



AN OVERVIEW OF PUBLIC EMPLOYEE PENSION PLAN DOMESTIC RELATIONS ORDERS

Introduction:

As most of you are aware, the Retirement Equity Act of 1984, the federal legislation that created Qualified Domestic Relations Orders, only applied to private employers whose benefits were governed by ERISA. The term "Qualified" means that the order addresses the rules established by the IRS and the Department of Labor that permit private plans to distribute a portion of the benefits to another individual incident to a domestic relations court action. Public plans (federal, state and local) were not affected by this legislation. Over the years, most public plan providers have had to change their rules (either in response to legislation or case law) to permit the acceptance of domestic relations orders and allow for distribution to ex-spouses and/or dependent children. Because their rule changes were not based on a single piece of legislation, each public plan was free to establish their own procedures and guidelines. This has resulted in a hodge-podge of procedural provisions from plan to plan. Even in the same state, different counties and cities might have distribution rules very different from one another. In many jurisdictions, public plans will be the defined benefit (pension) plans with which you will most often be dealing. If you practice near a military base you better learn the ins and outs of the Uniformed Services Former Spouses Protection Act. Or, it may be your local, state and county pensions with which you need the most familiarity. It is up to you to educate yourself on these plans but there are some generalities that I will cover in this issue.

Tip of the Month:

Who should pay for the preparation of the Domestic Relations Order?

Whether a domestic relations order is drafted by a service like ours or by the attorney, there are always additional costs. After the order is drafted, it must be presented to the judge for signature, filed with the Clerk's office and forwarded to the plan. Some investment companies that manage 401(k) funds now charge substantial fees for the processing of a QDRO. I have always felt that the order should be drafted by the attorney representing the alternate payee because it is he or she who has the responsibility of insuring that the order is prepared in a timely manner and it addresses all of the provisions of the settlement agreement. Unfortunately, the alternate payee is more often than not the wife who's financial means might be substantially less than those of the husband. The general rule as to who should pay for the order is dependent on the financial situations of the parties. If the alternate payee has sufficient means and income, he or she should pay for the order because it is to their benefit. If they have limited resources but can afford to pay half, then each party should pay for half of the cost, including the additional time put in by the alternate payee's attorney and any other fees. If the alternate payee is broke, and has limited employment skills, then the plan participant should bear all of the costs. In any event, this is an item that should always be included in the settlement agreement to avoid problems when the issue of "who pays?" comes up in the future, which it always will.

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Most public plans will provide you with guidelines detailing the retirement plan options and how the domestic relations order should address them. Few public plans will provide model orders but many do have sample paragraphs that they would prefer to see used in an order. The federal government's Office of Personnel Management (OPM), which oversees the benefits programs for civilian employees of the federal government, provides a 130 page (magazine size) handbook covering the distribution of marital property retirement assets from the Federal Employees Retirement System (FERS) and U.S. Civil Service Retirement System (USCSRS) plans. The publication is excellent in that it explains the benefits, how the plans work, and offers sample paragraphs to address different settlement options. It states what the plan will assume if the order is silent on a particular aspect of the plan (i.e. alternate payee gets pro-rata share of post-retirement COLA unless specifically denied in the order). In some cases, contributions made by public employees may be refunded upon application of the employee at the time of retirement. This could revoke the participant's rights to the annuity (pension) or impact the gross monthly amount of the pension available at retirement. All public domestic relations orders directed to plans that have this provision should state whether this will be permitted and if so, what portion of the refund is to be paid to the alternate payee.

State and local plan domestic relation order (DRO) provisions are a bit more problematic in that what is acceptable varies from state to state, county to county and even city to city in the same county. In Florida, some city plans refuse to honor DRO's while the State Equitable Distribution Statute includes retirement benefits and the State Retirement System, and most county and city retirement plans, honor DRO's. Not all of the states have modified their anti-assignment laws that have traditionally covered public employee retirement plans. For example, in Indiana no DRO's on public employees are permitted (other than federal employees who happen to be residents of the state).

How equitable a public employee DRO is allowed to be varies from plan to plan. The federal government civilian employee plans seem to be trying to be equitable in that there seems to be an excellent grasp of what is marital property and how it should be distributed, but they also have some quirky restrictions which are counter to the treatment of the pension benefit as a property asset. One of these little quirks is that under all federal pension plans (civilian and military), an alternate payee loses the survivorship rights awarded in the domestic relations order if he or she remarries prior to age 55. Some city and state plans also are very good but on the whole there are a lot of things you have to consider if you are going to use a public employee DRO for distribution purposes. As a general rule, the more information you obtain as to how the plan will treat the distribution and interpret the order, the better you will be able to decide if a domestic relations order is the right tool for your situation.

Many public plans (uniquely) have built-in annual cost of living allowances (COLA). This must be addressed when you are negotiating the settlement and drafting a public plan domestic relations order. In the absence of language (except for federal DRO's) making the portion of the pension awarded to the alternate payee subject to a pro rata increase of the COLA each year, the participant's share will substantially increase over a lifetime while the non-participant's share loses purchasing power. Until a change in the plan provisions in 2003, state plan alternate payees in Florida had to submit an amended domestic relations order, signed by a judge, each year the pension was in payout status in order to get their share of that year's COLA. The legal costs to prepare and submit the amended order often exceeded the annual amount of the COLA increase the alternate payee would be eligible to receive.

Most public plans will not provide a lifetime pension benefit to an alternate payee unless the order designates the alternate payee as the beneficiary of the participant's

survivor benefits. Under ERISA, private plans have to provide incomes for life to an alternate payee even if he or she is not designated a survivor. Paying the alternate payee's share on an actuarially reduced basis funds this lifetime benefit. If the alternate payee is female this means that the monthly dollar amount of her share will be substantially less than the full monthly dollar amount awarded to her because it will be adjusted so it can be paid over a much longer period of time (women live longer) than the projected period of time the benefit will be paid to the male participant. Of course, this is all based on assumed actuarial death rates and in real life anything can happen.

Another difference to be noted when comparing public plans with private plans is that, unlike private plans, most public plans do not offer a separate pre-retirement survivor annuity. A pre-retirement survivor annuity will be paid to a former spouse if he or she is named the beneficiary of the survivor annuity. None will be paid if they are not so designated. Conversely, we see many private plan settlements that designate the alternate payee the beneficiary of the pre-retirement survivor's annuity until the awarded portion of the lifetime pension goes into pay status for the alternate payee on an actuarially reduced basis with no post retirement survivor annuity..

Knowing that survivorship is critical ahead of time, means that it should always be included in any settlement agreement addressing deferred distributions of public employee pensions, whether federal, state, local or military. Failure to include survivorship means the alternate payee runs the risk of getting nothing if the participant dies prior to commencing receipt of benefits. Without the alternate payee having survivor beneficiary designation, all payments to the alternate payee will stop in the event the participant dies after retirement commences, but prior to death of the alternate payee.

[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.

For any questions or ideas for upcoming articles you can reach Paul Commerford at paul@lawdatainc.com.

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