DIVORCE FINANCIAL SOLUTIONS, LLC

Divorce Financial Counselors and Divorce Financial Analysts
2229 South Kinnickinnic Avenue
Milwaukee, WI 53207

GARRICK G. ZIELINSKI, CFP, CDFA
THOMAS M. KARTHAUSSER

Telephone: (414) 294-4755
Toll-Free: 1-888-337-7002
Fax: (414) 294-4789
www.divfinsolutions.com

WHICH EMPLOYEE BENEFIT RETIREMENT PLANS ARE EXEMPT FROM ERISA?

ERISA does not apply to several classes of employee benefit plans. ERISA Section 4(b) states the following:

> "The provisions of this subchapter shall not apply to any employee benefit plan if:
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> 1) such plan is a governmental plan
> 2) a church plan
> 3) a plan maintained solely for the purpose of complying with applicable worker's compensation laws, unemployment laws and/or disability insurance laws
> 4) a plan maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens
> 5) an excess benefit plan that is not funded (Rabbi Trust)"

The most common non-ERISA plan you may run into is the Federal Employees Retirement System. In Wisconsin, the most common non-ERISA plan is the Wisconsin Retirement System where it is estimated that 27% of Wisconsin residents are a participant in WRS.

ERISA section 3(32) defines a government plan as a "plan established or maintained for its employees by the Government of the United States, by the Government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term governmental plan also includes any plan to which the Railroad Retirement Act of 1935, or 1937 (45 U.S.C. 231 et seq.) applies, and which is financed by contributions required under the Act (Tier I contributions) and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act (22 U.S.C. 288 et seq.)". The Internal Revenue Service under Section 414(d) uses the same description.

Many plans that are not governed by ERISA still provide a method to bifurcate the plan benefits incident to a divorce. However, each plan and each entity have their own terms and conditions regarding bifurcation. The primary difference between governmental plans and ERISA plans are that governmental plans cannot be separately segregated. They are paid to a former spouse only if the participant spouse collects a benefit, when the participant spouse collects a benefit and as the participant spouse collects a benefit. Benefits awarded to a former spouse are paid, if, as and when paid to the participant spouse.

On the other hand, under ERISA plans it is allowable for the non-participant spouse to elect benefits independent of the participant spouse. Under ERISA, benefits awarded to a former spouse are derived through the eligibility of the participant spouse. Thus, when the participant spouse becomes eligible to commence a pension, the non-participant spouse becomes eligible regardless of whether or not the participant spouse chooses to retire.

Governmental plans require that you negotiate such benefits as former spouse survivor benefits, which will reduce the gross benefit, paid to the participant and who shall pay the cost. You also need to be clear in regard to cost of living adjustments and a refund of an employee's contributions from the plan that is considered a severe financial penalty. On the other hand, most ERISA plans provide provisions where an independent interest can be awarded to a former spouse and guarantee benefits so long as the former spouse survives. Any reductions taken as a result of providing such a benefit to a non-participant former spouse is taken from the non-participant portion of the benefit and nothing from the retained participant benefit.