



IN BRIEF

MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

Issue No. 80

MARCH 2000

RETIREMENT BENEFITS IN DIVORCE CASES

When handling a case involving a QDRO or a case requiring division of a federal employee's pension, do not wait until after the divorce decree has been entered to prepare the order. Always have the QDRO pre-approved by the plan administrator and entered by the court when the dissolution judgment is entered. A judgment dividing a federal employee pension should also be pre-approved. Always include the terms governing division of a federal employee's pension in the dissolution judgment. Following these tips can help you to avoid these risks:

- In the event of the participant's death, the alternate payee may not receive the benefits awarded to him/her in the judgment because all rights of a "surviving spouse" are terminated by the divorce (the divorce terminates "spouse" status), and the rights of an alternate payee pursuant to a QDRO do not arise until a QDRO is entered. Rights to plan benefits are fixed at the moment of the plan participant's death, and in the absence of a timely QDRO, the plan will not recognize the divorced spouse as a "surviving spouse" or as an alternate payee.
- The plan participant may decide to withdraw all of his/her retirement funds before the QDRO is entered and presented to the plan administrator. When the retirement funds are gone, there is nothing left to divide by QDRO.
- The plan may not be capable of division by QDRO or otherwise. Only certain kinds of retirement benefit plans are divisible by QDRO. An effort to solve the problem with an amendment to the judgment might be rejected as an impermissi-

ble attempt to modify a property division.

- In addition to tax qualified plans (governed by QDROs), plans for state, federal and non-tax qualified plans often have unique and unusual rules. For example, if a retirement plan of a *retired federal employee* is to be divided, the decree *must* include the terms of the division. See 5 CFR 838.806 and 5 CFR 838.1004. If the terms are not included in the decree, the spouse will be ineligible for benefits.

When working with retirement plans, advance planning can minimize these risks. Be sure to: (1) Have the form of the QDRO or judgment (when dealing with federal retirement plans) pre-approved by the retirement plan administrator, (2) submit the QDRO simultaneously with the decree and include the terms of the plan division *in* the decree when necessary such as when involving a retired federal employee, and (3) upon entry of the decree and order, immediately send a certified copy of the order to the plan administrator along with a formal request that the plan accept and administer the order according to its terms.

Dan Ricks

Kennedy, Watts, Arellano & Ricks LLP

DISCLAIMER

This newsletter includes claim prevention techniques that are designed to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented and readers should conduct their own appropriate legal research.