

Allocation of Plan Expenses in a Defined Contribution Plan.

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Divorce is a lot about decision making and, most importantly, financial planning. Divorce is perhaps the most important financial decision most people in America will make in their lives. It's the one day they buy and sell everything they own. A fundamental knowledge about property in general and sound financial planning strategies will go a long way toward insuring the survivor's economic well being.

On August 4, 1994, the Department of Labor issued its Advisory Opinion Letter No. AO 94-32A. In that AO, the DOL took the position "that imposing a separate fee or cost on a participant or alternate payee (either directly or as a charge against a plan account) in connection with a determination of the status of a domestic relations order or administration of a QDRO constitutes an impermissible encumbrance on the exercise of the right of an alternate payee, under Title I of ERISA, to receive benefits under a QDRO. Additionally, in the Department's view, "because Title I of ERISA imposes specific statutory duties on plan administrators regarding QDRO determinations and the administration of QDROs, reasonable administrative expenses thus incurred by the plan may not appropriately be allocated to the individual participant and beneficiaries affected by the QDRO."

On May 19, 2003, Field Assistance Bulletin 2003-3 (FAB) was issued. In that FAB, the DOL reversed its previous position, stating, "Since the issuance of AO 94-32A, the Department has had an opportunity to review the Act and the opinion in the context of a broader array of plan expense allocation issues raised in the course of investigations. On the basis of this review, the Department has determined that neither the analysis or conclusions set forth in that opinion are legally compelled by the language of the statute. Except for a few instances in which ERISA specifically addresses the imposition of expenses on individual participants, the statute places few constraints on how expenses are allocated among plan participants. In this regard, the same principals applicable to determining the method of allocating expenses among all participants, as discussed above, apply to determining the permissibility of allocating specific expenses to the account of an individual participant, rather than the plan as a whole (i.e., among all participants)."

The FAB goes on to specifically address QDROs and QMCSOs, stating, "ERISA does not, in our view, preclude the allocation of reasonable expenses attendant to QDRO or QMCSO determinations to the account of a participant or beneficiary seeking determination."

In order for a plan to allocate a fee to a specific plan participant's account, the plan is required to include in the Summary Plan Description a summary of any provisions that may result in the imposition of a fee or charge on a particular participant or beneficiary, or the individual account thereof, the payment of which is a condition to the receipt benefits under the plan.

It should be noted that, pursuant to 29 CFR §2520.102-3(l), plan are required to include in the Summary Plan Description a summary of any provisions that may result in the imposition of a fee or charge on a participant or beneficiary, or the individual account thereof, the payment of which is a condition to the receipt of benefits under the plan. In addition, §2520.102-3(l) provides that Summary Plan descriptions must include a statement identifying the circumstances that may result in the "...offset, [or] reduction...of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits..." These requirements are intended to ensure that participant and beneficiaries are apprised of fees and charges that may affect their benefit entitlements (FAB 2003-3).

ERISA requires that plan administrators must assure that the plan pays only reasonable expenses of administering the plan. Plan fiduciaries must take appropriate steps to ensure that plan procedures are designed to be cost effective and to minimize expenses associated with the administration of domestic relations orders. The term "reasonable expenses" is not defined. We assume that any specifically allocated costs are governed by this provision of ERISA.

Example of fees:

At the present time, the fees charged are generally in the range of \$ 350.00 up to \$ 2,500.00 per order. These fees apply only to defined contribution plans. Ceridian Retirement Plan Services is the 3rd party administrator for QDRO processing services for The Kroger Co. Savings Plan, The Kroger Co. Savings Plan for Bargaining Unit Associates and the Dillon Companies, Inc. Employees' Profit Sharing Plan. The QDRO administrative fees for these plans are as follows:

1. Upon written notification of a DRO matter and/or a request for information pertaining to the completion of a DRO matter, the participant's account will be charged \$125. The fee will be deducted from the investments in the following order: Kroger Fixed Income Fund, other investments, and Kroger Stock.
2. Upon receipt of a court document purporting to be a DRO on a defined contribution plan, the participant's account will be charged an additional \$350. The fee will be deducted as outlined above. There is no additional charge for the number of drafts or court-executed Orders received for the same plan for the same DRO.
3. If a subsequent Order is received for an additional defined contribution plan, the participant's account will be charged an additional \$150. The fee will be deducted as outlined above. There is no additional charge for the number of drafts or court-executed Orders received for the same plan for the same DRO.
4. At the time of processing, the amount awarded to an alternate payee pursuant to the DRO will have 50% of the total fee deducted prior to the account split.

Conclusion – The rules have changed. As a practitioner, you now have to consider the cost at the plan level of the administration of a QDRO and which party is going to pay for it.

Practice Tip – Prior to mediation or trial, determine how much the fees are going to be, if any, so that you and your client are not surprised. Obtain a copy of the plan's Summary Plan Description (SPD). See if there is any mention of these types of fees and see whose account is to be assessed. Determine when the fee is assessed. Is it assessed prior to or after segregation? Will the plan assess the fee against the alternate payee's account only, if the issue is addressed properly in a QDRO? If a plan assesses a fee, is the amount of that fee properly addressed in the parties' agreement? Has the court been made aware of the fee and how it will be assessed by the plan?