Court allows time-traveling QDRO to evade legal requirement

Antoinette M. Pilzner | Tuesday, April 19, 2016

Divorcing couples who want to divide qualified retirement plan benefits accrued during the marriage can only do so through a qualified domestic relations order submitted to the plan. Under both ERISA and the Internal Revenue Code, a qualified domestic relations order cannot require the qualified retirement plan to provide greater benefits than the benefits the plan would be required to provide without the order. However, a recent decision from the U.S. District Court for the Eastern District of Michigan allowed a domestic relations order to go back in time to get around this statutory limitation.

The situation is familiar to many plan administrators. The couple divorced in 1993, and the wife was awarded half of the husband's pension benefits. Because the plan had not received or even been informed of the divorce judgment, the plan began paying the husband 100 percent of his pension benefit in 1994 as a single life annuity. The wife first submitted the divorce judgment to the plan in 1994 after the husband began receiving his pension benefits. The plan administrator determined the divorce judgment did not satisfy the plan's requirements, and informed the wife and her attorney in 1994. The husband died in late 2007, before the wife had submitted a revised judgment or proposed QDRO to the plan. Because the husband had elected a single life annuity form of benefit, there were no benefits payable to any survivor or beneficiary by the plan after the husband's death.

The wife re-submitted the 1994 divorce judgment to the plan in 2008, after the husband's death. The plan rejected it, because the proposed QDRO would require the plan to pay additional benefits to the wife after

the plan had already paid all of the husband's benefits to the husband – a statutory no-no. In most situations, this would be the end of the story.

Here, the wife had a QDRO Nunc Pro Tunc entered by the court in 2014, with the order retroactive to the original 1993 divorce judgment date. The wife submitted the QDRO Nunc Pro Tunc to the plan. The plan rejected it, again based on the fact that all benefits owed by the Plan to the husband had been paid and the plan could not be required to pay additional benefits to the wife. So the wife sued the plan.

The court determined that the QDRO Nunc Pro Tunc must be treated as if it was entered by the court and received by the plan in 1993, before the husband began receiving his benefits. Under this "legal fiction" recognized by the court, the plan is treated as receiving the order before it paid any benefits to the husband, so the plan must now pay 50 percent of the husband's benefits to the wife, even though the plan had already paid 100 percent of the benefits accrued by the husband.

This decision exposes qualified retirement plans to significant liabilities, in spite of the clear statutory prohibition on a QDRO requiring a plan to pay increased benefits. A qualified retirement plan generally has no knowledge of the assignment of any portion of a participant's benefit to an alternate payee unless the participant or the alternate payee notifies the plan. But under this decision, even if a qualified retirement plan pays benefits to a participant in good faith and without knowledge of an assignment, the qualified retirement plan could still be required to pay additional benefits to the alternate payee. Alternate payees will no longer have an obligation to timely notify a plan of a benefit assignment. Arguably, conspiring divorcing spouses could use this decision to knowingly obtain additional benefits from a plan – participant-spouse first obtains all benefits from the plan, and then alternate payee-spouse submits nunc pro tunc QDRO to the plan to receive benefits assigned in the divorce.

The district court's decision has been appealed to the U.S. Court of Appeals for the Sixth Circuit. Because of the substantial financial burdens that would be imposed on qualified retirement plans if this decision is upheld, plan sponsors and plan administrators in Kentucky, Michigan, Ohio, and Tennessee need to keep an eye on this case.

Antoinette M. Pilzner

Team member bio