

# NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16<sup>TH</sup> STREET, N.W., WASHINGTON, DC 20006 • PHONE 202-737-5315 • FAX 202-737-1308



EDWARD C. SULLIVAN  
CHAIRMAN

RANDY G. DEFREHN  
EXECUTIVE DIRECTOR  
E-MAIL: [RDEFREHN@NCCMP.ORG](mailto:RDEFREHN@NCCMP.ORG)

May 7, 2007

## **Submitted Electronically at e-ORI@dol.gov**

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5669  
Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Attention: QDRO Regulation

Dear Sir or Madam:

These comments are filed by the National Coordinating Committee for Multiemployer plans (NCCMP) in response to the request for public comments on the Interim Final Regulations issued under section 1001 of the Pension Protection Act on March 7, 2007, concerning Time and Order of Issuance of Domestic Relations Orders Benefits as contained in the Federal Register of March 7, 2007, Volume 72, Number 44, Pages 10070-10074.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, health and other benefits. Our purposes is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries. These members in the normal course of their operations are regularly asked by participants and alternate payees to qualify domestic relations order.

## **Interim Final Rule**

The Interim Final Rule sets forth three general rules pertaining to the order, timing and requirements and protections of domestic relations orders. The operation and effect of each rule is illustrated by two or more examples. In the introductory "Overview of Interim Final Rule" the Department explains that the examples apply to specific facts but that "[t]hey do not represent the only circumstances for which these rules provide clarification." (72 Fed. Reg. 10071, fn. 2.)

Although it is understood that the examples are illustrative only, there are a number of scenarios involving situations, and in particular situations where a participant enters pay status or dies prior to the plan's receipt of a domestic relations order, that do not appear to be covered by these examples. It is not readily apparent how the rules would apply to these other situations. Moreover, these situations are complicated by conflicting or muddled case law. The NCCMP believes that these regulations and examples will be of significant benefit to plans, participants and alternate payees. The issues in these scenarios occur frequently based upon our conversations with affiliate plans. The existing uncertainty regarding the correct approach results in needless delay and expense to plans, participants and alternate payees. It will be a service to all concerned to clarify these scenarios.

The following are additional scenarios that the NCCMP believes require clarification through examples:

**1. Scenario 1(a). Subsequent order between same parties.** In this scenario the Participant and Spouse divorce and submit a signed domestic relations order to the plan. The order assigns a certain portion of the Participant's benefit to the Spouse. The plan administrator determines that it is a QDRO. Subsequently, but before the Participant enters pay status, the Participant and Spouse submit a second domestic relations order eliminating the assigned benefit in total so that the Spouse takes nothing under the Plan. Assuming the second domestic relations order meets all other requirements to be qualified, should it fail because it eliminates any and all payments to the Spouse?

**Scenario 1(b). Divorce and order after Annuity Starting Date.** In this scenario the Participant and Spouse are married when the Participant retires from a defined benefit plan with a qualified joint and survivor annuity benefit with the Spouse. Shortly after the Participant retires, the parties divorce. The parties' property settlement agreement provides that the Spouse waives any portion of Participant's pension benefits from Defined Benefit Plan including survivor benefits. This is incorporated into a domestic relations order which is submitted to the plan administrator.

### **Discussion of Scenario 1.**

There is a sound basis for concluding that the order in the Scenario 1(a) is not a QDRO. ERISA §206(d)(3)(B)(i) provides that a "qualified domestic relations order" is a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under the plan." In Advisory Opinion 2004-2A the Department of Labor stated its view that "provided that a domestic relations order otherwise meets the requirements of section 206(d)(3) of ERISA, a plan administrator may not fail to qualify the domestic relations order merely because the order changes a prior assignment to the same alternate payee" and that "a plan administrator may determine, consistent with the requirements of section 206(d)(3), that a domestic relations order is qualified even if it would supersede or amend a pre-existing QDRO assigning the same participant's benefits to the same alternate payee."

However, under the facts in Scenario 1(a), it could be concluded that as the result of the subsequent order there is no longer an order that meets the requirements of §206(d)(3). The subsequent order, by itself, does not satisfy the requirement of ERISA §206(d)(3)(B)(i) because it does not create or recognize the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under the plan. Therefore, this order is preempted. Similarly, the two orders taken together are not a QDRO because as a result of the subsequent order there is no longer an order requiring that benefits be paid to the alternate payee. Consequently, it could be concluded that the original domestic relations order that was determined to be a QDRO by the plan administrator remains in effect. The answer may be different if the second order, on its face, actually vacates the first order, since in that case, the original domestic relations order would no longer be in force, so there would no longer be an order to serve as a basis for the finding that the original order was a QDRO.

It would also appear that the order in Scenario 1(b) is not a QDRO. Again, ERISA §206(d)(3)(B)(i) provides that a "qualified domestic relations order" is a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a Participant under the plan." The Plan of benefits of the defined benefit plan, ERISA and the Code provide that the spouse as of Participant's annuity starting date is the spouse for purposes of the qualified joint and survivor annuity (QJSA) unless the QJSA is waived by the spouse. Therefore, an order eliminating Spouse's status as a spouse for purposes of the QJSA does not meet the definition of a QDRO. Finally, there is no basis for a plan provision permitting the spouse to waiver survivor benefits after the Participant's annuity starting date.

## **2. Divorce prior to annuity starting date but order issued after annuity starting date.**

**Scenario No. 2(a).** In this scenario the participant and spouse divorce. Before a domestic relations order is submitted the Participant enters pay status and selects a single life annuity. The plan provides that the benefit form may not be changed after the benefit has commenced. After the participant's annuity starting date the plan administrator receives a domestic relations order awarding the former spouse 50% of the Participant's benefit and requiring the former spouse to be treated as the current spouse for purposes of the qualified joint and survivor annuity.

**Scenario No. 2(b).** Same as Scenario 2(a) except before a domestic relations order is submitted the Participant remarries and enters pay status with a spouse entitled to be treated as the surviving spouse for purposes of the qualified joint and survivor annuity on the annuity starting date. As the result of the normal form of benefit requirement under the plan for married participants or as a result of selecting an optional form of benefit, the Participant begins receiving a joint and survivor benefit with the new spouse. After the participant's benefits have commenced, the plan administrator receives a domestic relations order that requires the former spouse to be treated as the current spouse for purposes of the qualified joint and survivor annuity.

**Scenario No. 2(c).** Same as Scenario 2(a) except the Participant has selected a joint and survivor benefit with a non-spouse beneficiary.

**Scenario No. 2(d).** Same as Scenario 2(a) except the plan administrator had notice prior to the Participant entering pay status that a domestic relations order would be submitted in the near future. Assuming the domestic relations order meets all other requirements to be qualified, should it fail because it was received after plan administrator had notice of a potential order but after the Participant entered pay status? Does it make a difference what type of notice was received by the plan administrator, such as a draft (unsigned) domestic relations order, a previously rejected domestic relations order, a copy of a property settlement or judgment of divorce, a letter or a phone call? What if the domestic relations order that is finally submitted is different than the draft order or property settlement previously submitted to the plan administrator? Does it make a difference if the final domestic relations order is submitted outside the 18-month period set forth in ERISA § 206(d)(3)(H)(v)?

## **Discussion of Scenario 2.**

Scenarios 2(a) through 2(d) cover situations where the parties divorce before the Participant's annuity start date but the court approved domestic relations order is received after the Participant's Annuity Starting Date. The only example in the Interim Final Rule that addresses a situation where the domestic relations order is received after the Participant's annuity start date is Example 3 under Section 2530.206(c). This example is distinguishable from the fact situations set forth above.

### **(a) Order after annuity start date – no new spouse or other beneficiary.**

Example 3 under Section 2530.206(c) is distinguishable from Scenario 2(a) because in the example the divorce occurs after, rather than before the annuity starting date. This factual distinction would not appear to be sufficiently material to alter the result with respect to the assignment of a portion of the participant's benefit. The plan could pay the former Spouse, prospectively, a portion of the Participant's monthly benefit notwithstanding that the divorce occurred before but the domestic relations order was submitted after the annuity start date. It would seem however, that the plan could not honor the provision that requires the former spouse to be treated as the current spouse for purposes of the qualified joint and survivor annuity. Since the single life annuity has already been established, an order requiring a joint and survivor annuity after the participant's annuity starting date requires the plan to provide a type of form of benefit not otherwise provided by the plan in violation of violation of 29 U.S.C. § 1056(d)(3)(D)..

### **(b) Order after annuity start date – annuity provides for a survivor benefit.**

Scenarios 2(b) and 2 (c) are not addressed in any example in the Interim Final Rule. Both involve situations where the domestic relations order is submitted to the plan after the Participant's annuity starting date. Scenario 2(b) involves a Participant with a subsequent spouse and 2(c) involves a Participant with a non-spouse beneficiary. One approach, and perhaps the most reasonable one, is to conclude that the survivor benefit under the form of benefit selected by the Participant is a vested benefit for both the Participant's Spouse and the non-spouse

beneficiary once the participant's annuity starting date occurs. Indeed, in the case of the second Spouse, this would appear to be mandated by ERISA. *See* 29 U.S.C. § 1055(f). While the survivor portion of the benefit would be protected, nothing would prohibit the Participant's monthly benefit being assigned in whole or part to the former Spouse during the life of the Participant.

**(c) Order after annuity start date – new spouse.**

The United States Court of Appeals for the Fourth Circuit took the above-approach with respect to a new spouse beneficiary in *Hopkins v. AT&T Global Information Solutions Company*, 105 F.3d 153 (4<sup>th</sup> Cir. 1997). In this case the state court issued orders providing the former spouse with both a share of the participant's monthly benefit and requiring the participant and plan to treat the former spouse as the surviving spouse for purposes of the joint and survivor annuity. There was no dispute that the assignment of a share of the participant's monthly benefit to his former spouse was permissible and did not cause the order to fail as a qualified domestic relations order. The court agreed with the plan however, that the designation of the former spouse as the surviving spouse for purposes of the post-retirement survivor benefit would cause the order to fail as a QDRO. The court, citing 29 U.S.C. §§ 1055(a) and 1055(f) found that ERISA protected those individuals who qualified as a spouse at the time of the participant's retirement and provided only a ninety day window in which to waive the automatic form of benefit. Therefore, the court held that the spouse became vested in the survivor benefit at the time of retirement. *Id.* at 156-57. The court concluded that the former spouse could have but failed to protect her interest by submitting a QDRO before the current spouse vested in the survivor benefit. *See also Singleton v. Singleton*, 290 F.Supp.2d 767, 770(EDKY 2003) (surviving spouse benefits vest in the current spouse at time of retirement if no valid QDRO is on file protecting these benefits).

Again, while the survivor portion of the benefit would be protected, nothing would prohibit the Participant's monthly benefit being assigned in whole or part to the former Spouse during the life of the Participant.

**(d) Order after annuity start date – non-spouse beneficiary.**

While a non-spouse beneficiary does not have the same protection of a spouse to a qualified joint and survivor annuity, one could nonetheless argue that the non-spouse beneficiary became vested in the survivor benefit elected by the Participant. Moreover, since the Participant's benefit and the survivor benefit are actuarially calculated based on the age of both, the substitution of the Spouse for the Participant could cause an increased benefit. This could cause additional actuarial problems if, for example, the participant died by the time the DRO was qualified or the beneficiary was already receiving a benefit. The easiest rule for a plan to administer is a rule which provides that the survivor benefit is vested in the survivor (whether it be a subsequent spouse or non-spouse beneficiary) designated at the time of the annuity starting date and may not be altered by a subsequently submitted domestic relations order. However, there are many cases that hold that unlike a spouse, a non-spouse beneficiary cannot be vested in a pre-retirement death benefit and therefore a post-death domestic relations order that names the former spouse as the participant's spouse for purposes of the pre-retirement surviving spouse benefit must be honored. These cases are discussed in more detail under Scenario 4 below. The NCCMP requests the

Department to clarify whether the subsequent spouse or a non-spouse beneficiary is vested in a survivor benefit at the time of retirement in the absence of a timely submitted domestic relations order.

**(e) Order after annuity start date – prior notice to plan.**

Does the outcome of the analysis above depend on whether the plan had some type of prior notice? It is clear that if a domestic relations order is submitted prior to the annuity starting date the plan is required under 29 U.S.C. § 1056(d)(3)(H) to segregate the alternate payee's portion of the benefit for 18 months while the order is reviewed and, if rejected, amended by the parties. Conversely, it would follow that any other type of notice such as a copy of a draft domestic relations order, a copy of a property settlement or a judgment of dissolution or a letter or phone call advising that a domestic relations order is forthcoming should have no effect and more specifically it should be insufficient to require the plan to review the information to determine what benefit it bestows, to segregate benefits or to honor a domestic relations order which may eventually be submitted after a participant retires.

In *Singleton v. Singleton*, cited above, the court held that knowledge of an impending QDRO in the form of a draft domestic relations order submitted to the Plan was not sufficient to protect an alternate payee's survivor benefit in the absence of a signed QDRO submitted prior to the participant's annuity start date. The court opined: "It is not enough under ERISA's statutory requirements that the Funds simply *know* of the existence of a DRO ...[ERISA requires] that where there is also a current spouse, the Funds must receive a QDRO prior to the triggering event." *But see Hogan v. Raytheon Co* 302 F.3d 854 (8<sup>th</sup> Cir. 2002) where the court in reaching its decision that a posthumously issued domestic relations order must be honored, placed substantial reliance on the fact that the plan was put on notice before the participant's death that a divorce decree had issued awarding the surviving spouse a portion of the participant's benefit.

It is the NCCMP's position that *Singleton* is decided correctly. To adopt any other rule could subject a plan to uncertainty and potential liability under numerous situations where an alternate payee may argue the plan had notice, such as a draft domestic relations order, a copy of a property settlement or divorce decree, a phone call, letter or email that a domestic relations order was being drafted or that a participant was in the middle of divorce proceedings. A plan should not have to guess at whether any type of information, no matter how vague or informal, is sufficient to put the plan on notice and alter benefits otherwise payable to a participant or beneficiary in the absence of a valid QDRO. A plan should only be required to act when it receives unequivocal notice in the form of an adjudicated domestic relations order.

In the case of *Schoonmaker v. Employee Savings Plan of Amoco Corp.*, 987 F. 2d 410 (7<sup>th</sup> Cir. 1993), the plan put a hold on the participant's account when the plan was advised that the participant's divorce was final. When the participant was unable to complete several investment transactions, he sued. The Court of Appeals determined that a hold could not be placed on the participant's account because the plan's QDRO procedures did not provide for it. However, plans cannot solve this problem simply by providing that a hold will be placed on participant's benefits pending receipt of a QDRO. The Plan is required under the Department's claims regulations to determine a claim for pension benefits within a specified time frame, therefore, the plan cannot

simply wait until the order is submitted. NCCMP has received information from its affiliates that it is not uncommon for there to be a delay of many months and even years between the divorce and the submission of a DRO to the plan. For the benefit of all concerned, there should be clear rules whether a DRO submitted after the plan has processed an application for benefits requires the application and benefit elections to be undone even if to do so would violate the terms of the plan.

### 3. Post Death Orders

**Scenario No. 3(a). Order after participant dies before retirement without a spouse.** In this scenario the Participant and Spouse divorce. Before a domestic relations order is submitted the Participant dies. Under the plan provisions, the Participant's death benefit is payable to a designated beneficiary. Subsequent to the Participant's death the plan receives a domestic relations order naming the Spouse as the surviving spouse for purposes of the pre-retirement survivor death benefit.

**Scenario No. 3(b). Order after participant dies before retirement with a subsequent spouse.** In this scenario which is similar to Scenario 2(b) the Participant and Spouse divorce. The Participant subsequently remarries. Before a domestic relations order is submitted the Participant dies.

**Scenario No. 3(c). Order submitted before participant's death but amended after participant's death to designate alternate payee is surviving spouse.** In this scenario, the Participant and Spouse divorce, the Participant remarries. An adjudicated order is submitted which does not designate the former Spouse as the surviving spouse. The order is determined not to be a QDRO. Before the order is revised the Participant dies prior to retirement. Subsequently, a revised order is submitted designating the former Spouse as the surviving spouse.

#### Discussion of Scenario 3.

With respect to a situation where an order is issued after the actively-employed participant's death, the Interim Final Rule (Example 1 in Section 2530.206(2)) addresses only the situation where a domestic relations order was first submitted before the participant's death but found to be defective. Since an order, albeit defective, was submitted prior to the participant's death, the conclusion reached in this example is covered by 29 U.S.C. § 1056(d)(3)(H) that requires a plan to segregate benefits for a period of up to 18 months upon submission of a domestic relations order. This example does not provide any guidance on whether, absent the submission of a domestic relations order prior to the participant's death, an order submitted after death must fail because of the timing of its submission to the plan. The example also does not discuss the situation described in Scenario 3(c) where the amended order submitted after the Participant's death includes changes not included in the originally submitted order and not required to qualify the order.

There is support for the sound proposition that a plan may properly disregard a posthumously issued domestic relations order awarding a pre-retirement death benefit to a former spouse regardless of whether or not the participant had a subsequent spouse. In *Samaroo v. Samaroo*,

193 F.3d 185 (3<sup>rd</sup> Cir. 1999), the court reasoned that under ERISA a former spouse's rights to a benefit can only be conveyed by a QDRO which must be on file with the plan before the death of the participant. The court held that in the absence of a domestic relations order, once the participant dies the current spouse or, if none, the designated beneficiary vests in the death benefit and that to hold otherwise would result in an increase in the benefits that existed at the time of death in violation of 29 U.S.C. § 1056(d)(3)(D). *Id.* At 190-91. *See also Sanzo v. NYSA-ILA Pension Fund*, 2002 U.S. Dist. LEXIS 37572 (DNJ 2005)(amended domestic relations order *nunc pro tunc*, submitted to the plan after the death of the participant, providing the former spouse with a pre-retirement death benefit not provided in the original order nor in the divorce decree, was properly rejected by the plan.)

Several courts however, have found posthumously entered domestic relations orders valid, although some have done so only to the extent the order reflects an interest already recognized in a divorce decree or property settlement and others have limited their holdings only where the death benefit, in the absence of the late submitted QDRO, would go to a non-spouse beneficiary. *See e.g. Files v. ExxonMobile Pension Plan*, 428 F. 3d 478 (2d Cir. 2005)(ERISA does not require a plan to be notified or receive a domestic relations order before death; the provision that the former spouse receive a benefit as set forth in the property settlement agreement triggered the QDRO qualification process); *Hogan v. Raytheon Co.*, 302 F.3d 854 (8<sup>th</sup> Cir. 2002)(plan must honor a posthumously issued order where it was on notice before the participant's death that a divorce decree was issued awarding the surviving spouse a portion of the participant's benefit and the domestic relations order was submitted within the 18 months period permitted under ERISA); *Marker v. Northrop Salaried Pension Plan*, 2006 US Dist LEXIS 75507 (ED II 2006)(ERISA sets no deadline for submitting a domestic relations order nor does it matter that the order gave the spouse the right after the participant's death to a pre-retirement death benefit not provided in the original marital separation agreement); *Patton v. Denver Post Pension Plan*, 326 F.3d 1148 (10<sup>th</sup> Cir. 2003)(ERSIA does not require pre-death notification of a domestic relations order nor does it matter that the order gave the spouse the right to a pre-retirement death benefit not provided in the original divorce decree); *Trustees of Directors Guild Pension Plans v. Tise*, 234 F.3d (9<sup>th</sup> Cir. 2000)(QDRO submitted after death was simply enforcing a right obtained in state court prior to the participant's death; cases that hold that a subsequent spouse vests in a benefit at the time of the participant's death absent a submitted domestic relations order to the contrary have no application to this case which involves a non-spouse beneficiary); and *National City Corp. v. Ferrell*, 2005 U.S. LEXIS 36149 (NDWV 2005)(ERISA does not prohibit a posthumous QDRO; cases that hold that a subsequent spouse vests in a benefit at the time of the participant's death absent a submitted domestic relations order to the contrary, have no application to this case which involves a non-spouse beneficiary).

It is the NCCMP's position, similar to its position discussed above with respect to the *Singleton* court's decision rejecting an order submitted after the annuity start date, that the *Samaroo* court's approach is the correct one. Upon the death of the participant, if no domestic relations order has been submitted to the plan, the death benefit should vest in the beneficiary under the statute or the plan. Any subsequently submitted domestic relations order should have no force and effect to divest this beneficiary of a benefit. To hold otherwise would subject the plan to uncertainty in how to apply the different factors that some, but not all courts, have held relevant including, (1) did the plan have notice that the former spouse was entitled to some benefit that would eventually



be submitted in the form of a domestic relations being drafted; (2) does the order enforce an interest already established in a state divorce dissolution order prior issued prior to death or does it seek to enforce an interest obtained by the former spouse after the participant's death; and (3) would the domestic relations order if qualified displace a non-spouse beneficiary only or also a current spouse beneficiary? It could also require the plan to engage in review and interpretation of a property settlement agreement, divorce decree or some other state order or judgment notwithstanding that it has no obligation to do so under the statute.

**Other Issues:**

The regulations should also clarify that orders received after a distribution has been made in the regular course of administering the plan cannot apply with respect to the amounts distributed. As we have noted, it is not uncommon for order to be received months or even years after a Participant's annuity starting date or after the Participant's death.

The regulations should clarify that unless amounts are held in escrow in accordance with the statute, that orders can have only prospective effect on benefits.

Finally, the examples should clarify that while an order submitted after the Participant's annuity starting date or after the Participant's death cannot substitute the former spouse for the current spouse as the designated surviving spouse, or change the benefit form elected, such an order can award all or a portion of the Participant's benefit to the former spouse for the life of the Participant.

**Conclusion**

The NCCMP requests that the Department include examples in the regulation addressing all of these fact patterns. NCCMP has been advised that these scenarios are not uncommon. The Department's guidance in the form of additional examples in these regulations will serve to protect participants, spouses, former spouses, other beneficiaries and plans from delay, uncertainty and conflicting judicial decisions. We will be happy to discuss this with you or provide additional information you may need as you finalize these regulations.

Sincerely,



Randy G. DeFrehn  
Executive Director