



---

# dol attempts to clarify treatment of post-death qdros

---

*MSK Client Alert*

March 2007

One of the thorniest issues retirement plan administrators face in dealing with Qualified Domestic Relations Orders (QDROs) is the situation in which a participant dies after getting divorced but before entry of a QDRO. Numerous federal court decisions have addressed issues arising from this fact situation, often with inconsistent results. Now, the U.S. Department of Labor (DOL) has weighed in to help resolve some of the issues raised, although most plan administrators and their advisors will probably find the guidance of only limited value.

## **Background**

If a participant in a defined benefit pension plan dies prior to beginning to receive benefits under the plan, the participant's surviving spouse is required by ERISA and the Internal Revenue Code to receive a survivor annuity. However, if an unmarried participant dies prior to retirement, the plan is not required to pay a benefit and many pensions plans do not provide for any benefit in these circumstances. If a person is divorced at the time of death and a QDRO has been entered awarding a portion of the participant's benefit or surviving spouse rights to the former spouse, then those provisions of the QDRO would be enforceable. However, if the participant becomes divorced and then dies before the entry of a QDRO, questions arise as to what extent the former spouse can enforce a QDRO that is entered after death.

## **The new regulations**

The DOL has recently issued "final interim" regulations intended, in part, to resolve some of the questions that arise with respect to QDROs upon the death of the participant. The regulations include general rules followed by examples intended to illustrate each rule. They were issued because the Pension Protection Act of 2006 (PPA) required the DOL to issue regulations to clarify that a domestic relations order (DRO) will not fail to constitute a QDRO solely (1)

## **attorneys**

Robert J. Lowe

## **practice areas**

employee benefits &  
executive compensation



## dol attempts to clarify treatment of post-death qdros

---

because the order is issued after another DRO or QDRO or (2) because of the time at which it is issued. The regulations were published in the Federal Register on March 7, 2007 and become effective 30 days thereafter. (Although the regulations also deal with other issues, the purpose of this article is to focus on the effect of the regulations on QDROs issued after the death of a plan participant.)

In accordance with the PPA, the new regulations provide that a DRO will not fail to be treated as a QDRO "solely because of the time at which it was issued." The regulations then provide an example in which, first, a participant submits a DRO while still alive, but the administrator finds it deficient. Then, the participant dies prior to retiring. Thereafter, a second DRO is submitted that corrects the defects in the first. The regulations state that this second DRO does not fail to be treated as a QDRO "solely because it is issued after the death of the participant." Thus, a DRO submitted after death can be a QDRO, subject to the following important requirement.

Another provision of the new regulations states that DROs described in these regulations are still "subject to the same requirements and protections that apply to qualified domestic relations orders under Section 206(d)(3) of ERISA." Thus, a post-death QDRO must still satisfy the requirements that the plan not be required to "provide any type or form of benefits, or any option, not otherwise provided under the plan" and that the plan not be required to "provide increased benefits (determined on the basis of actuarial value)."

The regulations illustrate this point with an example in which a participant in a 401(k) plan dies and, after his death, a DRO is presented which requires payment to an alternate payee in the form of annual installments. However, the plan in question does not provide for benefits in the form of installments. The example finds that the order does not qualify as a QDRO, not because it is presented after death, but rather because it provides for a form of benefit not available under the plan.

This last point is especially significant with respect to a fact pattern not addressed in the regulations in which the participant has remarried prior to death and in which there is a surviving spouse who would appear to be entitled to surviving spouse's rights under the terms of the plan. Since a QDRO cannot require a plan to provide increased benefits, if no QDRO has been entered prior to death, it could be argued that a QDRO cannot require a survivor annuity to be paid to an alternate payee when the plan is already required to pay a full survivor annuity to the surviving spouse.

Another example in the regulations bears on this issue. In this example, a plan administrator receives a DRO that provides that the former spouse will be treated as a surviving spouse for purposes of the death benefit provisions of the plan. The example provides that the DRO will not fail to be treated as a QDRO because the QDRO accords a former spouse surviving spouse's rights just because the alternate payee is no longer a "spouse" at the time the QDRO is issued. This rule, however, is also subject to the general requirement that a QDRO cannot require the plan to provide increased benefits.

### Unresolved issues

Even though the regulations provide some useful guidance, it would appear possible for plan administrators to continue to take the position that a DRO presented after death that provides benefits to a former spouse under a defined benefit pension plan will not be effective if there is a surviving spouse who acquired surviving spouse's



## dol attempts to clarify treatment of post-death qdros

---

rights in the benefit immediately upon death. The plan administrator would argue that even though a QDRO may be entered post-death and provide surviving spouse's rights to a former spouse, it cannot provide greater benefits than the plan allows. Since at the time of death, the former spouse has not acquired any rights under the plan and the plan would only be required to provide a survivor annuity, the plan would argue that the rights of the surviving spouse to the full survivor benefits cannot be divested and there is nothing left to award the former spouse.

One other fact obliquely referred to in the regulations may bear on this issue. By including in the first example described above the fact that the participant submitted a defective DRO prior to death, the regulations provide a situation in which the plan administrator has notice of the alternate payee's claim to a share of the benefit prior to death. Some courts have found this notice to be significant in determining the rights of the alternate payee when the QDRO is not submitted until after death. Thus, in situations in which a judgment has been issued by the state court awarding a portion of the benefit to the alternate payee, the plan has received notice of the alternate payee's rights in some manner such as an initial draft DRO or a joinder, as required under California law, but the QDRO has not been entered, then it is possible that the former spouse has acquired sufficient rights in the participant's benefit prior to the participant's death to receive a portion of the benefit.

By providing examples that do not address significant facts, such as the marital status of the participant at the time of death, the regulations are less useful than they could have been. Alternate payees and plan administrators will still be left to fight over many of these issues in court.

*For more information, please contact Robert J. Lowe at [rlo@msk.com](mailto:rlo@msk.com) or at (310) 312-3180. Robert is a partner at Mitchell Silberberg & Knupp LLP in the employee benefits and executive compensation practice area.*