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Via Email

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

Attention: QDRO Regulation

Subject: Comment letter on Interim Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders

This letter comments on the interim final rule relating to the timing and order of qualified domestic relations orders ("QDROs"). This rule, issued under Section 1001 of the Pension Protection Act of 2006 ("PPA"), was published in the *Federal Register* on March 7, 2007. Hewitt Associates (Hewitt) welcomes the opportunity to submit our comments for consideration by the Department of Labor (Department).

Who We Are

Hewitt consults on and assists in the administration of our clients' employee benefit plans, which cover more than 17 million participants. As such, Hewitt is one of the largest providers of retirement plan recordkeeping and administration services in the country. We have extensive experience in the administration of both ERISA and non-ERISA benefits.

Hewitt's QDRO administration and consulting services are an important part of our business offering. Hewitt processes defined benefit and defined contribution plan QDROs for approximately 120 clients and 440 plans. Hewitt's QDRO administration covers the entire spectrum of QDRO processing, from the initial submissions of domestic relations orders through qualification and final distribution of benefits to alternate payees. In addition, we have developed detailed QDRO procedures and model language to meet the needs of our clients, their participants, and alternate payees.

Hewitt commends the Department for its issuance of the interim final rule. The guidance provided by the Department will assist plan administrators and the parties to domestic relations orders in understanding and applying the provisions of the PPA and other legal requirements related to QDROs. This letter respectfully identifies several additional areas that should be clarified in final regulations. Additionally, we have included comments on the need for further guidance relating to QDROs.

Requests for Clarification

(1) The Regulations Should Provide More Scenarios to Illustrate the Rule That an Order Will Not Fail to Be a QDRO Merely Because of the Time at Which it Is Issued

Section 1001 of PPA directs the Department to issue regulations clarifying that an order otherwise meeting the QDRO requirements will not fail to be treated as a QDRO solely because of the time at which it is issued. The interim final rule provides an example of an order that is submitted before the participant's death, but is revised and qualified after the participant's death. We believe that the final regulations should address the many other common scenarios that may occur after a participant's death for which a denial would be valid. We have provided our suggestions for some needed examples and clarification.

(2) The Regulations Should Clarify That a Plan May Deny an Order Received After the Participant's Death if Such Order Would Otherwise Divest the Benefit That Becomes Payable to a Beneficiary at Death

It is clear from the regulations that a post-death order may be denied for other reasons. One overriding reason, not addressed in the interim final rule, is that upon death, benefits are no longer payable to the deceased participant but rather to the participant's beneficiaries, pursuant to the terms of the plan. It is an established rule that QDROs cannot require plans to pay benefits in excess of those provided under the plan. Therefore, the regulations should clarify that plans may deny any orders that are received after a beneficiary becomes entitled to payment (e.g., after the death of the participant).

Allowing post-death orders to divest beneficiaries will increase litigation involving plan benefits. This, in turn, will increase legal expenses that plans must incur to avoid becoming embroiled in legal disputes that involve conflicting claims to a participant's benefit after death. Clearly, plans need a uniform date upon which beneficiaries' claims can be established. Any date other than the date of death (following the qualification determination of an order pending at the time of death) would create inconsistencies in the payment of survivor benefits.

We agree that if an order is in the process of review at the time of the participant's death, the alternate payee should be provided with the opportunity to cure any failures of the order. That is the process we have generally seen followed. However, if there is no pending DRO at the time of death, beneficiaries of an existing survivor benefit should not be divested. This will only create uncertainty and confusion with respect to the payment of survivor benefits. We therefore request a reasonably narrow interpretation of section 1001 of PPA.

The following scenarios illustrate the uncertainties and inconsistencies that will arise if orders received after the death of a participant are allowed to divest beneficiaries:

Defined Contribution Plans

- A plan first receives an order after the participant's death and a portion of the deceased participant's account has been paid out to some but not all beneficiaries. May an order divest those beneficiaries who have not received payment in order to make the unpaid portion subject to a QDRO?

- A plan first receives an order after the participant's death and several installments of the deceased participant's account have been paid out to a beneficiary. May an order divest the beneficiary of remaining installments in order to make those amounts subject to a QDRO?

- A plan first receives an order after the participant's death and the beneficiary intends to take a distribution under the Internal Revenue Code's required minimum distribution rules. May an order divest the beneficiary of the unpaid amount in order to make them subject to a QDRO?

To summarize, if QDROs are permitted to attach unpaid amounts that become payable to beneficiary(ies) upon the death of the participant, designated beneficiaries in defined contribution plans may be required to lay aside their grief quickly in order to establish their claims or else take immediate distributions. In cases where there is more than one designated beneficiary, establishing any date for the vesting of a survivor benefit other than the date of a participant's death may result in the inconsistent treatment of otherwise equally entitled designated beneficiaries.

Defined Benefit Plans: Preretirement Death Benefits

Similar issues may arise under defined benefit plans where a participant divorces, remarries, and then dies before starting to receive benefits. The former spouse may submit a domestic relations order after the participant's death that would assign the right to all or part of the pre-retirement death benefits payable under the plan. If the second spouse is eligible for immediate payment at the time of death, may an order divest that entitlement? Or should the order be denied only if payments to the second spouse have already commenced? If the final regulations do not provide that the date of death is the date used to determine entitlement to preretirement death benefits, the treatment of surviving spouses (or other beneficiaries) might differ solely because the beneficiaries at the date of death do not have the right to receive benefits immediately upon the participant's death because they choose to defer commencement.

Defined Benefit Plans: Postretirement Death Benefits

The final regulations should clarify that if an order is received after the participant's death and the participant's annuity starting date has already occurred, the order must be denied because the only remaining survivor benefit is the benefit payable pursuant to the terms of the elected form of payment. A plan is not required to change the form of benefit or pay any benefit in addition to the benefit payable under the terms of the plan. Consistent with these rules, a plan should not be required to review a shared payment order that purports to divide the survivor benefit payable to the deceased participant's joint annuitant.

Accordingly, the final regulations should clarify that after benefits have commenced, a plan may deny an order that requires the plan to change the survivor designation of a joint and survivor annuity, change a form of payment, or divide the survivor annuity of a joint annuitant.

(3) The Regulations Should Clarify That a Plan May Deny an Order if an Alternate Payee Dies Prior to Qualification

If an alternate payee dies prior to the qualification of an order, the final regulations should clarify that the plan may deny the order due to the lack of a valid exception to the anti-alienation provision of Section 206(d)(1) of ERISA.

(4) The Regulations Should Provide Additional Examples of the Application of the Rules Regarding the 18-month Segregation Period

To illustrate the rule that plan administrators should apply the same requirements and protections to subsequent orders, the interim final rule indicates that if the plan receives a revised order more than 18 months after the first order, the plan administrator should launch a new 18-month segregation period. Additional examples are needed to clarify the following scenarios.

Revised Orders for the Same Parties Received Prior to Termination of the Initial 18-Month Period
The final regulations should clarify that the 18-month segregation period applies separately to each order received, including revised orders from the same parties that are received within the initial 18-month segregation period. For example, consider a plan that receives an order on June 15, 2007. Plan procedures provide that benefits will be segregated for 18 months to allow the alternate payee to correct any defects in the order that caused it to be denied. Benefit payments are suspended beginning July 2007. The initial DRO is denied. A revised order is received on March 17, 2008. That order is also denied. On January 1, 2009, 18 months from the first segregation of payments, the plan will release benefit amounts segregated for the months of July 2007 through March 2008 pursuant to the first order. However, because a second order was received on March 17, 2008, payments segregated for the months of April 2008 and following will continue to be segregated pursuant to that second order. If a revised order is not received, amounts will continue to be restricted under the second order until October 1, 2009, 18 months after the April 2008 payment was restricted.

Maximum Number of Months for Which Payments Are Restricted Cannot Exceed 18
The regulations should clarify that even though the 18-month period applies separately to each order received, no more than 18 months of a participant's payments should ever be suspended. This will clarify that alternate payees are not allowed to submit revised but deficient orders continuously and thereby maintain benefit segregation for longer than 18 months. In our experience, the vast majority of plans already apply this rule. However, we believe that some plan administrators might be confused by the example contained in the interim final rule if further clarification is not provided.

Additional Guidance Required—Required Use of Model Orders
We realize that the interim final rule intended only to cover the narrow scope of QDRO issues outlined in the PPA. However, because there is little formal guidance relating to QDROs, we want to take this opportunity to request an administrative option that will dramatically ease the burden on plan administrators, as well as the parties to the order.

Specifically, we suggest that the Department issue rules that allow plan sponsors to require the use of model QDROs. In order to require the use of plan models, plans could be required to provide both separate interest and shared payment models. Additionally, the Department could mandate that required model language must cover all types of benefits available under the plan, such as early retirement subsidies, early retirement supplemental benefits, cost-of-living increases, and other benefits available only in specified circumstances or to specified populations. In this way, plans could not structure required model language to shelter any plan benefits from the reach of alternate payees that could legally be awarded under a QDRO.

In our experience, almost all non-model orders are deficient and are therefore denied at least once. It is not unusual for the same parties to submit multiple orders over a period of years, none of which meets the requirements for a QDRO. Each order must be reviewed and denial points explained. On the other hand, when model orders are submitted, only a very small percentage is denied.

Often the terms of individually prepared orders are incomprehensible. For example, sometimes language about division of accounts or funds appears in orders purporting to apply to non-individual account defined benefit plans. In many cases, plan representatives must have multiple conversations with the parties or their representatives who have difficulty understanding retirement plan complexities. Because of the contentious nature of many domestic relations proceedings, these exchanges can often be distressing for the parties. In extreme instances, plans are summoned to appear in domestic relations court because the courts and domestic relations attorneys do not understand the QDRO rules, despite the plan administrator's best efforts to explain.

In reality, qualified plan rules are complicated. Generally, neither the parties to a domestic relations dispute nor their attorneys, nor the judges issuing these orders have the expertise to understand and successfully maneuver the complexities and subtle distinctions that cause orders to be denied. On the other hand, plan sponsors know their plans and the rules applicable to them. They also know the benefits available under the terms of their various plans. Accordingly, plan sponsors that are willing to provide comprehensive model QDROs should be allowed to require the use of such models to divide the participants' qualified plan benefits.

Because of the many differences in plan types and plan provisions, it is unrealistic to expect the Department or any other government agency to be able to issue model language similar to the National Medical Child Support Notice available for employer group health plans. There is also no justification for mandating that qualified plans must provide model language to parties seeking to secure a QDRO. However, for a significant number of plan sponsors, the ability to require standard language would be a welcome tool that enables more efficient and less costly QDRO administration.

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We realize that the Department may not believe that it has the authority under the current statute to allow plans to require the use of model QDRO language. If that is the case, we respectfully suggest that this matter be added to any legislative agenda the Department may submit to Congress.

Conclusion

We believe the interim final rule provides valuable guidance to employers but also raises some questions that we hope the Department will address in the final regulations. The Department's clarification on matters identified in this letter will be greatly appreciated and enable us to better assist plan sponsors with their QDRO administration.

If you have any questions or comments, please contact the undersigned at the telephone number or electronic mail address provided below.

Sincerely,

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