

ABA Sections of Business Law,
Labor Law, Real Property, Probate and Trust Law,
Taxation, and Tort and Insurance Practice

ABA Joint Committee on Employee Benefits

Meetings with Agencies
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Department of Labor Questions and Answers

1. **Questions:** Internal Revenue Code 414(p) provides the rules that govern domestic relations orders. To be considered a qualified domestic relations order (“QDRO”), the order must satisfy the requirements of section 414(p). Exclusive jurisdiction for determining whether a domestic relations order qualifies under IRC section 414(p) belongs to the Department of Labor. ERISA section 206(d)(3); LTR 8338063. Code section 414(p)(2)(D) requires that a domestic relations order must clearly specify each plan to which such order applies. See also ERISA section 206(d)(3)(C)(iv). If the order satisfies the Code and ERISA requirements, it is qualified and the alternate payee will have a right to satisfy the order from the participant’s plan balance or accrued benefit. The Code does not address whether the order fails the plan specificity requirement of Code section 414(p)(2)(D) if the plan to which the QDRO originally applied is subject to a merger and acquisition transaction in which employees become employed by the acquiring company and there is a transfer of plan assets to the acquiror’s plan. Will the order remain qualified if the plan assets are transferred to the acquiror’s plan as part of an acquisition? Must the acquiror’s plan administrator comply with the terms of the QDRO which names the participant’s former employer plan in the order? Should the alternate payee obtain a new QDRO naming the participant’s (and ex-spouse’s) new plan so as to satisfy the specific plan requirement of Code section 414(p)(2)(D)?

Answer: In the case where assets are transferred to a successor plan, the successor plan should be bound by the terms of the original QDRO with respect to those assets even if the successor is not mentioned. A new qualified domestic relations order is not necessary. See S. Rpt. No. 98-575 at page 20. Future accruals under the successor plan, as pension accruals earned from an employer unrelated to the employer sponsoring the plan to which the original QDRO was attached, would not be subject to the QDRO without specific naming of the new plan in an amended QDRO.

2. **Question:** Would an in-kind distribution of a collectible from a qualified pension plan to a participant violate the prohibited transaction rules of ERISA section 406, where the collectible would be valued by an independent appraiser, and where the distributions would be allowed by all participants that made such contributions (when such contributions were allowed prior to January 1, 1982)?

Answer: An in-kind distribution from a qualified pension plan that held collectibles in trust and acquired such collectibles when such contributions were permissible would not be considered a prohibited transaction violative of section 406 of ERISA since such distribution would not be deemed a sale or exchange of any property between the plan and a party in interest but rather a benefit distribution in accordance with the terms of the plan. However, if the plan terms only permit cash distributions, then such in-kind distribution would be a violation of ERISA.

3. **Question:** May penalties imposed for late filing of Form 5500 be paid from trust assets?

Answer: No, penalties for late filing of Form 5500s may not be paid from plan assets nor may the late filer program fees be paid from plan assets, since the penalties are imposed on the plan administrator. (There may be rare facts and circumstances where such a payment from plan assets may be allowed — e.g., the plan administrator is insolvent or no longer in existence.) To the extent that PBGC penalties for late premium payments may be able to be paid from plan assets, this may be due to the differences in the statutory language.

4. **Question:** If the proposed participant contributions plan asset regulations are adopted in their present form, will DOL Technical Release 92-01, with respect to pre-tax participant contributions, remain in effect?

Answer: Yes, it will remain in effect and is not proposed to be changed.

5. **Question:** If the proposed participant contributions plan asset regulations are adopted in their present form, will plan sponsors of insured plans be required to remit partial premium payments (i.e., after-tax participant contributions) to insurers within the required deposit time period?

Answer: Yes. DOL Technical Release 92-01 will remain in effect and is not prepared to be changed. Moreover, the exemptions in 29 C.F.R. §§2520.104-20 and 2520.104-44 will remain in effect. Nevertheless, the plan sponsor must still comply with the plan assets regulation.

6. **Question:** If the proposed participant contributions plan asset regulations are adopted in their present form, will plan sponsors be required to establish a trust to hold such items as COBRA payments or retiree contributions that are made on an after-tax basis? This question assumes that the employer's medical plan is self-funded, that participant contributions for active employees are made on a pre-tax basis through the employer's Section 125 cafeteria plan and that Technical Release 92-01 provides an exemption from the trust requirement.

Answer: COBRA and retiree contributions are participant contributions, and the non-enforcement release should be read as potentially impacting them. If the release does not apply, then there is no relief from the trust requirement for COBRA or retiree contributions.

7. **Question:** The FMLA regulations require the employer to notify an employee that leave will be treated as FMLA leave, but only touch on the potential consequences of failure to give the notice. What are the consequences if an employer fails to give that notice to an employee who has taken leave that would have qualified as FMLA leave?

Answer: The consequences depend on the circumstances and context in which the issue arises.

The simplest case is when an employee is seeking additional leave that would also qualify under FMLA.

In that case, since the employee received no earlier notice, the earlier leave cannot be counted against the FMLA entitlement, and the employee will be entitled to a full 12 weeks of leave.

More difficult are situations where the issue is entitlement to reinstatement. For example, if an employee took 11 weeks of leave that would have qualified as FMLA-protected leave and upon return was told that her position had been filled, the employee cannot be denied the FMLA's protection if the employee gave the employer enough information to determine that the leave was FMLA-protected. Therefore, the employee could assert the right to have the 11 weeks treated as FMLA leave and would be entitled to reinstatement.

The really difficult cases will be those where the employee was out for longer than the FMLA-protected period and never received notice that they were using up the FMLA leave. Assume an employee is on leave for a serious injury for 16 weeks and then seeks reinstatement. Assume further that the employer knew of the nature of the leave from the start, and assume that additional leave beyond the first 12 weeks would not constitute a reasonable accommodation under the ADA. The employer might argue that the employee has no right to reinstatement because the leave exceeded 12 weeks. The employee's counter argument is that no notice was given, so the employee is entitled to the maximum FMLA protection the law would allow, i.e., treat the most recent 12 week period (or the most recent day of leave, for that matter) as FMLA-protected, mandating reinstatement. The DOL's view is that the employee would be entitled to reinstatement and would count the last 12 weeks at FMLA leave whether or not the employee could have returned to work after the end of the first 12 weeks.

8. **Question:** The DOL has recently filed suit against certain insurers for failure to pass on negotiated health care provider discounts to employer plans purchasing service from the insurer. The DOL has alleged that such failure constitutes a breach of fiduciary duty. Does the DOL believe that it would be a breach of fiduciary duty if a self-insured plan does not pass on

negotiated discounts to plan participants and beneficiaries?

Answer: DOL has filed suits against self-insured plans who use insurance companies as administrators under ASO arrangements. The cases do not turn on whether a plan is insured or self-insured, but on plan language explaining co-pays and other payment provisions to participants. Plan language includes the descriptions in both the plan document and the summary plan description. According to the DOL, plan language that allows employers to not pass on discounts must be “brutally clear” — particularly in the summary plan description — to be sufficient.

9. **Question:** Do administrators of ERISA-covered managed care plans have a fiduciary duty to inform participants if the plan penalizes “primary care physicians” (financially or otherwise) for referring participants to specialists covered by the plan?

Answer: The DOL declined to answer this question.

10. **Question:** An employer maintains a basic non-contributory group life insurance program for its employees providing coverage of 1 times pay. It also provides a supplemental group life insurance program under which its employees can elect 1 times, 2 times or 3 times pay. Employee contributions for supplemental coverage are set at levels actuarially estimated to cover the full cost of the supplemental coverage. However, the basic and supplemental coverage are combined for experience by the insurer, so that insurer gains on one program may be used to offset insurer losses on the other policy. Because of this combining, the insurer charges lower premium rates under both policies than it would if the two were not combined for experience.

The ERISA plan document, SPD and employer treat both group life insurance programs as constituting a single ERISA plan, and a single Form 5500 covering both programs is filed. The plan document, group policy and summary plan description all set forth the details of the combining for experience feature of the two insurance programs. Does using favorable experience

from the supplemental group life insurance program to offset adverse experience under the basic group life insurance program violate Title I of ERISA?

Answer: No, as long as the two group life insurance programs are part of one ERISA plan. The fact that the employer treats the two programs as a single plan (including the filing of a single Form 5500) does not mean that they actually constitute a single plan. The DOL would look at all the facts and circumstances. The DOL would require that the SPD and the plan document clearly describe how the separate coverages relate to one another, including the details of the experience blending. The plan and summary plan description must be clear and explicit. If so, the arrangement would not be violative of Title I of ERISA. This situation differs from the case where an employer offers a supplemental group life program and represents to employees that the program is employee-pay-all. It also differs from the case where the basic group life insurance program and the supplemental group life insurance program are established as separate ERISA plans.

11. **Question:** An employer adopts in year X a group term life insurance plan for its employees. The plan is contributory. Employees pay fixed amounts pursuant to a plan schedule, and the employer pays the difference between the employee contributions and the full premium cost of the plan. The plan document, the group insurance policy and the summary plan description all provide that policy dividends will be used to offset cumulative employer payments since inception of the group policy, and that in the event the dividends exceeds cumulative employer payments, the excess will be used for the benefit of the participating employees. The insurer determines dividends based on the cumulative experience under the group policy.

In year X + 3, the insurer declares a dividend for year X + 2, the dividend exceeds the employer payments in year X + 2, but does not exceed the cumulative employer contributions since year X. Does the employer’s retention of the dividend violate Title I of ERISA?

Answer: No. Where employee contributions are fixed and the employer contributes the remainder of the premium cost, the employer is permitted to receive dividends up to the amount of its premium payments, as long as the plan document, the group insurance policy and the summary plan description so provide. This rule can be applied on a cumulative rather than a year-by-year basis, provided the insurer determines the dividends on a cumulative rather than a year-by-year basis. But, again, the DOL would require the dividend arrangement to be described in a clear and explicit manner. The DOL indicated that PTE 80-26 contains an analysis of exempt plan repayments of an employer's interest free loan which may be useful in this situation. Specifically, PTE 80-26 indicated that the employer cannot recover interest on its cumulative premiums.

12. **Question:** If a plan acquires an employer security that is not a marketable obligation, is the amount of the prohibited transaction excise tax determined with respect to the purchase price paid, the amount of the interest paid, or both?

Answer: DOL noted that this is an IRS issue and DOL had not consulted with the IRS about its answer. With that caveat, the DOL stated that, if the plan purchased a non-marketable obligation from a party-in-interest, then the excise tax would be determined on the purchase price paid and the amount of interest paid. However, if a plan purchased a non-marketable obligation from a third party, then the excise tax would be owed only on the amount of interest paid.

13. **Question:** Are state laws governing investment managers preempted?

Answer: The question is too broad and vague to answer. Without the specific law or provision, DOL could not answer the question or provide any analysis.

14. **Question:** Can a QDRO require a payment to the alternate payee's attorney, who is obligated by the QDRO to deposit those amounts in his trust account, and then distribute them pursuant to a prior court order?

Answer: No, the payment can only be made to an alternate payee as defined under ERISA, who then is treated as a beneficiary of the plan. The DOL noted that, after payment is made to the alternate payee, the alternate payee, of course, can turn over the money to the attorney. The DOL suggested that it might be proper to make the check payable to the alternate payee and mail it to the attorney if the order so provides.

15. **Question:** ERISA Section 403(d)(1) says that, in the case of a pension plan that is not subject to Title IV but is subject to Title I, the assets of the plan will be allocated in accordance with the provisions of ERISA Section 4044. Does this apply in the case of a defined contribution plan? If so, how?

Answer: On its face, section 4044 would also apply to defined contribution plans.

16. **Question:** Some states impose rules regarding the pass-through of voting rights to shareholders. Would those rules be preempted?

Answer: The question is too broad and vague to answer. Without the specific law or provision, DOL could not answer the question or provide any analysis.

17. **Question:** Assume that an individual accrued a benefit under a top-hat plan while a highly compensated employee (as that term is used in ERISA), but he later ceases to have such status. Does that mean that he cannot participate in the plan to the extent of his prior accruals and must forfeit those benefits?

Answer: The DOL declined to answer this question.

18. **Question:** Where a qualified plan makes a loan to a participant, is it a prohibited transaction for the plan trustee to require that the loan processing fee be deducted directly from the loan proceeds? Is the answer the same if the trustee gives the participant the choice between paying part of the loan proceeds to the trustee as the loan origination fee or paying the fee up front?

Answer: The DOL declined to answer this question, other than to say that they are looking at §406(b)(3) issues in another context, which might affect the questions posed.

19. **Question:** Is a state insurance department regulation preempted by ERISA where the regulation requires insurers to offer employees the option to continue group health insurance for 6 months after completion of the COBRA continuation period (so that employees may continue coverage for 24 months on termination of employment)? The regulation requires the option for a six-month continuation “upon completion of any continuation of coverage provided under COBRA.” Under the insurance department regulation, insured employers who are not subject to COBRA are only required to offer a six-month extension.

Answer: The state insurance department’s requirement that insurers offer to continue group insurance coverage beyond the continuation period required by COBRA and provide a conversion privilege at the end of the continuation period is preempted by ERISA. ERISA preempts laws which “relate to” employee benefit plans, with the relevant exception of laws which “regulate insurance.” According to the Supreme Court, a law regulates insurance if (1) it has the effect of transferring or spreading a policyholder’s risk; (2) the practice is an integral part of the policy relationship between the insurer and the insured; and (3) the practice is limited to entities within the insurance industry. See Pilot Life v. Dedeaux, 481 U.S. 41, 48-49 (1987). In Duclos v. Dynamics Corp., 12 E.B.C. 2648 (D.R.I. 1990), the court held that a state law requiring employers to continue divorced spouse’s medical benefits pursuant to a divorce decree at no additional premium was preempted by ERISA. Among other reasons, the regulation failed the second part of the Supreme Court’s test because it was not limited to requiring insurance policy provisions. Similarly, in Mimbs v. Commercial Life Insurance Company, 818 F. Supp. 1556 (S.D. Ga. 1993), the District Court held that state laws regarding continuation of coverage and the right to convert to an individual policy are preempted by ERISA.

The state insurance department’s continuation of coverage requirements are inconsistent with those of COBRA because the regulation requires a longer continuation period than COBRA. The regulation specifically requires the state continuation period to be tacked on to the end of the COBRA continuation period. This directly conflicts with COBRA proposed regulations, which provide that state continuation requirements are subsumed in the COBRA continuation period. IRS Proposed Reg. §1.162-26, Q&A 41(a). The state regulation appears to extend beyond the policy relationship between the insurer and the insured when the regulation must specifically mention COBRA to accomplish its ends. The DOL also noted that the case, Howard v. Gleason, 901 F.2d 1154 (2d Cir. 1990), is consistent with this analysis, as well as its Advisory Opinion Letter No. 82-006A.

20. **Question:** With respect to DOL Letter, dated March 21, 1996, to Honorable Eugene A. Ludwig, Comptroller of the Currency, which relates to fiduciary standards in connection with the utilization of derivatives in the management of a portfolio of assets of pension plans subject to ERISA, does the term “pooled fund”, as used in the first full paragraph on page 3 of the letter, include a fund whose underlying assets do not constitute plan assets (such as a mutual fund or a fund as to which equity participation by benefit plan investors is not significant as set forth in 29 C.F.R. § 2510.3-101(a)(2))?

Answer: Even if the assets in a pooled fund are not plan assets, a fiduciary would violate §404(a)(1)(B) if it invests in anything which is not prudently managed.

21. **Question:** Plan participants are exerting more and more pressure on plan administrators and their funding vehicles to accept telefax and E-mail transmittals of applications for distributions of benefits which include the REACT spousal waivers? Will the Department consider such “electronic” submissions as satisfying the “signed writing” requirements?

Answer: It is not DOL’s responsibility to regulate this area of Title I under the reorganization plan; the

responsibility is assigned to the IRS. Consequently, the DOL will not issue any advice. However, the DOL is interested in the issues presented by electronic communications to plan participants and, although no formal guidance will be forthcoming, a dialogue on these issues with practitioners is encouraged. In examining electronic communications, the DOL would want to know the following: (a) Why is the proposed electronic delivery of required information satisfactory under existing regulations? (b) Are participants who are targeted to receive the electronic communication capable of receiving and using electronic information — e.g., do the participants have access and training on computers and will a hard copy of information be available at no cost to participants? (c) What assurance is there of actual receipt by participants which would distinguish electronic delivery from posting in an area frequented by employees? (d) What are the demographics of the company's employees — i.e., extremely computer literate employees of a computer technology company or assembly employees of a manufacturing company? In order to arrange discussions on these issues, please call Mr. Canary at (202) 219-8515.