

When is a QDRO (or similar order) Required

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One of the things we have noticed when asked to prepare an order is that attorneys and judges commonly do not know when a QDRO (or similar order) is required and when other procedures are sufficient.

The term “qualified domestic relations order” or QDRO refers to a judgment, decree or order that creates or recognizes the existence of an alternate payee’s right to receive all or a portion of a plan participant’s benefits payable under an ERISA-qualified employee benefit plan [ERISA sec. 206(d)(3)(B) and IRC sec. 414(p)(1)]. Orders similar to a QDRO are accepted by many non-qualified, non-ERISA plans. The QDRO (or similar order) is the alternate payee’s “gateway” through the anti-alienation provisions required in all ERISA benefit plans (and sometimes adopted by non-ERISA plans) which prohibit a plan from distributing a participant’s benefits to anyone other than the participant (this includes the spouse). No person or entity other than an alternate payee can get through this gateway. An alternate payee (or the equivalent in a non-ERISA plan) may get through this gateway only with a properly drafted, served and accepted QDRO (or similar order).

The following is a brief discussion describing some of the different types of pension plans and retirement arrangements, whether or not the benefits are assignable and by what means:

1. Qualified Plans.

An ERISA qualified Plan is a plan that has met the Internal Revenue Service’s requirements under IRC Section 401, has received a favorable determination letter and continues to maintain its qualified status by complying with the changing laws and regulations as they occur. Continuing its qualified status allows a plan to maintain its tax sheltered status and deferral of tax to the plan participants on the plan benefits until the benefits are paid out. Benefits from all qualified plans are assignable. The parties need not divorce or be divorced in order for benefits to be assigned to an alternate payee. A qualified domestic relations order (“QDRO”) is required to assign plan benefits to an alternate payee.

2. Section 401(k) Plans.

IRC Section 401(k) outlines the terms of a type of plan that has a salary reduction feature with or without matching employer contributions. Section 401(k) also includes thrift and savings plans that have before-tax employee contributions. Section 401(k) plans are a type of qualified plan. Benefits from all Section 401(k) plans are assignable. The parties need not divorce or be divorced in order for benefits to be assigned to an alternate payee. A QDRO is required to assign plan benefits to an alternate payee.

2. Section 403(b) Plans.

IRC Section 403(b) outlines the terms of tax deferred employee annuity contracts. Section 403(b) annuity plans are often used by tax-exempt organizations, public schools (including junior colleges and universities) and churches. Benefits from all Section 403(b) plans are assignable. The benefits assigned are determined by the characteristics of the underlying annuity contracts. In Texas the investment companies that maintain the funds have the responsibility of determining whether or not an order meets the requirements to be “qualified.” The parties need not divorce or be divorced in order for benefits to be assigned to an alternate payee. A QDRO is required to assign plan benefits to an alternate payee.

3. Section 457 Plans.

IRS Section 457 outlines the terms of deferred compensation plans sponsored by state and local governments and tax-exempt organizations. Section 457 plans are not qualified plans. An example of a Section 457 plan is the City of Houston 457 Deferred Compensation Plan which is administered by Empower Retirement. Benefits from Section 457 Plans generally do not have “gateways” to assign benefits and, as such, are generally not assignable to alternate payees. However, most Section 457 Plans have amended their anti-alienation clauses to allow assignments to former spouses. In those cases, an order similar to a QDRO is required to assign benefits to a former spouse.

4. Military Retirement Systems.

The Uniformed Services Retirement System provides generous pensions to its members after retirement. The retirement benefits are statutorily authorized under Section 10 of the U.S. Code. The benefits are in the nature of a defined benefit plan. However, the benefits do not vest until retirement with at least 20 years of creditable service. Direct pay benefits from all military system benefits are assignable if the marriage meets the 10-and-10 rule. The Survivor Benefit Plan is assignable regardless of the 10-and-10 rule. All assignments of benefits must be incident to a divorce. The requirements for a Qualifying Court Order (“QCO”) were changed by the National Defense Authorization Act of 2017 (“NDAA 2017”). Uniformed Services members may also participate in the Uniformed Services Thrift Savings Plan (TSP), a voluntary defined contribution plan. A QCO is required to assign plan benefits to a former spouse.

5. Federal Government Retirement Systems.

The two primary federal governmental retirement systems are the Civil Service Retirement System (CSRS) and the newer Federal Employees Retirement System (FERS). Federal employees employed prior to 1984 are covered under CSRS, unless they voluntarily transfer to FERS. Employees hired after 1983 are automatically covered by FERS. Benefits from these federal government systems are assignable. Federal employees may also participate in the Federal Thrift Savings Plan (TSP), a voluntary defined contribution plan. Assignment of benefits under the CSRS, FERS and the TSP must be incident to a divorce. A Court Order Acceptable for Processing (“COAP”) is required to assign system benefits to a former spouse.

6. State and Local Government Systems.

All state and local government systems are generally qualified plans. However, they are not ERISA plans. It is not always obvious if system benefits are assignable. Some are, some are not. They must be reviewed on case by case basis. For those plans where benefits are assignable, an order similar to a QDRO is required to assign benefits to an alternate payee.

7. Police & Fire Department Retirement Systems.

Both Police and Fire Department retirement systems are generally authorized under state or local municipal statutes. The benefits paid at retirement are similar to traditional defined benefit plans. It is not always obvious if system benefits are assignable. Some are, some are not. They must be reviewed on case by case basis. For those plans where benefits are assignable, an order similar to a QDRO is required to assign benefits to an alternate payee.

8. Keogh Plans (HR-10 Plans).

Keogh Plans (HR-10 Plans) are retirement plans for self-employed individuals and partnerships. Most Keogh plans were frozen when ERISA was enacted and, although no contributions are made to the frozen plans, the tax deferred funds remain. There are still some active Keogh plans maintained by some employers. Benefits from Keogh plans are generally assignable. The parties need not divorce or be divorced in order for benefits to be assigned to an alternate payee. A QDRO is required to assign plan benefits to an alternate payee.

9. Simplified Employee Pensions.

Simplified Employee Pensions (SEPs) authorized under Section 408(k) of the IRC are not covered by the federal laws governing pensions. There are separate regulations covering SEPs that allow for the tax free transfer to a former spouse if the transfer is incident to a divorce. While SEPs can be transferred, they cannot be assigned. Transfers of SEPs are generally made by the trustee of the account. Usually the decree is sufficient to affect the transfer, provided it is specific with respect to the identification of the SEP. All transfers of account balances must be incident to a divorce. Generally, QDROs are not required for the transfer of SEPs.

10. Individual Retirement Accounts.

Individual Retirement Accounts, authorized under Section 408(a) of the IRC are not covered by the federal laws governing pensions. There are separate regulations covering IRAs that allow for the tax-free transfer to a former spouse if the transfer is incident to a divorce. While IRAs can be transferred, they cannot be assigned. Transfers of IRAs are generally made by the trustee of the account. Usually the decree is sufficient to affect the transfer, provided it is specific with respect to the identification of the IRA. All transfers

of account balances must be incident to a divorce. Generally, QDROs are not required for the transfer of IRAs.

11. TIAA-CREF Plans.

The Teachers Insurance Annuity Association and College Retirement Equity Fund (TIAA-CREF) is a special kind of insurance company. TIAA-CREF is not a pension plan per se. It is a funding vehicle for an eligible plan. Only certain employers such as universities, colleges, teaching hospitals, museums and other designated employers are eligible to use TIAA-CREF for their retirement programs. Benefits under TIAA-CREF are generally assignable. The parties need not divorce or be divorced in order for benefits to be assigned to an alternate payee. A court order similar to a QDRO is required to assign plan benefits to a former spouse.

12. Railroad Retirement Board.

Employees classified as “railroad employees” are covered by the Railroad Retirement Board. Railroad Retirement Board benefits are composed of two tiers of benefits. Tier 1 is equivalent to Social Security and Tier 2 is a defined benefit plan. Tier 1 benefits are not assignable to former spouses. Tier 2 benefits are assignable. All assignments of benefits must be incident to a divorce. A court order, although not similar to a QDRO, is required to assign plan benefits to a former spouse.