

## **CHECKLIST FOR ASSESSING THE VALIDITY OF A QDRO (Qualified Domestic Relations Order)**

ERISA and the Internal Revenue Code require qualified plans to honor the terms of a QDRO. The determination as to whether a particular domestic relations order is "qualified" is made by the plan's administrator. This checklist will help determine at the outset whether a particular order provides enough guidance as to how to pay benefits in *all* possible scenarios.

This checklist sets out those items which must be present for a domestic relations order to be a QDRO. The Plan Administrator must complete this checklist within 180 days of receiving a domestic relations order. If all items are present, the parties shall be notified that the order is a QDRO. If one or more items is not present, the parties shall be notified that the order is not a valid QDRO.

Complete a separate checklist for each plan governed by the terms of the order.

### \_\_\_\_\_ **1. Is the Document a Domestic Relations Order?**

The order must be a judgment, order, decree or other judicial approval of an agreement related to child support, alimony, or the division of marital property, issued pursuant to state law. Divisions of property agreed to by the parties but not formally approved by a court are not acceptable.

A Note on Revised Orders: If an order is found to be invalid, and the deficiencies are later corrected by the parties, the order may be resubmitted to the Plan. In this instance, the corrected order *must* be approved again by the court in order for it to be valid.

### \_\_\_\_\_ **2. Does the Order Include Names, Addresses, Social Security Numbers and Dates of Birth?**

The order must include the names, addresses, Social Security numbers and dates of birth of both the Participant and the Alternate Payee. In some cases, there will be several Alternate Payees. An order may designate a guardian or other representative of an Alternate Payee (e.g., an adult who cares for a minor child), however a trust may not be named as an Alternate Payee.

Note: Although the law requires the order to state the parties' addresses, you may have access to this information through other records. In practice, if the absence of a party's address is the **ONLY** deficiency and you have access to this information, you should not disqualify an order.

### \_\_\_\_\_ 3. Does the Order Identify the Plan(s) to Which It Applies?

The order must clearly identify all plans to which it applies. As long as there is no uncertainty about the identity of the plan in question, it is acceptable for an order to refer to an outdated or informal plan name. The order should also identify the Plan Administrator.

Note: The letter to the parties regarding whether the order is a QDRO should point out the proper name of the plan(s) covered by the order.

### \_\_\_\_\_ 4. Does the Order Create a Right to Determinable Benefits?

The order must create an Alternate Payee's right to benefits that are definitely determinable. This item must be carefully reviewed in conjunction with the plan to be sure that you can determine how much to distribute to the Alternate Payee and when to make the payment.

- A. Does the order relate to the type of plan covered? In some cases the parties' attorneys will draft orders based on form books or previously accepted QDROs. This can result in orders which are impossible to administer. For example, if the order related to a defined benefit plan attempts to divide the "account balance plus interest", it probably does not provide the information necessary to administer the order (and therefore it would not be a QDRO).
- B. Is the order clear as to what portion of the accrued benefit is to be divided? For example, most orders provide that the portion of the benefit accrued up to the date of the divorce is to be divided between the parties. If the order does not specify limits, the plan should provide benefits to the Alternate Payee based on the entire accrued benefit of the Participant at the time of the distribution (including accruals after receipt of the QDRO). Note that this may not be consistent with the parties' intentions in drawing up the QDRO, and they should be informed of this interpretation in the letter confirming the validity of the QDRO.
- C. Is the order clear as to how the benefit is to be divided between the parties? Many orders provide that the specified benefit is to be divided on a percentage basis (usually 50% for both parties). It is also permissible for an order to provide that the Participant's entire accrued benefit is to be paid to an Alternate Payee, or that benefits are to be divided upon some other formula or that a specific dollar amount of benefit is to be provided.
- D. Is the order clear as to when payments to the Alternate Payee are to begin? In most instances, Alternate Payees are treated just like other Participants/beneficiaries under the plan. There is an important exception to this rule related to the timing of benefit commencement. Under the QDRO rules, an order *may* provide that an Alternate Payee may begin receiving benefits at such time as the Participant reaches (or would have reached) the earliest retirement age as defined in Code Section 414(p), *even if* the Participant would not

otherwise be entitled to take a distribution at that time. Plans may also be amended to allow even earlier distribution to Alternate Payees. Orders may also provide for other dates of distribution to the Alternate Payee, e.g. at such time as distribution to the Participant is begun.

- E. Is it clear whether the Alternate Payee has been named as the surviving spouse for purposes of the qualified joint and survivor annuity, qualified pre-retirement survivor annuity or both? If the Alternate Payee is the surviving spouse for purposes of the qualified pre-retirement survivor annuity, is it clear whether the Alternate Payee's death benefit is based on the entire benefit or only the Alternate Payee's share?

\_\_\_\_\_ **5. Does the Order Limit the Alternate Payee's Benefits to an Amount Not in Excess of the Participant's Accrued Benefit?**

The order may not provide for benefits payable to an Alternate Payee which exceed the benefits payable under the plan(s). For example, if the order states that the Alternate Payee is to receive \$200 per month of the Participant's benefit, and Participant has only accrued a \$150 per month benefit to date, the order is not a valid QDRO. It is possible, however, for the order to specify that the Alternate Payee will receive all or some portion of the benefits earned by the Participant after the dissolution of the marriage.

The fact that a Participant is not yet vested in the plan does not disqualify the order, however the letter to the parties should note that benefits will only be payable under the order to the extent the Participant is vested when the benefits become payable.

\_\_\_\_\_ **6. Does the Order Provide for a Permissible Payment Method?**

The order must provide that benefits payable to the Alternate Payee are to be paid under a method allowed by the plan. For example, if the order requires a lump sum payment and the plan has no lump sum option available, the order is not a valid QDRO.

Generally if benefits are already in pay status, the order may not change the form of benefit payment. However, if the order awards 100% of the Participant's benefit to either the Participant or to the Alternate Payee (with the other party receiving 0%), the order may allow a change in the form of benefit payment, subject to the plan's consent and election procedures.

An order may not require payment to an Alternate Payee in the form of a joint and survivor annuity with the Alternate Payee's new spouse as beneficiary, even if this option is available to the Participant. Any other form of benefit or other election available to a Participant, however, must be made available to an Alternate Payee.

Note: It is acceptable for the order to require that the Alternate Payee begin receiving payments at the time when the Participant reaches the earliest retirement age under Code Section 414(p). Payments to the Alternate Payee may begin on such date, even if the Participant has not separated from service (and would not otherwise be entitled to a distribution). For plans with automatic cash-out procedures, the order may allow a distribution prior to date on which the Participant reaches the earliest retirement age under the plan.

\_\_\_\_\_ **7. Is this Order Consistent with Previous QDROs?**

If other QDROs (related to other Alternate Payees) have been received with respect to the benefits of this particular Participant, the order should be consistent with the provisions of those orders. An order cannot supersede the payment of benefits to an Alternate Payee under another QDRO. Regardless of the dates of the marriages involved, the first order received by the plan is followed first, with any remaining benefits subject to any order received later.

**This checklist should be updated if the DOL and IRS issue proposed or final regulations relating to QDROs.**