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QDRO Tips: How to Avoid Malpractice & Speed up the QDRO Process

FACULTY

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July 18, 2019
Suffolk County Bar Association, New York

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QDRO Tips; How to Avoid Malpractice & Speed up the Process

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OVERVIEW

1) QDRO Basics

2) Tips to Avoid Malpractice & Speed up the QDRO Process

3) QDRO Exotics:

- A Strategy for a Non-Qualified Plan for a Highly Compensated Executive that Does NOT Accept a QDRO
- Using QDRO to Collect Past Due Child Support

4) Checklist for Attorneys

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Don't Treat a Major Asset as an After-Thought

Here is a common scenario leading to a frustration, confusion a potential malpractice:

Just when you think you have finalized your negotiations and drafted your Stipulation of Settlement Agreement ("Agreement"), your language "assigning retirement benefits" gets rejected because the Plan's provisions will Not allow what's in the Agreement. Now you might have to re-open months long negotiations!

Do it right from the beginning and here is how.

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How YOU Can Speed up the QDRO Process

You have a Choice. You can either:

Do It Yourself and Hope that You:

Verified TOTAL benefits; and Truly Understood and Fully Explained the Plan's provisions and entitlements to your client; and Included the Right Language to effectuate the division of the benefits and protect your client's rights.

OR

Lean on an Expert from the Start.

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QDRO BASICS

The term *qualified domestic relations order* (QDRO) refers to a judgment, decree, or order that creates or recognizes the existence of an ***alternate payee's** right to receive all or a portion of a plan participant's benefits payable under an ERISA-qualified employee benefit plan.

any spouse, former spouse, **child, or other dependent of a participant.* QDROs are fast becoming the tool of choice for the collection of such past due child support

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QDRO BASICS: What's Divisible by QDRO

Be Aware of the main distinctions between ERISA and non-ERISA Plans

ERISA Plans ("Private Sector Plans")
 ARE Divisible by QDRO.
 ARE Required to Provide Pre- and Post – Retirement Survivorship Protection.

NON-ERISA Plans: ("Governmental Plans")
 NOT Divisible by a QDRO but may permit a Domestic Relations Order (DRO).
 ARE exempt from ERISA and some of the provisions of the IRS Code, which require private sector plans to provide joint and survivor annuities and pre-retirement survivor annuities.

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QDRO BASICS: What's Divisible by QDRO

Non-ERISA Plans:
Government Plans: In New York, there are Eight Public Retirement Systems divisible by Domestic Relations Order (**DRO**).

Civil Service & Federal Employees Retirement System are divisible by *Court Order Acceptable for Processing*. The Federal Thrift Savings Plan by *Retirement Benefits Court Order*. Military divisible by a *Military Pension Division Order*.

Plans for Highly Comped Execs ("Excess Plans") may not permit division by DRO; alternative option might be required. Will cover later.

IRAs – are NOT divisible by QDRO! Use Letter of Instruction to the Custodian instead.


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QDRO BASICS: What's Divisible by QDRO

The Nuances of the Non-ERISA Government Plans will make your head spin!

NYSTRS, NYS&LPFRS Union Plans FERS, CSRS Pop ups		Variable Supplement Fund Tiers NYS&LRS NYCERS
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You Don't Need to Memorize them - Hire an Expert!

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TIPS to Avoid Malpractice Landmines

Tip #1: Verify Benefits!

Did you verify the Participant's coverage under ALL retirement plans? He/she may have vested benefits under previous plan or be covered under multiple plans.

www.freeERISA.com can be a handy tool

Are the reports on an official company letterhead or just merely estimates from Plan's 'estimator tool' on their website? Does the report show employment and salary history?

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TIPS to Avoid Malpractice Landmines

Tip #2: Understand HOW the Plan works

1. Defined Benefit Pension Plan
Participant's benefits based on a specific plan formula including years of services and average salary. A future stream of income.

IMPORTANT! Some plans have multiple components. *Know what's marital and what's not?*

2. Defined Contribution Plan
Plan assets are maintained under individual participant's accounts, such as 401(k)s, employee stock ownership plans (ESOPs), 403(b)s and 457 plans.

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TIPS to Avoid Malpractice Landmines

Tip #3: Poor Timing of the QDRO can Be Your Biggest Malpractice Mouse Trap!

Get the QDRO process started as soon as possible to avoid nightmare scenarios where the Plan Participant dies, quits, or retires.

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TIPS to Avoid Malpractice Landmines

Tip #4: Include the Right Language

KEY AREAS TO ADDRESS FOR PENSION PLANS

1. Amount of Benefit
2. Early retirement subsidies and supplements, COLAs
3. Duration of Benefits & Survivorship protection
4. Blended Benefits with Another System
5. Disability Benefits

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TIPS to Avoid Malpractice Landmines

1) AMOUNT OF BENEFIT: USE COVERTURE

The coverture-based formula (known also as the 'Majauskas Formula), provides growth (inflationary) protection for the alternate payee, where the:

Numerator:
Represents the number of years of service earned under the plan during marriage

OVER

Denominator:
Represents all of the participant's years of service at retirement, death or termination

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TIPS to Avoid Malpractice Landmines

2) EARLY RETIREMENT SUBSIDIES, SUPPLEMENTS & COLAs

This is one of the most complicated and most misunderstood aspects of a defined benefit pension plan.

Warning. Many plan administrators will not provide the alternate payee with any portion of the early retirement subsidy unless the QDRO includes affirmative language to that effect.

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TIPS to Avoid Malpractice Landmines

3) COMMENCEMENT DATE, DURATION OF BENEFITS AND SURVIVORSHIP PROTECTION:

- Under "SEPARATE Interest" Approach
- Under "SEPARATE SEVERED" Interest Approach
- Under "SHARED" Interest Approach

Qualified Pre-retirement Survivor Annuity "QPSA"
Qualified (Post-retirement) Joint Survivor Annuity "QJSA"

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TIPS to Avoid Malpractice Landmines

4) MERGER OF BENEFITS WITH OTHER RETIREMENT SYSTEM:

Include Protective Language in your Stipulation of Settlement Agreement Assigning Alternate Payee Benefit Based on Participant's Service Earned or Merged under a Different Retirement System.

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TIPS to Avoid Malpractice Landmines

5) DISABILITY BENEFITS WITH STATE PLANS:

Include Protective Language in your Agreement that should the Participant retire on a disability retirement benefit from the Plan, the Plan is hereby directed to calculate the Alternate Payee's share, using a hypothetical service retirement benefit, based on the Participant's earnings and years of credited service, without any reduction for ordinary termination of employment.

[SAMPLE LANGUAGE FOR ILLUSTRATION PURPOSES ONLY]

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TIPS to Avoid Malpractice Landmines

KEY AREAS TO ADDRESS FOR DEFINED CONTRIBUTION PLANS:

1. Beware of the Word "Vested"
2. Understand the Different Dates and How They Effect Benefit (Assignment Date, Date of Segregation and Date of Distribution)
3. Include Investment Growth Language
4. Loans – Include or exclude?
5. QDRO Processing Fee: *Who is Paying?*

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TIPS to Avoid Malpractice Landmines

Tip #6: Beware of Using the Plan's, Bare-Bones, QDRO Model

Tip #7: Explain the QDRO Provisions to the Client

Tip #8 Audit Old QDRO Files

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THE QDRO EXOTICS

Non-qualified Plans

Non-Qualified Supplemental or Excess Plans – deferred compensation or Pension Plans provided to highly compensated executives. Offered by big Law Firms, Accounting Firms, etc.

Many of these Plans will NOT accept QDROs and you have to get creative! An alternative option might be required, such as direct payments from the employee to the former spouse. You have to carefully review the Partnership Agreements!

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THE QDRO EXOTICS

HOW TO USE QDRO TO COLLECT PAST DUE CHILD SUPPORT

- How Alternate Payee designation impacts taxability of payments.
- Direct the Plan to make payments directly to the Child support enforcement agency so that Participant gets properly credited for payments.

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USE QDRO CHECKLIST

3 SIMPLE STEPS TO HELP AVOID DELAYS & KEEP YOU OUT OF TROUBLE

- ___ Did You Confirm ALL Plans of Coverage?
Did you request the Plan documents to verify Plan provisions and entitlements?
Has the plan administrator detailed in writing the benefits eligibility and distribution rights of the participant?
- ___ Do You Understand the Plan Provisions and Entitlements and Explained them to Your Client?
- ___ Has the Plan Participant contacted their Benefits Department and Authorized a Release of Information to the QDRO preparer?

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USE QDRO CHECKLIST

Does your Stipulation of Settlement Agreement Address:

- ___ Assignment of the Fee for Preparing QDRO and for Qualifying the QDRO by the Plan (if applicable)?
- ___ Assignment of Benefits / Accurate use of Coverture?
- ___ Valuation Date?
- ___ Commencement and duration of the benefits?
- ___ Early retirement subsidies and supplements, COLAs?
- ___ Survivorship rights?
- ___ Merger of Plan Benefits?
- ___ Growth under defined contribution plan?
- ___ Treatment of loans?

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Questions? I can help with:

1. Preparation of QDROs
2. Preparation of DROs for Non-ERISA and Non-qualified Plans
3. Valuation of retirement assets including Pension Valuations
4. Marital/Separate Analysis of Defined Contribution Plans
5. Litigation consulting for drafting the language with respect to the division of retirement assets
6. Investment Rate of Return Analysis
7. Expert Witness Testimony

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