# Contents

About the Authors xvii  
Introduction xix

Chapter 1
Employee Benefit Plans and Domestic Relations 1

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1 Pensions before Employee Retirement Income Security Act (ERISA)</td>
<td>1</td>
</tr>
<tr>
<td>1.2 1974: ERISA Changes the Rules</td>
<td>2</td>
</tr>
<tr>
<td>1.3 The Anti-Alienation Clause of ERISA vs. State Divorce Law Developments</td>
<td>2</td>
</tr>
<tr>
<td>1.4 Federal and State Case-Law Development, 1974–84</td>
<td>3</td>
</tr>
<tr>
<td>1.5 1984: The Retirement Equity Act (REA) Changes the Rules Again</td>
<td>3</td>
</tr>
<tr>
<td>1.6 Case-Law and Regulatory Development, 1984–2000</td>
<td>4</td>
</tr>
<tr>
<td>1.7 Non-ERISA Plans: Military, Federal, State, and Local Government Retirement Plans</td>
<td>5</td>
</tr>
<tr>
<td>1.8 Case-Law and Regulatory Development since 2000</td>
<td>5</td>
</tr>
<tr>
<td>1.9 Why Are QDROs So Important?</td>
<td>6</td>
</tr>
<tr>
<td>1.10 Why Are QDROs So Difficult?</td>
<td>7</td>
</tr>
<tr>
<td>1.11 The Top Ten QDRO Mistakes and How to Avoid Them</td>
<td>8</td>
</tr>
<tr>
<td>1.12 Common Interests and Goals</td>
<td>10</td>
</tr>
</tbody>
</table>
Chapter 2
“Just Enough ERISA”: Core Definitions and Principles

2.1 Introduction 11

2.2 Key ERISA Definitions 12
A. Employee Benefit Plan 12
B. Employee Pension Benefit Plan 12
C. Employee Welfare Benefit Plan 12
D. Participant 13
E. Beneficiary 13
F. Plan Administrator 13
G. Plan Sponsor 14
H. Normal Retirement Age 14
I. Earliest Retirement Age 15
J. Defined Contribution Plan, or Individual Account Plan 15
K. Defined Benefit Plan 16
L. Hybrid Plan 17
M. Alternate Payee 17
N. Domestic Relations Order 19
O. Qualified Domestic Relations Order 20
P. Actuarial Value 21
Q. Written QDRO Procedures 21
R. Representative 21

2.3 Key ERISA Concepts 22
A. Plan as Separate Legal Entity 22
B. Vested Pensions 22
C. Matured Pensions 22
D. Pensions In Pay Status 22
E. Fiduciary Duties 22
F. Plan's Duties upon Receipt of a DRO 23
G. Protection of Spouses and Former Spouses 25
H. ERISA Preemption of State Law 26
I. Qualified Plan 27
J. QDRO Litigation 27
Chapter 3
Essential Information and How to Get It 29

3.1 Introduction 29

3.2 The Three Key Plan Documents 32
A. The Summary Plan Description 33
B. The Annual Benefits Statement 33
C. The Plan’s Written QDRO Procedures 35

3.3 How Do You Obtain These Key Documents? 40
A. When You Represent the Participant 40
B. When You Represent the Alternate Payee 40

Chapter 4
Interim Relief 45

4.1 Introduction 45

4.2 Immediate Steps 46
A. Informal Request 46
B. Interim DRO 47
C. State Law Remedies 48

4.3 Benefits Already In Pay Status 48

4.4 Investment Decisions 48

4.5 If Your Application for Interim Relief Fails 49

Chapter 5
Inclusion and Valuation 51

5.1 Introduction 51

5.2 Inclusion Dates 51

5.3 Use and Misuse of Coverture Fractions 53
A. Beginning Date for the Numerator 54
B. Ending Date for the Numerator 54
C. Commencement of Employment versus Entry into the Plan as Starting Point for the Numerator 55
D. Years of Employment versus Years of Credited Service in the Denominator 56
E. Do Not Use Coverture Fractions to Divide Defined Contribution Plans 58
5.4 Post-Divorce Events 58
   A. Post-Divorce Allocation of Interest, Dividends, and Capital Gains and Losses to Alternate Payee’s Share 58
   B. Post-Divorce Contribution Dates and Proration 59
   C. Vesting 61
   D. Forfeitures 64
5.5 Valuation Dates 65
5.6 Offset Method of Dividing Pensions 66
5.7 Alimony and Child Support 67

Chapter 6
How to Divide Deferred Payment Annuities 69

6.1 Introduction 69
6.2 Definitions and Examples 70
   A. Annuity 70
   B. Single Life Annuity 70
   C. Joint and Survivor Annuity 70
   D. Qualified Joint and Survivor Annuity (QJSA) 70
   E. Preretirement Survivor Annuity 71
   F. Qualified Preretirement Survivor Annuity (QPSA) 71
   G. Fixed Term Annuity 72
   H. Hybrid Annuity 73
   I. Actuary 73
   J. Actuarial Value 73
   K. Present Actuarial Value 74
   L. Employer Subsidy for Early Retirement 77
   M. Shared Interest Approach 78
   N. Separate Interest Approach 79
   O. Accrued Benefit 79
   P. Survivor Benefit Plan 80
   Q. Former Spouse Survivor Annuity 80
6.3 Alternative Approaches to Dividing Annuities 80
A. Pension Already In Pay Status 81
B. Shared Interest Approach: Single Life Annuity on Life of Participant 81
C. Shared Interest Approach: Qualified Joint and Survivor Annuity on Lives of Participant and Alternate Payee 82
D. Shared Interest Approach: Qualified Joint and Survivor Annuity on Lives of Participant and New Spouse (Other Than Alternate Payee) 82
E. Separate Interest Approach: Single Life Annuity on Life of Alternate Payee 83

6.4 Which Alternative Is Best for Your Client? 84

Chapter 7
Assessing Your Client’s Needs and Wishes:
Formulating a Strategy 89

7.1 Introduction 89
7.2 What Are the Realistic Alternatives? 90
A. Other Assets 90
B. Need for Valuation 91
C. Defined Contribution Plans 91
D. Defined Benefit Plans 92
E. Terms of the Plan 92
F. Tax Consequences 92
G. What If a QDRO Is Not Available? 92
7.3 What Factors Should Be Considered? 93
7.4 Which Alternative Should Your Client Pursue? 95
7.5 QDROs for Child Support and Alimony 95
7.6 Representing the Participant 96
7.7 Avoiding Malpractice Claims 97
## Chapter 8
### Drafting the DRO

#### 8.1 Introduction

#### 8.2 Who Will Draft the DRO?

#### 8.3 Preliminary Considerations
- A. Prepare Separate DROs for Each Plan
- B. Prepare the DRO as Soon as Possible
- C. Prequalify the DRO with the Plan
- D. The “Dirty Dozen”: 12 Good Reasons Why Your Clients (and Your Malpractice Insurance Carrier) Don’t Want You to Just Fill in the Blanks in the Plan’s Model Order

#### 8.4 QDROs Don’t Have to Be Complex

#### 8.5 Model DRO with Alternative Clauses for a Defined Benefit Plan
- Part A: Division of a Defined Benefit Plan Already In Pay Status
- Part B: Division of a Defined Benefit Plan Not Yet In Pay Status
  - Subpart I. Shared Interest Approach
  - Subpart II. Separate Interest Approach
- Part C: Division of a Defined Contribution Plan

#### 8.6 Final Quality Control Check

#### 8.7 DRO Checklist

## Chapter 9
### From DRO to QDRO

#### 9.1 Submission to the Court for Judge’s Signature and Filing

#### 9.2 Send the DRO to the Plan as Soon as Possible

#### 9.3 Follow Up, Follow Up, Follow Up!

#### 9.4 Rewrite the DRO as Necessary

#### 9.5 Get the Qualification Decision in Writing

#### 9.6 Following Up with Parties

#### 9.7 Review Old QDROs Every Three to Five Years

#### 9.8 When You Reach an Impasse
Chapter 10  
QDRO Litigation  

10.1 Litigation against the Plan  
   A. Concurrent Jurisdiction  
   C. State Jurisdiction and Venue  
   D. Removal to Federal Court  
   E. Remand to State Court  
   F. Remand to Plan Administrator  
   G. Federal Court Qualifies Order  
   H. State Court Qualifies Order  
   I. Plan as Party to Divorce Action  
   J. Failure to Follow Plan’s Own QDRO Procedures  
   K. Lawyers’ Fees  
   L. Sanctions for Failure to Provide Information  
   M. Standard of Review of Plan Administrator’s Decision  
   N. Appointment of Alternate Payee as Plan Administrator  
   O. Application to Qualify DRO after Death of Participant  
   P. QDROs for Employee Welfare Benefit Plans  
   Q. Named Beneficiary in Plan File  

10.2 Bankruptcy  

10.3 Tax Litigation with the IRS  

10.4 Malpractice  

Chapter 11  
Military Retired Pay  

11.1 Background  

11.2 Modernized Military Retirement System  

11.3 “Disposable Retired Pay”  

11.4 Timing of Payments  

11.5 Divisibility of Disposable Retired Pay as Property by State Courts  

11.6 State Law Division Factors
x Contents

11.7 Direct Payment for Property Division to Former Spouse 185
11.8 Direct Payment for Child Support and Alimony Orders 186
11.9 State Court Jurisdiction 186
11.10 Procedure for Obtaining Direct Payment 188
11.11 Military Retired Pay and Waiver for VA Disability 191
11.12 Survivor Benefit Plan 191
11.13 Medical Coverage 193
11.14 Discovery 193
11.15 Model Order Dividing Military Retired Pay 194
11.16 DD Form 2293 200
11.17 Checklist for Order Dividing Military Retired Pay as Property 200
11.18 Thrift Savings Plan 202

Chapter 12
Federal Civil Service Pension Plans 203

12.1 Federal Pension Plans 203
   A. Employee Annuities 205
   B. Refunds of Employee Contributions 206
   C. Former Spouse Survivor Annuity 206

12.2 Common Features 207
   A. OPM Responsibilities 207
   B. State Court Responsibilities 207
   C. Former Spouses’ Responsibilities 207
   D. Employees’ and Retirees’ Responsibilities 207
   E. Application for a COAP 208
   F. OPM Notice Procedures 208

12.3 Division of Employee Annuity 210
   A. Forbidden and Required Language 210
   B. Express Division 211
   C. Direct Payment 211
   D. Computation of Amount 211
   E. COLAs 212
   F. Pro Rata Share 212
G. Forbidden References 212
H. Level of Annuity to Which Formula, Fraction, or Percentage Is Applied 213
I. Payments after Death of Employee Not Allowed 213
J. Payments after Death of Former Spouse Allowed 213

12.4 Division of Refunds of Employee Contributions 213
A. Separation from Service and Entitlement 214
B. Time of Application 214
C. Required and Forbidden Language and References 214
D. Order Barring Payment of Refunds 214

12.5 Provision of a Former Spouse Survivor Annuity 215
A. Remarriage 215
B. Required and Forbidden Language 215
C. Express Award of Former Spouse Survivor Annuity 216
D. Specification of Type of Survivor Annuity 216
E. Computation of Formulas 216
F. Time of Order 217
G. Cost of FSSA Must Be Paid by Annuity Reduction 217
H. Amount 217
I. Pro Rata Share 218
J. Automatic COLA 218
K. Temporary Annuity Order 218
L. Election and Disclaimer 219
M. Special Notice Requirements 219

12.6 Discovery 219

12.7 Model COAP 220
Part A: Division of Employee Annuity 222
Part B: Division of Refund of Employee Contributions 223
Part C: Provision of Former Spouse Survivor Annuity 224
Part D: General Provisions 226
12.8 Checklist for COAP 228
12.9 Thrift Savings Plan 230
12.10 Railroad Retirement Act Pensions 231
12.11 Other Federal Plans 233

Chapter 13
Miscellaneous Plans: IRAs, Nonqualified Plans, State and Local Pension Plans, and QMCSOs 235

13.1 IRAs 235
13.2 Nonqualified Plans 237
13.3 State and Local Government Pension Plans 239
13.4 Qualified Medical Child Support Orders 240
13.5 Model QMCSO 242

Chapter 14
QDROs: From Headache to Profit Center for Your Law Practice 247

14.1 Introduction 247
14.2 Know the Law 248
14.3 Make Sure Your Clients Participate in All QDRO Decisions 248
14.4 Keep Your Clients Informed 249
14.5 Draft the DRO as Early as Possible, and Ask the Plan to Review It Early 250
14.6 Come to Court Prepared 250
14.7 Charge by the Hour, or Outsource Your QDRO Work 252
14.8 Working with a QDRO Expert 253
   A. The Unique Role of the QDRO Expert 254
   B. Substantive QDRO Issues Requiring Expert Analysis 254
   C. Lawyer, Accountant, or Actuary? 258
14.9 Follow Through, Follow Through, Follow Through! 261
14.10 Review QDROs Every Three to Five Years 262
## Chapter 15
QDROs: From Headache to Enhanced Employee Benefit for Plan Administrators and Their Lawyers

15.1 Write User-Friendly QDRO Procedures 263
15.2 Take an Educational Approach, Not an Adversarial Approach 266
15.3 Follow Your Own QDRO Procedures, and Document Your Actions 267
15.4 Establish a Personal Relationship with Every Participant 269
15.5 Don’t Take Sides 270
15.6 Always Show Respect for the Trial Judge 270
15.7 Don’t Give Legal or Tax Advice to the Participant or the Alternate Payee 273
15.8 Don’t Undercut the Participant’s Lawyer 273
15.9 Don’t Review the State Law Aspects of the DRO 274
15.10 Pay Compliments When They Are Deserved 275

## Chapter 16
Managing IV-D Agencies to Collect Child Support with QDROs

16.1 Advantages of QDROs for Child Support Enforcement 277
16.2 Misconceptions about Child Support QDROs 278
16.3 Strengths and Weaknesses of QDROs 279
16.4 When Should IV-D Agencies Use QDROs? 280
16.5 How Can a IV-D Agency Begin to Use QDROs? 281
16.6 Costs and Benefits 282
16.7 Practical Tips and Techniques 282
   A. Know the Law 282
   B. Redesign Your Case Intake and Information-Gathering Procedures 283
   C. Identify and Designate QDRO Specialists 283
   D. Train Your QDRO Specialists and the Judiciary 284
16.8 Model Child Support QDRO for IV-D Agencies

Part A: Division of Defined Benefit Plan:
Plan Already In Pay Status or Shared Interest Approach

Part B: Division of Defined Benefit Plan:
Separate Interest Approach

Part C: Division of Defined Contribution Plan

16.9 Final Quality Control Check

16.10 Child Support DRO Checklist

Chapter 17
Family Court Judges and QDROs

17.1 Introduction

17.2 Require Early Discovery and Prompt Disclosure

17.3 Enlist the Plan’s Cooperation

17.4 Make the Parties and Their Lawyers Come to Court Prepared

17.5 Be Creative

17.6 A Quick Test for Evaluating DROs

17.7 Recognize That ERISA Is a Power-Sharing Arrangement

17.8 Help the Lawyers Who Appear before You Improve Their Professional Skills

17.9 Retain Jurisdiction over the DRO
Chapter 18
Current Trends and Future Developments in QDROs 309

18.1 Introduction 309
18.2 Employers Outsource Their QDRO Processing 309
18.3 Fewer Defined Benefit Plans, More Defined Contribution Plans 310
18.4 Erroneous Use of “Interpretation Letters” 312
18.5 Imposition of QDRO Processing Fees 312
18.6 Regulatory Failure: Department of Labor Indifference to QDRO Processing Problems 313
18.7 The Rise and Spread of Unqualified Internet QDRO-Drafting Firms 314

Conclusion 317

Appendices 319

Appendix A: Text of Sections 1055 and 1056(d) of ERISA 319
Appendix B: Model Letter to Plan Requesting Disclosure of Benefits Information 337
Appendix C: Model Letter to Plan Transmitting DRO for Qualification and Asking for Confirmation of Payment Features 341
Appendix D: Model Document Discovery Request/Subpoena Duces Tecum 345
Appendix E: Model Interrogatories 347
Appendix F: Model Deposition Questions for Participant 349
Appendix G: Model Deposition Questions for Plan Official 353
Appendix H: Model Release of Information Form 359
<table>
<thead>
<tr>
<th>Appendix</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Model Client Letter and Questionnaire</td>
<td>361</td>
</tr>
<tr>
<td>K</td>
<td>Plan Administrator’s or Counsel’s QDRO Management Procedures Checklist</td>
<td>371</td>
</tr>
<tr>
<td>L</td>
<td>How to Read an Annual Benefits Statement</td>
<td>375</td>
</tr>
<tr>
<td>M</td>
<td>Uniformed Services Former Spouses Protection Act: Dividing Military Retired Pay</td>
<td>377</td>
</tr>
<tr>
<td>N</td>
<td>DoD Financial Management Regulation, Volume 7B, Chapter 29</td>
<td>395</td>
</tr>
<tr>
<td>O</td>
<td>QDRO Provisions of the Pension Protection Act of 2006</td>
<td>421</td>
</tr>
<tr>
<td>P</td>
<td>Interim Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders</td>
<td>423</td>
</tr>
<tr>
<td></td>
<td>Table of Cases</td>
<td>439</td>
</tr>
<tr>
<td></td>
<td>Index</td>
<td>447</td>
</tr>
</tbody>
</table>