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SHOULD A MODEL QDRO BE MODIFIED?

Most likely, the answer is yes. A model QDRO is nothing more than a form of guidance and all ERISA plans cannot require that model language be used. Any order that satisfies the requirements under ERISA, REA and the IRC for a QDRO must be recognized as such, even if the order does not bear a resemblance to the plans model QDRO.

The Plan Administrator's problem is that a practitioner's decision to alter the model language in a QDRO often results in the order not satisfying one or more of the requirements of ERISA, REA and the IRC. From the practitioner's point of view, the model QDRO language may include benefits and/or provisions not desired or negotiated by the parties. Under those circumstances, the result is not what the practitioner or the court had intended.

Many practitioners erroneously believe that model language will benefit the participant because the Plan "looks out" for the interest of the participant. Nothing could be further from reality. In my opinion, model language looks out for the best interest of *the Plan*. It is up to the practitioner to determine whether or not model language is suitable for their client situation, and whether or not the benefits awarded in the model QDRO were actually negotiated.

For example, most model QDRO language are shared interest QDRO's. In other words, they include language where *employee* contingencies and other triggering events dictate the amount of benefits paid to an alternate payee and when those benefits are paid. The most common model language you will see that is misunderstood, is when the alternate payee (former spouse) is deemed the surviving spouse for purposes of pre-retirement and/or post retirement survivor benefits. Survivor benefits have a cost to the participant in the plan. Survivor benefits, like most things in life, are not free. If survivor benefit elections are awarded in your QDRO, in most situations the participant will receive a reduced benefit at retirement as a result of the Plan being ordered to recognize the alternate payee as the surviving spouse. If survivor benefits were not negotiated during the settlement, they should not be included in the QDRO draft.

Some Plan Administrators offer shared interest and independent interest QDRO model language. The practitioner must understand the differences between the two model QDRO's and be prepared to alter the model language in order to benefit and/or protect their respective client's interest. For example, most model language forfeits the alternate payee's awarded benefit to the Plan if he or she predeceases the commencement of their benefit. In a shared interest QDRO, those benefits could revert to the participant under this scenario. Since a reduction in the participant's benefit is required to elect a survivor benefit for a former spouse, why wouldn't you insist that the alternate payee's benefit revert to the participant if the alternate payee predeceases the commencement of their awarded benefit?

Most plans model language provides that benefits are forfeited to the Plan in the event of a premature death. Ultimately, forfeitures reduce the cost of the Plan to the *employer* and do nothing for either the participant and/or alternate payee. Under a shared interest QDRO, the Plan must allow the benefit to revert to the participant if so stated in the QDRO. Under an independent interest QDRO, it is possible in some cases to have the benefit revert, but you should check with the Plan Administrator before settling on such language.

Recently, I reviewed a QDRO draft for a non-participant spouse. A “QDRO factory, to save the clients money” drafted the QDRO. The attorneys representing each party, signed by the court and submitted to the Plan Administrator for approval also signed the QDRO draft. A quick review of my file indicated that the QDRO was a “model QDRO” provided by the Plan. I also reviewed the Marital Settlement Agreement and the language in the agreement was typical. It simply stated that the non-participant spouse was awarded 50% of the participant’s accrued benefit in the plan through the date of divorce. However, the QDRO draft awarded a shared interest to the non-participant spouse, deemed her the “surviving spouse” for purposes of any pre and post-retirement survivor benefits payable (no cutoff date was indicated). Furthermore, upon the non-participants premature death, her awarded share was forfeited to the plan and it also awarded her 50% of all early retirement subsidies defined by a formula, and ad hoc increases in the plan benefit formula, if any. Simply stated, this non-participant spouse received substantially more than she bargained for *all at the cost* of the participant.

The cost breaks down like this:

- Survivor Benefit Election - \$300 per month reduction in gross benefits payable – present value in excess \$60,000.00.
- Survivor Annuity – Payable the month after the participant’s death regardless of age, in the amount that would have been paid at normal retirement age, and payable for as long as she is living. Cost is unknown, but has the potential to increase the benefits to the non-participant spouse two to four fold based on present value.
- Alternate Payee’s Premature Death – benefits are forfeited to the plan. The gross benefit is \$3,000.00 per month and \$1,500.00 per month awarded to the non-participant spouse. Upon her death the amount is forfeited to the plan, but could have been paid to the participant. Present value in excess of \$300,000.00!
- Early Retirement Subsidies Defined By Formula – Costs unknown. However, many plans approach older workers and as an incentive to get them to retire early, provide subsidized benefits or increased benefits. The non-participant spouse, in this case, will receive a proportionate share of those increases.
- Ad Hoc Increases In Plan Benefit Formula – Costs unknown. However, frequently plans alter the formula, which calculates the monthly benefit. In many circumstances plans require routine increases and most often through subsequent or future collective bargaining agreements. The non-participant spouse would be entitled to receive a benefit based on the formula in place at retirement, not as of the date of divorce.

Nonetheless, in this case, model language greatly benefited the non-participant spouse and made the administration of the QDRO very easy for the Plan Administrator at a huge potential cost to the participant.

