

Divorce and Future Retirement Benefits

This publication gives basic information about different types of retirement plans and options that may be available to you if you are getting a divorce. The law in this area can be complicated. We recommend that you get advice from an experienced lawyer, if possible.



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Retirement planning is part of most marriages and registered domestic partnerships, and should be part of every divorce. You and your spouse or partner worked together to save money for retirement. Generally, each of you is entitled to a share of that money, regardless of who earned what.

What Should I Know About Retirement Benefits?

There are two kinds of retirement benefits:

1. **Savings and/or investment programs**, such as IRAs, 401(k) Plans, and Thrift Savings Plans. These may also be called “defined contribution” plans. The employee, and sometimes the employer, deposits money into an account. The balance in the account changes based on the amount of the deposits and stock market performance.
2. **Pension plans**, sometimes called “defined benefit” plans. These plans are usually funded by an employer or labor union. Upon retirement, the plan pays a monthly amount during the remainder of the employee’s lifetime.

Payments from either type of plan start at a specified retirement age or after a specified number of years of service. In some instances, plans will allow a partial “survivor benefit” to be paid to a named surviving (non-employee) beneficiary if the employee passes away. There are strict rules about who can be a named beneficiary.

In most cases, retirement benefits earned before you were together or after you separated are considered separate property and will stay with the person who earned them. The retirement benefits earned during your relationship are considered jointly-acquired (or “community”) property and will be divided between you. Generally, you are entitled to receive your fair share of community benefits and all of your separate property benefits when they are distributed.

Pay attention to whether benefits are “vested” (legally assured) or “unvested” (conditional.) If a benefit is unvested, the owner must still do something more or meet a stated condition (usually be employed for more time,) before the benefit is vested. Both vested and unvested benefits are divided in a divorce.

What about Same-Sex Marriages and Registered Domestic Partners?

Same-sex marriages are treated just as any other marriage. Still, if you are dissolving a same-sex marriage, it is critical to get advice from a lawyer who knows about federal tax and retirement benefit law to make sure the changes in the law are being implemented correctly.

For state registered domestic partners, it may be more complicated. Partners who were registered on or after June 12, 2008, have the same community property rights as married couples, so their retirement benefits would be divided in the same way. But for registered domestic partners who were in a committed relationship before June 12, 2008, it may be more complicated. Registered domestic partners should talk to a lawyer with experience in community property issues. For more information, see the Legal Voice publication *Questions and Answers: Washington's Domestic Partnership Law*, listed in Resources.

How Can I Get Information about Our Retirement Benefits?

Your retirement may be 20 or 30 years away, but you are entitled to get detailed information *now* about the retirement benefits that you and your spouse or partner have earned.

If you and your spouse or partner are cooperative, you can each request information from your retirement plan administrators and share that information with one another. Just ask your retirement plan administrators to send you what they usually send to divorce lawyers. It won't be everything your lawyer will need, but it will be a good start.

Another way to get information is to use a Subpoena Duces Tecum, which is a legal order requiring delivery of documents or evidence. If you are working with a lawyer, you may ask him or her about using a Subpoena Duces Tecum. A Subpoena Duces Tecum is usually prepared by a lawyer because it must be in a specific form and contain precise information about what is being requested. It must also be signed by either a lawyer or a judge; you will need a judge to sign it if you are preparing it yourself. You do not need your spouse's or partner's permission to send a Subpoena Duces Tecum. Send this subpoena to the retirement plan administrator.

What About Military Retirement Plans?

If you or your spouse or partner has a military retirement plan, there are special rules. You should talk to a lawyer who has experience with military retirement plans.

What Do I Do with the Information I Get?

The first step is to determine the "present value" of the retirement benefit. The present value is the amount of money you would need to put in savings today to earn the promised benefit in the future. For defined contribution benefits, this is easy because the present value is usually just the amount in the retirement benefit account today.

Calculating the present value of a defined benefit plan is more complicated. An expert called an “actuary” does these calculations using commonly accepted mathematical formulas and assumptions about future interest rates and how long the employee will live. Sometimes these calculations also include assumptions about what the employee’s future earnings will be, and adjustments for variations in the cost of living.

A defined benefit of only a few hundred dollars a month can be very valuable. It is usually worth spending a little bit of money to have an actuary determine the present value of a defined contribution benefit. Find out which actuary you should use by asking a knowledgeable lawyer.

I Know the Present Value of the Retirement Benefits. Now What Do I Do?

Once you know the present value of the retirement benefits, they can be fairly divided between you and your spouse, or partner, in your divorce.

IRA accounts and many federal, state, and local government defined benefit (pension) plans are divided with special language in your “Decree of Dissolution” (the court document that makes your divorce final). This special language is regulated by federal and state laws. Usually you must follow the laws exactly. Benefits like Employee Stock Option Plans are often regulated only by the contract between the employee and employer. You may need special provisions in your Decree of Dissolution to protect your interest in those benefits as well.

By contrast, your interest in many retirement benefits provided through employers, such as 401(k) plans, Employee Stock Ownership Plans, and some pensions, are protected by a federal law called “ERISA” (Employment Retirement Income Security Act). ERISA requires that these types of benefits be divided in a “Qualified Domestic Relations Order” (QDRO). A QDRO is a separate court order that is entered at the same time as the Decree of Dissolution.

The rules for dividing retirement benefits are very complicated. Different benefits have different rules. Even if the retirement plan administrator gives you suggested court orders, you should talk with an experienced lawyer before dividing your benefits. Often, you cannot correct the errors if you do not do it right the first time. These errors may result in otherwise-preventable higher income taxes and penalties, or in the benefit not being divided at all.

After My Divorce is Final, How Do I Get My Money?

For each retirement benefit that you will receive, deliver a certified copy of your Decree of Dissolution or QDRO to the plan administrator or to the financial institution responsible for the plan. Include with each certified copy a letter asking that the retirement benefit be divided according to the Decree or QDRO. If you send the Decree of Dissolution or QDRO by U.S. Mail, use certified mail, return receipt requested. *You*

should do this immediately after the decree is entered. If you wait too long, the Decree does not effectively divide the benefit, and the employee keeps everything.

You must also fill out special IRS forms before the benefits are divided. You should ask a certified public accountant or other tax advisor for help completing these forms so that you do not make mistakes that will cause you to owe taxes or penalties to the IRS.

Even after the benefits are divided, they will not be paid to you until it is time to distribute them under the law or employer contract.

If I Don't Have a Lawyer, Can I Do This Myself?

You are allowed to do this without help from a lawyer. But there are so many different ways to make mistakes when dividing retirement benefit. Even if you cannot afford a lawyer for your divorce, we urge you to hire a lawyer just to help you divide retirement benefits. Spending some money now could make a big difference for your future. See the Legal Voice publications listed under "Lawyers & the Legal System" in Resources below.

Resources

- **EX-POSE (Ex-Partners of Servicemen/women for Equality):** Information about military pensions and other benefits for spouses in military marriages and military divorces, as well as referrals to lawyers for members.
By phone: 703-941-5844, Tuesdays and Wednesdays from 10:00 AM to 3:00 PM Eastern Time. Leave a voice message during non-business hours.
Online: www.ex-pose.org
- **Legal Voice:** Related publications:
Online: www.legalvoice.org/tools/
 - Under "Lawyers & the Legal System":
 - *How to Find a Lawyer and Other Legal Resources in Washington State*
 - *Working With a Lawyer*
 - Under "Family Law":
 - *Questions and Answers: Washington's Domestic Partnership Law*
 - Under "Handbook for Washington Seniors":
 - *Handbook for Washington Seniors: Legal Rights and Resources*

- **Northwest Justice Project:** Legal information on a wide range of issues, including divorce.
Online: www.washingtonlawhelp.org; click on “Family & Safety,” then “Divorce/Separation”
 - *Divorce: General Info*
 - *Getting a Divorce: Dividing Property and Debts*

- **United States Department of Labor:** In-depth information about retirement plans.
 - *Frequently asked questions about Qualified Domestic Relations Orders (QDROs):*
www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/qdro-overview.pdf
 - *QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders:*
www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/qdros.pdf
 - *What you Should Know About Your Retirement Plan* (see “Chapter 1: Types of Retirement Plans,” and “Chapter 9: Potential Claims against Your Benefit (Divorce)”):
www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/what-you-should-know-about-your-retirement-plan.pdf

- **Washington State Department of Retirement Systems:** Information on how divorce can affect retirement accounts for members of all DRS-administered retirement systems (such as Public Employees’ Retirement Systems, Teachers’ Retirement Systems, School Employees’ Retirement Systems, Public Safety Employees’ Retirement System, and Law Enforcement Officers’ and Firefighters’ Retirement System).
Online: www.drs.wa.gov/publications/member/multisystem/propertydivision.htm

This publication provides general information concerning your rights and responsibilities. It is not intended as a substitute for specific legal advice. This information is current as of August 2021.

Updated by Chloë Phalan, 8/27/21

Acknowledgments to Sarah Shifley, Jennifer Rydberg, Anne Bradley Counts, Colleen Silcox, Matthew Kaminski, and June Krumpotick for their work on previous versions of this memo.

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