

7

Qualified Domestic Relations Orders and Spousal Rights

JESSICA LAUREN BERGER

Harrison & Held, LLP
Chicago

IICLE[®] gratefully acknowledges the contributions of Sally Doubet King to the previous edition of this chapter.

I. [7.1] Introduction**II. Qualified Domestic Relations Orders**

- A. [7.2] Qualified Domestic Relations Orders — The Exception to the Employee Retirement Income Security Act of 1974 Spendthrift Provisions
- B. [7.3] Overview of Applicable Law and Guidance
- C. [7.4] Effective Date of Qualified Domestic Relations Order Rules
- D. [7.5] Employee Benefit Plans to Which Qualified Domestic Relations Orders Apply
- E. [7.6] Alternate Payees
- F. [7.7] Qualified Domestic Relations Order Requirements
- G. [7.8] Administrative Procedures for Qualification
- H. [7.9] United States Department of Labor Interim Final Regulations
 - 1. [7.10] Subsequent Domestic Relations Orders
 - 2. [7.11] Timing of Domestic Relations Orders
- I. Plan Features To Consider in Drafting Qualified Domestic Relations Orders
 - 1. [7.12] Defined-Contribution Plan
 - 2. [7.13] Retroactive Assignment Dates in Defined-Contribution Qualified Domestic Relations Orders
 - 3. [7.14] Defined-Benefit Plan
- J. [7.15] Divorce Decree as a Qualified Domestic Relations Order
- K. [7.16] Pitfalls to Qualification
- L. [7.17] Qualified Domestic Relations Order After Death of Participant
- M. [7.18] Contrary Beneficiary Designations
- N. [7.19] Qualified Domestic Relations Order Modification
- O. [7.20] Bankruptcy of Participant
- P. [7.21] Receipt of Benefits
- Q. [7.22] Dividing the Benefit — Shared Payment or Separate Interest
- R. [7.23] Taxation of Benefits

III. Qualified Retirement Plan Obligations Regarding Spouses

- A. [7.24] Qualified Joint and Survivor Annuity
 - 1. [7.25] Waiver of Automatic Qualified Joint and Survivor Annuity Distribution Form
 - 2. [7.26] Qualified Joint and Survivor Annuity Notice Rules
- B. Qualified Preretirement Survivor Annuity
 - 1. [7.27] Commencement of Annuity Payments
 - 2. [7.28] Waiver of Qualified Preretirement Survivor Annuity
- C. [7.29] Tax Issues for Surviving Spouses

IV. [7.30] Qualified Domestic Relations Orders Apply to Same-Sex Couples

V. Sample Forms and Documents

- A. [7.31] Sample Spousal Consent and Waiver Election
- B. [7.32] Sample Qualified Domestic Relations Order for Defined-Benefit Plan
- C. [7.33] Sample Qualified Domestic Relations Order for Defined-Contribution Plan
- D. [7.34] Qualified Domestic Relations Order Checklist
- E. [7.35] Sample Letter to Plan Participants Regarding Qualified Domestic Relations Order Procedures

I. [7.1] INTRODUCTION

This chapter provides an overview of the rights of the spouse of a participant in a qualified retirement plan, the obligations of the qualified retirement plan with respect to the spouse, and the treatment of domestic partners with respect to retirement plan benefits under current law. After the Supreme Court's decisions in *United States v. Windsor*, ___ U.S. ___, 186 L.Ed.2d 808, 133 S.Ct. 2675 (2013) and *Obergefell v. Hodges*, ___ U.S. ___, ___ L.Ed.2d ___, 135 S.Ct. 2584 (2015), same-sex married couples have the same rights as opposite-sex married couples with respect to qualified retirement plans. In *Windsor*, the Supreme Court held that the provision in the Defense of Marriage Act (DOMA), Pub.L. No. 104-199, 110 Stat. 2419 (1996), that defined marriage as a legal union between one man and one woman and spouse as a person of the opposite sex was unconstitutional. *Windsor* therefore mandates the recognition of same-sex marriages under federal law. In *Obergefell*, the Supreme Court ruled that the Fourteenth Amendment requires states to allow and to recognize same-sex marriage.

This chapter is intended only as a starting point for gaining familiarity with this subject matter; a seasoned benefits practitioner should be consulted for a more comprehensive analysis.

II. QUALIFIED DOMESTIC RELATIONS ORDERS

A. [7.2] Qualified Domestic Relations Orders — The Exception to the Employee Retirement Income Security Act of 1974 Spendthrift Provisions

The Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. No. 93-406, 88 Stat. 829, governs qualified retirement plans. See 29 U.S.C. §1001, *et seq.* The federal statute provides a comprehensive set of rules to protect the integrity of employee benefit plans and rights of participants and beneficiaries in those plans.

ERISA provides that the benefits conferred to participants and beneficiaries in qualified retirement plans may not be assigned or alienated. 26 U.S.C. §401(a)(13); ERISA §206(d)(1), 29 U.S.C. §1056(d)(1). These “spendthrift” provisions are intended to ensure that a participant's retirement benefits are actually available to provide financial support during the participant's retirement years. As the Supreme Court stated, ERISA's spendthrift provision “reflects a considered congressional policy choice . . . to safeguard a stream of income for pensioners (and their dependents . . .), even if that decision prevents others from securing relief for the wrongs done them.” *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 107 L.Ed.2d 782, 110 S.Ct. 680, 687 (1990).

A qualified domestic relations order (QDRO) is an exception to the anti-alienation provision of ERISA. 26 U.S.C. §401(a)(13)(B). A QDRO is any domestic relations order (DRO) such as a judgment, decree, or marital settlement agreement that is made pursuant to a state's domestic relations law that allows for the payment of qualified retirement plan benefits to certain persons who would otherwise be prevented from receiving such benefits. Specifically, a QDRO provides for child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant in a qualified retirement plan. 26 U.S.C. §414(p)(1)(B); ERISA §206(d)(3)(B)(ii), 29 U.S.C. §1056(d)(3)(B)(ii).

ERISA preempts any and all state laws insofar as they relate to employee benefit plans. ERISA §514(a), 29 U.S.C. §1144(a); *Egelhoff v. Egelhoff*, 532 U.S. 141, 149 L.Ed.2d 264, 121 S.Ct. 1322 (2001). It is not surprising that during the years immediately after the passage of ERISA, courts were divided on the question of whether anti-alienation rules applied to state DROs imposing family-support obligations on a participant's benefit in a qualified retirement plan. *See, e.g., Operating Engineers' Local #428 Pension Trust Fund v. Zamborsky*, 650 F.2d 196 (9th Cir. 1981) (order assigning benefits for alimony not in conflict with ERISA); *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979) (ERISA provisions do not alter traditional support obligations); *Cody v. Riecker*, 594 F.2d 314 (2d Cir. 1979) (ERISA does not prevent garnishment for support obligations).

Congress clarified the effect of the spendthrift provision on family-support obligations such as alimony and child support by enacting the Retirement Equity Act of 1984 (REA), Pub.L. No. 98-397, 98 Stat. 1426. REA amended ERISA to ensure that the statute's preemption provisions could not be used to block the enforcement of QDROs. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 100 L.Ed.2d 836, 108 S.Ct. 2182, 2189 – 2190 (1988).

B. [7.3] Overview of Applicable Law and Guidance

The law governing this subject matter is a complex mix of federal and state law. Federal and state courts have concurrent jurisdiction to rule on the validity of qualified domestic relations orders, and practitioners must look to both federal and state law to discern the application and interpretation of these statutory provisions in each applicable jurisdiction. ERISA §§502(a)(1)(b), 502(e)(1), 29 U.S.C. §§1132(a)(1)(b), 1132(e)(1); *Jones v. American Airlines, Inc.*, 57 F.Supp.2d 1224 (D.Wyo. 1999); *In re Marriage of Oddino*, 16 Cal.4th 67, 939 P.2d 1266, 65 Cal.Rptr.3d 566 (1997), *cert. denied*, 118 S.Ct. 1302 (1998); *Robson v. Electrical Contractors Association Local 134 IBEW Joint Pension Trust of Chicago*, 312 Ill.App.3d 374, 727 N.E.2d 692, 245 Ill.Dec. 245 (1st Dist. 1999), *reh'g denied, appeal denied*, 189 Ill.2d 702 (2000).

Prior to 2007, neither the Internal Revenue Service nor the United States Department of Labor (DOL) issued regulations with respect to the statutory provisions governing QDROs. However, the Pension Protection Act of 2006 (PPA), Pub.L. No. 109-280, 120 Stat. 780, instructed the DOL to issue regulations clarifying the status of domestic relations orders that initially fail to meet the QDRO requirements and must be revised to be deemed QDROs. Pursuant to the PPA's directive, the DOL issued interim final regulations on March 7, 2007. 72 Fed.Reg. 10070 (Mar. 7, 2007). The interim final regulations were finalized on June 10, 2010. 75 Fed. Reg. 32846 (June 10, 2010).

Prior to the PPA, Congress addressed the paucity of guidance and the complexity of rules relating to QDROs by directing the IRS to issue legally compliant sample language for QDROs in the Small Business Job Protection Act of 1996, Pub.L. No. 104-188, 110 Stat. 1755. IRS Notice 97-11, 1997-1 Cum.Bull. 379, was the response from the IRS to this directive and provides information intended to assist domestic relations attorneys, plan participants, spouses and former spouses of participants, and plan administrators in drafting and reviewing QDROs.

The Pension Benefit Guaranty Corporation (PBGC) and the DOL have published guidance on QDROs. The PBGC booklet entitled *Qualified Domestic Relations Orders & PBGC*, www.pbgc.gov/documents/qdro.pdf, provides guidelines for QDROs submitted to the PBGC after a plan terminates and the PBGC becomes trustee. The DOL booklet entitled *QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders*, www.dol.gov/ebsa/publications/qdros.html, provides general guidance on QDROs.

C. [7.4] Effective Date of Qualified Domestic Relations Order Rules

The qualified domestic relations order provisions of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code described in this chapter are applicable to domestic relations orders entered after December 31, 1984, and the enactment of the Retirement Equity Act. DROs entered before January 1, 1985, will be treated as QDROs if benefits were being paid according to the orders as of January 1, 1985. If benefits were not being paid pursuant to pre-1985 orders as of January 1, 1985, plan administrators have discretion to elect to treat the orders as QDROs. If a plan administrator elects not to treat a pre-REA order as a QDRO, the parties may amend the order to satisfy the QDRO requirements. Retirement Equity Act of 1984, §§303(d)(1), 303(d)(2), set out as a note to 29 U.S.C. §1001.

D. [7.5] Employee Benefit Plans to Which Qualified Domestic Relations Orders Apply

Qualified domestic relations order requirements apply to qualified pension, profit-sharing, and stock bonus plans and to church plans that elect to be covered under the minimum participation rules. The QDRO, as an exception to the anti-alienation rules, was designed to be the sole means for dividing qualified retirement plan benefits between a plan participant and one or more alternate payees (see §7.6 below).

QDRO requirements generally do not apply to benefits provided through group health plans maintained by employers. Some courts have held that QDRO rules apply to welfare benefit plans under the Employee Retirement Income Security Act of 1974 when a divorce decree specifies how the welfare benefits, such as life insurance benefits, are to be distributed. *Metropolitan Life Insurance Co. v. Wheaton*, 42 F.3d 1080 (7th Cir. 1994); *Metropolitan Life Ins. Co. v. Fowler*, 922 F.Supp. 8 (E.D.Mich. 1996). Practitioners should be aware of these cases and should determine what local courts have included in domestic relations orders. However, practitioners should also be aware that the statutory language of both the Internal Revenue Code and ERISA covers only qualified retirement plans.

ERISA §609 requires employer-sponsored group health plans to comply with qualified medical child-support orders (QMCSOs). 29 U.S.C. §1169(a)(1). A QMCSO is a medical child-support order such as a judgment, decree, or order (including a settlement agreement) made pursuant to a state domestic relations law that creates or recognizes the existence of an “alternate recipient” — a natural or adopted child of an employee eligible for or covered by an employer-sponsored group health plan. The QMCSO provides for the right of the alternate recipient to receive the health plan coverage to which the noncustodial employee/parent is entitled under the group health plan. The group health plan may also receive a National Medical Support Notice from an authorized state agency; this notice provides a mechanism for states to enforce medical child-support obligations of noncustodial parents.

PRACTICE POINTER

- ✓ Retirement benefit plans that are sponsored by federal and state governments cannot be divided with QDROs because government-sponsored plans are exempt from ERISA. Consequently, many government-sponsored plans have regulations that explain how to divide these plans.

Federal Retirement Plans. The order for dividing retirement benefits under the Civil Service Retirement System (CSRS), the Federal Employee Retirement System (FERS), and federal pensions is known as the court order acceptable for processing (COAP). The COAP is a court order approved in connection with or incident to a divorce or legal separation of an employee that is part of CSRS, FERS, or a federal pension. The order necessary to divide a Thrift Savings Plan is referred to as a retirement benefits order.

In 1982, Congress passed the Uniformed Services Former Spouses' Protection Act (USFSPA), Pub.L. No. 97-252, 96 Stat. 730 (1982). The USFSPA gives a state court the authority to treat military retirement plans as marital property and divide it between the spouses. 10 U.S.C. §1408. In order to divide a spouse's military retired pay, a military order must be prepared, entered with the court, and sent to the Defense Finance and Accounting Services.

Illinois Retirement Plans. Under Illinois law, benefits provided by the State Employee's Retirement System of Illinois (SERS) may not be paid to anyone other than the member, except to an alternate payee pursuant to a valid qualified Illinois domestic relations order (QILDRO). Under §1-119 of the Illinois Pension Code, 40 ILCS 5/1-101, *et seq.*, a QILDRO is a court order issued by an Illinois court that directs an Illinois public retirement system to pay an alternate payee all or a portion of a member's retirement benefit, certain refunds, or lump-sum death benefit.

E. [7.6] Alternate Payees

An "alternate payee" is the benefit recipient in a qualified domestic relations order. 26 U.S.C. §414(p)(1)(A)(i); ERISA §206(d)(3)(B)(i)(I), 29 U.S.C. §1056(d)(3)(B)(i)(I). An alternate payee may be a spouse, former spouse, child, or other dependent of the plan participant. If an alternate payee is a minor or is legally incompetent, the QDRO can require payment to someone with legal responsibility for the alternate payee such as a guardian. A retirement plan can be required to make payments under a child-support lien; however, the lien must meet the QDRO requirements of the IRS Code and the Employee Retirement Income Security Act of 1974. *Taliaferro v. Goodyear Tire & Rubber Co.*, 265 Fed.Appx. 240 (5th Cir. 2008).

Alternate payees are generally considered beneficiaries of the applicable qualified retirement plan and, as such, have certain rights under ERISA typically afforded to plan beneficiaries. *Boggs v. Boggs*, 520 U.S. 833, 138 L.Ed.2d 45, 117 S.Ct. 1754 (1997). These rights include the right to obtain plan documents such as a summary plan description.

F. [7.7] Qualified Domestic Relations Order Requirements

A qualified domestic relations order is a domestic relations order that the administrator of a qualified retirement plan deems to be qualified under the QDRO rules described in this section.

A “domestic relations order” is defined as a “judgment, decree, or order (including approval of a property settlement agreement),” which “is made pursuant to a State domestic relations law,” that provides “child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant.” 26 U.S.C. §414(p)(1)(B); ERISA §206(d)(3)(B)(ii), 29 U.S.C. §1056(d)(3)(B)(ii).

Notably, a DRO may be a QDRO even if it is not issued as part of a divorce proceeding, but a DRO must be issued as a result of a domestic relations proceeding to qualify as a QDRO. Therefore, legal proceedings related to a legal separation or family-support obligation may also produce a DRO. *See Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107 (3d Cir. 1994) (settlement entered into prior to parties’ divorce was determined to be QDRO).

To qualify as a QDRO, a DRO must contain

1. the name and last-known mailing address of the participant and the name and mailing address of each alternate payee covered by the order;
2. the name of each retirement plan to which the order applies;
3. the dollar amount or percentage (or method of determining the amount or percentage) of the benefit to be paid the alternate payee; and
4. the number of payments or the period to which the order applies. 26 U.S.C. §414(p)(2); ERISA §206(d)(3)(C), 29 U.S.C. §1056(d)(3)(C).

Thus, a QDRO need not be issued for each qualified retirement plan in which the participant participates. Rather, a single QDRO may assign the rights to benefits under more than one qualified retirement plan.

Additionally, there are certain provisions that a DRO must not contain to qualify as a QDRO. The DRO must not require a retirement plan to provide

1. an alternate payee or participant with any type or form of benefit, or any option, not otherwise provided under the plan;
2. increased benefits (determined on the basis of actuarial value);
3. for the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO; or

4. for the payment of benefits to an alternate payee in the form of a qualified joint and survivor annuity for the lives or the alternate payee and his or her subsequent spouse. 26 U.S.C. §414(p)(3); ERISA §206(d)(3)(D), 29 U.S.C. §1056(d)(3)(D).

A QDRO may give an alternate payee the rights to only a portion or all of a participant's benefits under a qualified retirement plan. A QDRO may also order a specific dollar amount be paid to the alternate payee or a percentage of the participant's accrued benefit. However, the QDRO may not require that the alternate payee receive more than the benefits to which the participant is entitled under the plan.

An alternate payee may elect a different form of benefit from that form selected by the participant, as long as the participant would be eligible for the form of benefit selected by the alternate payee and the form of benefit is available under the terms of the plan.

Because the joint and survivor rules apply to QDROs, plan administrators should be sure the QDRO contains beneficiary information when such information is relevant to the forms of benefits offered under the qualified retirement plan. 26 U.S.C. §§414(p)(2), 401(a)(11); ERISA §206(d)(3)(C), 29 U.S.C. §1056(d)(3)(C). In particular, if mandated by a QDRO, the former spouse of a participant will be treated as a surviving spouse of the participant for purposes of a joint and survivor annuity or preretirement survivor annuity; however, any subsequent spouse of that participant will not be treated as a surviving spouse for this purpose. 26 U.S.C. §414(p)(5); ERISA §206(d)(3)(F)(i), 29 U.S.C. §1056(d)(3)(F)(i).

PRACTICE POINTER

- ✓ A DRO will not be qualified unless the order is entered by a state agency with the authority to issue judgments, decrees, or orders pursuant to state domestic relations law (including a community property law). 26 U.S.C. §414(p)(1)(B); ERISA §206(d)(3)(B)(ii), 29 U.S.C. §1056(d)(3)(B)(ii). Therefore, it is not sufficient for the parties to submit to a plan administrator for qualification a property agreement agreed to and signed only by the alternate payee and the qualified retirement plan participant.

Furthermore, a DRO will not become a QDRO until the plan administrator of the applicable qualified retirement plan deems the DRO qualified under the QDRO rules. Therefore, the parties must submit the DRO for review and qualification before the alternate payee's right to the participant's benefits is secured.

It is often most efficient for the parties' legal counsel to request a sample QDRO from the applicable plan administrator or request that the plan administrator review a draft DRO prior to the state court finalizing the order.

G. [7.8] Administrative Procedures for Qualification

The administrator of the retirement plan is initially responsible for determining whether the domestic relations order constitutes a qualified domestic relations order. The qualified retirement

plan must establish reasonable, written procedures for determining the qualified status of a DRO and must notify the parties of both the receipt of a DRO and the plan procedures regarding qualification. The procedures should specify how the plan administrator will perform the following functions relating to the order while determination of the order's status is pending:

1. notifying individuals affected by the order;
2. segregating amounts payable under the order;
3. determining whether the order is qualified; and
4. distributing benefits under the QDRO. 26 U.S.C. §414(p)(6); ERISA §206(d)(3)(G), 29 U.S.C. §1056(d)(3)(G).

A plan administrator is not permitted to “look beneath the surface of the order” when making its determination as to the qualified status of a state DRO. *Blue v. UAL Corp.*, 160 F.3d 383, 385 (7th Cir. 1998). However, if a plan administrator receives evidence indicating that a DRO submitted by a participant and alternate payee may not be a valid order relating to marital property rights under state domestic relations law (such as evidence indicating that the order was obtained fraudulently), the plan administrator must take reasonable steps to determine the credibility of the evidence received. DOL Adv.Op.Ltr. No. 92-17A (Aug. 21, 1992). If the plan administrator determines that the evidence is credible, the plan administrator must determine whether the order is a valid DRO issued pursuant to a state domestic relations law as required under 26 U.S.C. §414(p)(2), ERISA §206(d)(3)(C), and 29 U.S.C. §1056(d)(3)(C). The plan administrator must accomplish this without “inappropriately spending plan assets or inappropriately involving the plan in the State domestic relations proceeding” based on the facts and circumstances of the situation. DOL Adv.Op.Ltr. No. 99-13A (Sept. 29, 1999).

During the time the plan administrator reviews a DRO, the plan administrator must segregate and separately account for all amounts that would have been payable to an alternate payee. If the DRO is determined to be qualified, the plan administrator must then pay all amounts determined to be due to the alternate payee. 26 U.S.C. §414(p)(7); ERISA §206(d)(3)(H), 29 U.S.C. §1056(d)(3)(H).

The determination as to whether the DRO is a QDRO must be made within 18 months after the date that the first payment would require payment to the alternate payee. However, the 18-month period will not begin until the first payment after the plan receives the order. If no determination is made during that time, then the plan administrator is permitted to make distributions to the participant who would have received them absent the order. If the DRO is later determined to be a QDRO, the alternate payee will be entitled only to amount payable under the order after subsequent determination. *Id.*

The DOL has stated that if the plan administrator determines that the order is not a QDRO, the notice to the participants should (1) explain why the order is not a QDRO, (2) refer to the plan's provisions that the plan administrator relied on, (3) point out any time limits, and (4)

describe any additional information necessary for the order to become a QDRO. 26 U.S.C. §414(p)(6); ERISA §206(d)(3)(G), 29 U.S.C. §1056(d)(3)(G). See *QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders* at Q2-14, www.dol.gov/ebsa/publications/qdros.html.

PRACTICE POINTER

- ✓ Plan administrators who change or fail to follow the plan's QDRO procedures — to the detriment of the participant or alternate payee — may come under attack as having breached their fiduciary duty. Therefore, a plan administrator should ensure that the plan's QDRO procedures accurately describe the plan's QDRO practices. One court has held that a plan administrator failed to administer the plan in accordance with the terms of the written document when the plan held a participant's account upon notice of a forthcoming DRO (but before actual receipt of the DRO), and this practice was not detailed in the plan's QDRO procedures. *Schoonmaker v. Employee Savings Plan of Amoco Corporation & Participating Cos.*, 987 F.2d 410 (7th Cir. 1993). See also *Day v. Wall*, 112 F.Supp.2d 833 (E.D.Wis. 2000).

For several years, the U.S. Department of Labor maintained that a plan could not charge the participant or alternate payee for any costs incurred by the plan while reviewing a DRO to determine if it was a QDRO. DOL Adv.Op.Ltr. No. 94-32A (Aug. 4, 1994). However, in DOL Field Assistance Bull. 2003-3 (May 19, 2003), the DOL took the position that in the context of defined contribution plans, a plan's administrator may assess reasonable expenses attributable to a QDRO determination against the individual account of the participant who is a party to a QDRO. Procedures for allocating QDRO-related administrative expenses must be set forth in plan documents, QDRO procedures, and summary plan descriptions. Because allocation of expenses represents a fiduciary duty of the plan sponsor or plan administrator, the method and amounts charged to individual participant accounts should be reasonable and must be applied in a nondiscriminatory manner.

H. [7.9] United States Department of Labor Interim Final Regulations

The Pension Protection Act of 2006 instructed the U.S. Department of Labor to issue regulations clarifying the status of domestic relations orders that initially fail to meet the qualified domestic relations order requirements. Pursuant to the PPA's directive, the DOL issued interim final regulations on March 7, 2007. 72 Fed.Reg. 10070 (Mar. 7, 2007). The interim final regulations were finalized on June 10, 2010. 75 Fed.Reg. 32846 (June 10, 2010).

1. [7.10] Subsequent Domestic Relations Orders

The U.S. Department of Labor interim final regulations provide that a domestic relations order will not fail to be a qualified domestic relations order solely because the order is issued after or revises an existing QDRO.

Subsequent DRO between the same parties. A second DRO issued in regard to the same parties may still qualify as a QDRO, even when the first DRO was found to be a QDRO and the second DRO seeks to reduce the benefits of the plan participant. 29 C.F.R. §2530.206(b)(2).

Subsequent DRO between different parties. When a plan participant incurs two divorces, a DRO issued in regard to the second ex-spouse of the participant will not be a QDRO if the order assigns the same benefits to the second ex-spouse that were previously promised to the first ex-spouse in a prior QDRO. *Id.*

2. [7.11] Timing of Domestic Relations Orders

A domestic relations order will not fail to be a qualified domestic relations order solely because of the time at which the order is issued. 29 C.F.R. 2530.206.

DRO issued after death. If a plan administrator rejects a DRO as deficient and the plan participant dies shortly thereafter while actively employed, the plan administrator may qualify a second DRO submitted after the death of the participant that corrects the defects of the first order. 29 C.F.R. §2530.206(c)(2), Example (1).

DRO issued after divorce. A plan administrator may qualify a DRO submitted by an ex-spouse that requires that the ex-spouse be treated as a surviving spouse under the terms of the plan, even if the ex-spouse does not meet the plan's definition of "surviving spouse." 29 C.F.R. §2530.206(c)(2), Example (2).

DRO issued after annuity starting date. A DRO does not fail to be a QDRO solely because it is issued after the annuity starting date. 29 C.F.R. §2530.206(c)(2), Example (3).

I. Plan Features To Consider in Drafting Qualified Domestic Relations Orders

1. [7.12] Defined-Contribution Plan

Each participant has his or her own individual account for a defined-contribution plan. The participant's benefits are based solely on the amount contributed to the participant's account. Examples of a defined-contribution plan are employee stock ownership plans and 401(k) plans. Qualified domestic relations orders for defined-contribution plans may have distribution limitations, such as account balance fluctuation, requirements about employment on the last day of a plan year, or hours completion. Separation rules applying to a participant also apply to the alternate payee unless the plan provides for immediate payout to an alternate payee.

2. [7.13] Retroactive Assignment Dates in Defined-Contribution Qualified Domestic Relations Orders

If an employer has changed record-keepers for its 401(k) plan or other defined-contribution plan after a client's divorce but prior to the drafting of the qualified domestic relations order, problems may arise. The new record-keeper could be unable to determine the participant's

account balance at the time of divorce or loss/gain in the account during the interim when continuity in the record-keeping system has been interrupted. A company can effectively restrict the assignment dates of QDROs. As a result, an attorney should seek approval of the QDRO immediately from the plan administrator to best protect his or her client's rights.

3. [7.14] Defined-Benefit Plan

A defined-benefit plan promises to pay each participant a specific benefit at retirement. An individual's benefits are usually based on a formula that takes into account many factors such as the number of years a participant has worked and the participant's salary. Qualified domestic relations orders for defined-benefit plans may have limitations on when distribution can take place, spousal consent required for lifetime and death distributions, or distributions after death paid in accordance with the original election. Also, the language of the order will determine whether an alternate payee will be treated as the surviving spouse for death benefits or whether the alternate payee is entitled to share in cost-of-living increases, early retirement, or other subsidies that may accrue after the effective date of the QDRO.

J. [7.15] Divorce Decree as a Qualified Domestic Relations Order

In any divorce proceeding, it is the best practice for the parties to create a domestic relations order that is separate from the divorce decree. However, a divorce decree may be deemed to be a DRO and qualified by a plan administrator if the divorce decree contains all the qualified domestic relations order requirements. *Iron Workers Mid-America Pension Plan v. Nevers*, 36 Employee Benefits Cas. (BNA) 1330 (N.D.Ill. 2005); *Metropolitan Life Insurance Co. v. Cronenwett*, 162 F.Supp.2d 889, 896 (S.D. Ohio 2001).

K. [7.16] Pitfalls to Qualification

A settlement agreement that failed to set forth requisite payments and the period affected by the order was not a qualified domestic relations order. *Guzman v. Commonwealth Edison Co.*, Pens. Plan Guide (CCH) ¶23970R (N.D.Ill. 2000) (courts have liberally construed criteria by which DROs will qualify as QDROs; however, important qualification is that order lacks no essential information and there is no ambiguity as to how to dispense proceeds of plan).

However, QDRO language need not use all the "magic words." If the agreement recognizes or assigns the qualified retirement plan benefit rights and is sufficiently precise, failure to refer to the spouse as the "alternate payee" does not invalidate the QDRO. "To accept anything less than what [the QDRO statute] expressly requires would contravene the Supreme Court's frequent admonition that courts must not read language out of a statute." *Hawkins v. Commissioner*, 86 F.3d 982, 992 (10th Cir. 1996)

NOTE: The U.S. Department of Labor has stated that if a plan has a one-year marriage rule, an order purporting to be a QDRO is invalid if it provides a benefit to a former spouse who has been married to the participant less than one year.

An order awarding a portion of a current spouse's surviving benefits to a former spouse is not a QDRO. Because the current spouse's interest in the surviving spouse's benefits vested on the date the participant retired, the order assigning a portion of the surviving spouse benefits to the former spouse relates to the benefits payable with respect to a beneficiary — not benefits payable with respect to a participant — and, therefore, is not a QDRO. *Hopkins v. AT&T Global Information Solutions Co.*, 105 F.3d 153 (4th Cir. 1997); *Rivers v. Central & South West Corp.*, 186 F.3d 681 (5th Cir. 1999). Additionally, a divorce decree was not a QDRO when it failed to specify when and how the participant's pension benefits were to be distributed to the former spouse. *Smith v. Rice*, 139 S.W.3d 539 (Ky.App. 2004). Alternatively, a divorce decree that referred to any policy of insurance on the former spouse's life was found to be sufficiently compliant with the Employee Retirement Income Security Act of 1974 as a QDRO even though the decree did not name a specific life insurance policy. *Metropolitan Life Insurance Co. v. Clark*, 159 Fed.Appx. 662 (6th Cir. 2005).

L. [7.17] Qualified Domestic Relations Order After Death of Participant

The U.S. Department of Labor's final regulations provide that a domestic relations order entered after the death of a participant may be qualified by a plan administrator. As explained in §7.11 above, the final regulations state that if a plan administrator rejects a DRO as deficient and the plan participant dies shortly thereafter while actively employed, the plan administrator may qualify a second DRO submitted after the death of the participant that corrects the defects of the first order.

Prior to the DOL final regulations, numerous courts addressed whether a qualified domestic relations order may be entered after a participant's death. In *IBM Savings Plan v. Price*, 349 F.Supp.2d 854 (D.Vt. 2004), a QDRO entered after the death of the participant was found to be valid. See also *Patton v. Denver Post Corp.*, 326 F.3d 1148 (10th Cir. 2003); *Marker v. Northrop Grumman Space & Missions Systems Corp.*, 39 Employee Benefits Cas. (BNA) 1004 (N.D.Ill. 2006); *Guzman v. Commonwealth Edison Co.*, Pens. Plan Guide (CCH) ¶23970R (N.D.Ill. 2000). In accordance with the plan's QDRO procedures, the participant's spouse submitted a DRO to the plan administrator for review before submission to the court. Approximately three months after submitting the DRO for review, the participant died. The former spouse ultimately obtained a QDRO from the court nine months after the participant's death. The court found that the QDRO could be applied retroactively because the Employee Retirement Income Security Act of 1974 allows an alternate payee eighteen months after benefits become payable to obtain a QDRO. However, in *R.A.F. v. Southern Company Pension Plan*, 44 Employee Benefits Cas. (BNA) 2815 (M.D.Ala. 2008), the participant's former spouse was denied survivor benefits when she submitted a divorce decree to the plan administrator (and the decree did not meet QDRO requirements) four years after the divorce was granted and two years after the participant died.

The Supreme Court declined to review a decision by the Third Circuit requiring a pension plan to recognize a property settlement agreement as a QDRO, even though it was determined to be "qualified" only after the participant's death. *Files v. ExxonMobil Pension Plan*, 428 F.3d 478 (3d Cir. 2005), *cert. denied*, 126 S.Ct. 2304 (2006).

M. [7.18] Contrary Beneficiary Designations

One court has ruled that a qualified domestic relations order will trump any beneficiary designation made by the plan participant in violation of the terms of the qualified domestic relations order. However, absent a QDRO, the plan administrator is obligated to apply the terms of the plan as they relate to beneficiary designations. *Riordan v. Commonwealth Edison Co.*, 128 F.3d 549, 552 (7th Cir. 1997).

Under Illinois law, if a QDRO fails to specify that an alternate payee has a right of survivorship, the alternate payee will not be entitled to the participant's benefit. *Robson v. Electrical Contractors Association Local 134 IBEW Joint Pension Trust of Chicago*, 312 Ill.App.3d 374, 727 N.E.2d 692, 698, 245 Ill.Dec. 245 (1st Dist. 1999) (failure of QDRO to specify survivor benefits overrode designation of former spouse as beneficiary).

The U.S. Supreme Court held in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 555 U.S. 285, 172 L.Ed.2d 662, 129 S.Ct. 865 (2009), that the participant's former spouse was entitled to a distribution of the participant's plan benefits after his death. The former spouse was the participant's designated beneficiary according to the plan documents; however, she had waived her rights to any interest in the plan pursuant to a divorce decree. The waiver failed, and the plan administrator was required to follow the plan documents to determine the proper beneficiary. Accordingly, a wavier must adhere to all of the statutory requirements of the Employee Retirement Income Security Act of 1974 and all of a plan's governing procedures to be effective. *Vanderkam v. Pension Benefit Guaranty Corp.*, 943 F.Supp.2d 130, 143 (D.D.C. 2013), *aff'd sub nom. VanderKam v. VanderKam*, 776 F.3d 883 (D.C.Cir. 2015).

N. [7.19] Qualified Domestic Relations Order Modification

A qualified domestic relations order may be modified at any time after its execution so that it complies with requirements under the Employee Retirement Income Security Act of 1974. *Ochoa v. Ochoa*, 71 S.W.3d 593, 28 Employee Benefits Cas. (BNA) 1473 (Mo. 2002). A trial court retains jurisdiction to modify a QDRO when the terms of the original QDRO conflict with the parties' separation agreement. *Himes v. Himes*, 2004 Ohio 4666 (5th Dist. 2004) (amended QDRO adopted when original QDRO mistakenly provided former spouse with right to portion of participant's 401(k) plan account). However, modification of a QDRO was not mandated when a divorce decree awarded the alternate payee a specific sum from the participant's retirement funds and the funds subsequently declined substantially in value. *Veidt v. Cook*, 2004 Ohio 3170 (12th Dist. 2004). *See also Grecian v. Grecian*, 140 Idaho 601, 97 P.3d 468 (App. 2004) (alternate payee who was awarded half of participant's benefits was entitled to value of those benefits on date couple divorced rather than at time plan distributed benefits); *Kremenitzer v. Kremenitzer*, 81 Conn.App. 135, 838 A.2d 1026 (2004) (court granted former spouse's motion to correct QDRO to clarify that she was entitled to value of participant's 401(k) plan as of date of their divorce, as was stated in parties' separation agreement).

O. [7.20] Bankruptcy of Participant

A divorced spouse's right to obtain a qualified domestic relations order cannot be discharged in the participant's spouse's bankruptcy. *Gendreau v. Gendreau*, 122 F.3d 815 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1187 (1998); *Rueff v. Rueff (In re Rueff)*, 259 B.R. 895 (Bankr. C.D.Ill. 2000). However, one court ruled that a former spouse's claim to a participant's benefits was dischargeable in bankruptcy because the divorce decree was not a valid QDRO. *Martel v. Zeitler (In re Zeitler)*, 213 B.R. 457 (Bankr. E.D.N.C. 1997), *aff'd*, 255 B.R. 172 (E.D.N.C. 1999).

P. [7.21] Receipt of Benefits

An alternate payee does not have to wait until the participant is in pay status or reaches normal retirement age in order to receive benefits from a defined-benefit pension plan. If the alternate payee meets plan requirements, the payments may begin on or after the date the participant reaches the "earliest retirement age." 26 U.S.C. §414(p)(4); ERISA §206(d)(3)(E), 29 U.S.C. §1056(d)(3)(E). If the alternate payee receives payments prior to retirement of the participant, the payments are based on the present value of a normal retirement benefit, disregarding any early retirement subsidy. 26 U.S.C. §§414(p)(4)(A), 414(p)(4)(B); ERISA §206(d)(3)(E), 29 U.S.C. §1056(d)(3)(E). However, if the participant subsequently becomes eligible for an additional early retirement benefit upon retirement, a court may modify a prior qualified domestic relations order to adjust the benefit payable to the alternate payee under the QDRO to account for the early retirement subsidy. *Gearhart v. Gearhart*, 23 Employee Benefits Cas. (BNA) 2256 (Ohio App. 1999). "[T]he trial court was in the best position to determine whether a final divorce decree and QDROs needed clarification in order to equitably divide a party's retirement benefits." *Hocker v. Hocker*, 171 Ohio App.3d 279, 870 N.E.2d 736, 739 (2d Dist. 2007).

Under a defined-contribution pension plan (such as a 401(k) plan or a profit-sharing plan), the alternate payee generally must wait until the participant attains age 50 or terminates employment and, therefore, would be entitled to a distribution from the plan. 26 U.S.C. §414(p)(4); ERISA §206(d)(3)(E), 29 U.S.C. §1056(d)(3)(E). However, if the plan document includes a provision allowing for immediate payment of an alternate payee's interest, the alternate payee can request distribution in accordance with that provision and other plan guidelines.

An alternate payee's account balance or accrued benefit under the plan is subject to the consent requirements for distributions that apply to participants. Thus, a plan cannot involuntarily cash out the interest of an alternate payee if the value of that interest exceeds \$5,000 at the date of distribution. 26 U.S.C. §411(a)(11).

A QDRO may provide that the former spouse is to be treated as the surviving spouse for purposes of preretirement death benefits. If the participant and former spouse were married for at least one year, the alternate payee may be entitled to survivor annuity benefits. 26 U.S.C. §414(p)(5); ERISA §206(d)(3)(F), 29 U.S.C. §1056(d)(3)(F); *In re Marriage of Allison*, 189 Cal.App.3d 849, 234 Cal.Rptr. 671 (1987).

Q. [7.22] Dividing the Benefit — Shared Payment or Separate Interest

Two basic methods are available when drafting the division of benefits provisions: (1) the shared payment method and (2) the separate interest method. Often these two methods are not clearly distinguished in the qualified domestic relations order, and as a result, the plan administrator may have questions about how the order will be administered. The first step in determining how an accrued benefit should be divided for purposes of a QDRO may depend on the reason behind the payment. To illustrate the ways in which benefits may be divided, both the shared payment approach and the separate interest approach will be discussed in further detail in this section. The shared payment and separate interest methods can both be used for either defined-benefit or defined-contribution plans.

The shared payment approach focuses on splitting the payment that the participant is currently receiving or is entitled to receive under the plan. Shared payments anticipate that payment to the alternate payee will begin when the participant retires and will be a percentage or dollar amount of the form of benefit chosen by the participant. Under the shared payment method, the alternate payee will not receive any payment until the alternate payee begins benefits or is already in pay status. Shared payments are generally the only option when a participant is already in pay status at the time of the divorce and settlement.

QDROs for shared payments should specify the amount (a percentage, dollar amount, or method for determining the amount) and the number of payments or period during which payments must be made. For example, the QDRO may state that shared payments to an alternate payee will continue for the alternate payee's lifetime or until the date the alternate payee remarries. The plan administrator will be responsible for determining when the end date occurs (documentations should be obtained) and for restoring the shared payment to the participant, if appropriate. The provision of survivor benefits may be limited under the shared payment method if the participant is already in pay status. If the participant is not yet in pay status, the QDRO could be drafted to specify the participant's election of a form of benefit that would provide a survivor benefit. If a QDRO awards the alternate payee a percentage of the participant's benefits, the alternate payee will automatically receive a share of any future subsidy or increase in the participant's benefits unless the QDRO provides otherwise.

The separate interest approach divides the participant's accrued benefit into two separate parts: one for the participant and one for the alternate payee. The alternate payee then generally has most of the rights accorded to the participant with respect to his or her separate portion. Rather than stating the amount or percentage of the participant's payment, the separate interest requires a detailed description of the amount or percentage of the participant's accrued retirement benefit (or the manner in which the amount or percentage is to be determined). To fulfill the requirement to specify the number of payments or period to which the QDRO applies, the separate interest QDRO often includes language giving the alternate payee the same right that the participant would have to elect the form of benefit payment and the time the benefit payments will commence. This language, however, would have to comply with other QDRO requirements. For example, the QDRO cannot provide an amount or form of benefit not otherwise available under the plan and cannot allow an alternate payee to elect an annuity with a survivor benefit for

his or her subsequent spouse. Under a separate interest, however, the alternate payee can designate a beneficiary for his or her benefit (if allowed by the plan) and can include the right to survivor benefits as part of the separate interest.

The treatment of future increases in the participant's compensation, additional years of service, or changes in the plan's provision should be considered when drafting a QDRO that uses a separate interest approach to allocate plans under a defined benefit plan.

A QDRO should include language that considers specific investment vehicles and division of any future contributions when drafting an order that allocate to the alternate payee a separate interest under a defined contribution plan.

In *Anderson v. Suburban Teamsters of Northern Illinois Pension Fund Board of Trustees*, 588 F.3d 641 (9th Cir. 2009), a plan participant's QDRO was a "separate interest QDRO" rather than "shared payment QDRO" since it provided that the alternate payee could elect to begin benefit payments when the participant reached the earliest retirement age under the plan. Therefore, even though the participant began receiving a disability benefit from the plan and the alternate payee had not yet elected payment, the participant had no right to the portion of his benefit awarded to the alternate payee.

R. [7.23] Taxation of Benefits

Generally, any distribution from a retirement plan made to a spouse or former spouse that is not pursuant to a qualified domestic relations order will be taxed to the participant. *Karem v. Commissioner*, 100 T.C. 521 (1993). An IRS Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., must be issued to the recipient of a designated distribution, and the entire distribution must be reported in the name of the individual covered by the plan (*i.e.*, the participant) regardless of whether there is a marital settlement agreement or a state community property law under which part of the distribution is treated as having been distributed to, and taxable to, the covered individual's former spouse. Pvt.Ltr.Rul. 7952045 (Sept. 25, 1979).

When a distribution is made to a non-spouse beneficiary of a participant under a QDRO, the distribution will be treated as a distribution to the participant, and the participant will be taxed on the distribution. IRS Notice 89-25, 1989-1 Cum.Bull. 662. However, any distribution made to the spouse or former spouse of a participant as an alternate payee under a QDRO will be treated as a distribution to the spouse or former spouse, and the spouse or former spouse will be taxed on the distribution in the year of distribution. 26 U.S.C. §402(e)(1)(A). This is the case even if the QDRO states that the participant will be responsible for payment of the tax. *Clawson v. Commissioner*, 72 T.C.M. (CCH) 814 (1996). When a distribution is made to a former spouse (or spouse) of a participant as an alternate payee under a QDRO, a Form 1099-R should be issued to the former spouse (or spouse) to the extent he or she is treated as the alternate payee and not to the participant. Pvt.Ltr.Rul. 9619040 (May 10, 1996).

These rules regarding the taxation of benefits are important to keep in mind when drafting or reviewing domestic relations orders, particularly when an order covers non-spouse payees or both spouse and non-spouse payees, as when an order covers an ex-spouse and dependent children. The order should clearly state which amounts are payable to the child or children to ensure that those amounts are taxable to the participant.

Internal Revenue Code §72(t) imposes a ten-percent penalty on early withdrawals. This section also provides for exemptions from the early withdrawal penalty. One exemption from the early withdrawal penalty is for distributions from qualified plans made pursuant to a QDRO. 26 U.S.C. §72(t)(2)(C). This exemption applies regardless of the age of the participant or alternate payee at the time of the distribution. *Id.*

III. QUALIFIED RETIREMENT PLAN OBLIGATIONS REGARDING SPOUSES

A. [7.24] Qualified Joint and Survivor Annuity

A qualified joint and survivor annuity (QJSA) is an annuity for the life of the participant with a survivor annuity for the life of the surviving spouse in an amount not less than 50 percent nor more than 100 percent of the annuity payable during the joint lives of the participant and spouse and is the actuarial equivalent of a single-life annuity for the life of the participant. 26 U.S.C. §417(b); ERISA §205(d)(1), 29 U.S.C. §1055(d)(1).

Generally, defined-benefit plans and certain defined-contribution plans must pay retirement benefits to married plan participants and their spouses in the form of a QJSA. Plans must provide this option to married participants unless the participant elects, with the notarized consent of the spouse, another form of benefit. 26 U.S.C. §§401(a)(11)(A), 417(a)(2); ERISA §§205(a), 205(c)(2), 29 U.S.C. §§1055(a), 1055(c)(2). Distribution to an unmarried participant must be made as a single-life annuity unless the participant elects otherwise and the plan so provides. 26 U.S.C. §417(b)(2); ERISA §205(d)(2), 29 U.S.C. §1055(d)(2).

QJSA and qualified preretirement survivor annuity (QPSA) requirements apply to defined-benefit plans and to any defined-contribution plan that is subject to the minimum funding standards of 26 U.S.C. §412. QJSA and QPSA requirements also apply to participants under any other defined-contribution plan unless *all* of the following conditions are met:

1. The plan provides that the participant's nonforfeitable benefit is payable in full upon the participant's death to the participant's surviving spouse (unless the participant elects, with his or her spouse's consent, to provide the benefits to another designated beneficiary).
2. The participant does not elect the payment of benefits in the form of a life annuity.
3. The plan is not a transferee or offset plan with respect to the participant. Treas.Reg. §1.401(a)-20, Q&A-3.

The QJSA must be at least as valuable as any other optional form of benefit payable under the plan at the same time. A plan must designate the QJSA if the plan has two or more actuarially equivalent joint and survivor benefits.

The plan must treat a participant and spouse who are married on the annuity starting date as married and must provide benefits that are to commence on the annuity starting date in the form of a QJSA unless the participant, with spousal consent, elects another form of benefit. 26 U.S.C. §§401(a)(11)(A), 417(a); ERISA §§205(a), 205(c)(1), 29 U.S.C. §§1055(a), 1055(c)(1). A plan does not have to treat a participant as married unless the participant and spouse have been married throughout the one-year period ending on the earlier of the annuity starting date or the date of the participant's death. However, a participant and spouse who remain married for one year must be treated as married for a year on the annuity start date even if this is not the case. 26 U.S.C. §§401(a)(11)(D), 417(d)(1); ERISA §§205(b)(4), 205(f), 29 U.S.C. §§1055(b)(4), 1055(f). Therefore, the plan must provide an automatic QJSA to any participant who is married on the annuity starting date. Further, the spouse to whom the participant is married on the annuity starting date is entitled to the QJSA coverage in the event of the participant's death unless otherwise provided by a QDRO. 26 U.S.C. §417(d); 26 CFR 1.401(a)-20, Q&A 25.

The Pension Protection Act of 2006 introduced a new survivor annuity option that must be offered if the plan provides benefits in the form of a QJSA. The new option requirement is effective for plan years beginning after December 31, 2007. 26 U.S.C. §§417(a)(1)(A), 417(g). If a plan provides benefits in the form of a QJSA, it will also be required to offer a qualified optional survivor annuity (QOSA) and provide a written explanation of the terms and conditions of the option to participants. A QOSA satisfies the conditions to be QJSA. IRS Notice 2008-30, 2008-12 Int.Rev.Bull. 638. Simply stated, the QOSA provides a greater benefit for the surviving spouse than was provided during the participant's life. This option will allow participants to choose a form of benefit most appropriate for their situation. Some couples may prefer a benefit that pays less while the participant is still alive and a greater benefit to the surviving spouse upon the participant's death. The level of the spouse survivor annuity that must be provided under a QOSA is dependent upon the level of the spouse survivor annuity provided under a plan's QJSA. *Id.*; IRS Publication 6391, *Joint and Survivor Determination of Qualification* (Feb. 1, 2015).

1. [7.25] Waiver of Automatic Qualified Joint and Survivor Annuity Distribution Form

GENERAL RULE: A participant and spouse may waive the automatic qualified joint and survivor annuity distribution form if they make a written election no less than 30 nor more than 180 days prior to the annuity starting date. 26 U.S.C. §§417(a)(6)(A), 417(a)(7)(A)(i); ERISA §§205(c)(7)(A), 205(c)(8)(A)(i), 29 U.S.C. §§1055(c)(7)(A), 1055(c)(8)(A)(i).

EXCEPTION: A plan may permit the participant and spouse to waive the requirement that the written election must be made a minimum of 30 days before the annuity starting date and agree to a minimum period of 7 days between the date the participant and spouse are notified by the plan of their waiver rights and the annuity starting date. 26 U.S.C. §417(a)(7)(B); ERISA §205(c)(8)(B), 29 U.S.C. §1055(c)(8)(B). Note that any election by the participant to waive the 30-day period is not valid unless (a) the plan has given the participant 30 days to consider

whether to waive the QJSA (b), the participant has the right to revoke the waiver until the later of 7 days following receipt of the written explanation or the annuity starting date, and (c) the plan provides that the annuity starting date is a date after the participant has receive the written explanation. 26 C.F.R. §1.417(e)-1(b)(3); IRS Publication 6391, *Joint and Survivor Determination of Qualification* (Feb. 1, 2015).

A plan satisfies the requirement to provide a QJSA only if each participant may elect to waive the QJSA form of benefit and revoke such election to waive the QJSA form of benefit at any time during the applicable election period (the 180-day period before the annuity starting date). The “annuity starting date” is generally the first day of the first period for which an amount is paid as an annuity or any other form. It is important to note that the annuity starting date is the date on which payments are supposed to commence, rather than the date on which payment is actually received by the participant. Treas.Reg. §1.401(a)-20, Q&A-10.

Within a reasonable time before the annuity starting date (generally no less than 30 days and no more than 180 days before the annuity starting date (Treas.Reg. §1.417(e)-1(b)(3)(ii))), the plan must provide each participant with a written explanation of the terms of the QJSA and notify the participant of his or her right to waive the QJSA form of benefit. The written explanation must include (1) the terms and conditions of the QJSA, (2) the participant’s right to make an election to waive the QJSA, (3) the effect of an election to waive the QJSA, (4) the rights of the participant’s spouse, and (5) the right to revoke an election to waive the QJSA. 26 U.S.C. §417(a)(3)(A); ERISA §205(c)(3)(A), 29 U.S.C. §1055(c)(3)(A).

A plan may not accept a prenuptial agreement as a waiver. If a participant divorces and then remarries, the former spouse’s waiver is not binding on the new spouse unless provided by a QDRO. 26 C.F.R. §1.401(a)-13(g); IRS Publication 6391, *supra*.

See §7.31 below for a sample spousal consent and waiver of election form.

2. [7.26] Qualified Joint and Survivor Annuity Notice Rules

In December 2003, the Internal Revenue Service published final regulations that revised and expanded the requirements of the qualified joint and survivor annuity notice. Treas.Reg. §1.417(a)(3)-1. The IRS issued a final modification revising the regulations concerning disclosure of relative values of optional forms of benefit on March 24, 2006. 71 Fed.Reg. 14,798 (Mar. 24, 2006). The regulations were later revised and clarified. The final regulations, as revised, addressed concerns that the information provided to participants regarding optional forms of benefits did not provide adequate information for the participants to compare and assess their distribution options without professional advice. Under the final regulations, a QJSA notice must contain the following five items:

- a. a description of each optional form of benefit;
- b. a description of eligibility conditions for the optional form of benefit;

- c. a description of the financial effect of electing the optional form of benefit (*i.e.*, the amount payable under the form of benefit to the participant during the participant's lifetime and the amount payable after the death of the participant);
- d. a description of the relative value of the optional form of benefit compared to the value of the QJSA (for defined benefit plans only) (beginning in 2007, an optional form of benefit may be disclosed as "approximately equal" to the QJSA option if the optional form of benefit is at least 95 percent but not greater than 105 percent of the actuarial present value of the QJSA); and
- e. a description of any other material features of the optional form of benefit. 71 Fed.Reg. 14,798.

The IRS delayed the original effective date of the final regulations to distributions with annuity starting dates beginning on or after February 1, 2006. In the interim period, plans were required to comply with the 1988 rules regarding the disclosure of relative values and the financial effect of benefit elections. However, plans with certain forms of benefit, such as lump-sum distributions, or plans with distributions that are not as valuable as the QJSA, were not eligible for the delayed effective date and were required to comply with the final regulations on or after October 1, 2004. 71 Fed.Reg. 14,798 (Mar. 24, 2006); IRS Announcement 2004-58, 2004-2 Cum.Bull. 66. Federal courts have roundly criticized the single opinion of an Illinois court finding a prenuptial agreement to be a valid waiver because of the court's blatant failure to acknowledge or adhere to the explicit waiver requirements of the Employee Retirement Income Security Act of 1974. *In re Estate of Hopkins*, 214 Ill.App.3d 427, 574 N.E.2d 230, 158 Ill.Dec. 436 (2d Dist.), *appeal denied*, 141 Ill.2d 542 (1991).

The above requirements relate to the waiver of a QJSA or preretirement survivor annuity. A number of cases have held that these requirements do not apply to the waiver of other ERISA benefits. *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1401 (2001) (named ERISA beneficiary may waive his or her entitlement to proceeds of ERISA plan providing life insurance benefits, provided that waiver is explicit, voluntary, and made in good faith). *See also Hill v. AT&T Corp.*, 125 F.3d 646 (8th Cir. 1997) (waiver of pension rights language in divorce decree not sufficient to clearly divest former spouse of interest in pension plan of participant).

B. Qualified Preretirement Survivor Annuity

1. [7.27] Commencement of Annuity Payments

Defined-benefit plans and certain defined-contribution plans must provide a qualified preretirement survivor annuity to a participant's surviving spouse if a vested participant dies before his or her annuity starting date. 26 U.S.C. §401(a)(11)(A)(ii). Therefore, if a participant is alive on his or her annuity starting date, benefits are payable as a qualified joint and survivor annuity rather than a QPSA.

For a defined-benefit plan, a QPSA is a survivor annuity for the life of the participant's surviving spouse if the participant dies prior to actual retirement.

If the participant dies after reaching the earliest retirement age, the annuity is calculated as if the participant had retired with an immediate QJSA on the date before his or her death.

If the participant dies on or before the earliest retirement age, the annuity is calculated in an amount not less than the amount that would be calculated if the participant had

- a. separated from service on the earlier of the date of death or the actual termination date;
- b. survived to the earliest retirement age;
- c. retired with an immediate QJSA at the earliest retirement age; and
- d. died on the day after the day on which the participant would have attained the earliest retirement age. 26 U.S.C. §417(c)(1)(A); ERISA §205(e)(1)(A), 29 U.S.C. §1055(e)(1)(A).

For a defined-contribution plan, a QPSA is an annuity for the life of the surviving spouse, the actuarial equivalent of which is not less than 50 percent of the participant's vested account balance at the time of the participant's death (the remainder can be distributed by designation of the participant). 26 U.S.C. §417(c)(2); ERISA §205(e)(2), 29 U.S.C. §1055(e)(2). Annuity payments must be commenced under a defined-benefit plan no later than the month in which the participant would have attained the earliest retirement age. 26 U.S.C. §417(c)(1)(B); ERISA §205(e)(1)(B), 29 U.S.C. §1055(e)(1)(B); Treas.Reg. §1.401(a)-20, Q&A-22(a).

Under a defined-contribution plan, payments must be commenced within a reasonable period after the participant's death. Treas.Reg. §1.401(a)-20, Q&A-22(b).

The participant must have been married for one year at the time of the annuity starting date or on the date of the participant's death. 26 U.S.C. §417(d); ERISA §205(f), 29 U.S.C. §1055(f).

2. [7.28] Waiver of Qualified Preretirement Survivor Annuity

Plans must provide participants with a written explanation of qualified preretirement survivor annuities, similar to the written notice required for qualified joint and survivor annuities, explaining a participant's right to waive the QPSA. The written explanation must be provided to participants within the applicable period. The "applicable period" is whichever of the following periods ends last:

- a. the period beginning with the first day of the plan year in which the participant attains age 32 and ending with the close of the plan year preceding the plan year in which the participant attains age 35;
- b. a reasonable period ending after the individual becomes a participant;

- c. a reasonable period ending after the QPSA is no longer fully subsidized; or
- d. a reasonable period ending after 26 U.S.C. §401(a)(11) first applies to the participant. Treas.Reg. §1.401(a)-20, Q&A-35.

The final regulations issued by the IRS in December 2003 (discussed in §7.26 above) also apply to QPSAs. Under these final regulations, a QPSA notice must contain

- a. a general description of the QPSA;
- b. the circumstances under which the QPSA will be paid, if elected;
- c. the availability of the election of a QPSA; and
- d. the financial effect of the election of the QPSA on the participant's benefit (*i.e.*, an estimate of the reduction of the participant's estimated normal retirement benefit that would result from an election of the QPSA). Treas.Reg. §1.417(a)(3)-1.

The IRS did not delay the original effective date of the final regulations for QPSAs. As a result, the final regulations are effective for all QPSA notices provided on or after July 1, 2004. IRS Announcement 2004-58, 2004-2 Cum.Bull. 66.

The following conditions apply to participants that elect to waive the QPSA:

- a. A participant's waiver requires spousal consent (26 U.S.C. §§417(a)(2), 417(a)(6)(B), 417(a)(7)(A)(i); ERISA §§205(c)(2), 205(c)(7)(B), 205(c)(8)(A)(i), 29 U.S.C. §§1055(c)(2), 1055(c)(7)(B), 1055(c)(8)(A)(i)).
- b. The waiver option occurs much earlier than with QJSA, so there may be a plan charge for waiving this option (Treas.Reg. §1.401(a)-20, Q&A 21).
- c. A participant and spouse might choose this for estate planning reasons.

Plan administrators must adhere to the QPSA rules under all circumstances. A widow who did not consent to her deceased husband's beneficiary designation of someone other than herself was entitled to a QPSA even though the plan ceased contributions before the plan was amended to adopt QPSA provisions under the Retirement Equity Act of 1984 because the plan was not actually terminated. The court held that REA's QPSA provisions are mandatory. *Lefkowitz v. Arcadia Trading Company Ltd. Benefit Pension Plan*, 996 F.2d 600 (2d Cir. 1993).

C. [7.29] Tax Issues for Surviving Spouses

All retirement plan distributions are subject to income tax, except to the extent that after-tax contributions make up part of the distributed amount. If after-tax contributions are included in monthly annuity payments from a retirement plan, a portion of each payment is treated as

nontaxable. See 26 U.S.C. §72(d). The same tax rules apply to a surviving spouse's annuity payment made under a qualified preretirement survivor annuity or qualified joint and survivor annuity after the plan participant's death.

For lump-sum payments, any nontaxable portion of the distribution will be reported as such on the IRS Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc. (see §7.23 above), issued following the distribution. Nontaxable portions of lump-sum distributions should be reported in Box 2a of Form 1099-R. Generally, taxable portions of lump-sum payments are eligible as rollover distributions. 26 U.S.C. §402(c). An eligible surviving spouse may roll over distributions to an individual retirement account (IRA) or to the surviving spouse's qualified retirement plan (if that plan permits such rollovers). 26 U.S.C. §402(c)(4). Under certain circumstances, a surviving spouse may be able to roll over both the pretax and after-tax portions of a qualified plan lump-sum distribution to his or her qualified retirement plan; the plan administrator should provide information regarding all rollover options at the participant's death or upon written request.

Under current law, a surviving spouse may elect to roll over the distributions from the deceased participant's eligible retirement plan, 403(b) plan, 457 plan (governmental), or IRA into the spouse's IRA rather than take a lump-sum payment. 26 U.S.C. §402(c)(9). Prior to the Pension Protection Act of 2006, this option was available only to spousal beneficiaries. The PPA amended 26 U.S.C. §402(c) to permit non-spousal designated beneficiaries to establish an IRA to receive a tax-free rollover of the distribution from a deceased participant's eligible retirement plan. However, the rollover must be made in a trustee-to-trustee transfer, and the IRA established to receive the distribution will be treated as an "inherited" IRA subject to the inherited IRA rules of 26 U.S.C. §408(d)(3)(C). For example, the new IRA owner cannot name a subsequent beneficiary to receive the proceeds of the inherited IRA. Additionally, the IRA established to receive the rollover of the decedent's account balance is subject to the minimum distribution rules applicable to distributions to non-spousal beneficiaries based on the decedent's date of death. See 26 U.S.C. §401(a)(9)(B). This provision is effective for distributions made after December 31, 2006.

Lump-sum distributions made to surviving spouses from qualified retirement plans are not subject to the ten-percent penalty for early withdrawal (generally, before age 59½). To the extent that a surviving spouse does not take a distribution or rollover of the decedent's benefit under a defined-contribution plan, the surviving spouse will have the same rights as the participant for most plan purposes, although the plan administrator may impose certain restrictions. Further information about specific plan options may be obtained from the summary plan description or the plan administrator of the deceased participant's plan.

IV. [7.30] QUALIFIED DOMESTIC RELATIONS ORDERS APPLY TO SAME-SEX COUPLES

Qualified domestic relations order rules apply to retirement plans of same sex couples. The U.S. Supreme Court held, in *United States v. Windsor*, ___ U.S. ___, 136 S.Ct. 808, 133 S.Ct. 2675 (2013), that §3 of the Defense of Marriage Act was unconstitutional. This section defined

marriage between one man and one woman and spouse as an individual of the opposite sex. The Court concluded that “DOMA undermines both the public and private significance of state-sanctioned same-sex marriages” (133 S.Ct. at 2694) and found that “no legitimate purpose overcomes [DOMA’s] purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity” (133 S.Ct. at 2696).

Following *Windsor*, federal agencies began to determine how marital status applied to federal statutes. On August 30, 2013, the Treasury and the IRS announced that same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes. The ruling applies regardless of whether the couple lives in a jurisdiction that recognizes same-sex marriage or a jurisdiction that does not recognize same-sex marriage. See Rev.Rul. 2013-17, 2013-38 Int.Rev.Bull. 201. This ruling applies to all Federal tax rules that relate to qualified retirement plans. Rev.Rul. 2013-17 applied prospectively as of September 16, 2013.

A few weeks later, on September 18, 2013, the U.S. Department of Labor took the same position for purposes of the Employee Retirement Income Security Act of 1974. DOL Technical Release No. 2013-04 (Sept. 9, 2013). On April 5, 2014, the IRS issued Notice 2014-19, 2014-17 Int.Rev.Bull. 979, to provide additional guidance with respect to qualified retirement plans. This notice provided that any retirement plan qualifications rules that are relevant because a participant is married apply to all married individuals regardless of their spouse’s sex. *Id.*

A plan will not fail to meet requirements because it did not recognize a participant’s same-sex spouse prior to June 26, 2013. *Id.* However, a plan must adopt an amendment if (a) a plan’s terms with respect to the requirement of §401(a) of the Internal Revenue Code define a marital relationship by reference to §3 of DOMA; (b) it is inconsistent with *Windsor*; (c) it conflicts with Rev.Rule 2013-17, 2013-38 Int.Rev.Bull. 201; or (d) it contradicts with Notice 2014-19. IRS Notice 2014-19, Q&A 8. Notice 2014-19 provides that the deadline to adopt the amendment is the later of (a) the applicable deadline under §5.05 of Rev.Proc. 2007-44, 2007-28 Int.Rev.Bull. 54 or its successor, or (b) December 31, 2014. *Id.*

Same-sex spouses may now be an alternate payee of a QDRO. Further, after *Windsor, supra*, and subsequent agency guidance, qualified defined benefit plans are required to provide qualified joint and survivor annuities and qualified preretirement survivor annuities to participants in same-sex marriages, but not to domestic partners. IRS Notice 2014-19, 2014-47 Int.Rev.Bull. 979.

In Illinois, the same-sex marriage bill was signed on November 20, 2013, and it became effective on June 1, 2014. On June 26, 2015, the U.S. Supreme Court held that states must recognize lawful same-sex marriages performed in other states. *Obergefell v. Hodges*, ___ U.S. ___, ___ L.Ed.2d ___, 135 S.Ct. 2584 (2015). Accordingly, a federal, state, or local government plan cannot constitutionally treat same-sex spouses less favorably than opposite-sex spouses. All states must treat opposite and same sex married couples in the same manner. *Obergefell* did not address if the decision will apply retroactively to same-sex couples. So far, no state or localities appear to require retroactive recognition of same-sex marriage.

NOTARIZATION

On the [day] of [month], [year], the above-named individual personally appeared before me and acknowledged that such person's spousal consent to this instrument was given, and this instrument was executed as such person's free act and deed.

Notary Public

My Commission Expires:

[Name of company] **use:** _____

Received on: _____ **By:** _____

[Name of Company]
**PENSION PLAN
 WAIVER ELECTION**

In accordance with the provisions of the [name of company] Pension Plan (Plan), I elect NOT to receive my accrued benefits in the form of a Qualified Joint and Survivor Annuity. Instead, I elect to receive my vested account balance as indicated on the attached Distribution Election Form. The Plan Administrator has provided me with an explanation of the terms of the Qualified Joint and Survivor Annuity described in the Plan, my right to make this Waiver Election, the time period during which I may make this Waiver Election, the financial effect of my election not to receive my benefits in the form of a Qualified Joint and Survivor Annuity, and the necessity of obtaining written consent from my spouse. I understand that I may revoke this Waiver Election at any time during the election period described in the Plan and explained to me by the Plan Administrator but that if I revoke this Waiver Election, the automatic form of payment will be a Qualified Joint and Survivor Annuity unless I complete another Waiver Election and my spouse completes another Spousal Consent.

I have executed this Waiver Election this [day] of [month], [year].

 [Signature of Participant]

B. [7.32] Sample Qualified Domestic Relations Order for Defined-Benefit Plan

NOTE: This is a sample form and should not be taken as the only acceptable form for a domestic relations order. Many state practice manuals include sample forms that comply with state family law requirements and practice rules.

IN THE CIRCUIT COURT OF THE [District Number] JUDICIAL DISTRICT
[Name of County] COUNTY, STATE OF [Name of State]

IN RE THE MARRIAGE OF)	
)	
[Name of Petitioner],)	
)	
PETITIONER)	
)	NO. [number]
and)	
)	
[Name of Respondent],)	
)	
RESPONDENT.)	

STIPULATED QUALIFIED DOMESTIC RELATIONS ORDER

This matter coming to be heard for the purpose of entry of a Qualified Domestic Relations Order as defined in 29 U.S.C. §1056(d)(3); by the Petitioner, [name of petitioner], appearing in open court by [name of petitioner’s attorney], [his] [her] attorney; and by the Respondent, [name of respondent], appearing in open court by [name of respondent’s attorney], [his] [her] attorney; and the Court now being fully advised in the premises,

FINDS:

A. This Court has jurisdiction of the parties hereto and the subject matter hereof.

B. On [month] [day], [year], this Court entered a Judgment for Dissolution of Marriage, which Judgment approved a Marital Settlement Agreement containing provisions relative to maintenance and the distribution of marital property rights, and which Judgment provided in part that the Alternate Payee receive a portion of the benefits otherwise payable with respect to the Participant under the [name of plan] (“Plan”) to which this Qualified Domestic Relations Order applies.

C. For the purposes of this Order, the following definitions shall be used, namely:

- (1) [name of participant, employee] — Participant, Employee.**
- (2) [name of alternate payee] — Alternate Payee. The alternate payee is the [spouse] [former spouse] [child] [other dependent] of the participant.**
- (3) Years of Marriage — the parties were married from [month] [day], [year], to [month] [day], [year].**

(4) **Marital Dissolution Date** — [month] [day], [year], the date as of which the Participant's accrued benefit is being divided under the terms of the final Judgment dissolving the marriage of the parties. This definition is for the sole purpose of computing the Marital Portion of the Participant's interest in the Plan (and not to interfere with or circumvent the actual date of disbursement of benefits to payees pursuant to the terms and provisions of the Plan).

(5) **Marital Portion** — an amount equal to the product of (a) the accrued benefit (as defined in the Plan and expressed as a single-life annuity commencing at age 65) accrued by the Participant under the terms of the Plan as of the Marital Dissolution Date, multiplied by (b) a fraction, the numerator of which is the number of years of marriage during which Plan benefits were accrued by the Participant prior to the Marital Dissolution Date and the denominator of which is the total number of years during which Plan benefits were accrued by the Participant prior to the Marital Dissolution Date.

(6) **Earliest Retirement Age** — either (a) the later of (i) the date the Participant attains age 50 or (ii) the earliest date on which the Participant could elect to receive retirement benefits under the Plan within the meaning given to such term by §417(f)(3) of the Internal Revenue Code of 1986, as amended (Code), if the Participant had terminated employment as of such date, or if earlier, (b) the date on which the Participant is actually entitled to a distribution from the Plan on account of [his] [her] termination of employment.

(7) **Actuarial Equivalent** — a benefit equal in value to another benefit, as determined by the Plan Administrator as of a given date in accordance with the provisions of the Plan relating to actuarial equivalence.

(8) **Plan Administrator** — the person or committee appointed to administer the Plan.

D. The name and last-known mailing address of the Participant covered by this Order are as follows:

Name:

Address:

City, State, Zip:

Social Security Number:

Date of Birth:

E. The name and last-known mailing address of the Alternate Payee covered by this Order are:

Name:
Address:
City, State, Zip:
Social Security Number:
Date of Birth:

IT IS HEREBY ORDERED, as follows:

1. Subject to the provisions of the Plan and the terms of this Order, the Alternate Payee is hereby awarded an interest (as described below in this Paragraph 1) in the retirement benefits otherwise payable under the Plan with respect to the Participant, which interest (hereinafter referred to as the “Alternate Payee’s Interest”) shall be equal to [____ percent] of the Marital Portion. To the extent vested, the Alternate Payee’s Interest shall be distributed to [him] [her] pursuant to the following provisions of this Paragraph 1. Even if the Participant dies prior to attaining the Earliest Retirement Age, the Alternate Payee shall be entitled to benefits under this Order as provided in Subparagraph 1(c) below, subject to the foregoing provisions of this Order.

(a) Time and Amount of Payment to Alternate Payee — The Alternate Payee’s Interest shall be distributed to the Alternate Payee as of the date on which the Participant attains (or would have attained) age 65, provided that the Alternate Payee may elect to have payment of the Alternate Payee’s Interest commence in a reduced amount (calculated by using the Plan’s normal factors for determining Actuarial Equivalence) as of any month that begins on or after the later of the date on which the Participant attains the Earliest Retirement Age or the date on which the Plan Administrator determines that this Order is a Qualified Domestic Relations Order as defined in §414(p) of the Code. Nothing in the foregoing provisions of this Subparagraph 1(a) shall be construed to require the Plan to commence payment of the Alternate Payee’s Interest until the Alternate Payee files such application for benefits and such other forms as the Plan Administrator may customarily require for the distribution of benefits to an Alternate Payee.

(b) Form of Payment to Alternate Payee — Subject to the terms of Paragraph 4 of this Order, the Alternate Payee’s Interest shall be distributed to the Alternate Payee in such form as [he] [she] may elect from among the forms of benefit available under the Plan for the payment of the Participant’s benefits; provided, however, that (i) such form shall be the Actuarial Equivalent of the Alternate Payee’s Interest based on the form of benefit and date of commencement elected by the Alternate Payee, and (ii) the Alternate Payee’s Interest shall not be distributed in the form of a joint and survivor annuity with respect to the Alternate Payee and [his] [her] subsequent spouse.

(c) Surviving Spouse Benefit — In the event that the Participant predeceases the Alternate Payee before attaining the Earliest Retirement Age, the Alternate Payee shall be treated as the surviving spouse of the Participant for purposes of the qualified

preretirement survivor annuity payable under the Plan, solely to the extent necessary to preserve the Alternate Payee's right to the Marital Portion. Any charge that may be imposed by the Plan with respect to the qualified preretirement survivor annuity coverage provided in accordance with the terms of this Order shall be charged against the Alternate Payee's Interest, and such coverage may not be waived without the written consent of the Alternate Payee in such form and at such time as the Plan may require.

(d) **Prior Death of Alternate Payee** — In the event that the Alternate Payee predeceases the Participant before payment of Plan benefits commences to either the Participant or the Alternate Payee, the Participant's benefit under the Plan shall be determined as though this Order had never been entered.

2. Any increases (including, without limitation, any increases resulting from a Plan amendment or from a change in the rate of compensation paid to the Participant by his employer) in the Participant's accrued benefit under the Plan occurring subsequent to the Marital Dissolution Date are not to be construed as part of the Marital Portion. Accordingly, such increases shall be disbursed to and enjoyed solely by the Participant, and the Alternate Payee shall not be entitled to share in any such increase.

3. Both the Alternate Payee and the Participant shall have the duty to notify the Plan Administrator in writing of any changes in his or her respective mailing address subsequent to the entry of this Order. The Plan is administered by [name of plan], located at [address].

4. Nothing in this Order is intended to require, and the Order shall not be construed to require,

- (a) the Plan to provide any type or form of benefit or any option not otherwise provided under the Plan;
- (b) the Plan to provide increased benefits; or
- (c) the Plan to pay benefits to an alternate payee that are required to be paid to another alternate payee under another Order that was determined to be a Qualified Domestic Relations Order.

5. It is intended by the parties that this Order will qualify as a Qualified Domestic Relations Order (as defined in §414(p) of the Code and §206(d)(3) of the Employee Retirement Income Security Act of 1974, as amended (ERISA)), and that this Order shall be interpreted and administered in conformity with the provisions of the Code and ERISA relating to Qualified Domestic Relations Orders. If the Plan Administrator determines at any time that the provisions of this Order are inconsistent with the definition of a Qualified Domestic Relations Order under the Code or ERISA, this Order shall be amended as necessary to comply with the requirements of a Qualified Domestic Relations Order with respect to the Plan. Both parties shall enter into any Agreed Order of this Court as may be

FINDS:

A. This Court has jurisdiction of the parties hereto and the subject matter hereof.

B. On [month] [day], [year], this Court entered a Judgment for Dissolution of Marriage, which Judgment approved a Marital Settlement Agreement containing provisions relative to maintenance and the distribution of marital property rights, and which Judgment provided in part that the Alternate Payee receive a portion of the benefits otherwise payable with respect to the Participant under the [name of plan] (Plan).

C. For the purposes of this Order, the following definitions shall be used, namely:

- (1) [name of participant, employee] — Participant, Employee.**
- (2) [name of alternate payee] — Alternate Payee. The alternate payee is the [spouse] [former spouse] [child] [other dependent] of the participant.**
- (3) Years of Marriage — the parties were married from [month] [day], [year], to [month] [day], [year].**
- (4) Marital Dissolution Date — [month] [day], [year], the date the final Judgment was entered dissolving the marriage of the parties. This definition is for the sole purpose of computing the marital portion of the Participant’s interest in the Plan (and not to interfere with or circumvent the actual date of disbursement of benefits to payees pursuant to the terms and provisions of the Plan).**
- (5) Marital Portion — with respect to each of the Accounts (as defined in the Plan) of the Participant under the Plan, the term “Marital Portion” means the amount credited to the Participant’s Account as of the Marital Dissolution Date, determined after all adjustments required under the Plan have been made, provided that the term “Marital Portion” shall not include any amount withdrawn or distributed from the Accounts in accordance with the provisions of the Plan during the period prior to the date on which the Plan was first notified in writing by the parties of the pendency of this Order.**
- (6) Earliest Retirement Age — the earliest date on which the Participant can elect to receive benefits within the meaning given to such term by §417(f)(3) of the Internal Revenue Code of 1986, as amended (Code).**
- (7) Plan Administrator — the person or committee appointed to administer the Plan.**

D. The name and last-known mailing address of the Participant covered by this Order are:

Name:
Address:
City, State, Zip:
Social Security Number:
Date of Birth:

E. The name and last-known mailing address of the Alternate Payee covered by this Order are:

Name:
Address:
City, State, Zip:
Social Security Number:
Date of Birth:

IT IS HEREBY ORDERED, as follows:

1. Subject to the provisions of the Plan and the terms and conditions of this Order, the Alternate Payee is hereby awarded an interest (as described below in this Paragraph 1) in the benefits otherwise payable under the Plan with respect to the Participant, which interest (hereinafter referred to as the “Alternate Payee’s Interest”) shall be equal to [____ percent of] [the sum of \$_____ from] the Marital Portion of the Participant’s benefits under the Plan. The Alternate Payee’s Interest, as adjusted from time to time in accordance with the provisions of the Plan, shall be distributable to [her] [him] in a lump-sum cash payment or in any other form permitted under the Plan, as elected by the Alternate Payee, as soon as practicable following the first to occur of the following events:

- (a) the date on which the Participant attains age 50 years;**
- (b) the date the Participant terminates employment with the Employers and Related Employers (as defined in the Plan) (Termination Date); or**
- (c) the first date, if any, on which the Plan permits distribution to the Alternate Payee both prior to the Participant’s attainment of the Earliest Retirement Age (as defined in §414(p)(4) of the Code) and prior to the Participant’s Termination Date.**

2. Any increases in the Participant’s Account balances under the Plan caused by employer or employee contributions occurring subsequent to the Accounting Date and any earnings that are attributable to such contributions are not to be construed as part of the Marital Portion. Accordingly, such increases shall be disbursed to and enjoyed solely by the Participant, and the Alternate Payee shall not be entitled to share in any such increases.

3. In the event that the Alternate Payee dies before receiving the amounts payable to [her] [him] under the terms of this Order, the Alternate Payee's Interest, after all adjustments required under the Plan have been made, shall be distributable to [her] [his] beneficiary (as defined below) as soon as practicable following the first date on which such amounts would otherwise be distributable to the Alternate Payee in accordance with the terms of this Order and the provisions of the Plan. The Alternate Payee's beneficiary shall be:

- (a) the person or persons designated by the Alternate Payee in a writing filed with the Plan Administrator in such form and at such time as the Plan Administrator may require; or
- (b) if no beneficiary has been designated by the Alternate Payee, the Alternate Payee's beneficiary determined under the provisions of the Plan as though [she] [he] were a participant under the Plan.

4. To the extent permitted by the Plan, a separate account shall be maintained under the Plan to reflect the Alternate Payee's Interest, which account shall be adjusted from time to time in accordance with the provisions of the Plan. In the event that a separate account is established under the Plan to reflect the Alternate Payee's Interest, such account shall be invested in accordance with the provisions of the Plan or as determined by the Plan Administrator in the absence of such provisions.

5. Both the Participant and the Alternate Payee shall have the duty to notify the Plan Administrator in writing of any changes in her or his respective mailing address subsequent to the entry of this Order. The Plan is administered by [name of plan], located at [address].

6. Nothing in this Order is intended to require, and the Order shall not be construed to require:

- (a) the Plan to provide any type or form of benefit or any option not otherwise provided under the Plan;
- (b) the Plan to provide increased benefits; or
- (c) the Plan to pay benefits to an alternate payee that are required to be paid to another alternate payee under another Order that was determined to be a Qualified Domestic Relations Order.

7. It is intended by the parties that this Order will qualify as a Qualified Domestic Relations Order (as defined in §414(p) of the Code and §206(d)(3) of the Employee Retirement Income Security Act of 1974, as amended (ERISA)), and that this Order shall be interpreted and administered in conformity with the provisions of the Code and ERISA relating to Qualified Domestic Relations Orders. If the Plan Administrator determines at any time that the provisions of this Order are inconsistent with the definition of a Qualified Domestic Relations Order under the Code or ERISA, this Order shall be amended as

necessary to comply with the requirements of a Qualified Domestic Relations Order with respect to the Plan. Both parties shall enter into any Agreed Order of this Court as may be required to amend this Order to comply with such requirements and to affect the intent of this Order with respect to the division of benefits under the Plan.

8. This Court retains jurisdiction to establish or maintain this Order as a Qualified Domestic Relations Order; however, no amendment of this Order shall require the Plan to provide any form of benefit or any option that is not otherwise provided under the terms of the Plan.

9. A true copy of this Order shall be served upon the Plan Administrator and the Order shall take effect immediately and shall remain in effect until further order of the Court.

AGREED:

Petitioner

Respondent

ENTER:

Date

Judge

D. [7.34] Qualified Domestic Relations Order Checklist

QUALIFIED DOMESTIC RELATIONS ORDER CHECKLIST

Complete a separate checklist for each plan to which an order applies.

1. Plan name:
2. Participant’s name:
3. Alternate payee’s name:
4. Court issuing the order:
5. Date of order:
6. Date order received:
7. Individuals to whom notice is to be sent:

Consult with legal counsel if the answer to any of the following questions is “No.”

- Yes: _____ No: _____ 1. Is the order a judgment, decree, order, or approval of a property settlement agreement?
- Yes: _____ No: _____ 2. Does the order relate to the provision of child support, alimony payment, or marital property rights?
- Yes: _____ No: _____ 3. Is the order made pursuant to a state domestic relations law or community property law?
- Yes: _____ No: _____ 4. Is the alternate payee a spouse, former spouse, child, or other dependent of the participant?
- Yes: _____ No: _____ 5. Does the order identify the name, mailing address, social security number, and birth date of the participant, each alternate payee, and contingent alternate payee (if applicable)?
Does the order provide the name of guardian or legal representative if the alternate payee is a minor or legally incompetent?
NOTE: This information does not need to be provided if it is otherwise known by the Plan Administrator.
- Yes: _____ No: _____ 6. Does the order identify the marriage date of the parties and the subsequent date of dissolution of the marriage for purposes of calculating the “marital portion” of the accrued benefit?
- Yes: _____ No: _____ 7. Does the order identify the amount or percentage of the participant’s benefits to be paid by the plan to each alternate payee or the manner in which the amount or percentage shall be determined?
NOTE: The order should provide that the alternate payee would receive benefits only to the extent the participant is vested. If the alternate payee’s benefit is specified in terms of a dollar amount, verify that the amount does not exceed the participant’s vested account balance or accrued benefit.
The usual approach is that contributions to the participant’s account in a defined-contribution plan (or benefit accruals under a defined-benefit plan) after the marital dissolution date are not part of the marital portion. However, if the alternate payee’s benefit is described only in terms of a percentage of the participant’s account (or benefit) without specifying the date as of which the determination is made, the award may be intended to include contributions made and earnings credited (or benefit accrual, compensation, or formula changes) after the date of the award. If this is not clearly stated, revisions should be requested.

NOTE: A QDRO could require the amount payable to an alternate payee to be recomputed to include a portion of the early retirement subsidy otherwise payable to the participant if the participant retires after the alternate payee has commenced benefit payments.

Yes: _____ No: _____ 8. Does the order allow the alternate payee to elect an immediate commencement date or any later date permitted under the plan?

NOTE: The order may specify the date that benefit payments to the alternate payee are to be made (*e.g.*, the participant’s “earliest retirement date”) or may provide that the alternate payee has a right to elect benefit commencement in accordance with plan provisions that allow immediate distributions.

Yes: _____ No: _____ 9. Does the order specify what happens when the participant and alternate payee die?

Yes: _____ No: _____ 10. Does the order identify the number of payments or the period to which the order applies?

Yes: _____ No: _____ 11. Does the order identify each plan to which the order applies?

Yes: _____ No: _____ 12. Does the plan provide for the type or form of benefits specified in the order?

A benefit awarded to an alternate payee may be paid in any form available to a participant (except in the form of a joint and survivor annuity to an alternate payee and his or her subsequent spouse). The order may provide that the alternate payee has a right to elect the form of payment or may specify the form in which the alternate payee’s benefits are to be paid.

Yes: _____ No: _____ 13. Is this the first domestic relations order in effect with respect to the participant’s benefits under the plan? (If not, can the benefits payable under this order be paid without conflicting with the benefits already payable under a previous QDRO?)

Defined-Benefit Plan ONLY 14. If the order provides for preretirement survivor benefits for the alternate payee with respect to the participant’s accrued benefit under a defined-benefit plan in the event the participant dies before his or her benefits commence,

Yes: _____ No: _____ (a) does the information about the parties indicate that they were married for at least one year as of the date of the marital dissolution?

Yes: _____ No: _____ (b) does the order clearly state that the alternate payee will be considered the surviving spouse and therefore be entitled to preretirement survivor benefits relating to the marital portion of the accrued benefit?

E. [7.35] Sample Letter to Plan Participants Regarding Qualified Domestic Relations Order Procedures

**LETTER TO PLAN PARTICIPANTS REGARDING
QUALIFIED DOMESTIC RELATIONS ORDERS PROCEDURES**

The following establishes the Qualified Domestic Relations Order Procedure for the [Name of Plan] (Plan) and is sent to you as required by the Internal Revenue Code (Code) and the Employee Retirement Income Security Act (ERISA). The Plan may make payments under a Domestic Relations Order (DRO) only if the DRO has been determined to be a Qualified Domestic Relations Order (QDRO). When the Plan receives a DRO, the Plan Administrator will follow the procedures described below in determining whether it is a QDRO:

[ALTERNATIVE A — IF DRO HAS BEEN RECEIVED]

1. On [month] [day], [year], the Plan received a DRO with respect to the plan in which you are a plan participant or alternate payee. You have the right to designate a representative to receive copies of notices that are sent with respect to the DRO. If no designation is received by the Plan, notifications concerning the DRO will be sent to you at the address included in the DRO or, if no address is included, at any address otherwise known to the Plan Administrator.

[ALTERNATIVE B — IF NO DRO HAS BEEN RECEIVED, BUT NOTIFICATION OF
PENDING DISSOLUTION HAS BEEN RECEIVED]

1. On [month] [day], [year], the Plan received notification of a pending dissolution proceeding in which you are named. The Plan cannot make payments to anyone other than the participant in the absence of a QDRO. Upon receipt of a DRO, the above-stated procedures for determining whether it is a QDRO will be followed.

2. Any plan participant affected and each person specified in the DRO as entitled to payment of benefits under the Plan (the Alternate Payee) will be notified of the receipt of such order. The notification will be sent to the address included in the DRO or, if no address is included, any address otherwise known to the Plan Administrator.

3. The Plan Administrator may refer the DRO to legal counsel for advice as to whether the DRO is a QDRO as defined by §414(p) of the Code, §206(d) of ERISA, and regulations issued thereunder.

4. When counsel notifies the Plan as to the status of the DRO, the Plan will notify the concerned participant and each alternate payee of the Plan Administrator's determination within a reasonable time. If the DRO has been determined to be a QDRO, notification shall also include the terms of entitlement and directions as to payments contained in the DRO.

5. During the time the status of the DRO is being determined, the Plan Administrator will, as soon as practical, place a hold on the participant's account or accrued benefit under the Plan. To the extent that the participant's benefit under the Plan is currently payable (or in pay status) in accordance with Plan terms, the Plan Administrator will ascertain any dollar amounts payable to each alternate payee pursuant to the DRO and separately account for any amounts currently payable.

6. The status of the DRO must be determined during an 18-month period, as specified by law, which commences when the DRO is submitted for review to the Plan Administrator. If a DRO is determined to be a QDRO within the 18-month period, the Plan Administrator will notify the parties and establish Plan records that indicate the respective Plan interests of the participant and each alternate payee. Each alternate payee listed in the QDRO will receive further information at that time relating to his or her rights under the Plan, including the right to receive and procedures for requesting a distribution from the Plan. If the DRO is determined not to be a QDRO within the 18-month period or the issue is not resolved prior to the end of the 18-month period, the hold will be removed from the participant's account or accrued benefit under the Plan. If the participant was in pay status when the DRO was initially received, any amount held for payment pending resolution of these issues will be distributed to the participant or other person entitled to payment. If the DRO is determined not to be a QDRO before the 18-month period expires and the Plan Administrator receives written notice that one of the parties is attempting to rectify the order, the Plan Administrator will delay payment until the end of the 18-month period.

7. [For reference purposes, sample forms for domestic relations orders have been included, which you may wish to review with your legal counsel.] **If you have further questions, please contact the Plan Administrator, [name], [address], [phone number].**

PLAN ADMINISTRATOR

By: _____

