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To: EBSA, E-ORI - EBSA

Subject: Comments on 72 FR 10070; 29 CFR §2530.206

On March 7, 2007, EBSA issued an "Interim Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders" (72 FR 10070; 29 CFR §2530.206). The Federal Register invites comments and requests that they be submitted electronically, no later than May 7, 2007. This is a comment on the rule. This writer represents multiemployer defined benefit pension plans and brings that perspective to the issues.

This comment focuses on only one aspect of the rule. Paragraph (c) states, without elaboration, that "a domestic relations order shall not fail to be treated as a qualified domestic relations order solely because of the time at which it is issued." Example 1, which follows, makes clear that this rule is intended to permit a "qualified" order to be issued after the death of the plan participant.

The facts of Example 1 show a situation where a post-death QDRO is reasonable: the parties contemplated a QDRO at the time of their divorce; they attempted to have a QDRO entered; but the plan participant died before an otherwise "qualified" order could be issued. Under those facts, the intent of the parties is effectuated by permitting a post-death order to be found "qualified."

The shortcoming of the Regulation is that it opens the door to all post-death QDROs, whether or not those QDROs are reasonable attempts to carry out the division of property contemplated in a divorce. The following scenario demonstrates an abusive situation. A married individual participates in a defined benefit pension plan that provides a qualified pre-retirement survivor annuity ("QPSA"). The plan participant and the spouse divorce and the participant, seeking to retain the entire pension, enters into a property settlement agreement that does not provide for a QDRO but, by way of adjustment, awards 100% of the marital home to the spouse. After the divorce but prior to retirement, the participant dies. Under the Regulation as written, the former spouse can ask the court to enter a QDRO designating the former spouse as a surviving spouse for purposes of the QPSA.

In this scenario, the QDRO does not effectuate the intent of the parties who, at least while both were alive, contemplated that there would be no QDRO. But, once the plan participant has died, there is no one to object to the entry of a QDRO that is contrary to the intent of the divorce settlement. It is unrealistic to expect that a State court judge would examine the record in detail to confirm that an unopposed motion to enter a QDRO is meritorious.

The abuse could be even more egregious than in the preceding example. Assume that an individual was married for at least a year, and therefore satisfies the marriage requirement of ERISA Section 206(d)(3)(F)(ii). When the parties divorced, neither had accrued any pension benefits, so the divorce was silent on the issue of a QDRO. After the divorce, one party became covered under a defined benefit pension plan and earned the vested right to a pension. That party (the

plan participant) never remarried and died prior to retirement. Under the Regulation as written, the plan participant's former spouse can ask the court to enter a QDRO designating the former spouse as a surviving spouse for purposes of the pension plan's QPSA. Note that nothing in ERISA limits a spouse's interest to pension rights earned during that spouse's marriage to the plan participant. As in the prior scenario, there is no one with standing to object to the entry of such an order.

Some will argue that a pension plan's primary defense against an attempt to obtain an unmerited QDRO is with the State court that is asked to enter the QDRO. That might in fact be enough protection, provided that the pension plan is given an opportunity to object. One way to do this would be to modify the Regulation to provide that, in the case of a post-death QDRO (and only in that situation), the respondent pension plan must be brought into the lawsuit as a party. This procedure would give the pension plan an opportunity to examine the record and see that a prospective alternate payee actually had an interest in the pension that he or she seeks to attach. This would not be an undue burden on pension plans because, in cases where the reasonableness of a post-death QDRO is apparent (as in the scenario presented in Example 1 of the Regulation), the pension plan could consent to the entry of the order without incurring the expense of appearing in and participating in the litigation.

The suggestion in the preceding paragraph represents a significant departure from current practice because, at present, the regulatory scheme contemplates that a pension plan need not be made a party to a domestic relations case in order to be bound by a "qualified" order. This is a practical approach and is also economical for pension plans, who prefer to avoid incurring legal fees to appear in routine domestic relations cases. The approach assumes that a pension plan is merely a stakeholder: the plan will pay the pension that has been earned and the plan need not concern itself with how that benefit is divided among the participant and those who qualify as alternate payees. This logic falters with respect to defined benefit plans, however, because defined benefit plans rely on a predictable quantity of forfeitures. There are vested participants who die, unmarried, prior to retirement. The benefits earned by those participants are forfeited and are used by the plan to pay the benefits of others. This is neither a boon to the living nor an insult to the dead; it is the way defined benefit plans operate. If something happens to alter the assumptions the plan actuary has employed, the plan's expenses go up and its ability to pay the promised benefits is impaired. This increase in cost is precisely what would happen if, in the case of every deceased divorced participant, an alternate payee appeared to claim the QPSA. It is not far-fetched to imagine the advertisements that will be placed by entrepreneurial attorneys: "Were you ever married to a person who is now dead? You may have a right to your former spouse's pension! Call me at . . ."

In most cases, it is the plan participant who protects the pension plan from actuarial disadvantage, also known as "adverse selection." By protecting his or her own pension, the participant protects the pension plan from the claims of those who should have no entitlement. When the participant is deceased, the pension plan must protect itself and the plan can best do so by being made a party to the domestic relations case.

As a separate issue, I would ask for a clarification of Examples 2 and 3 that follow paragraph (c)(2) of the Regulation. Both Examples are sound and, in this writer's opinion, correct, but they present unanswered questions that may require additional examples. Example 2 indicates that, if a spouse has lost his or her status as a spouse as a result of a divorce, a subsequent QDRO can reinstate the former spouse's survivorship rights. In Example 3, the plan participant waived, with the spouse's consent, the right to a QJSA. The parties subsequently divorced and Example 3 indicates that nothing in these facts prevents a QDRO from being entered, assigning a portion of the participant's pension to the former spouse.

ERISA Section 206(d)(3)(F) states that a QDRO can require a former spouse to be treated as a surviving spouse for purposes of Section 205, which provides for the QPSA and QJSA. Nothing in Section 206(d)(3)(F) requires a plan to treat a former spouse more favorably than a current spouse. If a current spouse consents to the participant's waiver of the QJSA, a plan may consider that consent to be irrevocable. Example 3 does not specifically state that the former spouse's prior waiver can preclude a QDRO from reinstating survivorship rights that the spouse has waived. I assume this is the correct answer, but would appreciate a clarification.

The question is slightly different if we combine the facts of Example 2 and Example 3. If the plan participant's marriage was ended by divorce prior to the participant's retirement, but no QDRO was entered at the time of divorce, can a subsequent QDRO reinstate the former spouse's survivorship rights after the participant's annuity starting date? In my example, the participant properly waived the QJSA and that waiver did not require spousal consent because the participant was at that time unmarried. If the QJSA was properly waived at the time of retirement, can a post-retirement QDRO require the pension plan to change the participant's form of benefit from a single life annuity to a QJSA? I expect that, once the election period has expired, the answer to this question should be "no," but I would appreciate a clarification.

Thank you for your attention to these issues. I understand that the law and the regulations have a legitimate interest in protecting the interest of former spouses, but I believe the Regulation can perform the equally important function of protecting defined benefit pension plans from adverse selection that increases plan costs and negatively affects the benefit security of all participants in the plan.

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