

**U.S. Department of Labor**

Pension and Welfare Benefits Administration  
Washington, D.C. 20210



August 4, 1994

94-32A  
ERISA SECTION  
404(a)(1)  
206(d)(3)

Mr. Homer L. Elliott  
Drinker Biddle & Reath  
Philadelphia National Bank Building  
Broad and Chestnut Streets  
Philadelphia, PA 19107

Dear Mr. Elliott:

This responds to your request for an advisory opinion on behalf of the VIZ Manufacturing Company (the Company) regarding its Savings and Investment Profit-Sharing Plan (the Plan). Your request concerns the application of the "qualified domestic relations order" (QDRO) exception to the anti-assignment and alienation rules contained in section 206(d)(3) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and sections 401(a)(13)(B) and 414(p) of the Internal Revenue Code of 1986 (the Code).<sup>1</sup> At issue is a proposed amendment to the Plan that would allow the costs of determining and administering a QDRO to be charged against the account of the participant affected by the QDRO. Your submission contains the following facts and representations.

The Plan is maintained to provide retirement benefits to eligible employees. Consistent with the Plan documents, alienation of benefits payable under the Plan is prohibited except in the case of a QDRO or any domestic relations order entered before January 1, 1985.

The Plan has received and continues to receive domestic relations orders that purport to be QDROs. In each instance the Plan Administrator must comply with certain notice and procedural requirements in determining whether the domestic relations order is a QDRO. You represent that it is not unusual for a domestic relations order to go through several modifications before it meets the requirements necessary to be a QDRO and each time the Plan Administrator may need to seek the advice of an attorney concerning whether or not the order is a QDRO.

Section 14.4 of the Plan provides that Plan expenses shall be paid solely out of the trust established with respect to the Plan. You represent that the expenses incurred in the determination and administration of any particular domestic relations order affect the earnings available to be allocated to the accounts of all plan participants. Further, you state that since the determination and administration of any particular domestic relations order does not affect all participants and beneficiaries, but only the participant (and any alternate payee(s)) subject to the domestic relations order, the Company desires to amend the Plan to provide that the costs associated with determining the qualified status of a domestic relations order and with administering distributions under a QDRO be charged against the account of the participant affected.

Section 206(d)(1) of ERISA generally requires pension plans covered by Title I to provide that plan benefits may not be assigned or alienated. Section 206(d)(3)(A) of ERISA states that section 206(d)(1) applies to an assignment

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<sup>1</sup> References to the Internal Revenue Code sections that parallel these provisions of Title I of ERISA are omitted from the following, but may be assumed to be incorporated by reference when the parallel section of Title I is cited.

or alienation of benefits pursuant to a "domestic relations order," unless the order is determined to be a QDRO. Section 206(d)(3)(A) further provides that pension plans must provide for payment of benefits in accordance with the applicable requirements of any QDRO.

Section 206(d)(3)(B) of ERISA defines the terms "qualified domestic relations order" and "domestic relations order" as follows:

(B) For purposes of [section 206(d)(3)]--

(i) the term "qualified domestic relations order" means a domestic relations order--

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under the plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgement, decree, or order (including approval of a property settlement agreement) which—

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a state domestic relations law (including a community property law).

Section 206(d)(3)(C) requires that in order for a domestic relations order to be qualified such order must clearly specify (i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order; (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined; (iii) the number of payments or period to which such order applies; and (iv) each plan to which the order applies.

Section 206(d)(3)(D) specifies that a domestic relations order is qualified only if such order does not require (i) the plan to provide any type of benefit, or any option, not otherwise provided by the plan; (ii) the plan to provide increased benefits (determined on the basis of actuarial value); and (iii) 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.

Section 206(d)(3)(G) of ERISA requires the plan administrator to determine the qualified status of domestic relations orders received by the plan, and to administer distributions under such qualified orders, pursuant to reasonable procedures established by the plan. Upon receipt of the order, the plan administrator must promptly notify the participant and each alternate payee named in the order of its receipt by the plan and of the plan's procedures for determining the order's qualified status.

Section 206(d)(3)(I) of ERISA specifies, among other things, that if a plan fiduciary acts in accordance with part 4 of Title I of ERISA in the administration of a domestic relations order, including the determination of whether to treat a domestic relations order as being (or not being) a qualified domestic relations order, then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to ERISA.

Section 206(d)(3)(J) of ERISA provides that a person who is an alternate payee under a QDRO shall be considered a beneficiary under the plan.

As appears from the foregoing, section 206(d)(3) of ERISA expressly grants an alternate payee the right to receive pension plan benefits payable under a QDRO. In general, it is the view of the Department that a plan may not encumber the exercise of a right mandated by Title I of ERISA by imposing conditions on the exercise of the right that are not contemplated by the statute.<sup>2</sup> We note, in this regard, that nothing in Title I of ERISA requires or permits a plan to impose any separate fees or costs (apart from the appropriate allocation of reasonable administrative expenses of the plan as a whole) in connection with a determination of the status of a domestic relations order or the administration of a QDRO.<sup>3</sup>

Accordingly, it is the view of the Department that imposing a separate fee or cost on a participant or alternate payee (either directly or as a charge against a plan account) in connection with a determination of the status of a domestic relations order or administration of a QDRO would constitute an impermissible encumbrance on the exercise of the right of an alternate payee, under Title I of ERISA, to receive benefits under a QDRO. Additionally, in the Department's view, because Title I of ERISA imposes specific statutory duties on plan administrators regarding QDRO determinations and the administration of QDROs, reasonable administrative expenses thus incurred by the plan may not appropriately be allocated to the individual participants and beneficiaries affected by the QDRO.<sup>4</sup>

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle  
Director of Regulations and Interpretations

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<sup>2</sup> The Department distinguishes such statutorily-granted rights of participants and beneficiaries from rights that a plan may, but is not required to, provide under Title I of ERISA. Thus, for example, under ERISA sections 404(c) and 408(b)(1), and the Department's implementing regulations, reasonable expenses associated with a participant's exercise of an option under the plan to direct investments or to take a participant loan may be separately charged to the account of the individual participant, provided such charges are consistent with Titles I and IV of ERISA and in accordance with the documents and instruments governing the plan.

<sup>3</sup> By contrast, Title I of ERISA expressly permits plans to impose separate administrative costs in a variety of cases. For example, section 104(b)(4) of ERISA states that the plan administrator may impose a reasonable charge to cover the cost of furnishing copies of plan documents or instruments upon request of a participant or beneficiary. See also, section 602 of ERISA, which permits a group health plan, subject to certain conditions, to require the payment of 102% of the applicable premium for any period of continuation coverage elected by an eligible participant or beneficiary.

<sup>4</sup> Of course, in administering QDROs, plan administrators must follow reasonable procedures, as required under section 206(d)(3)(G), and must assure that the plan pays only reasonable expenses of administering the plan, as required by sections 403(c)(1) and 404(a)(1)(A) of ERISA. In this regard, it is the view of the Department that plan fiduciaries must take appropriate steps to ensure that plan procedures are designed to be cost effective and to minimize expenses associated with the administration of domestic relations orders.