

FOOTE Notes on Retirement

Issue

When an attorney obtains a sample QDRO form from a company and fills in the blanks, is that form written in a manner that benefits the participant, the alternate payee or both equally?

Proposed Answer

To answer this question, it is necessary to understand the purpose of a model QDRO. A company does not prepare a sample QDRO for the benefit of the participant or the alternate payee. Models are produced and distributed for the ease and benefit of the Plan Administrator so that the Plan Administrator knows that the order meets the minimum requirements of federal ERISA law. Many model QDROs do not contain a provision about cost of living adjustments (COLAs) because the inclusion of such a provision is not a required for an order to be qualified and executed by the Plan. There are only nine absolute requirements for an order to be qualified. The other 20-30 different types of provisions, such as survivorship rights and choice of benefits, are discretionary elements.

If a discretionary element is included in a QDRO, the Plan Administrator will follow that provision if it does not violate the Plan, whether it benefits the participant or alternate payee. If a discretionary element, such as a COLA, are not included into a final QDRO, what happens? Similar to the default intestate succession laws when there is not a will upon death, every plan has a **default** instruction on what to do with these benefits. Some plans automatically include the COLAs as part of the alternate payee's benefit unless the QDRO says otherwise. Some plan do not.

When you are preparing a final property settlement and/or QDRO, make sure that you know what the **default** rules are for many of these very important, but discretionary, provisions of retirement division order. Otherwise, depending of whether you represent the participant or alternate payee, how do you know whether to include them?