



Pension Benefit Guaranty Corporation  
1200 K Street, N.W., Washington, D.C. 20005-4026

July 23, 2020

[Former Spouse]



Re: Appeal 2019-██████; Case No. 195882; Republic Technologies International LLC –  
USWA Defined Benefit Plan (the “Plan”)

Dear [Former Spouse]:

The Appeals Board is responding to your appeal of PBGC’s May 14, 2019 determination. PBGC determined that a domestic relations order (“DRO”) dated ██████████, 2018, issued by the ██████████ Ohio (the “2018 DRO”) is not a qualified domestic relations order (“QDRO”) pursuant to section 206(d)(3)(B) of the Employee Retirement Income Security Act of 1974, *as amended* (“ERISA”).<sup>1</sup> You claim that PBGC’s determination is in error and that the 2018 DRO should be qualified and given effect.

### **Summary of decision**

We find that the 2018 DRO would require PBGC to provide a type or form of benefit, or any option, not otherwise provided under the Plan. Accordingly, the Appeals Board upholds PBGC’s determination of May 14, 2019, that the 2018 DRO is not a QDRO under ERISA § 206(d)(3)(B). We must therefore deny your appeal.

### **Background**

#### ***1. Statutory background***

PBGC provides pension insurance in accordance with ERISA.<sup>2</sup> If a plan sponsor of a tax-qualified defined benefit pension plan is unable to support its plan and the plan terminates, PBGC becomes the statutory trustee of the plan and pays benefits pursuant to the terms of the plan, subject to limitations set by Congress under ERISA.<sup>3</sup>

The Plan terminated on June 14, 2002, without sufficient assets to provide all benefits PBGC guarantees under ERISA, and PBGC became statutory trustee of the Plan. The terms of

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<sup>1</sup> Throughout this decision, we will use the section symbol “§” to replace the word “section.”

<sup>2</sup> ERISA §§ 4022(a), 4061.

<sup>3</sup> ERISA § 4042(c), 4042(d).

the Plan, the provisions of ERISA, and PBGC's regulations determine the benefits PBGC can pay.<sup>4</sup>

When PBGC becomes the statutory trustee of a terminated plan, PBGC collects participant data and plan documents from the former plan administrator.<sup>5</sup> PBGC then audits that information. PBGC relies on the information it receives from a former plan administrator unless PBGC's audit of that information shows that it is wrong, or a participant or beneficiary supplies PBGC with documents indicating that the information is incorrect.

## ***2. Factual background***

PBGC's records include the following information:

- [Participant] was born on [REDACTED];
- You were born in [REDACTED];
- [Spouse] was born in [REDACTED];
- [Participant] began accruing credited service under the Plan on [REDACTED];
- You and [Participant] married on [REDACTED];
- [Participant] was actively employed by Republic Technologies International, LLC when the Plan terminated on June 14, 2002;
- On [REDACTED], you and [Participant] divorced;
- [Participant] and [Spouse] married on [REDACTED];
- [Participant] was married to [Spouse] when he died on [REDACTED], 2018; and
- [Participant] did not commence benefit payments under the Plan before his death.

The Decree of Dissolution ending your marriage to [Participant] was signed on [REDACTED] by Judge [REDACTED], Ohio, and it incorporated a Separation Agreement signed by you and [Participant]. The Separation Agreement included a provision assigning you a 50% interest in the marital portion of [Participant's] pension benefit under the Plan.<sup>6</sup> PBGC received copies of the Decree of Dissolution and Separation Agreement in October 2005.

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<sup>4</sup> ERISA §§ 4022, 4061.

<sup>5</sup> ERISA §§ 4042, 4046.

<sup>6</sup> A copy of the Decree of Dissolution with the Separation Agreement is provided as Enclosure 1. Article 3, Paragraph H of the Separation Agreement addresses the parties' agreement regarding [Participant's] pension benefit under the Plan.

On January 5, 2006, [REDACTED], your attorney at that time, provided PBGC a draft DRO (“2006 draft DRO”) for review.<sup>7</sup> The 2006 draft DRO included provisions relating to your 50% share of [Participant’s] pension, the date on which you could commence your benefit and the term of your payment, and what would happen if either you or [Participant] predeceased the other.

In a January 24, 2006 letter, PBGC notified you (with copies to [REDACTED] and [Participant]) that it had completed its review of the 2006 draft DRO and explained that if it were submitted in the form of a certified order, PBGC would treat it as a qualified domestic relations order, or QDRO, under ERISA. The letter advised you that PBGC had interpreted the 2006 draft DRO to include the following points:

- **“Alternate Payee will receive 50% of the marital portion from [date of marriage] to plan termination, June 14, [2002].”**
- **“Alternate Payee may begin payments when Participant commences retirement[.]”**
- **“If participant predeceases the alternate payee, payments to the alternate payee will not be [a]ffected.”**
- **“If Alternate Payee predeceases the participant, prior to commencement, payments shall revert back to participant.”**

(Emphasis in Original.)

PBGC’s January 24, 2006 letter advised you to contact the PBGC representative identified if the agency’s interpretation was not what you intended. The letter explained that you might need to, among other actions, revise the 2006 draft DRO if the PBGC’s interpretation did not reflect your intent. There is no indication in PBGC’s records that you or [REDACTED] ever responded to the letter.

As noted above, [Participant] married [Spouse] in [REDACTED] and, [REDACTED] years later, died on [REDACTED], 2018.<sup>8</sup> When [Participant] died, he was [REDACTED] years old and no longer employed by RTI, but he had not yet elected to commence his pension benefit under the Plan. Despite the length of time between the date of the 2006 draft DRO and [Participant’s] date of death in 2018, no order intended to satisfy ERISA’s QDRO requirements was entered in the [REDACTED] court during that period.

Soon after [Participant’s] death, your attorney, [REDACTED], Esq., contacted PBGC. In a December 21, 2018 letter to PBGC, [REDACTED] stated that you had retained him to “prepare and file a [QDRO] . . . .” [REDACTED] enclosed a domestic relations order, signed on [REDACTED],

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<sup>7</sup> A DRO is typically a court order relating to the assignment of marital property rights to a former spouse under state domestic relations law. See ERISA § 206(d)(3)(B)(ii). Parallel provisions regarding QDROs also appear at section 414(p) of the Internal Revenue Code.

<sup>8</sup> [Participant] and [Spouse] had initiated divorce proceedings at the time of his death but were still married.

2018, by Judge [REDACTED],  
Ohio, i.e., the 2018 DRO.<sup>9</sup>

The terms of the 2018 DRO were similar to those of the 2006 draft DRO submitted to PBGC. Like the 2006 draft DRO, the 2018 DRO assigned you 50% of the marital portion of [Participant's] benefit, meaning 50% of the benefit he earned during your marriage until Plan termination.<sup>10</sup> Under the 2018 DRO, you could elect your benefit form and your benefit commencement date, subject to PBGC's qualification of the order. The 2018 DRO additionally provided that [Participant's] death would not affect your separate benefit and that you would be treated as [Participant's] surviving spouse for purposes of the Plan's pre- (and post-) retirement survivor benefits, "based on all of the benefit in which [Participant] retains a separate interest."<sup>11</sup>

### **Issue presented by your appeal of PBGC's determination**

On May 14, 2019, PBGC determined that the 2018 DRO is not a QDRO pursuant to section 206(d)(3)(B) of ERISA.<sup>12</sup> PBGC explained its determination as follows, in relevant part:

The post-mortem DRO seeks to require PBGC to offer a type or form of benefit, or any option not otherwise provided by the plan. 29 U.S.C. [United States Code] § 1056(d)(3)(D)(i). The participant is deceased and was married [to Spouse] at the time of his death. As there was no QDRO in place (that is, one qualified by PBGC) at the time of the participant's death, his spouse at the time of death was entitled to the qualified pre-retirement survivor annuity (QPSA) as a beneficiary. Any QDRO attempting to require PBGC to pay either a separate interest benefit or a death benefit to any other beneficiary will fail to be a QDRO because it seeks to require PBGC to reannuitize a benefit over a different measuring life. As such, it seeks to require PBGC [to] offer a "type or form of benefit, or any option not otherwise provided by the plan." 29 U.S.C. § 1056(d)(3)(D)(i).

Moreover, the Department of Labor, in the preamble to its regulations on QDROs, makes clear that "a domestic relations order that is received after the annuity starting date and that requires the allocation to an alternate payee of some or all of the

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<sup>9</sup> Domestic Relations Order dated [REDACTED], 2018, provided as Enclosure 2.

<sup>10</sup> We note that the 2006 draft DRO stated that the alternate payee would be entitled to 50% multiplied by the number of months of [Participant's] Plan participation from the [REDACTED] marriage date through the [REDACTED] divorce date, divided by [Participant's] total months of Plan participation. Because the Plan terminated on June 14, 2002, [Participant] did not earn any months of Plan participation after that date.

<sup>11</sup> See Enclosure 2, § 10.

<sup>12</sup> Determination of May 14, 2019, provided as Enclosure 3.

death benefit that, under the form of benefit in effect, is payable to another beneficiary” will fail to satisfy this element of ERISA’s QDRO requirements. 75 Fed. Reg. 111, p. 32848. Consequently, there are no benefits available to be assigned to any alternate payee at this time.

We note that PBGC’s determination of May 14, 2019, is consistent with chapter 6, section 6.6-3, of the agency’s Operating Policy Manual. Subsection F of the policy, regarding PBGC’s review of post-mortem domestic relations orders, states: “PBGC will not fail to qualify a post-mortem order solely for the reason that the order was issued by a court or appropriate entity on or after a participant’s death. However, if the participant is married at his or her death . . . , PBGC will not qualify the order.”<sup>13</sup>

In your appeal, you assert that PBGC’s determination is incorrect. You argue the following:

I believe the decision is incorrect because the legal papers were signed by both myself my ex-husband and the judge + lawyer stating that I was to Always remain the beneficiary to this retirement fund AND I was to receive 50% of his pension. Also his “present” wife AND [Participant] were in the process of their own divorce at the time of his death. I also have ■ children to the man, as she has ■■■■.

(Emphasis in Original.)

Pursuant to PBGC’s regulation at 29 Code of Federal Regulations (“CFR”) § 4003.57, the Appeals Board notified [Spouse] by letter on September 4, 2019, that it was considering changing PBGC’s determination and qualifying the 2018 DRO under section 206(d)(3) of ERISA. The Appeals Board’s letter stated, in part, the following:

Contrary to PBGC’s May 2019 determination, the Appeals Board is considering that there is no basis to determine that any annuity has started with respect to the benefit [Participant] earned under the Plan. While [Participant] was eligible to commence benefit payments prior to his death, [Participant] did not commence benefit payments while he was alive. Following [Participant’s] death, a survivor annuity could have been immediately payable, but no survivor annuity has been paid to either you or [Spouse]. Therefore, the Board is considering finding that there has been no annuity starting date, as defined in ERISA section 205(h)(2)(A), and no reannuitization would be required if the 2018 Order is qualified.

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<sup>13</sup> See PBGC Operating Policy Manual (“OPM”), chapter 6, section 6.6-3, subsection F, paragraph 1(b) (“Post-mortem orders”), provided as Enclosure 4.

The Appeals Board provided you a copy of the September 4, 2019 letter it sent to [Spouse]. In your September 16, 2019 response to the Appeals Board, you enclosed, among other documents, a list of additional docket entries in the pending divorce between [Participant] and [Spouse].<sup>14</sup> [Spouse's] attorney also responded to the Appeals Board's September 4, 2019 letter, but no additional documentation was provided with that response.<sup>15</sup>

The issue presented by your appeal of PBGC's determination is whether PBGC correctly determined that the 2018 DRO would require PBGC to provide a type or form of benefit, or any option, not otherwise provided under the Plan, in violation of ERISA § 206(d)(3)(D)(i). For the reasons explained below, the Appeals Board finds that it would and upholds PBGC's determination of May 14, 2019.

## Discussion

### *Relevant statutory and regulatory provisions*

#### *1. The joint and survivor forms of benefit for married participants*

Under ERISA, all defined benefit pension plans like the Plan must provide pension benefits of married participants who retire and commence their benefit on their annuity starting date in the form of a **qualified joint and survivor annuity** ("QJSA").<sup>16</sup> A QJSA is an annuity for the life of the participant and a survivor annuity for "the life of [the participant's] spouse" that is *at least* 50 percent of the amount of the annuity payable for the joint lives of the participant and spouse.<sup>17</sup>

Additionally, such plans are required to provide **qualified preretirement survivor annuities** ("QPSA") to the surviving spouses of vested participants who die before their annuity starting dates.<sup>18</sup> Like the survivor benefit under a QJSA, described above, a QPSA is an immediate annuity for the life of the participant's surviving spouse.<sup>19</sup> If a married participant dies after their earliest retirement age, the annuity payments to the surviving spouse may not be

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<sup>14</sup> On September 30, 2019, you provided the Appeals Board with a PBGC Retirement Estimate listing [Participant] as the participant and you as the beneficiary. We note that PBGC prepared the Retirement Estimate on [REDACTED], which was before your [REDACTED] divorce from [Participant].

<sup>15</sup> In a September 17, 2019 letter to the Appeals Division, [Spouse's] attorney [REDACTED] stated: "This is simply a case where the party, and/or attorney for [Former Spouse], neglected to secure QDRO benefits prior to the death of [Participant] . . . We consider this matter closed."

<sup>16</sup> ERISA §§ 205(a)(1) and 205(d)(1). ERISA defines "annuity starting date" for benefits payable as an annuity as "the first day of the first period for which an amount is payable as an annuity." ERISA § 205(h)(2)(A)(i).

<sup>17</sup> ERISA § 205(d)(1).

<sup>18</sup> ERISA § 205(a)(2). "If the participant is not alive on the annuity starting date, the surviving spouse must receive a QPSA." See 26 CFR § 1.401(a)-20 Q&A 10(a).

<sup>19</sup> See 26 CFR § 1.401(a)-20 Q&A 18.

less than the amounts payable as a survivor annuity benefit under the QJSA, assuming the participant retired with an immediate QJSA on the day before the participant's death.<sup>20</sup>

A married participant's pension benefit is actuarially converted from the single life annuity form of benefit to the plan's joint form of annuity, typically the joint and 50% survivor annuity. In that case, the surviving spouse's QPSA benefit is 50% of the amount otherwise payable under the plan's QJSA during the joint lives of the participant and the spouse. For a participant who dies after their earliest retirement age, as in this case, the surviving spouse's QPSA benefit is calculated as of the participant's death.<sup>21</sup> If payments to the surviving spouse commence after the earliest retirement age, the plan must provide for reasonable actuarial adjustment to reflect the delayed payment.<sup>22</sup>

ERISA defines the QPSA benefit to be provided to the *surviving spouse of a participant* who dies before the annuity starting date.<sup>23</sup> A participant's surviving spouse is different from the participant's *former spouse*. A participant's former spouse is generally not entitled to the benefits of a participant under the anti-alienation rule, discussed next, except as provided in an assignment under a QDRO, discussed below. Thus, under section 206(d)(3)(F) of ERISA, "*to the extent provided in any QDRO,*" a *former spouse* of a participant may be treated as a surviving spouse of the participant for purposes of the entitlement to a survivor annuity benefit under a QPSA (or QJSA) under section 205.

## **2. The anti-alienation rule and the exception for QDROs**

Under the "anti-alienation rule" of section 206(d)(1) of ERISA, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Benefits may not be assigned or alienated by either a participant or a beneficiary.

ERISA provides a relevant exception to the anti-alienation rule. Section 206(d)(3)(A) states that the anti-alienation rule under section 206(d)(1) does not apply to a domestic relations order, or DRO, that is determined to be a qualified domestic relations order, or QDRO. Under ERISA, a QDRO is defined as a DRO that "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan . . ."<sup>24</sup>

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<sup>20</sup> ERISA § 205(e)(1); 26 CFR § 1.401(a)-20 Q&A 18. Under ERISA, "earliest retirement age" means "the earliest date on which, under the plan, the participant could elect to receive retirement benefits." See ERISA § 205(h)(3).

<sup>21</sup> See 26 CFR § 1.401(a)-20 Q&A 19 ("The QPSA is calculated as of the earliest retirement age if the participant dies before such time, or at death if the participant dies after the earliest retirement age"); IRS Publication 6391, at 11, line d.; 2015 WL 6675089 (April 2015) ("The QPSA is calculated . . . as of the date of death if the participant dies after the earliest retirement age").

<sup>22</sup> IRS Publication 6391, at 11, line d.; line c. i. ("Where the participant dies after the earliest retirement age, the plan must allow the spouse to direct commencement of payments within a reasonable time after the participant's death").

<sup>23</sup> See ERISA §§ 205(a)(2), 205(e)(1).

<sup>24</sup> See ERISA § 206(d)(3)(B)(i) (definition of QDRO).

To be a QDRO, a DRO must satisfy certain requirements. Under section 206(d)(3)(D) of ERISA, a DRO may be a QDRO, only if:

- (1) The DRO “does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,”
- (2) The DRO “does not require the plan to provide increased benefits (determined on the basis of actuarial value), and”
- (3) The DRO “does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.”

The U.S. Department of Labor (“DOL”) has issued a regulation clarifying certain timing issues regarding DROs and QDROs. The DOL regulation sets forth certain basic principles on the timing of DROs and the applicable requirements and protections identified above under section 206(d)(3)(D) of ERISA. Under the “timing principle” embodied in section 2530.206(c)(1) of the regulation, a DRO will not necessarily fail to be treated as a QDRO, “solely because of the time at which it is issued.”<sup>25</sup> And, under section 2530.206(d)(1) of the regulation, a DRO will be a QDRO only if the order satisfies the protections applicable under section 206(d)(3) of ERISA.<sup>26</sup>

The regulation uses examples to illustrate the foregoing principles. Under Examples 1, 2, and 3 of section 2530.206(c)(2) of the regulation, illustrating the timing principle, a DRO will not fail to be a QDRO solely because it is issued after a participant’s death, after the participant and his spouse divorce, or after the participant’s annuity starting date.<sup>27</sup> In other words, the timing of a post-mortem DRO would not necessarily violate section 206(d)(3)(D)(i) of ERISA, which prohibits a DRO from requiring a pension plan “to provide any type or form of benefit, or any option, not otherwise provided under the plan.”<sup>28</sup>

Similarly, under Examples 1, 2, 3 and 4 of the section 2530.206(d)(2) of the regulation, a DRO will be a QDRO only if the DRO satisfies the requirements and protections made applicable by ERISA § 206(d)(3)(D), quoted above. But, in the preamble to the regulation, the DOL indicates that a DRO issued after a participant’s annuity starting date could fail to meet the requirements of section 206(d)(3)(D)(i) of ERISA. The DOL states the following, part of which was quoted in PBGC’s determination of May 14, 2019:

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<sup>25</sup> 29 CFR § 2530.206(c)(1) (emphasis added).

<sup>26</sup> 29 CFR § 2530.206(d)(1). The third principle under the regulation provides that a DRO will not fail to be treated as a QDRO solely because the DRO is issued after, or revises, another DRO or QDRO. *See* 29 CFR § 2530.206(b)(1). This principle is not relevant to the issues raised by your appeal.

<sup>27</sup> 29 CFR § 2530.206(c)(2).

<sup>28</sup> ERISA § 206(d)(3)(D)(i).



With regard to the principle, expressed above, that a [DRO] issued after the annuity starting date does not violate the requirements of section 206(d)(3)(D)(i) merely because the order requires the allocation of some or all of the participant's determined monthly benefit payment to an alternate payee, the Department, based on its review of sections 206 and 205 of ERISA, the case law, and other relevant guidance, is of the view that such a principle does not apply to a [DRO] that is received after the annuity starting date and that requires an allocation to an alternate payee of some or all of the death benefit that, under the form of benefit in effect, is payable to another beneficiary.

An example of this is the plan's receipt of a [DRO] after the annuity starting date of a QJSA that assigns to the participant's former spouse a shared payment of the benefits payable to a participant's current spouse's survivor benefits under the QJSA.<sup>29</sup>

Thus, in discussing the circumstances under which the timing principle would not apply, the DOL relied on ERISA §§ 205 and 206, discussed above, and case law in which the Supreme Court described the "the statutory object" of ERISA § 205 as ensuring a "stream of income to surviving spouses."<sup>30</sup> In addition, the DOL cited three circuit court cases holding that surviving spouse benefits under the QJSA irrevocably vest in the surviving spouse when the participant retires.<sup>31</sup>

### ***Relevant Plan provisions***

The Appeals Board reviewed the terms of the Plan in effect when the Plan terminated. The Plan document in effect when the Plan terminated was the Republic Technologies International, LLC – USWA Defined Benefit Plan, Amended and Restated, Effective September 8, 1998.<sup>32</sup>

The Plan's QPSA provisions are contained in sections 6.01 and 6.02 of the Plan, entitled "Pre-Retirement Survivor Annuity Coverage" and "Surviving Spouse's Benefit," respectively. Pre-Retirement Survivor Annuity Coverage is "automatically applicable" for a married participant who was accruing Continuous Service after September 8, 1998, and who had completed at least five years of Continuous Service.<sup>33</sup>

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<sup>29</sup> 75 Fed. Reg. 32846, 32848 (June 10, 2010) ("Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders"). A copy of the final regulation and the preamble thereto is provided as Enclosure 5.

<sup>30</sup> 75 Fed. Reg. at 32848, footnote 6 (*citing Boggs v. Boggs*, 520 U.S. 833, 843 (1997)).

<sup>31</sup> *Id.* (*citing Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153, 157 (4<sup>th</sup> Cir. 1999); *Rivers v. Central & S.W. Corp.*, 186 F.3d 681, 683 (5<sup>th</sup> Cir. 1999); *Carmona v. Carmona*, 603 F.3d 1041, 1059 (9<sup>th</sup> Cir. 2008)).

<sup>32</sup> Excerpts from the Plan are provided as Enclosure 6.

<sup>33</sup> *See* section 6.01(a)(1) of the Plan, Enclosure 6.

Under the Plan, the Surviving Spouse of a Participant who dies while Pre-Retirement Survivor Coverage is in effect is eligible to commence the benefit in the month elected by the Surviving Spouse in a benefit application, but not later than the month in which the Participant would be eligible to receive a Deferred Vested Pension.<sup>34</sup> The Plan's Pre-Retirement Survivor Annuity is payable for the life of the Surviving Spouse.<sup>35</sup> The Plan defines the Surviving Spouse for purposes of section 6.01 of the Plan as the "person to whom the Participant was married as of the date of the Participant's death," if they were married for at least one year preceding the death.<sup>36</sup>

The amount of the Plan's Pre-Retirement Survivor Annuity in the case of a Participant who retired with a Deferred Vested Pension after age 55, but who elected to defer—and who died before—benefit commencement, is the amount determined under section 5.03(b) of the Plan "as though the Participant had elected to have Pension payments commence with the first of the month following the date of death," or a later date as specified by the Surviving Spouse, multiplied by a plan factor.<sup>37</sup> The amount of the QPSA benefit under the Plan satisfies ERISA's requirement that the surviving spouse will not receive less than the 50% survivor benefit under the Plan's QJSA.

Additionally, the Plan does not provide any method of electing a new annuity starting date after an annuity starting date has been established, and the Plan does not provide that one measuring life can be substituted for another following an annuity starting date.

### *Analysis of your appeal*

#### *1. [Spouse] became entitled to the Plan's QPSA death benefit when [Participant] died*

When [Participant] died on [REDACTED], 2018, the Plan's QPSA under section 6.01(a)(1) was automatically applicable, as he was a married participant who was accruing Continuous Service after September 8, 1998, and who had completed at least five years of Continuous Service. He was age [REDACTED] at his death and had passed his earliest retirement age of 55. He was married to [Spouse] at his death and had been married to [Spouse] since [REDACTED], so the one-year marriage requirement under ERISA and the Plan was satisfied. Accordingly, under section 6.01(e) of the Plan, in the absence of a QDRO, [Spouse] was [Participant's] surviving spouse for purposes of the Plan's Pre-Retirement Survivor Annuity. She therefore became immediately entitled to the death benefit payable under the Plan's QPSA, or Pre-Retirement Survivor Annuity.

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<sup>34</sup> See section 6.01(b)(3) of the Plan, Enclosure 6. Participants are eligible to receive a Deferred Vested Pension at age 65 unless a Participant elects early commencement under section 5.03(d), which is essentially age 55. See section 7.02(d) of the Plan, Enclosure 6.

<sup>35</sup> See section 6.01(b) (flush language), Enclosure 6.

<sup>36</sup> It may also include a former spouse of the Participant to the extent provided in a QDRO, within the meaning of section 11.01(d) of the Plan. See section 6.01(e) of the Plan, Enclosure 6.

<sup>37</sup> See section 6.01(c)(2) of the Plan and Appendix D, Enclosure 6. The factor would be one-half the 50% factor in Appendix D, based on [Participant's] and [Spouse's] ages on his date of death, [REDACTED], 2018.

The amount of [Spouse's] survivor annuity benefit is prescribed by ERISA and the Plan. Under ERISA § 205(e)(1)(A), [Spouse's] survivor annuity benefit payments cannot be less than the amounts payable under the Plan's QJSA if [Participant] had died with an immediate QJSA on [the day before Participant's death]. [Spouse's] survivor annuity benefit is calculated as of [Participant's] death on [REDACTED], 2018, as if [Participant] had retired with an immediate QJSA on [the day before his death].<sup>38</sup>

Because the Plan's QJSA is a joint and 50% survivor annuity form of benefit, [Spouse's] QPSA benefit payments cannot be less than 50% of the amount of the QJSA benefit payments that would have been payable during [Participant's] life. Because [Spouse] will commence her payments after [Participant's] early retirement age, her benefit will be actuarially adjusted to reflect the delayed payment.

**2. *PBGC cannot qualify the 2018 DRO because it would require the Plan to provide a type or form of benefit, or any option, not otherwise provided under the Plan.***

As quoted above, PBGC determined that the 2018 DRO would not satisfy section 206(d)(3)(D)(i) of ERISA because it would require PBGC to provide a type or form of benefit, or any option, not otherwise provided under the Plan. PBGC reasoned that because the 2018 DRO would require PBGC to pay you a separate interest benefit for your life, as well as the death benefit assigned to [Spouse], the 2018 DRO would require the agency to reannuitize [Spouse's] QPSA benefit over a different measuring life, namely, yours. PBGC also reasoned that the 2018 DRO would require the allocation to you of some or all the death benefit that is payable to [Spouse].

The preamble to the DOL regulation states that “any [DRO] received by a plan after the original annuity starting date of the participant that would require reannuitization with a new annuity starting date would violate section 206(d)(3)(D)(i), unless the plan specifically provides such an option.”<sup>39</sup> The preamble gives one example of what would be deemed a reannuitization:

Examples of an order requiring reannuitization with a new annuity starting date would include an order issued after the annuity starting date directing the plan to substitute one measuring life for another or directing the plan to change the form of benefit, such as from a single life annuity to a [QJSA] with a death benefit or from an annuity to a lump sum payment.<sup>40</sup>

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<sup>38</sup> See 26 CFR § 1.401(a)-20 Q&A 19; IRS Publication 6391, at 11, Line d.; 2015 WL 6675089 (April 2015).

<sup>39</sup> 75 Fed. Reg. at 32848, Enclosure 5. As discussed above, the Plan does not permit reannuitization.

<sup>40</sup> *Id.*

As explained above, under the DOL regulations, a DRO does not fail to be a QDRO *solely* because of the time it is issued.<sup>41</sup> Thus, a DRO may be a qualified DRO, or QDRO, even if it is issued after a participant's annuity starting date or death.<sup>42</sup> But, as stated in the regulation preamble, this timing principle would not apply to a DRO received after the annuity starting date if it either requires "reannuitization [of the benefit] with a new annuity starting date" or assigns to an alternate payee "some or all of the death benefit that, under the form of benefit in effect, is payable to another beneficiary."<sup>43</sup> Such a DRO would violate section 206(d)(3)(D)(i) of ERISA, because it would require "a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan."<sup>44</sup>

Although the regulation's preamble expressly addressed the potential inapplicability of the timing principle when a DRO is received after the annuity starting date, the timing principle is not limited to cases in which a DRO is received after the annuity starting date. As discussed above, the examples in the regulation illustrating the timing principle include orders issued after the annuity starting date, divorce, and death. And while the preamble discusses an exception to the timing principle involving a DRO received after the annuity starting date, neither the regulation nor the preamble forecloses a similar exception to the timing principle when the DRO is received after a participant's death.

For instance, if a DRO is received after a married participant's preretirement death, the Appeals Board concludes, consistent with PBGC policy, that the timing principle does not apply if it requires PBGC to alter the surviving spouse's QPSA death benefit.<sup>45</sup> As explained above, under ERISA § 205(a), "*a [QPSA] shall be provided to the surviving spouse*" if a participant dies before the annuity date with a surviving spouse. The QPSA is an immediate survivor annuity for the life of the surviving spouse.<sup>46</sup> In cases in which the participant dies after their earliest retirement age, the payments may not be less than the amounts payable as a survivor annuity under the QJSA, as if the participant retired with an immediate QJSA on the day before their death. Accordingly, the Board finds that a DRO received after a participant's preretirement death would violate ERISA § 206(d)(3)(D)(i) if it assigns the alternate payee some or all of the QPSA death benefit payable to the participant's surviving spouse.

In addition, ERISA defines the "annuity starting date" for both participants and surviving spouses as "the first day of the first period for which an amount is payable as an annuity."<sup>47</sup> It is

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<sup>41</sup> 29 CFR § 2530.206(c)(1).

<sup>42</sup> 29 CFR § 2530.206(c)(2) (Examples 1 and 3).

<sup>43</sup> 75 Fed. Reg. at 32848.

<sup>44</sup> *Id.*

<sup>45</sup> See PBGC OPM, chapter 6, section 6.6-3, subsection F, paragraph 1(b) ("[I]f the participant is married at his or her death . . . PBGC will not qualify the order."), Enclosure 4.

<sup>46</sup> 26 CFR § 1.401(a)-20 Q&A 19; IRS Publication 6391, at 11, Line d.; 2015 WL 6675089 (April 2015).

<sup>47</sup> ERISA § 205(h)(2)(A)(i); 26 CFR § 1.401(a)-20 Q&A 10(b)(5).

the “first date for which an amount is paid, not the actual date of payment.”<sup>48</sup> The surviving spouse of a participant who dies before retirement is entitled to the QPSA—an *immediate* annuity for the life of the surviving spouse, calculated as of the participant’s date of death.<sup>49</sup> Accordingly, the first day of the month following a participant’s date of death can be treated as the surviving spouse’s annuity starting date if it is the first day of the first period for which an amount is payable as an annuity.<sup>50</sup> Hence a DRO received after a surviving spouse’s annuity starting date that directs PBGC to substitute an alternate payee’s life for the surviving spouse’s life would require reannuitization with a new annuity starting date and violate ERISA § 206(d)(3)(D)(i).

As discussed above, the 2018 DRO assigned you a 50% separate interest in [Participant’s] pension benefit; it provided that his death would not affect your assignment; and it provided that you would be treated as [Participant’s] surviving spouse for the Plan’s QPSA benefit to the extent of [Participant’s] remaining separate interest.<sup>51</sup> Because [Spouse] is entitled to be paid her QPSA benefit retroactively to the first of the month following [Participant’s] death under PBGC policy, the 2018 DRO would require PBGC to substitute your measuring life for [Spouse’s] and assign you all the QPSA death benefit payable to her with a new annuity starting date.

The Appeals Board decides that PBGC cannot, after [Participant’s] death, qualify the 2018 DRO and implement the 2018 DRO’s assignments. Even if the 2018 DRO would not require reannuitization, the assignment of [Spouse’s] QPSA benefit to you would violate ERISA and the terms of the Plan. Under ERISA and the Plan, PBGC must provide [Spouse’s] QPSA death benefit as if [Participant] retired on [the day before his death], with an immediate QJSA.<sup>52</sup> As noted above, three circuit courts have found that a surviving spouse’s death benefit under a QJSA irrevocably vests on the participant’s annuity starting date. The QPSA death benefit is the survivor portion of the QJSA, calculated as of the participant’s date of death. Based on those authorities and a more recent circuit court case to the same effect, the Appeals Board finds that QPSA benefits similarly vest in the surviving spouse when a participant dies before retirement,

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<sup>48</sup> *Cf.*, 26 CFR § 1.401(a)-20 Q&A 10(b)(2) (“Thus, if participant A is to receive annuity payments as of the first day of the first month after retirement but does not receive any payments until three months later, the annuity starting date is the first day of the first month. For example, if an annuity is to commence on January 1, January 1 is the annuity starting date even though the payment for January is not actually made until a later date.”).

<sup>49</sup> 26 CFR § 1.401(a)-20 Q&A 19; IRS Publication 6391, at 11, Line d.; 2015 WL 6675089 (April 2015). If the surviving spouse defers payment of the immediate annuity, the surviving spouse is entitled to the actuarial equivalent of the benefit at the later date.

<sup>50</sup> 26 CFR § 1.401(a)-20 Q&A 10(b)(2); *see also* PBGC OPM Chapter 5, Section 5.2-4 (“Annuity Starting Dates”), Subsection D.6. (“Retroactive Annuity Starting Dates” – “Qualified Preretirement Survivor Annuity”) (“A QPSA benefit may be paid retroactively to the first of the month following a participant’s death, if the completed application, including all required documentation, is received within 180 days from the date of the letter sending the application to the surviving spouse.”)

<sup>51</sup> *See* Enclosure 2, §§ 3, 8, and 10.

<sup>52</sup> *See* ERISA § 205(a)(2); ERISA § 205(e)(1)(A)(i); *see also* section 6.01(a) of the Plan.

absent a waiver of the QPSA under ERISA § 205(c)(1)(A) or a pre-mortem QDRO assigning the survivor benefit to a former spouse.<sup>53</sup>

In summary, while the 2018 DRO does not fail to be qualified solely because it was received after [Participant's] death, PBGC's post-mortem qualification of the 2018 DRO would cause the substitution of your measuring life for [Spouse's] and assign [Spouse's] vested QPSA death benefit to you, fundamentally altering the benefit entitlement for surviving spouses under ERISA and the Plan that became immediately effective on [Participant's] death—months before the 2018 DRO was presented to PBGC. Consequently, PBGC cannot qualify the 2018 DRO because it would require the Plan to provide a type or form of benefit, or any option, not otherwise provided under the Plan, violating section 206(d)(3)(D)(i) of ERISA.<sup>54</sup> The Appeals Board upholds PBGC's determination of May 14, 2019, and denies your appeal.

### Decision

Having applied the terms of the Plan, the provisions of ERISA, and PBGC's regulations to the facts in your case, the Appeals Board finds insufficient basis for changing PBGC's determination of May 14, 2019, that the 2018 DRO was not a QDRO under section 206(d)(3)(B) of ERISA. Therefore, we are denying your appeal.

This is the agency's final decision in this matter. You may seek review of this decision in an appropriate United States District Court. If you have any questions, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,



James L. Eggeman  
Member, Appeals Board

Enclosures (6):

1. Decree of Dissolution dated [REDACTED], including Exhibit A—Separation Agreement (13 pages)
2. Domestic Relations Order dated [REDACTED], 2018 (5 pages)
3. Determination dated May 14, 2019 (3 pages)
4. PBGC Operating Policy Manual, Chapter 6, Section 6.6-3 (12 pages)

<sup>53</sup> See *Vanderkam v. Pension Benefit Guar. Corp.*, 943 F. Supp. 2d 130, 141 (D. D.C. 2013), *aff'd sub nom* 776 F.3d 883 (D.C. Cir. 2015).

<sup>54</sup> See 75 Fed. Reg. at 32848, Enclosure 5. We note that the 2018 DRO provides that “Nothing in this Order shall require PBGC: . . . (b) To provide any type or form of benefit or any option not paid by PBGC with respect to the Plan.” See Enclosure 2. As quoted above, under PBGC's policy on post-mortem DROs, PBGC does not qualify such DROs for the benefit of a former spouse if the participant is married at their death. See Enclosure 4.

5. 75 Fed. Reg. 32846 (“Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders”) (7 pages)
6. Excerpts from the Republic Technologies International LLC – USWA Defined Benefit Plan (45 pages)