



Divorce, Pensions and Retirement Benefits

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WORKING WITH OFFSETTING RETIREMENT BENEFITS

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Practice Tip of the Month:

What is the plan provider's obligation in a divorce action?

By law (I.R.S. and ERISA), retirement plan trustees are obligated to maintain records that are subject to audit and review. These records are on hand and can be provided as needed for the purpose of determining the value of a participant's benefits at a particular point. The laws governing defined benefit plans (pensions) are more specific and demanding than the laws governing defined contribution plans (401(k) plans and other types of retirement savings plans).

Most defined benefit plans can give the exact amount of an accrued benefit on any date and tell you how the benefit is determined and when an employee can begin receiving these monthly benefits. They can tell you of any early supplemented retirement schemes, which in many States are included when valuing the pension or preparing a QDRO. You can request an accrued monthly pension figure 15 years ago and generally, easily have it furnished. To get any benefit statements or information, for confidentiality reasons, you must either have a signed and witnessed release form from the participant or go through the discovery process. Never rely on the participant to get you these figures for you. They are too easy to alter and they may not provide you with information on all the plans in which they participate. (I have published release forms in the past and will attach one to the end of this newsletter for your use. It is very important that the release form be very specific because you are not going to be provided any information for which you do not ask.)

Defined contribution plans are a bit more problematic. As a general rule they are not managed by the employer but rather by an outside investment or mutual fund company. These plans are portable and the specific quarterly investment results for the employee are only required to be maintained for six years. This means that companies can change investment managers (and they often do) or the employee can change employers and transfer his account balances to another company using another investment manager. Getting older, quarterly records needed to identify the marital portion when the participant commenced plan participation prior to the marriage date may be impossible, thereby forcing you to negotiate the marital portion or apply a coverture calculation.

Usually, the account is all marital, so getting a final figure from the last employer is all you will really need.

Introductory Special!

Free Pension Appraisal

If you are an attorney who has never used our services, then let us prepare a free pension appraisal (a \$150.00 value) so that we can demonstrate to you the outstanding support and expertise we provide to every one of our attorney/clients. We make this offer knowing that once you try us you will become a regular client.

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WORKING WITH OFFSETTING RETIREMENT BENEFITS

Most marriages today have both partners employed. In the usual situation the husband has the job with better benefits but that, of course, is not always the case. We often see the husband in a job with better pay but lesser retirement benefits (many unions, or executive positions with smaller private sector companies, do not have particularly good retirement benefits) while the wife might be a teacher or employed in another public service job. In a case like that, it usually will be the wife who has the better retirement benefits. In any event you will be dealing with offsetting retirement benefits.

Over the past 20 years many private companies have abandoned traditional pensions in favor of 401(k) plans or other retirement savings schemes. If both the husband and the wife work in the private sector, and have a form of retirement savings benefits, dealing with two defined contribution plans is relatively easy. Whomever has the larger account balance owes 50% of the difference (assuming it is all marital) to the other partner. Distribution can be handled by offset against another marital asset or by use of a Qualified Domestic Relations Order to either transfer the difference to the other partner's retirement account or distribute the funds immediately.

The difficulty arises when you have one partner with a defined benefit plan and the other with a defined contribution plan. You have some choices in these situations. You can do two Qualified Domestic Relations Orders dividing the marital share of each plan equally or do a present value of the pension plan and the participant with the higher value benefit compensates the other partner with 50% of the difference in the value by immediate offset against another marital asset. If you want to use a Qualified Domestic Relations Order and the defined contribution plan has the higher value, it is relatively easy to determine the amount to be distributed. Using the same methodology as in the previous example, 50% of the difference is awarded to the party with the pension..

It becomes a little more difficult if the pension plan is more valuable than the defined contribution plan and the parties elect to do a Qualified Domestic Relations Order, possibly to insure that the non-participant in the pension retains their interest in the survivor benefits. In this case you must place a present value on the pension benefit and subtract the value of the defined contribution account from that value. Once you have that figure you can determine the percentage of the pension that is left to be distributed by dividing the adjusted value of the pension into the value of the defined contribution plan. The results of that calculation will identify the portion of the pension that is marital after you subtract the defined contribution plan. Now when preparing your Qualified Domestic

Relations Order instead of “50% of a fraction as determined by dividing the number of months married while employed by the total months of employment” you would replace 50% with 50% of the figure determined by the calculation that adjusted the % value of the pension after subtracting the value of the defined contribution plan as shown in the beginning of this paragraph.

Your new Qualified Domestic Relations Order distribution might read “28.3% of a fraction as determined by dividing the number of months married while employed by the total months of employment”. If you have the order prepared by a pension consultant he or she will make these calculations for you and give you a sheet explaining how the numbers used were calculated.

If both parties have defined benefit plans the procedure would be the same only you would have to have two pension appraisals prepared. The difference between the higher value pension and the lower value pension would be subtracted from the higher value pension and the same methodology for preparing the Qualified Domestic Relations Order language used as in the previous paragraphs.

Working with offsetting retirement benefits in divorce cases will only become more common as our society has now moved to the two working partner marriage construct. Your job is to recognize that different benefits are handled different ways and to insure that the proper adjustments are made. If you are uncomfortable working with numbers, get outside help. It is too easy to make a very costly mistake if you inadvertently divide the wrong number into the wrong number, which we have seen more often than you would think. If you lack confidence in your math skills it is wise to use an expert to avoid what could be a very costly error.

SEE BELOW FOR OUR “RETIREMENT ASSET RELEASE FORM”

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.

Web: www.lawdatainc.com

RETIREMENT ASSET RELEASE FORM

I, _____, do hereby instruct a representative of
(Plan Participant - printed)

(Name – address – phone # of benefits provider)

to cooperate fully with _____
(Name of attorney - address - phone #)

_____ or his/her designee and answer any and all questions relating to my pension plan or any other retirement or deferred income plans in which I participate. I also request that you furnish this individual a current plan booklet and a

current accrued benefits statement, and a statement as of _____,
(Marital Property Cut-off Date)

of all of my accrued retirement benefits including any defined contribution, defined benefit or deferred compensation plans in which I am a participant. The defined benefit plan statements should detail the accrued vested benefit payable to me on my normal retirement date along with a statement of projected pension benefits, including supplemental benefits, if any, payable to me on the earliest date that I may receive them on an actuarially unreduced basis (based on my current income) assuming continued employment to that date. If my benefit is contingent upon my classification or job level or contribution level please so state and advise what that may be. Also, please provide a statement showing my service computation date (first day of employment), dates of all breaks in service (if any), my current salary and my annual salary for the past five years, the legal names of the plans in which I participate and their addresses and the name, address and telephone number of the person to be contacted if additional information is needed. I authorize that person to answer all questions incident to this request. The defined contribution plan statements should show my current plan balances as well as my account balances on

_____ and on _____.
(Marital Property Cut-off Date) (Date of Marriage)

Signature of Plan Participant

Today's Date

Date of Birth

Social Security #

Witness # 1 - Signature

Witness # 2 - Signature

Witness # 1 - printed

Witness # 2 – printed