

PENDING DIVORCE DOES NOT REQUIRE SPOUSAL CONSENT FOR SERP PAYOUT

by

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In a terse opinion, a federal appeals court has rejected the claim of an executive's estranged wife that she was entitled to a portion of the executive's SERP benefits. The case is *Dickerson v. United Way of New York City*, 2009 U.S. App. LEXIS 23961 (2d Cir. 2009) (unpublished).

In *Dickerson*, the former wife of a United Way of New York City executive complained that her husband's former employer paid her husband approximately \$2 million under a SERP, without first obtaining her consent. In particular, the wife claimed the \$2 million payout constituted "joint marital assets" which should not have been distributed to her husband in light of ongoing divorce proceedings.

Although the SERP was presumably a defined benefit arrangement, the court concluded that ERISA's qualified joint and survivor annuity rules, which require a participant's spouse's consent to the election of a form of benefit other than a QJSA, did not apply. That was because the SERP was a top hat plan, and top hat plans are not subject to ERISA's survivor annuity rules. (The United Way actually denied that a SERP existed and maintained instead that the \$2 million was paid pursuant to a separation agreement, but the court assumed for purposes of its ruling that a SERP did exist.)

Because the wife failed to allege that she was a beneficiary of the alleged SERP, and because the court could not infer from her status as the participant's wife that she would have been entitled to a benefit under the plan given that the survivor annuity rules did not apply, the wife was not a participant or beneficiary with standing to sue for benefits under ERISA Section 502(a)(1). The wife therefore failed to state a claim under federal law, so her suit was dismissed.

Lesson. Some employers choose to include spousal consent rules in their top hat plans. Many include those rules not because they feel a legal obligation to do so, but because they wish to require such consent as a matter of plan design. *Dickerson* is a reminder that even though a top hat plan may be a companion to a qualified retirement plan, it is not legally necessary to mimic the survivor annuity or spousal consent rules applicable to the related qualified plan.

The case may also be useful precedent for the proposition that distributions from top hat plans need not be delayed simply due to the pendency of divorce proceedings. This is a bit unclear since the court's analysis was not detailed enough to know whether the result would have been different had the plan been given formal notice, prior to distribution, that the wife was seeking a division of property that would include an order to pay her plan benefits.

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Although the wife claimed that the employer knew of the divorce proceedings, neither the court's opinion, nor that of the district court below, note any allegation by the wife that she gave formal notice to the employer of the pending divorce, nor or her intention to seek an order requiring division of the SERP benefit.

Note: This article has been published in the *NASPP Advisor*, a publication of the National Association of Stock Plan Professionals (NASPP).