

DIVIDING RETIREMENT BENEFITS AT DIVORCE BENCH CARD

Many people have retirement assets of one kind or another. A key inquiry in a divorce is whether either party has such an asset, and if so, what kind it is and how it should be divided. This bench card provides guidance for effectively dividing employer-sponsored retirement benefits governed by the Employee Retirement Income Security Act of 1974, as amended (ERISA). These benefits stem from two types of plans, defined benefit plans (e.g., traditional pension plans, cash balance plans) and defined contribution plans (e.g., 401(k) plans, profit-sharing plans, employee stock ownership plans). Plans such as 403(b) plans, 475 plans, and retirement annuity contracts under TIAA-CREF (Teachers Insurance and Annuity Association of America and College Retirement Equities Fund, primarily for teachers, researchers, and academics) are non-ERISA plans but are often divided the same way. However, it is best to check the plan before dividing the benefits to check its division rules.

To divide employer-sponsored retirement benefits, a court order, in addition to the divorce decree, is needed. (Individual Retirement Accounts (IRAs) do not need an extra order.) For plans governed by ERISA, this is a QDRO. Other plans, like for the military, federal, state government, or railroad employees, and some church employees, require an order similar to a QDRO but governed by different law and with different requirements. This bench card concerns only ERISA-governed plans.

Key Terminology

- **Participant (“P”)**: The person who earned the retirement benefit (employee, former employee, retiree).
- **Alternate Payee (“AP”)**: A spouse, former spouse, child, or dependent of

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a participant who is assigned all or a portion of the participant's retirement benefits.

- **Domestic Relations Order** ("DRO"): A judgment, decree, or order made pursuant to state domestic relations law, which creates or recognizes the existence of an alternate payee's right to receive, 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 retirement plan, and relates to the provisions of child support, alimony payments, or marital property rights and contains certain information and meets certain other requirements.
- **Qualified Domestic Relations Order** ("QDRO"): A QDRO is a DRO that has been qualified by an ERISA retirement plan administrator. While the term "QDRO" is frequently used in casual conversation to refer to any order dividing a retirement benefit, it technically refers only to those plans governed by ERISA, and that is how the term is used in this bench card. Retirement plans are not permitted, by federal law, to follow any order that does not meet the requirements set forth by the statute.

The *plan*, not the court, decides whether the order is acceptable.

Information to Obtain

To make a fair, appropriate division of retirement benefits, the court must be

aware of both the facts and the law regarding such benefits, the marriage, P's history with the plan, and federal and state law governing division of such assets. Key questions to ask include:

- Does either party have retirement benefits? If so, what kind of benefits?
 - Traditional pension plan (defined benefit plan or "DBP")
 - Who is the sponsor? Private or non-profit employer, labor union, government employer, military, railroad, other?
 - ***If the plan is a DBP sponsored by a private or non-profit employer or a labor union, follow this bench card.*** For other plans, you will need to consult the law governing the particular type of plan. Federal law governs military, railroad, and federal employee plans, while state law governs state government employee plans.
 - Traditional IRAs, Rollover IRAs and Roth IRA are not employer-sponsored plans, and thus no additional order is needed.
 - ***For defined contribution plans (DCP), e.g., 401(k), profit-sharing plan, that are sponsored by a private or non-profit employer or labor union, follow this bench card. Non-ERISA 403(b) and 457 plans may have similar rules and requirements, but confirm with***

the plans before following this bench card.

- Does the plan have QDRO Procedures and a template for a QDRO? If so, have the party or counsel obtain them and provide them to the court.
- Did P contribute to the plan (DCP) or accrue a benefit (DBP) before the marriage? If so, need to account for pre-marital/separate/non-community share of benefit.
- For DCP, are there any outstanding loans? They will affect the value of the benefit, and depending on whether they were taken out during the marriage and for what purpose they may also affect how the loan and the account value should be allocated.
- Is there a request or a possibility of offsetting the retirement benefits value with other assets in the marital estate? An accurate value is needed to be sure the offset is appropriate, but if P retains the full retirement account, a QDRO will not be necessary. An actuary should be used if you are determining the present value of a DBP benefit.
- For a DCP, are account statements sufficient to determine the account's value, or is an expert needed, for example, to trace a separate property interest?
- For a DBP, is P already receiving payments? If so, the parties will have used a shared interest approach when dividing the benefits. If not, most plans allow the benefit to be divided using a shared or separate interest approach. Does the court have any discretion in making this decision?
- What is the state law governing valuation and division of retirement benefits (if not already familiar with it)?

This information will primarily come from the parties and their counsel, if any. Be aware, however, that if the parties have a history of domestic abuse, financial abuse is common, and the victim spouse may not have the information or even be aware that retirement benefits exist. Spouses who have perpetrated abuse often attempt to manipulate the situation to benefit their financial position and to retaliate against the victim spouse for leaving.

Decisions to Make

Some of the decisions to be made will depend on the type of plan at issue. The first few points apply to any division. Others will depend on whether the plan is a DBP or a DCP. Most plans in recent times are DCPs, but a few employers and many labor unions retain traditional pensions. Look under the appropriate heading for the decisions necessary for the type of plan.

- Allocation between the parties: The general decision of how much each spouse should receive will be based on the state law factors and considerations governing division of marital property. Some aspects of how to effectuate the division, however, are specific to the type of plan, so this is also touched on below for each type of plan.
- DCP plans:
 - Who will pay any administrative fees assessed by the plan?
 - **Valuation date:** this is typically the date of divorce, but it may also be the date of separation or the date that benefits begin to be paid. In some states, state law governs; in others, the judge makes the decision. If P contributed before the marriage, the value as of the date of the marriage must also be determined.
 - **Allocation:** allocation between the parties must be stated as a dollar amount or a percentage (check the template, if the plan has one, for whether one or the other is preferred).
 - **Interest and increase/loss in value:** Will interest, dividends, increases and losses on the awarded amount between the valuation date and the time the benefit is segregated be awarded to AP? This must be specified in the order.
 - **Vested amount:** Only a share of the vested amount may be awarded to AP; do not attempt to award unvested amounts unless a party demonstrates that the plan so allows (which is very unusual).
- **Loans against account:** If the account has loans against it, P remains responsible to the plan for repayment, but the amount and purpose of the loan (was it for community purposes or to benefit the marriage?) may affect how the account should be divided to facilitate repayment.
- **Tax implications:** Be aware of tax implications when considering whether to allow an offset of a DCP for a non-retirement asset: DCPs are generally funded pre-tax, so that should be considered in determining whether an asset obtained with post-tax funds is a fair offset. A tax expert is likely necessary to assist in making this determination.
- DBP plans:
 - **Survivor Benefits:** Whether AP will be treated as surviving spouse with respect to some or all the qualified pre-retirement survivor benefit (“QPSA”). This only applies if the P is not yet retired. Most common with shared interest approach.
 - Whether the qualified joint and survivor annuity (“QJSA”) will be awarded. If a shared interest approach is used, this needs to be awarded to ensure the AP receives a benefit after the death of P.

- **Type of award: Separate vs Shared Interest:** A separate interest is typically preferred. If the Plan will not allow a separate interest award, the court must decide whether/to what extent to require P to elect a particular form of benefit, under which AP will continue to receive the benefit if P predeceases AP after retirement.
 - **Separate interest award** results in a benefit that is payable to AP over the lifetime of AP, and it is actuarially adjusted/calculated based upon AP's life. Neither the death of P nor P's decision to defer payment for whatever reason will have an impact on AP's ability to receive that separate interest when P becomes eligible to retire. This can only be used when P is not yet retired at the time of divorce. There are a very small number of plans that require a QPSA even for a separate interest, so always double-check with rules of the plan – this is very rare.
 - **Shared interest award** means AP is not permitted to receive benefits before P's benefits go into pay status (i.e., P retires), and AP does not have control over the timing or form of payment. If P is already in pay status at the time of the divorce, a shared interest award is required.
- **Determining and Articulating AP's Portion of Benefit:** AP's award needs to be defined. If P is already receiving benefits, a monthly dollar amount for AP's share is usually included. Otherwise, AP's share is generally stated as a percentage.
 - Coverture-based formula is the most common approach for determining the marital portion of a DBP. Different states use different formulas. Although these are two common methods to determine the marital portion, the formula ultimately used should be based on the state.
 - An immediate offset fraction that divides the benefit at the time of divorce (aka "frozen coverture" or "accrued coverture") and
 - The deferred interest fraction that divides the benefit at the time it goes to pay status (aka "true coverture" or "prospective coverture")

- The true coverture method favors AP

Dollar amount of P's accrued benefit @ P's benefit commencement date/AP's benefit commencement date x	# of months creditable service under the Plan during the marriage	x percentage awarded to AP by the court
	Total # of months of P's creditable service under Plan as of P's benefit commencement date or, if earlier, AP's benefit commencement date	

- The frozen coverture method favors the P

Dollar amount of P's accrued benefit @ date of divorce x	# of months creditable service under the Plan during the marriage	x percentage awarded to AP by the court
	Total # of months of P's creditable service under Plan as of date of divorce	

- **Ancillary benefits:** Will AP receive the benefit of ancillary benefits accruing to the plan, such as from future cost-of-living or early retirement subsidies, etc.? This must also be specified in the order, and it can significantly affect the value of a DBP allocation.

The stereotype is that parties to a case that involves a retirement benefit can afford counsel, but some workers, especially those who have such a plan based on membership in a union for a lower-paying job, may not be able to hire a lawyer. Also, one spouse is often at a financial disadvantage following separation, especially if domestic violence is present. Be careful of making assumptions about the parties' resources before obtaining full information.

The Order

- Assign responsibility to prepare the QDRO and set a deadline before plenary power is lost.
- If the parties lack counsel, inquire about one of them employing the services of a QDRO preparer.
- If that is not feasible, then follow the usual practice for order preparation with self-represented litigants in your court. Note, however, that if your court generally requires them to prepare their own orders, the risk of errors, and possibly even deliberate misstatement by the party drafting the order, is increased.
- If the plan offers a template for QDROs, using it can help to ensure the order is accepted by the plan. However, approval by the plan only means the QDRO meets the requirements of ERISA; it does not mean it correctly reflects the agreed to or ordered division. The template may not be appropriate for each case and you need to ensure the template provides for the proper division for each specific case.
- What to include:
 - Names and contact information for P and AP;
 - If domestic violence exists, protect the victim spouse's contact information from access by the other spouse, for example, by using the state address confidentiality program, if available, or using counsel's address;
 - Date of valuation;
 - AP's allocation (stated as appropriate for the type of plan and the award to AP);
 - For DCPs, whether AP is to receive gains, losses, interest, or dividends between the valuation date and the segregation date;
 - For DBPs, whether AP is to receive any survivor benefits, and if so, what kind and in what amount;
 - For DCPs, who is responsible for any administrative fees;
 - For DBPs, whether AP is to receive any ancillary benefits (e.g., COLAS, early retirement supplements, etc.), and if so, specify the amount.

Other Questions

Division of retirement benefits can be complicated, but we hope this bench card provides some guidance. If you have additional questions, please feel free to contact the [National Council of Juvenile and Family Court Judges](https://www.ncjfcj.org) at info@ncjfcj.org or complete the [contact form](#), or contact the [Pension Rights Center](#) by using the [contact form](#) for assistance.