1.1 Pensions before Employee Retirement Income Security Act (ERISA)

Before 1974, private pension plans were not regulated by the federal government and were only sporadically regulated by the states. Common problems during this era included a lack of disclosure to employees regarding their pension rights, inequitable conduct by employers, impoverishment of elderly employees by the bankruptcy of their employers, and other abuses. Many employers reserved the right to terminate pension payments if their former employees did or said anything after retirement that was perceived to be against the employer’s interests. Employees eligible to receive a pension after 40 years of loyal service could be fired a month, or even a single day, before their fortieth anniversary and receive nothing.

During this period, the state courts afforded no special treatment to pension plans in domestic relations cases. Payments from pension plans were treated, like any other income, as subject to attachment and garnishment for child support or alimony.
1.2 1974: ERISA Changes the Rules

In the early 1970s, pressure mounted for the federal government to step in and begin regulating this area. The result was the enactment of the Employee Retirement Income Security Act of 1974, now universally known as ERISA, which is codified in both titles 26 (income taxes) and 29 (labor) of the United States Code. ERISA is a comprehensive statute that has made dramatic changes to every aspect of the design, creation, and operation of all private sector “ERISA-qualified” pension and benefit plans.

Virtually every private employee benefit plan in the United States today is an ERISA-qualified plan. Substantial tax benefits flow to both the employers that sponsor qualified plans and the employees who participate in them. First, the employer may deduct contributions to the plan when they are made. Second, funds in a plan grow tax-free until withdrawn. Finally, employees are not taxed on their pension benefits until they actually begin to receive them. These significant tax benefits are available if, and only if, the plan obtains, and maintains by compliance with ERISA, its ERISA-qualified status. See Internal Revenue Code, 26 U.S.C. §§ 401, 402, and 414. Today over 800,000 ERISA-qualified plans contain over $4 trillion in assets for the benefit of over 90 million working Americans. (Allen, Melone, Rosenbloom, & VanDerhei, Pension Planning: Pension, Profit-Sharing and Other Deferred Compensation Plans (8th ed. 1997), at 2, 437–38.)

1.3 The Anti-Alienation Clause of ERISA vs. State Divorce Law Developments

From its enactment in 1974, ERISA has required that each pension plan ensure that the benefits it provides not be “assigned or alienated.” 29 U.S.C. § 1056(d)(1). This provision was intended, at least in part, to “protect an employee from his own financial improvidence in dealing with third parties.” See Hawkins v. Comm’r, 86 F.3d 982, 988 (10th Cir. 1996); see also American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 124 (2d Cir. 1979).

At about the same time ERISA was enacted, the state courts, led by California, began holding that pension rights earned or accrued by one spouse during a marriage were marital or community property and were divisible as such between both spouses in divorce proceedings. See, e.g., In re Marriage of Fithian, 517 P.2d 449
Today virtually every state has come to recognize this principle and treats pensions (usually only that portion of pension benefits earned or accrued while the parties were married) as property divisible in divorce proceedings. Annotation, Pension or Retirement Benefits as Subject to Assignment or Division by Court in Settlement of Property Rights between Spouses, 94 A.L.R.3d 176. It is malpractice to ignore or neglect a client’s rights to receive a share of the spouse’s pension in a divorce action. Smith v. Lewis, 530 P.2d 589 (Cal. 1975); Hutchinson v. Divorce & Custody Law Center, 449 S.E.2d 866 (Ga. Ct. App. 1994); Bross v. Denny, 791 S.W.2d 46 (Mo. Ct. App. 1990).

1.4 Federal and State Case-Law Development, 1974–84

The potential for conflict between ERISA’s anti-assignment clause and the developing state domestic relations law doctrine of pension divisibility rapidly turned into a very serious problem early on. During the decade following ERISA’s enactment in 1974, a number of cases wrestled with the issue of whether the two principles really were in conflict, and, if so, how to resolve it. Most cases held that there was an “implied exception” to the anti-assignment language of section 1056(d)(1) for family support obligations (American Tel. & Tel. Co. v. Merry, 592 F.2d 118 (2d Cir. 1979)), or that a state court divorce order splitting a pension between divorcing spouses merely recognized a preexisting inchoate property right, an implicit joint ownership rather than an “alienation or assignment” forbidden by ERISA. Carpenters Pension Trust v. Kronschnabel, 460 F. Supp. 978 (C.D. Cal. 1978), aff’d, 632 F.2d 745 (9th Cir. 1980), cert. denied, 453 U.S. 922 (1981). But other cases held that divorce-related property divisions or garnishments for family support obligations would violate section 1056(d). Monsanto Co. v. Ford, 534 F. Supp. 31 (E.D. Mo. 1981); Francis v. United Tech. Corp., 458 F. Supp. 84, 85–86 (N.D. Cal. 1978).

1.5 1984: The Retirement Equity Act (REA) Changes the Rules Again

In response to this decade of uncertainty and rapidly proliferating federal and state litigation, Congress acted in 1984 to clarify how state domestic relations laws and ERISA should interact. It passed a new law amending ERISA, known as the “Retirement Equity Act”

REA amended certain key sections of ERISA and the Internal Revenue Code. The provisions of REA are now scattered throughout ERISA and the Code and have become an integral part of those laws. The text of the two major provisions, sections 1055 and 1056(d) of ERISA, as amended by REA, is set forth in Appendix A. For an excellent analysis of the history and general goals of REA, see *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991).

REA provides that certain orders entered in state domestic relations cases relating to the provision of child support, alimony, or property division must be accepted and honored by ERISA-qualified pension plans. These orders are known as “QDROs,” which stands for “Qualified Domestic Relations Orders.” REA specifies the required characteristics of QDROs, sets forth the procedures that plans must follow in determining whether an order is a QDRO, specifies the tax consequences of payments made pursuant to QDROs, and regulates many other matters concerning these orders. REA also requires the provision of survivors’ benefits for spouses and former spouses of employees. All of these matters are explored in detail in later chapters.

1.6 Case-Law and Regulatory Development, 1984–2000

REA has been widely recognized as a valid and useful statute. See, e.g., *Boggs v. Boggs*, 520 U.S. 833 (1997). The 1974–84 philosophical debate over the conflict between ERISA and state court domestic relations orders was over. That conflict was resolved by Congress when it enacted REA and created the concept of QDROs. An order considered a QDRO is expressly exempted from the anti-assignment and anti-alienation clause of section 1056(d)(1) of ERISA. Section 1056(d)(3) now provides that section 1056(d)(1) “shall not apply [to] . . . a QDRO.” The battleground in the federal and state courts has now shifted to whether or not the parties have complied with all the requirements of REA and whether a state court order in a domestic relations case is or is not qualified. Recent cases on these topics are discussed in the appropriate chapters that follow.

Regulatory jurisdiction over ERISA matters is divided between the Department of Labor (DOL) and the Internal Revenue Service (IRS). Insolvent pension plans fall under the jurisdiction of
the federal Pension Benefit Guaranty Corporation (PBGC), estab-
lished in 1974. In the late 1990s, all three of these federal govern-
ment agencies issued regulations and publications on QDROs,
which are also discussed subsequently.

1.7 Non-ERISA Plans: Military, Federal, State, and Local
Government Retirement Plans

During the same period (1974–2000) that the developments in the
private pension world described previously were taking place, par-
allel—but not identical—developments occurred in the world of
public sector pensions. It seemed both illogical and inequitable for
a wife in one family to be able to receive a share of her husband’s
pension rights under REA because he was employed by a private
company, while her neighbor received nothing at all because her
husband was a military officer, a policeman, or a federal, state, or
municipal civil servant.

The remedy for this obvious inequity was the enactment dur-
ing the 1970s and 1980s of specific federal and state laws making
such pensions divisible in a comparable, but not identical, fashion
to the mechanism for private sector pension divisions created by
REA. These laws include the Uniformed Services Former Spouses
Protection Act and significant amendments to the federal statutes
governing federal civil service pensions. These laws and their prac-
tical application are discussed in Chapters 11 and 12. The Office
of Personnel Management (OPM) has published a helpful hand-
book for lawyers involved in dividing federal civil service pensions
and benefits (see section 12.1).

In 1993, ERISA was amended to allow courts and child sup-
port agencies to obtain Qualified Medical Child Support Orders
(QMCSOs) under procedures similar to, but simpler than, the pro-
cedures for obtaining QDROs. These orders, and miscellaneous
types of plans such as Individual Retirement Accounts (IRAs), are
discussed in Chapter 13.

1.8 Case-Law and Regulatory Development since 2000

Since 2000, it has become well accepted that private pension and
employee benefit plans are subject to division incident to divorce
and subject to garnishment for the purposes of child support and
alimony. The case law since 2000 has further refined a spouse’s
interest in a Participant’s employer sponsored retirement plan. The biggest development since 2000 has been the shift from defined benefit pension plans to defined contribution plans such as a 401(k). In fact, few private companies still offer pension plans for their employees, opting instead for defined contribution plans. Coinciding with this development is the addition of other employer-sponsored benefit plans such as Employee Stock Purchase Plans (ESPP).

On the public side, this shift from defined benefit plans to defined contribution plans has been regulatory. We first saw this shift when the federal government, in 1986, changed from the Civil Service Retirement System (CSRS) to the Federal Employee Retirement System (FERS). The change from CSRS to FERS reduced the pension benefit while adding a defined contribution plan, the Thrift Savings Plan (TSP), with matching government contributions. This change from CSRS to FERS was a cost saving measure, just as this shift from defined benefit plans to defined contribution plans has been a cost saving measure for private employers. Most recently, the uniformed services have followed suit, introducing the new Blended Retirement Systems (BRS) in the National Defense Authorization Act of 2015. The BRS follows the lead of FERS, reducing the military pension benefit while enhancing the TSP with government contributions. These new changes with the BRS are discussed in further detail in this book.

1.9 Why Are QDROs So Important?

Over 100 million Americans are covered by ERISA, military, and civil service1 employee benefit and pension plans. These plans contain well over $4 trillion in assets. Pension rights are usually a divorcing couple’s largest or second-largest asset (the other being the family home) and are a major source of income for the purposes of paying alimony and child support payments.

With over 50 percent of all marriages ending in divorce and uncollected child support being a major social problem, every divorce lawyer, state court judge, employee benefit Plan Administrator, corporate legal department, employee benefits and human resources department, and state “IV-D” (child support

1. When using the general term “civil service,” the authors are referring to both CSRS and FERS employees.
enforcement) agency must learn to deal effectively with QDROs and related methods of dividing military and civil service pensions.

1.10 Why Are QDROs So Difficult?

Despite the many advantages and great utility of QDROs, they have for various reasons remained a headache for many of the professionals who deal with them. First, ERISA uses a highly technical vocabulary and unfamiliar concepts. It is discouraging to diligently request plan documents in discovery and then try to wade through page after page of discussions of “accumulated actuarial funding deficiency,” “attained age-normal credit method,” “maximum average actual deferral percentage test,” and similar incomprehensible jargon, not to mention such acronyms as TPA, SSTWB, HCE, EGTRRA, SERP, and VEBA. Chapter 2 will help you overcome this difficulty by cutting through some of these complexities and explaining them in understandable terms.

Second, each employee benefit plan is different, with different benefit schedules, options, specially defined terms, benefit payment options, and procedures for qualifying state-court domestic relations orders. ERISA is a permissive statute that allows employers to use an almost infinite variety of plan designs as long as certain minimum standards are met. This leads to wide variations in plan features and makes it difficult to learn from experience in this area, because to a certain extent each new plan you encounter requires you to “reinvent the wheel” in drafting a suitable QDRO.

Third, QDROs are a difficult and sometimes explosive mix of state and federal law. State law governs such matters as the inclusion and valuation dates for pension rights; the percentage awarded to each party; and terminating payment events such as remarriage or emancipation for alimony or child support QDROs. Federal law governs plan design and features; the form and timing of benefit payments; normal, early, and disability retirement ages and conditions; joint and survivor annuity design; and QDRO approval procedures. The two legal systems—federal and state—occasionally conflict with each other or with the wishes and desires of the parties. When you draft a QDRO you must undertake the difficult task of making sure that all aspects of state and federal law are covered in a single instrument that resolves all inconsistencies and conflicts between these laws and that is acceptable to both parties, opposing counsel, the trial judge, and the Plan Administrator. This is a challenging task under the best of circumstances.
Finally, while QDROs may seem dry and technical at times, they have a significant emotional dimension. Emotions run high in divorce and child support cases, often leading to protracted and bitter litigation over every clause and every penny involved in a QDRO.

1.11 The Top Ten QDRO Mistakes and How to Avoid Them

Listed next, in reverse order, are the ten most common mistakes I have seen divorce lawyers make in dealing with QDROs. Each mistake is followed by references to the chapters and sections in this book that will enable you to avoid it.

MISTAKE #10. Failure to discover and divide all employee benefit plans (including nonqualified plans and benefits from prior or part-time employment). SOLUTION: Use the discovery techniques outlined in Chapter 3 and the model discovery forms in Appendices B through I to make sure you discover all employee benefit plans. Then use the checklists at the end of Chapters 8, 11, 12, and 13 to make sure you cover all the issues in dividing them.

MISTAKE #9. Failure to provide for cost-of-living adjustment (COLA) increases to be shared between the Participant and the Alternate Payee. SOLUTION: Use the model clauses in Chapters 8, 11, 12, and 13 to make sure you include these important rights.

MISTAKE #8. Blindly following the plan’s model QDRO and just “filling in the blanks” (particularly when you represent the Alternate Payee). SOLUTION: Subsection 8.3D explains in detail the serious dangers involved in doing this.

MISTAKE #7. Failing to prorate contributions to Defined Contribution Plans that are made at the end of the contribution year that spans the date of separation or divorce. SOLUTION: For tips and techniques on solving this problem, see subsection 5.3B and clause 5L in subsection 8.5, part C.

MISTAKE #6. Limiting the division of benefits to vested benefits only, rather than to accrued benefits. SOLUTION: See the discussion in subsections 5.3C and D.

MISTAKE #5. Failing to specify, when dividing a Defined Contribution Plan, whether the Alternate Payee will receive
interest, dividends, gains, and losses on her share between
the date of valuation and the date a separate account is
established for the Alternate Payee. (Failure to specify
whether this adjustment should be made leads to a result
known in the QDRO trade as “If it goes up, I’m your part-
ner; if it goes down, I’m your creditor,” and may lead to
years of litigation.) SOLUTION: See clauses 5L, 5M, and 5N
in subsection 8.5, part C.

MISTAKE #4. Not having the plan review and approve your
QDRO in advance so you can bring it to court with you
(with amounts or percentages left blank if necessary) or
attach it as an exhibit to the separation agreement. SOLU-
TION: Unless the Participant is threatening to withdraw
funds from his plan, take out a loan against his account,
or retire in the immediate future—potentially placing the
Alternate Payee’s share of benefits in jeopardy—this is
always a good practice. See subsection 8.3C.

MISTAKE #3. Automatically following the Shared Interest
Approach in every case. SOLUTION: Most Alternate Pay-
ees prefer the Separate Interest Approach because it gives
them control over when payments from a Defined Benefit
Plan begin and ensures that payments will continue for the
Alternate Payee’s lifetime. In contrast, the Shared Interest
Approach means the Alternate Payee receives no payments
at all until the Participant chooses to retire, and payments
to the Alternate Payee may cease on the Participant’s
death. See section 6.3 and section 8.5, clause 5, part B, for
a full discussion of how to use both the Shared Interest and
Separate Interest approaches.

MISTAKE #2. Failing to provide a qualified preretirement sur-
vivor annuity (QPSA) benefit for ERISA plans, survivor
benefit plan (SBP) for military retired pay divisions, or
Former Spouse Survivor Annuity (FSSA) for federal civil
service plan divisions for your Alternate Payee clients.
SOLUTION: This is an extraordinarily common omission.
Failure to expressly provide for survivor benefits for your
Alternate Payee clients at trial or in a stipulation or sep-
aration agreement can be fatal to your ability to include
them in a subsequent QDRO if the Participant or his law-
yer objects. Failure to expressly include survivor benefits in
the QDRO itself is always fatal. It takes only a few words to
preserve these vitally important rights for your Alternate Payee clients in ERISA, military, and civil service plans. See the definitions in subsections 6.2C–F, P, and Q and the clauses in subsections 8.5(7), 11.13(7), and 12.5.

MISTAKE #1. Failure to follow through until your order has been accepted as a QDRO by the plan. SOLUTION: The most common form of malpractice in the QDRO area is the failure of counsel for the Alternate Payee to persevere and make sure that a QDRO is entered by the state divorce court as well as sent to and finally accepted by the plan. In my experience in plan administration, about 15–20 percent of the time when an initial QDRO application is rejected by the plan, the application is simply abandoned. The plan never hears back from the Alternate Payee’s lawyers, and the Alternate Payee’s rights are irrevocably lost. Chapter 9 is devoted to this problem and covers it in detail.

1.12 Common Interests and Goals

One perennial problem with QDROs is that the constituencies most actively involved in them—state IV-D agencies, lawyers in private practice, plan officials, and state court judges—rarely meet or communicate with each other. A major objective of this handbook is to encourage better communication and cooperation among these groups. We all have a common goal: using QDROs to equitably divide employee benefits and provide child support, and qualifying DROs and putting them into effect with a minimum of time, effort, expense, and friction.

Whatever your role in QDROs, it will help you do a better job if you read every chapter of this handbook. If you’re a Plan Administrator, don’t skip the sections on law office management and client relations. Reading them will help you better understand the concerns and difficulties faced by the divorce lawyers with whom you deal. If you work for a IV-D agency, read the material addressed to Plan Administrators. It will help you anticipate the responses your DRO will receive as well as the responses to your requests for assistance. Every chapter will help you understand how to accomplish your own work as well as appreciate the concerns and goals of the other parties with whom you must deal in order to accomplish your QDRO goals.