

QDROs

The Division of Retirement Benefits Through Qualified Domestic Relations Orders



**U.S. Department of Labor
Employee Benefits Security Administration**

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Chapter 3

Drafting QDROs

This chapter provides guidance for the process of drafting domestic relations orders that qualify as QDROs. The following areas are addressed:

- ❑ What are the most common and useful ways of dividing retirement benefits?
- ❑ What are survivor benefits, and why are they important?
- ❑ When can an alternate payee receive the benefits assigned by a QDRO?
- ❑ In what form will the alternate payee receive the assigned benefits?

Although domestic relations orders that involve retirement plans are issued under and governed by state law, Federal law (ERISA and the Code) and the terms of the relevant retirement plan determine whether these orders can be QDROs. This chapter discusses how to draft orders that will qualify as QDROs while accomplishing the purposes for which the retirement benefits are being divided.

This chapter also discusses the most common methods of dividing retirement benefits under the two separate types of retirement plans: defined benefit plans and defined contribution plans. The following questions and answers emphasize the importance of understanding the nature of a participant's retirement benefits and of making decisions about the assignment of any survivor benefits payable under the retirement plan.

Q 3-1: What is the best way to divide a participant's retirement benefits in a QDRO?

There is no single “best” way to divide retirement benefits in a QDRO. What will be “best” in a specific case will depend on many factors, including the type of retirement plan, the nature of the participant's retirement benefits, and why the parties are seeking to divide those benefits.

In deciding how to divide a participant's retirement benefits in a QDRO, it is also important to consider two aspects of a participant's retirement benefits: the benefit payable under the plan directly to the participant for retirement purposes (referred to here as the “retirement benefit”), and any benefit that is payable under the plan on behalf of the participant to someone else after the participant dies (referred to here as the “survivor benefit”). These two aspects of a participant's retirement benefits are discussed separately in this booklet only in order to emphasize the importance of considering how best to divide retirement benefits.

The following four questions and answers introduce the basic concepts that should inform decisions about drafting QDROs. Question 3-2 explains the scope of assignment permitted by the QDRO provisions; Questions 3-3 and 3-4 relate primarily to the retirement benefit; Question 3-5 describes survivor benefits. Later questions present more specific information about how to draft QDROs.

Q 3-2: How much can be given to an alternate payee through a QDRO?

A QDRO can give an alternate payee any part or all of the retirement benefits payable with respect to a participant under a retirement plan. However, the QDRO cannot require the plan to provide increased benefits (determined on the basis of actuarial value); nor can a QDRO require a plan to provide a type or form of benefit, or any option, not otherwise provided under the plan (with one exception, described in Questions 3-9 and 3-10, for an alternate payee’s right to receive payment at the participant’s “earliest retirement age”). The QDRO also cannot require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another QDRO already recognized by the plan.

[ERISA §§ 206(d)(3)(B)(i)(I), 206(d)(3)(D), 206(d)(3)(E); IRC §§ 414(p)(1)(A)(i), 414(p)(3), 414(p)(4); Advisory Opinion 2000-09A (see Appendix A)]

Q 3-3: Why are the reasons for dividing the retirement benefits important?

Generally, QDROs are used either to provide support payments (temporary or permanent) to the alternate payee (who may be the spouse, former spouse or a child or other dependent of the participant) or to divide marital property in the course of dissolving a marriage. These differing goals often result in different choices in drafting a QDRO. This answer describes two common different approaches in drafting QDROs for these two different purposes.

One approach that is used in some orders is to “split” the actual benefit payments made with respect to a participant under the plan to give the alternate payee part of each payment. This approach to dividing retirement benefits is often called the “shared payment” approach. Under this

approach, the alternate payee will not receive any payments unless the participant receives a payment or is already in pay status. This approach is often used when a support order is being drafted after a participant has already begun to receive a stream of payments from the plan (such as a life annuity).

An order providing for shared payments, like any other QDRO, must specify the amount or percentage of the participant's benefit payments that is assigned to the alternate payee (or the manner in which such amount or percentage is to be determined). It must also specify the number of payments or period to which it applies. This is particularly important in the shared payment QDRO, which must specify when the alternate payee's right to share the payments begins and ends. For example, when a state authority seeks to provide support to a child of a participant, an order might require payments to the alternate payee to begin as soon as possible after the order is determined to be a QDRO and to continue until the alternate payee reaches maturity. Alternatively, when support is being provided to a former spouse, the order might state that payments to the alternate payee will end when the former spouse remarries. If payments are to end upon the occurrence of an event, notice and reasonable substantiation that the event has occurred must be provided for the plan to be able to comply with the terms of the QDRO.

Orders that seek to divide a retirement benefit as part of the marital property upon divorce or legal separation often take a different approach to dividing the retirement benefit. These orders usually divide the participant's retirement benefit (rather than just the payments) into two separate portions with the intent of giving the alternate payee a separate right to receive a portion of the retirement benefit to be paid at a time and in a form different from that chosen by the participant. This approach to dividing a retirement benefit is often called the "separate interest" approach.

An order that provides for a separate interest for the alternate payee must specify the amount or percentage of the participant's retirement benefit to be assigned to the alternate payee (or the manner in which such amount or percentage is to be determined). The order must also specify the number of payments or period to which it applies, and such orders often satisfy this requirement simply by giving the alternate payee the right that the participant would have had under the plan to elect the form of benefit payment and the time at which the separate interest will be paid. Such an order would satisfy the requirements to be a QDRO.

Federal law does not require the use of either approach for any specific domestic relations purpose, and it is up to the drafters of any order to determine how best to achieve the purposes for which retirement benefits are being divided. Further, the shared payment approach and the separate interest approach can each be used for either defined benefit or defined contribution plans. *See* Question 3-4 for a discussion of the two basic types of retirement plans. However, it is important in drafting any order to understand and follow the terms of the plan. An order that would require a plan to provide increased benefits (determined on an actuarial basis) or to provide a type or form of benefit, or an option, not otherwise available under the plan cannot be a QDRO. *See* Questions 3-4, 3-6, and 3-7 for further information on dividing retirement benefits under defined benefit and defined contribution plans.

In addition to determining whether or how to divide the retirement benefit, it is important to consider whether or not to give the alternate payee a right to survivor benefits or any other benefits payable under the plan. *See* Question 3-5 for a discussion of survivor benefits.

[ERISA § 206(d)(3)(C)(ii) - (iv); IRC § 414(p)(2)(B) - (D)]

Q 3-4: In deciding how to divide the participant's retirement benefits, why is understanding the type of retirement plan important?

Understanding the type of retirement plan is important because the order cannot be a QDRO unless its assignment of rights or division of retirement benefits complies with the terms of the plan. Parties drafting a QDRO should read the plan's summary plan description and other plan documents to understand what retirement benefits are provided under the plan.

Retirement plans may be divided generally into two types: defined benefit plans and defined contribution plans.

A defined benefit plan promises to pay each participant a specific benefit at retirement. This basic retirement benefit is usually based on a formula that takes into account factors like the number of years a participant works for the employer and the participant's salary. The basic retirement benefit is generally provided in the form of periodic payments for the participant's life beginning at what the plan calls "normal retirement age." This stream of periodic payments is generally known as an "annuity." A participant's basic retirement benefit under a defined benefit plan may increase over time, either before or after the participant begins receiving benefits, due to a variety of circumstances, such as increases in salary or the crediting of additional years of service with the employer (which are taken into account under the plan's benefit formula), or through amendment to the plan's provisions, including some amendments to provide cost of living adjustments.

Defined benefit plans may promise to pay benefits at various times, under certain circumstances, or in alternative forms. Benefits paid at those times or in those forms may have a greater actuarial value than the basic retirement benefit payable by the plan at the participant's normal retirement age. When one form of benefit has a greater actuarial value than another

form, the difference in value is often called a “subsidy.” See Appendix C for further discussion of the benefits provided under defined benefit plans.

A defined contribution plan, by contrast, is a type of retirement plan that provides for an individual account for each participant. The participant’s benefits are based solely on the amount contributed to the participant’s account and any income, expenses, gains or losses, and any forfeitures of accounts of other participants that may be allocated to such participant’s account. Examples of defined contribution plans include profit sharing plans (like 401(k) plans), employee stock ownership plans (ESOPs), and money purchase plans. A participant’s basic retirement benefit in a defined contribution plan is the amount in his or her account at any given time. This is generally known as the participant’s “account balance.” Defined contribution plans commonly provide for retirement benefits to be paid in the form of a lump sum payment of the participant’s entire account balance. Defined contribution plans by their nature do not offer subsidies.

It should be noted, however, that some defined benefit plans provide for lump sum payments, and some defined contribution plans provide for annuities.

[IRS Notice 97-11, 1997-2 IRB 49 (Jan. 13, 1997) (Appendix C)]

Q 3-5: What are “survivor benefits,” and why should a QDRO take them into account?

Federal law requires all retirement plans, whether they are defined benefit plans or defined contribution plans, to provide benefits in a way that includes a survivor benefit for the participant’s spouse. The provisions creating these protections are contained in section 205 of ERISA and sections 401(a)(11) and 417 of the Code. The type of survivor benefit that is required by Federal law depends on the type of retirement plan. Plans also may provide for survivor (or “death”) benefits that are in addition to those required by Federal law. Participants and alternate payees drafting

a QDRO should read the plan's summary plan description and other plan documents to understand the survivor benefits available under the plan.

Federal law generally requires that defined benefit plans and certain defined contribution plans pay retirement benefits to participants who were married on the participant's "annuity starting date" (this is the first day of the first period for which an amount is payable to the participant) in a special form called a "qualified joint and survivor annuity" (QJSA) unless the participant elects a different form and the spouse consents to that election. When benefits are paid as a QJSA, the participant receives a periodic payment (usually monthly) during his or her life, and the surviving spouse of the participant receives a periodic payment for the rest of the surviving spouse's life upon the participant's death. See Appendix C for a description of the QJSA. Federal law also generally requires that, if a married participant with a non-forfeitable benefit under one of these types of plans dies before his or her "annuity starting date," the plan must pay the surviving spouse of the participant a monthly survivor benefit. This benefit is called a "qualified preretirement survivor annuity" (QPSA). Appendix C also describes the QPSA.

Those defined contribution plans that are not required to pay retirement benefits to married participants in the form of a QJSA or QPSA (like most 401(k) plans) are required by Federal law to pay any balance remaining in the participant's account after the participant dies to the participant's surviving spouse. If the spouse gives written consent, the participant can direct that upon the participant's death any balance remaining in the account will be paid to a beneficiary other than the spouse, for example, the couple's children. Under these defined contribution plans, Federal law does not require a spouse's consent to a participant's decision to withdraw any portion (or all) of his or her account balance during the participant's life.

If a participant and his or her spouse become divorced before the participant's annuity starting date, the divorced spouse loses all right to the survivor benefit protections that Federal law requires be provided to a

participant's spouse. If the divorced participant remarries, the participant's new spouse may acquire a right to the Federally mandated survivor benefits. A QDRO, however, may change that result. To the extent that a QDRO requires that a former spouse be treated as the participant's surviving spouse for all or any part of the survivor benefits payable after the death of the participant, any subsequent spouse of the participant cannot be treated as the participant's surviving spouse. For example, if a QDRO awards all of the survivor benefit rights to a former spouse, and the participant remarries, the participant's new spouse will not receive any survivor benefit upon the participant's death. If such a QDRO requires that a defined benefit plan, or a defined contribution plan subject to the QJSA and QPSA requirements, treat a former spouse of a participant as the participant's surviving spouse, the plan must pay the participant's benefit in the form of a QJSA or QPSA unless the former spouse who was named as surviving spouse in the QDRO consents to the participant's election of a different form of payment.

It should also be noted that some retirement plans provide that a spouse of a participant will not be treated as married unless he or she has been married to the participant for at least a year. If the retirement plan to which the QDRO relates contains such a one-year marriage requirement, then the QDRO cannot treat the alternate payee as a surviving spouse if the marriage lasted for less than one year.

In addition, it is important to note that some retirement plans may provide for survivor benefits in addition to those required by Federal law for the benefit of the surviving spouse. Generally, however, the only way to establish a former spouse's right to survivor benefits such as a QJSA or QPSA is through a QDRO. A QDRO may provide that a part or all of such other survivor benefits shall be paid to an alternate payee rather than to the person who would otherwise be entitled to receive such death benefits under the plan. As discussed above (*see, e.g., Question 3-3*), a spouse or former spouse can also receive a right to receive (as a separate interest or as shared payments) part of the participant's retirement benefit as well as a survivor's benefit.

[ERISA §§ 205, 206(d)(3)(F); IRC §§ 401(a)(11), 414(p)(5), 417; Advisory Opinion 2000-09A (see Appendix A)]

Q 3-6: How may the participant's retirement benefit be divided if the retirement plan is a defined contribution plan?

An order dividing a retirement benefit under a defined contribution plan may adopt either a “separate interest” approach or a “shared payment” approach (or some combination of these approaches). See Question 3-3 for a discussion of these two approaches. Orders that provide the alternate payee with a separate interest, either by assigning to the alternate payee a percentage or a dollar amount of the account balance as of a certain date, often also provide that the separate interest will be held in a separate account under the plan with respect to which the alternate payee is entitled to exercise the rights of a participant. Provided that the order does not assign a right or option to an alternate payee that is not otherwise available under the plan, an order that creates a separate account for the alternate payee may qualify as a QDRO.

Orders that provide for shared payments from a defined contribution plan should clearly establish the amount or percentage of the participant's payments that will be allocated to the alternate payee and the number of payments or period of time during which the allocation to the alternate payee is to be made. A QDRO can specify that any or all payments made to the participant are to be shared between the participant and the alternate payee.

In drafting orders dividing benefits under defined contribution plans, parties should also consider addressing the possibility of contingencies occurring that may affect the account balance (and therefore the alternate payee's share) during the determination period. For example, parties might be well advised to specify the source of the alternate payee's share of a participant's account that is invested in multiple investments because

there may be different methods of determining how to derive the alternate payee's share that would affect the value of that share. The parties should also consider how to allocate any income or losses attributable to the participant's account that may accrue during the determination period. If an order allocates a specific dollar amount rather than a percentage to an alternate payee as a shared payment, the order should address the possibility that the participant's account balance or individual payments might be less than the specified dollar amount when actually paid out.

[ERISA §§ 206(d)(3)(C); IRC § 414(p)(2)]

Q 3-7: How may the participant's retirement benefit be divided if the retirement plan is a defined benefit plan?

As indicated earlier, an order may adopt either the shared payment or the separate interest approach (or a combination of the two) in dividing retirement benefits in a defined benefit plan. See Question 3-3 for a discussion of these two approaches.

If shared payments are desired, the order should specify the amount of each shared payment allocated to the alternate payee either by percentage or by dollar amount. If the order describes the alternate payee's share as a dollar amount, care should be taken to establish that the payments to the participant will be sufficient to satisfy the allocation, and the order should indicate what is to happen in the event a payment is insufficient to satisfy the allocation. The order must also describe the number of payments or period of time during which the allocation to the alternate payee is to be made. This is usually done by specifying a beginning date and an ending date (or an event that will cause the allocation to begin and/or end). If an order specifies a triggering event that may occur outside the plan's knowledge, notice of its occurrence must be given to the plan before the plan is required to act in accordance with the order. If the intent is that all

payments made under the plan are to be shared between the participant and the alternate payee, the order may so specify.

As discussed in Appendix C at pages 100-101, a defined benefit plan may provide for subsidies under certain circumstances and may also provide increased benefits or additional benefits either earned through additional service or provided by way of plan amendment. A QDRO that uses the “shared payment” method to give the alternate payee a percentage of each payment may be structured to take into account any such future increases in the benefits paid to the participant. Such a QDRO does not need to address the treatment of future subsidies or other benefit increases, because the alternate payee will automatically receive a share of any subsidy or other benefit increases that are paid to the participant. If the parties do not wish to provide for the sharing of such subsidies or increases, the order should so specify.

If a separate interest is desired for the alternate payee, it is important that the order be based on adequate information from the plan administrator and the plan documents concerning the participant’s retirement benefit and the rights, options, and features provided under the plan. *See* Question 2-1. In particular, the drafters of a QDRO should consider any subsidies or future benefit increases that might be available with respect to the participant’s retirement benefit. The order may specify whether, and to what extent, an alternate payee is to receive such subsidies or future benefit increases. *See* Appendix C at pages 100-101 for a discussion of subsidies and possible future increases in a participant’s benefits in a defined benefit plan.

[ERISA §§ 206(d)(3)(C), 206(d)(3)(D); IRC §§ 414(p)(2), 414(p)(3)]

Q 3-8: May the QDRO specify the form in which the alternate payee's benefits will be paid?

A QDRO that provides for a separate interest may specify the form in which the alternate payee's benefits will be paid subject to the following limitations: (1) the order may not provide the alternate payee with a type or form of payment, or any option, not otherwise provided under the plan; (2) the order may not provide any subsequent spouse of an alternate payee with the survivor benefit rights that Federal law requires be provided to spouses of participants under section 205 of ERISA (*see* Question 3-5); and (3) (for any tax-qualified retirement plan), the payment of the alternate payee's benefits must satisfy the requirements of section 401(a)(9) of the Code respecting the timing and duration of payment of benefits. In determining the form of payment for an alternate payee, an order may substitute the alternate payee's life for the life of the participant to the extent that the form of payment is based on the duration of an individual's life. As discussed in Appendix C at pages 102-103, however, the timing and forms of benefit available to an alternate payee under a tax-qualified plan may be limited by section 401(a)(9) of the Code.

Alternatively, a QDRO may (subject to the limitations described above) give the alternate payee the right that the participant would have had under the plan to elect the form of benefit payment. For example, if a participant would have the right to elect a life annuity, the alternate payee may exercise that right and choose to have the assigned benefit paid over the alternate payee's life. However, the QDRO must permit the plan to determine the amount payable to the alternate payee under any form of payment in a manner that does not require the plan to pay increased benefits (determined on an actuarial basis).

A plan may by its own terms provide alternate payees with additional types or forms of benefit, or options, not otherwise provided to participants, such as a lump-sum payment option, but the plan cannot prevent a QDRO from assigning to an alternate payee any type or form of benefit, or option, provided generally under the plan to the participant.

[ERISA §§ 206(d)(3)(A), 206(d)(3)(D), 206(d)(3)(E)(i)(III); IRC §§ 401(a)(9), 401(a)(13)(B), 414(p)(3), 414(p)(4)(A)(iii)]

Q 3-9: When can the alternate payee get the benefits assigned under a QDRO?

A QDRO that provides for shared payments must specify the date on which the alternate payee will begin to share the participant's payments. Such a date, however, cannot be earlier than the date on which the plan receives the order. With respect to a separate interest, an order may either specify the time (after the order is received by the plan) at which the alternate payee will receive the separate interest or assign to the alternate payee the same right the participant would have had under the plan with regard to the timing of payment. In either case, a QDRO cannot provide that an alternate payee will receive a benefit earlier than the date on which the participant reaches his or her "earliest retirement age," unless the plan permits payments at an earlier date. Question 3-10 describes how to determine this "earliest retirement age," which is often a date earlier than the earliest date on which the participant would be entitled to receive his or her retirement benefit.

The plan itself may contain provisions permitting alternate payees to receive separate interests awarded under a QDRO at an earlier time or under different circumstances than the participant could receive the benefit. For example, a plan may provide that alternate payees may elect to receive a lump sum payment of a separate interest at any time. As discussed in Question 3-8 and in Appendix C at pages 102-103, section 401(a)(9) of the Code may affect when benefits must be paid under tax-qualified retirement plans.

[ERISA §§ 206(d)(3)(C), 206(d)(3)(D), 206(d)(3)(E); IRC §§ 401(a)(9), 414(p)(2), 414(p)(3), 414(p)(4)]

Q 3-10: What is “earliest retirement age,” and why is it important?

For QDROs, Federal law provides a very specific definition of “earliest retirement age,” which is the earliest date as of which a QDRO can order payment to an alternate payee (unless the plan permits payments at an earlier date). The “earliest retirement age” applicable to a QDRO depends on the terms of the retirement plan and the participant’s age. “Earliest retirement age” is the earlier of two dates:

- the date on which the participant is entitled to receive a distribution under the plan, or
- the later of either:
 - the date the participant reaches age 50, or
 - the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service with the employer.

Drafters of QDROs should consult the plan administrator and the plan documents for information on the plan’s “earliest retirement age.” The following examples illustrate the concept of “earliest retirement age.”

Example 1. The retirement plan is a defined contribution plan that permits a participant to make withdrawals only when he or she reaches age 59½ or terminates from service. The “earliest retirement age” for a QDRO under this plan: is the earlier of (1) when the participant actually terminates employment or reaches age 59½, or (2) the later of the date the participant reaches age 50 or the date the participant could receive the account balance if the participant terminated employment. Since the participant could terminate employment at any time and thereby be able to receive the account balance under the plan’s terms, the later of the two dates described

above is “age 50.” The “earliest retirement age” formula for this plan can be simplified to read the earlier of: (1) actually reaching age 59½ or terminating employment or (2) age 50. Since age 50 is earlier than age 59½, the “earliest retirement age” for this plan will be the earlier of age 50 or the date the participant actually terminates from service.

Example 2. The retirement plan is a defined benefit plan that permits retirement benefits to be paid beginning when the participant reaches age 65 and terminates employment. It does not permit earlier payments. The “earliest retirement age” for this plan is: the earlier of (1) the date on which the participant actually reaches age 65 and terminates employment, or (2) the later of age 50 or the date on which the participant reaches age 65 (whether he or she terminates employment or not). Because age 65 is later than age 50, the second part of the formula can be simplified to read “age 65” so that the formula reads as follows: the “earliest retirement age” is the earlier of (1) the date on which the participant reaches age 65 and actually terminates or (2) the date the participant reaches age 65. Under this plan, therefore, the “earliest retirement age” will be the date on which the participant reaches age 65.

[ERISA § 206(d)(3)(E); IRC § 414(p)(4)]



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