

Comments to Department of Labor final interim rule relating to time and order of issuance of domestic relations orders

The National Women's Law Center (the Center) has worked on issues pertaining to women's retirement security for nearly 35 years. In particular, the Center and its coalition partners urged Congress to enact legislation requiring plans to recognize later-issued QDROs in order to ensure that divorced spouses receive their court-awarded benefits. We appreciate the opportunity to comment on the final interim rule issued by the Department of Labor pursuant to Section 1001 of the Pension Protection Act.

Congress required the Department of Labor to promulgate clarifying regulations under Section 1001 based on its understanding that uncertainty existed as to whether certain QDROs, including those that revised a prior domestic relations order (DRO) or QDRO or that were issued subsequent to a divorce, constituted valid QDROs.¹ In fact, this uncertainty resulted in pension plans refusing to distribute court-awarded benefits, including pension benefits, to divorced spouses. These refusals by pension plans frustrated the intent of the divorcing parties and deprived the divorced spouse of a court-awarded share of a marital asset, often one of the most significant assets of the marriage.

The inability of divorced spouses to receive court-awarded pension benefits is particularly problematic for women. Women are less likely to earn pension benefits in their own right,² and are more likely than men to rely on a spousal pension benefit in retirement.³ In addition, women can ill afford to lose retirement assets of any kind, as they are more likely to be poor in retirement than men.⁴

In general, the final interim rule is helpful and achieves the statutory purpose of resolving the existing uncertainty as to the validity of later-issued QDROs. However, some changes to the factual scenarios in the rule's examples would further effectuate the intent of the statute. First, the factual scenario in the first example under section (c)(2) of the interim final rule should be changed to avoid the appearance of imposing requirements not contemplated by the Pension Protection Act. Second, a factual scenario addressing timing issues relevant for QDROs that award child support should be added to section (c)(2).

¹ S. Rep. No. 109-174, at 124 (2005). Section 1001 of the Pension Protection Act is identical to Section 701 of the National Employee Savings and Trust Equity Guarantee Act of 2005, S. 219, 109th Cong. (2005), to which this Senate Finance Committee report pertains.

² Ken McDonnell, *Retirement Annuity and Employment-Based Retirement Income*, 26 EBRI Notes 1 (Feb. 2005).

³ According to NWLC calculations based on the 1998 Health and Retirement Study, 87% of married women as opposed to 31% of married men relied on their partner's pension income.

⁴ See, e.g., U.S. Census Bureau, Current Population Survey Annual Social and Economic Supplement, 2005 at tbl POV01 (2006), available at http://pubdb3.census.gov/macro/032006/pov/new01_100_01.htm (last visited May 7, 2007).

Section (c)(2), Example 1

Example 1 refers to “Orders issued after death,” and concludes that a QDRO “does not fail to be treated as a QDRO solely because it is issued after the death of the Participant.” However, the Example provides that a deficient DRO was submitted before the participant died, and that the QDRO submitted after the Participant’s death corrected those defects.

To the extent that the examples “provide interpretive guidance,” the inclusion of a defective DRO submitted before the Participant’s death in this factual scenario creates uncertainty as to whether a QDRO submitted after a participant’s death would be valid in the absence of a defective QDRO submitted prior to the participant’s death. Even though the examples do not, as the preamble to the interim final rule explains, “represent the only circumstances for which these rules would provide clarification,” comments have already been submitted that confirm that this factual scenario raises additional questions about the application of the statutory language.

Compelling a divorced spouse to submit a DRO prior to a participant’s death in order for a QDRO issued after the death to be recognized would impose a requirement nowhere found in ERISA or the Pension Protection Act. Even before the enactment of the Pension Protection Act, at least one federal Court of Appeal has explicitly rejected the argument that a pension plan must even receive *notice* prior to the death of a participant before recognizing a QDRO submitted after the participant’s death.⁵ In addition, the language of Section 1001 of the Pension Protection Act on its face makes clear that such a requirement is not contemplated. Section 1001 provides, in relevant part, that “a domestic relations order otherwise meeting the requirements to be a qualified domestic relations order . . . shall not fail to be treated as a qualified domestic relations order *solely because the order is issued after, or revises, another domestic relations order or qualified domestic relations order; or of the time at which it is issued.*” (Emphasis added.) As its title makes clear, Section 1001 exclusively addresses issues relating to the time and order of issuance of QDROs, not issues related to notice to pension plans. A notice requirement would, moreover, effectively substitute an additional obstacle for divorced spouses seeking to obtain court-awarded benefits for the one Section 1001 sought to remove. As a result, the Center respectfully submits that the Department of Labor should eliminate from Example 1 any fact that lends itself to an interpretation that such a requirement exists. The Example could simply provide that “*Participant and Spouse divorce. Shortly thereafter, Participant dies while actively employed.*”

If, contrary to this recommendation, the Department of Labor decides to utilize an example in which the plan received notice, at a minimum, Example 1 should feature a less formal type of notice than an actual DRO. A plan may reasonably be expected to receive notice that a QDRO may be submitted from a document far less formal and

⁵ *Patton v. Denver Post*, 326 F.3d 1148, 1151 (10th Cir. 2003).

onerous to obtain than a court order.⁶ A letter from Participant, Spouse, or their counsel that, for example, indicated that the parties were divorcing or requested information related to Spouse's retirement plan for the purpose of divorce proceedings, should suffice. Accordingly, the language in the Example should be changed as follows: "Participant and Spouse divorce, and the administrator of Participant's plan receives a letter from Spouse indicating that Participant and Spouse have divorced. Shortly thereafter, Participant dies while actively employed. A domestic relations order is subsequently submitted to the plan. The order does not fail to be treated as a QDRO solely because it is issued after the death of the Participant."

Section (c)(2), Proposed Example 4

It is important to recognize that, although the legislative history of Section 1001 refers to pension benefits awarded to divorced spouses, issues related to the timing and order of issuance of QDROs also arise in connection with other court-ordered domestic relations obligations, including current and past-due child support payments. As one commentator indicated, some child support QDROs are rejected because they are submitted after the child is no longer a minor. As with QDROs pertaining to court-awarded pension benefits, the rejection of child support QDROs deprives the child or children and the custodial parent of court-ordered benefits, but it is particularly inequitable for a noncustodial parent to be able to evade child support obligations merely by refusing to pay until the child reaches the age of majority. An example clarifying that, if a child support debt is owed, a QDRO shall not fail to be treated as a valid QDRO solely on the ground that it is issued after the child reaches the age of majority should be added as Example 4 under section (c)(2).

Conclusion

The regulation and examples are generally helpful in implementing the provisions of the Pension Protection Act relating to the timing and order of issuance of domestic relations orders. However, the Center respectfully submits that Example 1 under section (c)(2) should be changed to eliminate the implication that notice to a pension plan is required in order for the plan to recognize a QDRO issued after a participant's death. In addition, the Center urges the Department to include an example under section (c)(2) illustrating that a QDRO dealing with child support payments shall not fail to be treated as a QDRO solely because it is issued after the child reaches the age of majority.

Thank you again for the opportunity to comment.

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⁶ See, e.g., *Files v. ExxonMobil Pension Plan*, 428 F.3d 478, 480 (3d Cir. 2005) (benefits administrator received notice in the form of a letter from the employee's divorce counsel, advising the administrator of the divorce and requesting a sample QDRO).