

June 10, 2010

DOL Releases Final Regulations Relating to Time and Order of QDROs

On June 10, 2010, the Department of Labor (DOL) issued [final regulations](#) relating to the time and order of the issuance of domestic relations orders. These regulations finalize the interim final rule published March 7, 2007 by DOL pursuant to the Pension Protection Act of 2006 (PPA). Under section 1001 of the PPA, Congress instructed DOL to issue regulations to clarify that a domestic relations order otherwise meeting the requirements to be a qualified domestic relations order (QDRO) under section 206(d)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) or section 401(a)(13) of the Internal Revenue Code will not fail to be treated as a QDRO solely because (1) the order is issued after, or revises, another domestic relations order or QDRO, or (2) of the time at which it is issued. PPA also requires that the regulations clarify that these orders are subject to all of the same requirements and protections that apply to QDROs, including the provisions of section 206(d)(3)(H) of ERISA and section 414(p)(7) of the Code.

The regulations, which are effective July 30, 2010, are substantially similar to the interim final rule, but several changes were made to the examples, and one additional example was added.

Example 1 Regarding Timing: Paragraph (c)(2) of the Interim Final Rule and the Regulations

DOL intended this example in the interim final rule to clarify that a domestic relations order will not fail to be a QDRO solely because the order is issued after the death of a participant. Commenters noted that a statement in the original version of the example could be interpreted as requiring a plan fiduciary to reject a posthumous order if the plan fiduciary was not given notice of that order before the death of the participant. In the regulations, DOL modified the example to clarify that the example deals solely with the timing issues and that the validity of a QDRO does not depend on the plan receiving notice of a pending domestic relations order before the participant dies.

Example 3 Regarding Timing: Paragraph (c)(2) of the Interim Final Rule and the Regulations

DOL intended this example to clarify that a domestic relations order will not fail to be a QDRO merely because it is issued after the participant's benefit commencement date (i.e., the annuity starting date). Commenters expressed concern that the original example could be read to require plans to provide a type or form of benefit, or an option, not otherwise available under the plan contrary to section 206(d)(3)(D)(i) of ERISA. In the regulations, DOL clarified that the example deals solely with the timing issue and it is assumed that for all other purposes the order meets the requirements of section 206 of ERISA. The preamble to the regulations provides that a domestic relations order issued after the annuity starting date would not violate section 206(d)(3)(D)(i) of ERISA merely because the order requires the allocation of some or all of the participant's ongoing benefit payments under the applicable optional form of benefit to an alternate payee. In this case, the plan is merely required to pay a portion of the benefit, which is otherwise due to the participant, to another person; for example, a monthly benefit of \$1,000 is paid 50% to the participant and 50% to the former spouse. However, any domestic relations order received by a plan after the participant's original annuity starting date that would require reannuitization

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with a new annuity starting date and a change in the form of payment would violate section 206(d)(3)(D)(i) of ERISA unless the plan specifically permits this type of change.

Example 4 Regarding Requirements and Protections: Paragraph (d)(2) of the Regulations

In addition to modifying Example 3 of Paragraph (c)(2) as described above, DOL also added a new example under Paragraph (d)(2) to clarify that a domestic relations order does not fail to be a QDRO solely because it is issued after the annuity starting date. The new example further clarifies that domestic relations orders requiring any change in the form of payments, including changing from a single life annuity for the participant to a single life annuity for the former spouse, is permitted under section 206(d)(3)(D)(i) of ERISA only if the plan specifically allows this type of change.



If you have any questions about this Legal Alert, please feel free to contact the attorneys listed below or the Sutherland attorney with whom you regularly work.

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