



Strategic Approach to
Qualified Domestic Relations
Orders

**Los Angeles County
Child Support Services Department**



What is a QDRO?

A "qualified domestic relations order" creates or recognizes the existence of an "alternate payee's" right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant (obligor) under a retirement plan, and that includes certain information and meets certain other requirements.

26 U.S.C.A. § 414(p)(1)

Strategic Approach to QDROs

Who Is an Alternate Payee?

For purposes of the QDRO provisions, an alternate payee cannot be anyone other than the following:

- a spouse
- former spouse
- child
- other dependent of a participant

Access to Obligor's Retirement

In general, ERISA (Employee Retirement Income Security Act) does not permit a participant (obligor) to assign or alienate the participant's interest in a retirement plan to another person.

These "anti-assignment and alienation" rules are intended to ensure that a participant's (obligor's) benefits are actually available to provide financial support during the participant's retirement years.





Why Do We File QDROs?

A limited exception to the anti-assignment and alienation rules is provided for assignments of retirement benefits through QDROs.

29 U.S.C.A. § 1056(d)(1); 26 U.S.C.A. § 414(p)

Why Do We File QDROs?

Support the Department's
Efforts to Increase Total
Collections



Strategic Approach to QDROs

LOS ANGELES RESULTS

**Started using admin.
subpoena in Oct. 2014**

2015-mid July '16 → **155 QDROs =
\$3.18m+**

CONTRA COSTA RESULTS

**Started using admin. subpoena in 2013
and Retirement Benefit Verification
form in early 2014**

1-2014 to 9-13-16 → **118 QDROs =
\$1,035,000**

**32 QDROS in Que =
\$1,530,000**

Strategic Approach to QDROs

Screening for QDROs

Criteria for initiating a QDRO

- EDD earnings greater than \$3,000 per month
- Arrears balance of \$10,000 or more
- Active verified employer
- IWO payment received within last 60 days
- Employed for 18 consecutive months with employer within past 5 years
- a variety of approaches to this step

Use Administrative Subpoena to locate NCP's retirement accounts

Strategic Approach to QDROs

Screening for QDROs

Discovery – Power of the Administrative Subpoena Under 42 U.S.C.A. 666(c)(1)(B)

- The Administrative Subpoena is the Federal form state IV-D programs are required to use in interstate cases pursuant to section 454(9)(E) of the Social Security Act.
- A state may elect to adopt and use this form in intrastate cases.
- This form is issued by the IV-D program to subpoena financial or other information needed to establish, modify, or enforce a child support order – (see also FC 17512).

Strategic Approach to QDROs

Workflow... How Does it Happen?

1. **LCSA IT Staff** generate Excel database (list) of NCPs who meet the screening criteria.
2. **LCSA Staff** generates administrative subpoena or letter to employer.
3. **LCSA Attorney/or Staff** reviews response from employer & determines if QDRO appropriate.*
4. **LCSA Attorney/or Staff** generate QDRO Package
5. **LCSA staff** mails Certified Copy of QDRO + Cover Letter + Confidential Addendum to Plan Administrator via Certified Mail.

* LA CSSD audits the case, sends the Plan a draft, and upon approval of the draft generates a QDRO package and sets a court date. Other counties proceed by Ex-Parte. The process varies between jurisdictions.

Two Types of Retirement Plans

- Defined Contribution Plans
- Defined Benefit Plans






Defined Contribution Plans

Normally Lump Sum Distribution

(The focus of this approach)

Voluntary Employer-Sponsored Plans:

- Employee Stock Ownership Plans (ESOP)
- 401k, 457, and 403b Retirement Plans



Why **not** Defined Benefit Plans

(Not the focus of this approach)

Non-Voluntary Retirement Plans (pension plans):

- Participant needs to reach the Plan's earliest retirement age
- No lump sum distribution available (monthly benefit on retirement is predetermined by a formula based on the employee's earnings history, tenure of service and age, rather than depending directly on individual investment returns)

Strategic Approach to QDROs

Why is Understanding the Type of Retirement Plan Important?

It's important to know what you are eligible to receive. Is it the right to receive monthly payments in the future, or a portion of an account with an identifiable balance that is fluctuating over time?

The relevance of various issues, such as earnings and losses, surviving spouse benefits, and cost of living increases depend on the type of plan being divided.

Strategic Approach to QDROs

Why is Understanding the Type of Retirement Plan Important?

- The order must not require a Plan to provide an Alternate Payee with type or form of benefits not otherwise provided under the Plan.
- The order must not require a Plan to provide increased benefits.
- The order must not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

29 U.S.C.A. § 1056(d)(3)(D)(i)-(iii), 26 U.S.C.A. §414(p)(3)(A)-(C)



When a QDRO Isn't Needed

A QDRO isn't needed to divide certain types of Individual Retirement Accounts (IRAs).

They are not subject to ERISA, since they are not considered employer plans.



Sometimes QDROs do not Work

Government Plans- Some city, county, state (**PERS**) and federal (**TSP**, **FERS**, and **CSRS**) plans are not subject to QDROs.

However, these accounts may be accessed using other prescribed enforcement mechanisms, such as a levy or a writ.



Sometimes QDROs Don't Work

Government Plans- some city, county, state and federal plans are not subject to any division. Non qualified Plans, i.e., not subject to division, usually have the these terms:

- Supplemental
- SERP
- Non-qualified
- Excess Benefit Plans

Strategic Approach to QDROs

Caution



Some governmental employers also offer Defined Contribution Plans which are subject to a QDRO.

Strategic Approach to QDROs

What Provisions Must a QDRO Contain?

- ✓ Name and last known mailing address of the participant and alternate payee
- ✓ Name of each plan to which the order applies
- ✓ Dollar amount or % to be paid to the Alternate Payee
- ✓ Number of payments or time period of the order

Note: Plan Administrators are *not* required to determine the validity of the underlying order or whether the Alternate Payee is in fact a spouse, former spouse, child, or other dependent.

**29 U.S.C.A. § 1056(d)(3)(C)(i)-(iv); 26 U.S.C.A. § 414(p)(2)(A)-(D);
See Advisory Opinion 99-13A; Advisory Opinion 92-17A**

Strategic Approach to QDROs

Who Is an Alternate Payee?

For purposes of the QDRO provisions, an alternate payee cannot be anyone other than the following:

- a spouse
- former spouse
- child
- other dependent of a participant

29 U.S.C.A. § 1056(d)(3)(K), 26 U.S.C.A. § 414(p)(8)



Why Choose the Child (emancipated children may be included) as Alternate Payee in a QDRO for Child Support?

- The parties may *never* have been married.
- The former spouse will pay taxes.

Stahl v Commissioner, US Tax Court

(Tax Court Memo 2001-22) 26 U.S.C.A. § 402

(e)(1)(A)



Taxation for Non-Spouse

Distribution to a non-spouse alternate payee is taxable to the participant.

***Stahl v. Commissioner*, U.S. Tax Court
(T.C. Memo 2001-22). 26 U.S.C.A. § 402 (e)(1)(A)**

Strategic Approach to QDROs

Payments to Alternate Payees

In DOL Advisory Opinion 2002-03A, the Department of Labor (DOL) ruled that a governmental agency (e.g., CSEA) may receive a QDRO payment on behalf of an alternate payee.

The DOL stated that although the Mississippi Division of Child Support Enforcement could not be considered to be an alternate payee, payments could be made to the agency on behalf of an alternate payee.

Strategic Approach to QDROs

Gross-Up



As the tax consequence to the Participant (per the QDRO) can potentially reduce the amount available to the Alternate Payee, a “gross-up” method may be used to require the plan administrator to segregate an additional portion of the Participant’s total account balance, so the Alternate Payee receives the full child support arrearage amount.



Are there Tax Penalties?

Typically a 10% additional tax is imposed on early distributions from a qualified retirement plan.

However, this does not apply to distributions pursuant to a QDRO.

26 U.S.C.A. § 72(t)(2)(C)

Strategic Approach to QDROs

What Happens After a Proposed QDRO is Submitted to the Plan?

- Plan Administrator notifies the Participant and each Alternate Payee of the receipt of the order and provides a copy of the Plan procedures for determining qualification as a QDRO (*allows Participant time to appeal the decision*).
- The Plan Administrator has a “reasonable time” to determine whether the order is a QDRO pursuant to their written procedures.
 - 29 U.S.C.A. §1056 (d)(3)(G)(i); 26 U.S.C.A. § 414(p)(6)(A)&(B);
 - 29 U.S.C.A. § 1056(d)(3)(G)(ii)



What must a Plan Administrator do?

- *Time is of the Essence*

- If the order still has not been determined to be qualified within **18 months** after the date of which the first payment to the alternate payee would have been required, the participant is entitled to be paid all of the amount being separately accounted for (and any interest thereon).

- 26 U.S.C.A. § 414(p)(7)(B)&(C)

Strategic Approach to QDROs

Issues to Consider

Freeze on Account: Some Plan Administrators will place a freeze on the account upon the receipt of the admin subpoena, while others require a draft of a QDRO, and yet others want a signed QDRO prior to placing a freeze.

Divorced Parties: Check the disso judgment to make sure the property distribution has been finalized. Note: California is a Community Property State.

Consolidation of Local Court Cases with Children Of Same Parents: to avoid duplicative Plan fees.

Strategic Approach to QDROs

- **RESOURCES:**

- **QUALIFIED DOMESTIC RELATIONS HANDBOOK (third edition) – Gary Shulman**
- <http://www.brightscope.com/>
- <http://www.qdrodesk.com/plans/>
- <http://kepler.sos.ca.gov/cbs.aspx>
- <http://www.acf.hhs.gov/programs/css/resource/administrative-subpoena-form-instructions>

- **ONLINE HANDOUTS:**

- **Sample Administrative Subpoena**
- **Sample QDRO**
- **Sample Response Forms**
- **Sample QDRO Information Worksheet**