



GETTING A DOMESTIC RELATIONS ORDER IMPLEMENTED WITHOUT WRITING AN ORDER

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Practice Tip of the Month:

How to avoid the embarrassment of negotiating a settlement using a domestic relations order when the plan provider refuses to recognize or comply with a domestic relations order?

It seems almost unbelievable today, but it is possible to run into plan providers who refuse to comply with a domestic relations order. In most cases these will be public employers, but there are also many labor union and executive plans that are not subject to compliance with ERISA rules. The Indiana Retirement System, which covers State employees, refuses to honor orders because they feel they are contradictory to State law barring liens on retirement assets for public employees. Obviously, this could be changed by the State legislature but unless there is some kind of action on the part of an organized lobbying group, concerned with the welfare of former spouses, this is not going to happen. Many members of labor unions have retirement savings or annuity plans that are exempt from the rules of ERISA and IRS (non-complying plans) as do companies who provide special plans for highly compensated employees. The trade-off is that these private plans may not always enjoy the same tax benefits of an ERISA covered plan nor do the employees always have the same level of protection for their funds, but the plan providers have much more freedom.

In the case of the public plans, they are exempt from federal ERISA compliance by law, so it will take a state appellate level case law change, or the legislature, to bring these plans into compliance with the existing state statutes which recognize retirement assets as marital property subject to either equitable distribution or community property laws. In Florida, the State public employee plans and most county plans recognize domestic relations orders but there are a number of cities (i.e., Miami Beach (not Miami), Hollywood, etc. who refuse to do so. Again, only a concerted effort on the part of interest groups will bring about any change.

As an attorney, before you include any retirement asset in your settlement negotiations, first check with the plan to verify that they will accept orders. If you have prepared orders for a plan provider in the past and had them accepted, check again. Many providers are in the process of changing their benefit packages. Also, many States have defined benefit plans for employees for which they will accept orders but also have non-complying contributory retirement savings annuity plans that are not subject to orders. Always satisfy yourself that what you propose to do is doable.

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Not many attorneys are aware that in some special situations involving federal and military pensions it is possible to structure the final decree with enough specificity to avoid the drafting of a separate order. This would apply to Uniformed Services Former Spouse's Protection Act Orders and Domestic Relations Orders directed to federal employers. There are many more federal non-military plans than just the U.S. Civil Service and Federal Employees Retirement System (FERS). The U.S. State Department has a plan as does the U.S. Public Health Service and I am sure other agencies, of which I have never heard, that have their own special plans.

In order to avoid the preparation of a separate order you must first contact the agency and get from them their requirements for acceptance of a domestic relations order. Each plan has their own. The military requires numerous specific recitations in the final decree and the completion of a number of Department of Defense forms by the alternate payee before they will implement the order. But they will do so without a separate Uniformed Services Former Spouse's Protection Act Order if all the ducks are in a row. The Federal Office of Personnel Management has a large handbook that can be purchased that covers every conceivable situation dealing with U.S. Civil Service and FERS plans. The Federal Thrift Plan is managed separately, so you will have to get their guidelines if a Thrift Plan is included in the distribution.

The benefit to your client is that he or she will not have to incur the expense of the preparation of a separate order. Obviously, this will mean more work for you if you usually have a service prepare the order and pass on the expense to your client, but as we all know, there are occasions when getting paid is doubtful, and paying for the preparation of the order by a service, out of your own pocket, may just be money you will never see again.

Even though the plan provider is providing you with their guidelines, it is probably not a good idea for you to try to structure the final decree to meet their specifications, while protecting the interests of your client at the same time, if you are not comfortable drafting domestic relations orders. That

exercise can turn into a nightmare, as many agencies will not pre-approve a final decree and if the decree is rejected by the plan you will have to go back for an amended final decree which seems a little riskier than going back to the judge with some changes in a domestic relations order to meet the plan's requirements. Also, many clients do not like their dirty laundry being aired to their employer as can be the case when the whole final decree is submitted.

I am giving away some trade secrets here but if you employ an expert to write your settlement language dealing with the retirement asset distributions, you can advise that you want to include all the language necessary to incorporate into the settlement that will meet the guidelines of the plan to accept the incorporated settlement agreement in the final decree as a domestic relations order. Not all will do this, and most will charge more than they usually charge for just the settlement language, but it will be much cheaper than preparing a separate order after or coincident with the final decree.

Whether or not you ever attempt to incorporate a federal domestic relations order in your final decree is up to you. It really depends on how comfortable you are working in the area of pensions and defined contribution accounts. Also, some plans, like the U.S. Military Reserve or the National Guard, are going to take a little basic arithmetic skill to figure out what the non-participant spouse would be entitled to receive under the point system they use to compute a pension. But, as necessity is the mother of invention, at least you know that if the financial need presents itself, under certain circumstances, there are alternatives to drafting a separate order.

Model Property Settlement Language

Download our settlement language form and let the experts at LawDATA, Inc. **draft model property settlement language** (<http://www.lawdatainc.com/SetLanForm.pdf>) that deals specifically with the pension plan to which the order is addressed and the facts of your case.

Mr. Commerford has been active in the valuation of pensions and the preparation of Domestic Relations Orders for his attorney clients since the founding of LawDATA, Inc. in 1984. He has presented Continuing Legal Education programs, dealing with the valuation and distribution of retirement assets incident to divorce cases, for State Bar Associations throughout the country and written many articles on the subject for legal publications.

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