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

Attention: QDRO Regulation

We are writing to comment on the final interim rule relating to the time and order of issuance of domestic relations orders. The Pension Rights Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers and their families. The Center's Women's Pension Project focuses on poverty prevention among older women. We appreciate the opportunity to comment on this interim final rule.

The Labor Department's final interim rule relating to the time and order of issuance of domestic relations orders (DROs) will help effectuate congressional intent in enacting Section 1001 of the Pension Protection Act of 2006. Specifically, it will help ensure that that DROs will not fail to qualify simply because of the timing or order of their issuance. The interim rule generally reflects an appropriate balance between the interests of state courts in having their orders enforced, and the interests of plan administrators in receiving clear direction on the distribution of court-awarded benefits to participants and beneficiaries.

The final rule will however, be more helpful if it clarifies that the examples provided are merely illustrative rather than comprehensive. Furthermore, the rule could enable plans and divorcing couples to avoid costly litigation if it were to include certain basic principles that could guide plan administrators and the courts in addressing situations not encompassed by the examples.

I. The final rule should clarify that the examples are only illustrative.

The examples accompanying the interim final rule are very helpful. However, they identify only limited situations, and, if read literally, could be interpreted to preclude the application of the rule to other circumstances. For instance, Example (1) under timing; "Orders issued after death," describes a situation where a plan administrator found that a state court's domestic relations order submitted while the participant was "actively employed" was "deficient". A second, corrected court order, submitted after the participant's death, was a valid QDRO.

However, the rule illustrated by the example should also apply if, the participant had left the plan with a vested benefit, and if, rather than a prior deficient court order submitted to the plan, there was merely a court approved property settlement awarding survivors benefits that had never been submitted to the plan – as long as the state court later issued a valid DRO.

For this reason it is important that unless the final rule includes a comprehensive set of examples, the rule explicitly state that the examples provided do not preclude other factual situations that may arise.

II. The final rule should include basic principles to guide administrators and the courts.

To avoid confusion, costly litigation, and delays in the distribution of retirement benefits, the final rule should articulate the basic principles that govern the relationship between state DROs that relate to retirement benefits and the enforcement of QDROs by plan administrators under federal law. These principles include the fundamental concept that state domestic relations courts are solely responsible first, for creating the right of an alternate payee to receive a share of private retirement benefits and survivor's benefits, and second, for determining whether to issue a QDRO to enforce this right either at the time of a divorce, when the division of property has been determined either by a court or an agreement between the parties, or many years later.

Equally important, is the principle that the plan administrator must enforce a right to benefits created by a state court if the court has issued a QDRO. The only exceptions to this principle are if the QDRO directs the plan to pay a benefit or a form of benefit that is not provided by the terms of the plan, or if the QDRO directs the plan to pay a benefit that has already been paid out to the participant, an alternate payee or another beneficiary.

These principles are consistent with federal court rulings that require payment by the plan administrator where the alternate payee delays in submitting the QDRO to the plan. According to practitioners we have consulted, such delays are very common. In some instances, recently divorced individuals do not know that a QDRO is needed, think they cannot afford the substantial legal fees to have a QDRO prepared, or assume that they should wait until retirement age to submit the QDRO to the plan. Most commonly, the delays are attributable to lawyers who simply fail to draft and submit the QDRO to the plan in a timely manner.

The court decisions that address delayed submission of QDROs typically deal with situations where the participant dies before the QDRO is presented to the plan. Usually, the alternate payee's right to a survivor's benefit has been reflected in a court-approved settlement agreement or in court order that has not yet been submitted to a plan for qualification. However, in one instance, where the alternate payee did not know about the retirement benefit at the time of the divorce, the court created the right to the benefit retroactively. *Patton v. Denver Post Corp.*, 326 F.3d 1148 (10th Cir. 2003)

The *Patton* case also highlights another key principle: Lack of notice to a plan is not a bar to enforcing an otherwise valid QDRO submitted after the death of a participant when the right to the benefit was created before the participant died. Early notification is in the interest of an alternate payee because it ensures that a plan does not inadvertently make payments to another alternate payee or other beneficiary, but nothing in ERISA states that a plan can use the lack of notice by itself as an excuse to deny payments otherwise required by a QDRO.

Request for a hearing

Because of the importance and complexity of the issues raised by the interim final rule, we

request that the Department hold a hearing to hear the views of domestic relations practitioners, plan administrators, and representatives of women's, retiree and consumer groups concerned about these issues.

Respectfully submitted,



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