Information may need to be obtained from the plan sponsor via a detailed subpoena as a plan sponsor may resist production of these documents.

2. ERISA requires plan sponsors to periodically provide benefit statements, SPDs, and other disclosures to participants. Often, this information and subpoenaed information from the employer do not provide sufficient detail to verify the accuracy of benefit calculations, and are out of date. The Working Spouse should provide the plan sponsor an Authorization to Release Information to his and the other marital partner's advisors to enable detailed information requests directly from the plan sponsor.

3. Assure that each marital partner and his or her attorney have copies of all the documents. Employee data should be verified and benefit calculations should be independently reproduced with differences explained satisfactorily by the plan administrator. The Non-working Spouse must be convinced he or she is treated fairly.

4. Present values of defined benefit plan accrued benefits should be determined by a qualified pension actuary based on reasonable assumptions. The assumptions mandated under PPA '06, and published monthly in IRS Notices for Lump Sum Distribution present values produce single sum life annuity present values under projected mortality and interest rates in a non-advocacy manner. Avoid so called "economist" who may advocate on behalf of one or the other Spouse; and, have no reliable basis for their assumptions selections and present value calculations.

5. Pre-dissolution negotiations should include pension and other professionally qualified experts to represent each party's best interests. All retirement plan documentation and calculations should be referenced in the negotiations, and retained for future reference in the event the QDRO is contested.

The final step in QDRO preparation is to obtain the approvals of the marital parties and the employer sponsoring the retirement plan. The proposed QDRO is then submitted to the Court overseeing the dissolution for its approval and entering as the official document.

The marital dissolution season usually begins in early Spring to coordinate with the end of the school year. Pension assets can easily be the primary marital asset, net of mortgage and other marital debts. Marital partners contemplating a dissolution of marriage are well served to begin collecting information relevant to their marital pension assets early in the dissolution process.

Please call or e-mail any questions or comments.