

**U.S. Department of Labor**

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



AUG 21 1992

92-17A  
Sec. 206(d)(3)

Ms. Ann E. Neydon  
Sachs, Kadushin, O'Hare  
Helveston & Waldman, P.C.  
1000 Farmer  
Detroit, Michigan 48226

Dear Ms. Neydon:

The Internal Revenue Service has referred to us your request for an advisory opinion on behalf of the Cement Masons' Pension Trust Fund (the Plan) concerning 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), to an order from the Circuit Court for the County of Wayne, Michigan. Your submission contains the following facts and representations.

The Plan is qualified under section 401(a) of the Code. The Plan has received a proposed Qualified Domestic Relations Order (the Order) in connection with a domestic relations proceeding in the Circuit Court for the County of Wayne in the State of Michigan. The Order states that X is a Plan participant whose benefit account is not in pay status. As a result of such proceeding, a property division was entered into between X and Y. The property division was executed prior to, and is referenced in, the Order.

According to the terms of the Order, which you enclosed with your letter, the Court approved the property division prior to granting an annulment *ab initio* of the marriage between the parties. You represent that, at the time of the property division and before the annulment, the parties had been married for 38 years and the marriage had produced six children. Under the Order, and pursuant to the terms of the property division, Y is designated as the "alternate payee" assigned 50% of the participant's accrued benefit as of the date of the Order. The Order further designates Y as the surviving spouse of X. You indicate that Michigan domestic relations law provides for the division of property and the entry of such an order upon the annulment of a marriage.<sup>1</sup>

You request an opinion as to whether a state court correctly ruled that a party to an annulled marriage (1) is a "former spouse" of a participant for purposes of the definition of "alternate payee" in section 206(d)(3)(K) of ERISA, and (2) is designated as a "surviving spouse" pursuant to section 206(d)(3)(F) of ERISA for purposes of the joint and survivor and pre-retirement annuity provisions. In essence, you are requesting an opinion on whether the plan administrator is required to review such rulings as part of the process of determining whether a domestic relations order is qualified under section 206(d)(3) of ERISA.

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<sup>1</sup> Section 552.19 of the Michigan statute states that "upon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money." (MCLA 552.19)

Under the Retirement Equity Act of 1984, as amended (REA), the Secretary of Labor has authority to issue regulations interpreting the QDRO provisions in section 206(d)(3) of ERISA, as well as the parallel provisions in sections 401(a)(13)(B) and 414(p) of the Code. To date, the Department has not issued regulations interpreting these provisions. Because your inquiry presents issues on which the answer seems to be clear from the application of these statutory provisions to the facts described, the Department has determined, in accordance with section 5.03 of ERISA Procedure 76-1, 41 Fed. Reg. 36281 (Aug. 27, 1976), that it is appropriate to issue an advisory opinion in this case. For convenience, references to Code sections that parallel provisions of Title I of ERISA are omitted from the following discussion, but may be assumed to be incorporated by reference when the parallel section in Title I of ERISA is cited.

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 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.

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.

The term "alternate payee" is defined by section 206(d)(3)(K) to mean "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant."

Section 206(d)(3)(F) of ERISA provides, with respect to the joint and survivor and pre-retirement annuity provisions, that, to the extent provided in any qualified domestic relations order:

- (i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 205 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and
- (ii) if married for at least 1 year, the surviving spouse shall be treated as meeting the requirements of section 205(f).

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.

Based on the foregoing, when a pension plan receives an order requiring that all or a part of the benefits payable with respect to a participant be distributed to an alternate payee, the plan administrator must determine that the judgment, decree or order is a "domestic relations order" within the meaning of section 206(d)(3)(B)(ii) of ERISA -- *i.e.*, that it relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of the participant, and that it is made pursuant to a State domestic relations law by a State authority with jurisdiction over such matters. Additionally, the plan administrator must determine that the order is qualified under the requirements of section 206(d)(3)(B)(i) of ERISA. It is the view of the Department that the plan administrator is not required by section 206(d)(3) or any other provision of Title I to review the correctness of a determination by a competent State authority that an individual is a "spouse," "former spouse," "child," "other dependent" or "surviving spouse" of the participant under state domestic relations law.<sup>2</sup>

With respect to your submission, you have represented that the Order assigns to former spouse Y, as "alternate payee," 50% of participant X's accrued benefit under the Plan, and designates Y as the "surviving spouse" of X. Further, you indicate that Michigan domestic relations law provides for such a division of property upon the annulment of a marriage. Accordingly, it is the view of the Department that, to the extent the Order was executed by a court of competent jurisdiction pursuant to Michigan domestic relations law, neither the determination under the Order that Y is a "former spouse," and thus meets the requirements to be an "alternate payee" for purposes of section 206(d)(3)(B) of ERISA, nor the determination that Y is a "surviving spouse" for purposes of section 206(d)(3)(F) of ERISA, are required to be reviewed by the plan administrator. The Department expresses no view regarding the qualified status of the domestic relations order in this case.<sup>3</sup>

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<sup>2</sup> While the question of whether an order is a qualified domestic relations order under 206(d)(3) of ERISA is a federal question, determinations regarding an individual's status as a "spouse," "former spouse," "child," "other dependent" or "surviving spouse" for purposes of a QDRO are questions of state law.

<sup>3</sup> As indicated in sections 5.01 and 5.04 of ERISA Procedure 76-1, the Department ordinarily will not issue opinions on matters which are inherently factual in nature, or on the form or effect in operation of particular plan provisions. Accordingly, the Department will not issue advisory opinions as to whether any particular domestic relations order constitutes a QDRO, or whether a specific plan procedure for determining the qualified status of domestic relations orders satisfies the requirements of ERISA section 206(d)(3)(G)(ii).

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