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## PLAN DISTRIBUTIONS

### *Improving the Process to Distribute Retirement Benefits Pursuant to a QDRO*

*One of the hurdles to the sufficient accumulation of retirement savings for the achievement of retirement security is loss of retirement savings in divorce. Plan administrators are required by law to follow prudent procedures to administer the assignment of retirement benefits pursuant to a QDRO. Yet, questions remain as to the extent that affected parties understand the QDRO process and whether obtaining one is affordable so that its intended goals are met.*

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The ability to assign retirement plan benefits in divorce pursuant to a qualified domestic relations order (QDRO) has been possible for more than 35 years. The QDRO provisions were added to The Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code) by the Retirement Equity Act of 1984 with

the intent to create a clearer process for divorced parties to divide retirement benefits. Under both Section 206(d)(3) of ERISA and Section 414(p) of the Code, plans are required to establish reasonable procedures to determine the qualified status of a domestic relations order (DRO) that divides marital property under applicable state law, and to administer distributions under QDROs. In addition, Department of Labor (DOL) regulations require a plan's Summary Plan Description (SPD) to include a description of the procedures governing QDRO determinations or a statement indicating that participants can obtain a copy of such procedures from the plan administrator without charge. Yet, the US Government Accountability Office (GAO) has determined that many individuals, particularly those with lower incomes or other disadvantages, face several challenges to successfully navigating the QDRO process, which may lead some to forgo pursuing a QDRO. [Report to The Honorable Patty Murray, Ranking Member of the Committee on Health, Education, Labor and Pensions, US Senate, entitled "DOL Could Better Inform Divorcing Parties About Dividing Savings" (July 2020) (Report)] With individuals divorcing later in life, and overall high divorce rates, this reality is especially troubling for the retirement security of the affected parties.

### The GAO Report

In the Report, the GAO responded to the request to review the process by which DROs (court-issued judgments, decrees, or orders made pursuant to state domestic relations law that relate to the provision of child support, alimony payments, or marital property rights to certain individuals, including a spouse or former spouse) become QDROs, and examined through surveys, as well as interviews with large plan sponsors, recordkeepers, agency officials, and experts: (1) the number of QDRO recipients; (2) the fees and other expenses for processing QDROs; and (3) the reasons plans do not initially qualify DROs, as well as the challenges experts identify regarding the QDRO process. When a DRO is approved or qualified as a QDRO by a retirement plan administrator, it can divide retirement benefits and provide crucial financial security to a former spouse, referred to as an alternate payee. Under ERISA and the Code, a QDRO complies with certain legal requirements and its qualified status is determined by a plan administrator. For a DRO to become a QDRO, it must contain certain information, including:

1. Name and last known mailing address of the participant and each alternate payee (spouse, former spouse, child or dependent) covered under the order;
2. Amount or percentage (or the manner in which the amount or percentage is to be determined) of the participant's benefit to be paid to the alternate payee by each plan;
3. Number of payments or time period to which the order applies; and
4. Name of each plan to which the order applies.

In addition, a DRO can be a QDRO only if it does *not* require:

1. A plan to provide any benefit or option not otherwise provided under the plan;
2. The plan to provide increased benefits; and
3. The payment to an alternate payee of benefits that are required to be paid to another alternate payee under another order previously determined to be a QDRO.

If the retirement plan administrator determines the DRO to be a QDRO pursuant to its reasonable procedures, a participant's retirement benefit is eligible to be divided and provided to the alternate payee.

Despite reasonable procedures, the GAO identified that divorcing individuals report experiencing the following challenges from the QDRO review process:

1. an inability to pay the fees associated with the DRO preparation;
2. lack of knowledge about a spouse's retirement benefits;
3. lack of expertise when couples represent themselves in their divorce; and
4. lack of a full understanding of how QDROs can be used, such as a means of obtaining child support.

### Fees

QDRO fees arise in several ways including DRO preparation and review, attorney fees, and plan or service provider fees. The GAO found that fees for QDRO preparation and review vary widely, especially if model documents from the plan sponsor and/or recordkeeper are not used by QDRO preparers (for example, ranging from \$75 to \$1,200 for review of a defined contribution DRO involving a single plan). The DOL's Field Assistance Bulletin 2003-03 confirms its view that ERISA does not preclude defined

contribution plans from charging participants or alternate payees reasonable fees for QDRO reviews, and fees paid by plans for outside service provider assistance in this review may be passed on to plan participants and alternate payees. Fees charged by QDRO preparers, such as attorney's fees or other QDRO service provider preparation fees, are outside of the DOL's purview.

The DOL does not collect information about these fees, nor does the DOL require that fees for reviewing or processing a QDRO be included in the Form 5500 or in the SPD. The DOL does, however, require large plans to report compensation above certain thresholds received by service providers for services provided to the plan, as well as a description of the services provided, on the Form 5500 Schedule C. Thus, information is not widely available regarding providers of QDRO services and reasonable costs of these services, whether provided by attorneys and QDRO service providers, or by plans, their administrators or recordkeepers for reviewing and qualifying DROs. The Report noted it is not uncommon for couples with low incomes to choose not to pursue a QDRO because their retirement account balances are not sufficient to warrant paying the fees for drafting and approving the QDRO. The GAO suggested in its Report that the DOL should consider collecting fee information as part of existing reporting requirements, to determine trends in fees or discern outlier plan fees that warrant further consideration.

### **Lack of Knowledge and Expertise**

In the Report, the GAO noted that several experts opined that some prospective alternate payees may not know their spouse had a retirement account and, therefore, a benefit to which they might have a claim. In addition, many prospective alternate payees have difficulty obtaining information about their spouse's retirement plan directly from the plan sponsor or administrator and some plans are unclear on what information they are allowed to provide to alternate payees. As a result, these individuals may miss out on an opportunity to enhance their retirement security through pursuing a QDRO. In addition, when participants and prospective alternate payees represent themselves in the divorce proceedings as pro se litigants, they may be unaware of the need for a QDRO, may not recognize provisions in a QDRO that may not treat them equitably, even when they use a model QDRO to draft a DRO, and they may have difficulty navigating the process of having a

DRO qualified by the plan. For example, they may use a plan's model QDRO without modifying it to reflect any court approved settlement, or fail to meet formatting requirements of their state's court system, which may result in the need to submit a DRO to the plan multiple times before it is qualified. The GAO Report noted that the DOL publishes a QDRO booklet entitled "The Division of Retirement Benefits Through Qualified Domestic Relations Orders" (QDRO Booklet), but it is not widely known. The Pension Benefit Guaranty Corporation (PBGC) also has a process whereby prospective alternate payees can request information regarding whether a participant is currently receiving benefits from a plan being administered by PBGC, and California has a court form for prospective alternate payees' as they develop and attempt to qualify a DRO that also addresses survivor benefits.

The GAO Report further noted that missing information is often cited as a reason why DROs were not initially qualified by plan administrators, causing multiple rounds of submission of orders to the plan, additional reviews, and fees. It is not uncommon for basic required information to be absent from or incorrect on the DRO, such as the name or last known mailing address of the participant or alternate payee, or the name of the plan to which the order applied. Another frequent provision missing from the DRO was identified as "the dollar amount or percentage (or the method of determining the amount or percentage) of the benefit to be paid to the alternate payee." If the amount was identified, the description did not comply with plan provisions.

### **Lack of Understanding on How to Use a QDRO**

The GAO noted in the Report that, while a QDRO may be pursued to provide child support payments for dependent children in addition to providing retirement income, experts generally stated that the use of QDROs for such purposes was rare, and a few experts said that many involved parties are not aware of, or do not understand, that QDROs can be used for this purpose. Experts that were interviewed noted that they were aware of only a couple of states where child welfare agencies were focusing on helping alternate payees obtain a QDRO for child support payments when their spouse did not otherwise provide them. However, the amount being sought in the QDRO for child support can take up a substantial portion, or even the entire portion, of the retirement benefits that

are being divided. Once the cost of the fees for reviewing the QDRO are included, the participant and alternate payee may not have any remaining benefit.

### What Can the DOL Do?

Experts interviewed for the Report suggested that the DOL could do more to make resources on QDROs more readily available to divorcing parties, including information on the process and requirements for obtaining one. Clearer information and more targeted outreach regarding how to complete QDROs could provide involved parties, such as participants, prospective alternate payees, and family law practitioners, with resources to draft orders that are more likely to comply with federal law or plan requirements. Despite the availability of DOL publications on the challenges of planning for retirement, and the QDRO Booklet, many affected parties can easily be unfamiliar with the term “QDRO” and unaware of these publications. There is further confusion regarding survivorship benefits in the event the participant in the retirement plan dies before the former spouse (alternate payee), especially how the rules operate in defined benefit pension plans when the former spouse has waited until after the participant has retired to obtain a DRO.

The Report explained that, until July 2020, the DOL’s centralized page on its Website for information on divorce listed only its QDRO Booklet, and did not include links to the DOL’s three FAQs related to QDROs. In July 2020, DOL officials stated the agency had posted the three sets of QDRO FAQs on the agency’s Separation & Divorce Web page in place of the QDRO Booklet. In addition to the FAQs, the DOL provides educational seminars and other outreach to assist plan fiduciaries and other stakeholders. As part of this outreach, the DOL has included some information on QDROs as part of presentations on broader topics, but has not conducted more targeted outreach.

Experts opined in the Report that it would be helpful if the DOL (similar to what the PBGC has done) could develop and publish a checklist of common documents and information needed to develop a DRO, and that such a checklist would help ensure that DROs are more likely to be qualified on first review. The DOL has taken some steps to assist plans seeking to reduce complexity and costs by clarifying the process for QDROs. The DOL described in the QDRO Booklet the benefit of plans outlining their QDRO procedures in detail as a way of minimizing

administrative burden, cost, and confusion for participants and alternate payees. It suggests, for example, that plans describe information about the plan and the participant’s benefits that are available to alternate payees, and the amount of time it will take to qualify a DRO.

DOL officials informed the GAO that the agency has not targeted QDROs for enforcement efforts because concerns have not been elevated through its Benefits Advisor program, which it uses to help target its limited resources for conducting investigations. DOL officials said that among 175,000 to 200,000 queries annually, it receives about 800 to 900 QDRO-specific questions, and that these are generally related to the timeliness of service by the plan and are straightforward to resolve. DOL officials also said that its Benefit Advisors may make referrals to investigators; however, as of the date of the Report, the concerns regarding QDROs shared in these queries have not required attention by enforcement staff. The DOL does assess SPDs to, among other things, determine if plan administrators are complying with DOL regulations that require SPDs to include certain information regarding the plan’s QDRO procedures. Further, its Enforcement Manual provides for investigators to use the Reporting and Disclosure Checklist to determine whether a plan’s SPD meets the style, format, and content requirements under the regulations. To supplement their review, DOL officials said that some of its investigators also complete a Summary Plan Description checklist, which specifically asks whether the SPD contains a description of procedures governing QDROs or a required reference statement, as prescribed under ERISA. The DOL stated that it did not have other documentation regarding monitoring and enforcement activities specific to QDROs.

### GAO Recommendations

With a substantial increase in the divorce rate among those aged 50 and over and roughly two million individuals divorcing in the United States each year, The GAO opined that it is increasingly important that individuals are informed about their ability to seek a portion of their spouse’s retirement upon divorce. Thus, the GAO made two recommendations to the Secretary of Labor: 1) EBSA (the DOL agency that oversees retirement (and other benefit) plans) should explore ways to collect information on fees charged to participants or alternate payees by a retirement plan, including plan service provider fees

the plan passes on to participants, for review and qualification of domestic relations orders and evaluate the burden of doing so. The GAO suggested, for example, that the DOL could consider collecting fee information as part of existing reporting requirements in the Form 5500; and (2) EBSA should take steps to ensure that information regarding the requirements for QDROs is available and easily accessible for participants and alternate payees. The GAO suggested, for example, that EBSA could develop a checklist of documents and information that parties could use to help draft a domestic relations order that would be more likely to be qualified as a QDRO on a plan administrator's first review, and, EBSA could conduct outreach focused on QDROs to practitioners, such as members of the family bar who may draft domestic relations orders.

The DOL generally agreed with the GAO's recommendation to consider ways to collect additional information on fees related to QDROs, and said it would informally engage with interested stakeholders. The DOL stated, however, that the reasonableness of fees depends on the facts and circumstances involved in a particular case and expressed concern about imposing a regulatory burden to collect aggregate information that it said would not likely provide a better understanding of the reasonableness of such fees, but acknowledged that there may also be ways to collect information about QDRO-related fees that minimizes the burden on plans. For example, the DOL could consider collecting information on QDRO-related fees through the Summary Plan Description checklist used by enforcement staff. The GAO encouraged further review of plan practices related to fees for QDRO review and qualification, and exploring ways to collect QDRO-related fees to enable the DOL to better understand trends in fees or discern outlier plan fees that warrant further consideration.

The DOL also generally agreed with GAO recommendation that it should take steps to ensure that information regarding the requirements for QDROs is available and easily accessible. The GAO suggested that the DOL could consider developing a checklist of documents and information that parties could use to help draft a DRO likely to be qualified as a QDRO on a plan administrator's first review which are more accessible than the information in the QDRO Booklet. A checklist was also suggested by several experts as a way to make the technical requirements of a QDRO more user-friendly. In response to the GAO, the DOL

posted the three sets of QDRO FAQs on its web page in July 2020. The DOL also stated it would continue to work with stakeholders, including family law bar practitioners and conduct additional outreach as recommended in the Report.

### What Can Plan Sponsors and Fiduciaries Do?

The Report signals that there is renewed focus on the QDRO process, plan procedures, and reasonableness of fees. It would be prudent for plan sponsors and fiduciaries to revisit their QDRO procedures and fees for QDRO review services, and consider taking steps to make additional resources available that would better ensure that the process for obtaining a QDRO is clear and accessible for participants and alternate payees. While many qualified retirement plan sponsors offer plan participants model QDRO documents and provide them with the required QDRO procedures, it would be prudent to ensure that accessible information on the qualification process of DROs is available to assist participants and alternate payees navigate the process in a more timely and cost-effective manner.

Plan sponsors and fiduciaries should consider taking the following actions:

- Review service provider agreements to determine scope of current QDRO services for plans, determine whether there are any gaps in services requiring any changes to the scope of such services, and make applicable updates.
- Review fees associated with plan QDRO services and determine if they are reasonable.
- Determine whether the plan sponsor will pay some or all of the QDRO review fees and whether any fees charged to participants are permissibly allocated in accordance with applicable guidance.
- Ensure the plan has formal written QDRO procedures and make any desired updates.
- Create or update any model QDRO documents that are offered to participants and alternate payees to draft orders.
- Ensure that the SPD includes the description of the plan's QDRO procedures or the required statement that participants and beneficiaries may obtain a copy of the procedures free of charge.
- Consider additional participant communications or FAQs that can be provided to plan participants or made available on plan websites to explain the QDRO process and any specific issues that could

be explained, such as (i) the effect of a subsequent order, or order received by the plan following a participant's death, on the benefit, (ii) shared versus separate interest approaches to assign a benefit, (iii) death benefits, (iv) interplay of QDROs and beneficiary designations.

- Ensure plan QDRO records and beneficiary designation records are up to date.
- Review terms of plans other than qualified retirement plans, such as terms for nonqualified retirement plans, and determine whether they reflect whether such benefits can be assigned pursuant to a QDRO or whether plan amendments are desired, and ensure the QDRO process for these plans is properly communicated.

## Conclusion

Whether there is an uptick in plan audit and enforcement activity or implementation of increased fee disclosure requirements related to QDROs remains to be seen. Regardless, it would be prudent to revisit plan QDRO services, procedures, and communications, and to evaluate the reasonableness of related fees and fee allocations, to make any desired improvements, and ensure that the plan's QDRO procedures are compliant with applicable guidance and that the process serves the intended goals. In addition, the issuance of further DOL guidance on these issues should be monitored so that it can be timely addressed. ■

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