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Retirement Benefits Checklist

Obtain a copy of the latest summary plan description.

Determine whether the plan is a defined benefit plan (and whether it is a cash balance pension plan), a defined contribution plan, or a hybrid plan.

Does the plan have specific dates that it will or will not divide the benefit (e.g., calendar year end only, last valuation date)?

Will the plan divide the benefits on a date chosen by the parties?

Does the plan have a suggested QDRO (Qualified Domestic Relations Order) form?

Does the plan have specific rules on the division of the plan benefits (e.g., percentage only, dollar amount only, a number of units only)?

If the plan is a defined contribution plan, the attorney should obtain current statements that show current value or account balance and determine—

- whether a loan against the account exists and, if so, the balance
- whether the participant's benefit is in pay status
- whether the participant's benefit contains a separate-property component; if so, determine the value of the community's interest by tracing or subtracting the value on the date of marriage from the current value

If the plan is a defined benefit plan, the attorney should obtain current statements and determine—

- how the plan works and what it consists of
- the value of the plan
- whether the plan is stable and properly funded
- whether the participant's benefit is in pay status
- whether the participant's benefit contains a separate property component; if so, determine the value of the community's interest

- whether the alternate payee will receive a separate interest or a shared payment
- whether cost-of-living adjustments are available
- whether early retirement subsidies are available
- what the survivor benefits are
- when the alternate payee can receive his or her benefits and in what form

After the information listed above has been obtained, the following matters should be resolved:

DEFINED CONTRIBUTION PLAN

If the plan is a defined contribution plan, the agreement or decree should include provisions regarding the following:

1. The amount of the alternate payee's interest expressed in dollars, percent, or units. (*Caution:* If the alternate payee's interest is expressed in dollars and the value of the plan drops to an amount less than the alternate payee's interest, the QDRO will not be qualified at the time of distribution or segregation to the alternate payee.)

2. If the account balance on the date of segregation or distribution to the alternate payee is less than the amount the alternate payee was awarded, will the alternate payee receive the account in its entirety and will the participant pay the deficiency? If so, determine the date and whether the payment will be by cash, cashier's check, or money order sent to the alternate payee's specified address.

3. Specify the date of the division of the retirement benefit (e.g., date of divorce).

4. Whether the contributions to the plan after any agreement is reached or rendition by the court until the date the decree is signed will be awarded to the participant or divided between the parties.

5. Whether the alternate payee's interest will be subject to gains and losses between the date of agreement or rendition and the date the funds are distributed or segregated to the alternate payee.

6. Whether the amount of any loan against the account will or will not be deducted for purposes of determining the amount of alternate payee's interest. To illustrate, assume the participant owns a defined contribution account that contains assets valued at \$10,000. Assume also that the participant has borrowed \$2,000 against the plan and that one of the assets is participant's note for \$2,000. If the \$2,000 note is deducted from the account for purposes of calculation, the alternate payee's 50 percent entitlement will be \$4,000 (half of \$8,000). On the other hand, if the note is not deducted, the alternate payee's 50 percent entitlement will be \$5,000 (half of \$10,000). Including an example in the agreement or decree can be very helpful.

7. If there is a loan against the account, who will pay the tax in the event of default?

8. Ensure that the client understands that the alternate payee's interest in a defined benefit plan will fluctuate according to market conditions.

DEFINED BENEFIT PLAN

If the plan is a defined benefit plan, the agreement or decree should include provisions regarding the following:

1. Whether the alternate payee's interest will be a separate interest or a shared payment. (If the participant's benefit is in pay status, the parties must use a shared-payment QDRO.)
2. The amount of the alternate payee's interest expressed in dollars or percentage.
3. Whether the alternate payee will receive a joint and survivor annuity.
4. The attorney for the alternate payee should insist that his or her client receive a preretirement survivor annuity no matter what kind of QDRO is used, except when the plan is a cash-balance pension plan.
5. Specify the date of the division of the retirement benefit (e.g., date of divorce).
6. Whether the alternate payee will receive a pro rata share of any cost-of-living adjustments or other economic improvements that are not based on the participant's future performance or future income.
7. Whether the alternate payee will receive a portion of any early retirement subsidy; if so, specify how the portion is calculated.
8. Devise a procedure for the alternate payee to receive the payments that accrue between the date of agreement or rendition and the date the plan begins to pay the alternate payee if the benefit is in pay status.
9. If the benefit is in pay status, ensure that the alternate payee understands when his or her payments terminate.

OTHER ISSUES FOR DETERMINATION

Whether the retirement benefit is a defined benefit or a defined contribution plan, the following matters must be addressed in the agreement or decree:

1. Specify that the participant will not take out a loan against the plan assets until the QDRO is qualified and will not withdraw or encumber the alternate payee's portion of the plan. (Consider this language: "Participant will not take any action, affirmative or otherwise, that may circumvent the terms and provisions of this [agreement/decree] or that could extinguish or diminish the rights and entitlements of Alternate Payee as set forth herein.")
2. Specify who will draft the QDRO.

3. Specify who will be responsible for presenting the QDRO to the court for signature.
4. Specify who will be responsible for getting the QDRO to the plan administrator for qualification.
5. Specify who will pay for the preparation of the QDRO.
6. Specify that the parties agree to sign any QDRO that is approved by the plan administrator if the substantive division is in accordance with the agreement or decree, whichever is later.
7. If the participant is the plan administrator, devise a procedure for the selection of a substitute to fairly determine whether the QDRO will be previewed for qualification and determine who will make the ultimate decision on qualification of the QDRO.