

DIVIDING CIVIL SERVICE RETIREMENT

BENEFITS IN DIVORCE TELECLASS

With Carol Ann Wilson, CFP

- I. How is division of retirement benefits for Civil Service employees different from everyone else?
 - A. Unique statutory scheme with its own rules, tests, opportunities and traps.
 - B. How long has this retirement system been around?
 1. For those working in the U.S. Civil Service, a retirement system has been in place in some form since 1920, which is the date from which the “old” system (“Civil Service Retirement System,” or “CSRS”) for those who began service before 1984, can be traced.
 2. The entire system was altered for incoming employees in a “new” system (“Federal Employees’ Retirement System,” or “FERS”), for those who began service on or after January 1, 1984.
 - C. What are the basics of the Civil Service retirement system?
 1. Essentially a defined benefit plan, which takes into account years of service and highest salary in determining a monthly sum to be paid to an employee from the date of retirement until death.
 2. In 1984, the new system also created a defined contribution retirement account called the “Thrift Savings Plan” (“TSP”), but it is administered separately.
 - a. So there are really two different benefits to track in every divorce case.
 3. In 1992, sweeping changes were made to the regulations governing division of Civil Service retirement benefits, making virtually every prior reference on the subject out of date.
 - a. The new regulations addressed the employee annuity (the pension), refunds of employee contributions, and survivor’s benefits, but not the thrift plan
- II. OK, so how are these benefits treated upon divorce?

- A. Governed by State law, except where limited by the federal regulations.
- B. Guidance available?
 - 1. The OPM publishes a Handbook for attorneys who are drafting retirement orders for CSRS or FERS retirement benefits. Available on line.
- C. Any special terminology in Civil Service cases?
 - 1. Completely different lexicon – re-invented many words.
 - a. Top of the list, *never* use the term “QDRO” or “Qualified Domestic Relations Order.”
 - (1) Original regulations would have voided even if perfect.
 - (2) Revised will grudgingly be enforced – so long as all the correct terminology is present.
 - (3) OPM word is “COAP” (“Court Order Acceptable for Processing”).
 - (4) Better practice to never use the terms “QDRO,” “Alternate Payee,” or other ERISA-type language in such an order.
 - b. OPM even assigned new meanings to words long used elsewhere to mean something else.
 - (1) In OPM-ese, the “accrue” does *not* refer to the accumulation of benefits; means the commencement of payments under the retirement plan.
 - (2) “Employee annuity” means recurring payments to a retiree, not the account itself. In other words, a verb, not a noun.
 - (3) “Gross” does not mean “all.” “*Self-only*” means all. “Gross” means self-only less survivorship premium.
 - (4) In other words, a practitioner’s use of words to mean what the practitioner always thought they meant (even if that is what they mean to everyone else) could invalidate an order submitted to OPM; great care is warranted.
 - 2. A COAP must specifically state that OPM is to pay the money directly to the former spouse. Any reference to a “Self-only Annuity” contradicts any attempt to insert a survivor annuity.

D. What benefits are payable under a Civil Service Retirement?

1. Three separate orders should be in every COAP:
 - a. The lifetime benefits (“employee annuity”)
 - b. The potential refund of employee contributions, and
 - c. Death benefits (“former spouse survivor annuity”).
 - d. If an order is submitted using the words “retirement accounts” or “retirement fund” as the thing to be divided, OPM will interpret the order as going to contributions only and will **not** divide the annuity.
 - e. Attempts to stipulate to modifications without a formal order will be ignored.

E. Let’s start with the lifetime benefits.

1. Like ERISA-based private plans, but unlike the military and most State plans, a spouse can be awarded up to 100% of the retirement benefits.
2. If the order does not specify, the OPM will presume that any percentage or fraction payable to the spouse is from the gross annuity (i.e., after deduction for the survivorship premium).
3. Amendments to court orders altering the payments due to a former spouse will be honored, prospectively, but specific instructions have to be given if OPM is asked to make up for a prior under- or over-payment.
4. Care should be taken in the definition of what is to be divided, with pains taken to note the subtle differences in OPM definitions of terms.
 - a. For example, under the regulations, using the phrase “creditable service” tells OPM to calculate the spousal share to **include** accrued, unused sick leave in addition to actual time in service.
 - b. Using the phrase “total service” or “service performed,” however, tells the OPM to **not** include unused sick leave in the calculation.
5. The regulations allow the spouse to be awarded a percentage, fraction, formula, fixed dollar sum certain, or “prorata share” of whatever benefits (self-only, gross, or net) are being divided.
 - a. Apparently, unlike with military orders, it is **possible** to issue a “dollars plus percentage of COLAs” form of order as long as everything is clearly spelled out, but OPM will **presume** that an order

for a percentage or fraction is supposed to include COLAs, while a dollar sum certain award is not.

- b. Another direct contradiction to the military presumptions: an order including both a formula or percentage *and* a dollar sum certain will be presumed to have included the dollar sum only as an *estimate* of the initial payment, so that the formula or percentage controls.
6. One interesting conundrum is created by the OPM rule that an order purporting to provide for payments of a spousal share upon eligibility for retirement (“earliest retirement date” in the land of QDROs) will be rejected as “non-complying.”
 - a. *Gillmore* orders.
 - b. Since such a provision is essentially mandated by the law of several states, but forbidden by OPM regulations, some clever draftsmanship is required; probably the best thing is to mandate direct payments from the employee *until* retirement (of course that is where the money would really have to come from anyway), and from OPM thereafter.
7. Unlike in the military system, it is apparently possible to have an “interim COAP” provide for payments to a court while matters are being worked out, with an amended COAP submitted when the court issues its final order.
8. The COAP may *not* specify that payments continue for the lifetime of the former spouse (since the benefits terminate at the death of the employee, and only *survivor’s* benefits (to the former spouse) would be available after that date).
9. What if a court determines there are arrears owed?
 - a. A COAP may be used as a resource for payment of accrued arrearages. The COAP must specify how much is to be paid, so as to obtain accrued arrears, interest on the arrears, and interest on the declining balance of arrears until paid.
 - b. An amortization schedule must be done so that the order can reference how much will be due and when it will be due (OPM will not do the calculations for you).
 - c. Note that if payment of a lump sum is ordered, and there is no specific order to direct the entire monthly retirement payment to the former spouse, OPM will only make payments against that lump sum up to half of the gross payment, and will not allow modification for interest.

- (1) Again, if such is the situation, perform the amortization scheduling ahead of time, and make the lump sum in an amount that contemplates interest.

F. OK. Next, the employee contributions.

1. The former spouse can be awarded a portion of any refund to be made of employee contributions, or (if the former spouse is awarded a portion of the annuity itself), any such refund may be barred.

G. Survivor's benefits. Is there anything special about survivorship in the Civil Service area?

1. Fascinating; if the former spouse predeceases the member: the former spouse's share of the retirement benefits revert automatically to the retiree **unless** the court order provides otherwise.
2. Instead of that automatic reversion, the court **can** provide that the money is paid:
 - a. (1) into court (presumably for further distribution upon further court order);
 - b. (2) to "an officer of the court acting as a fiduciary";
 - c. (3) to the estate of the former spouse; or
 - d. (4) to one or more of the retiree's children.
3. Thus, it is possible to create a heritable asset for the former spouse.
4. The Civil Service rules are rather rigidly set up to expect that all the divorcing, re-marrying, and adjustments to orders will go on while an employee is still in service, **or** that the first order entered after the retirement of the worker deals with all aspects of the retirement and survivorship benefits perfectly.
 - a. Amendments to orders are possible, but **not** if they are issued after the date of retirement or death of the employee and they modify or replace the first order dividing the marital property of the employee or retiree and the former spouse.
 - b. In fact, any order that awards, increases, reduces, or eliminates a former spouse survivor annuity, or explains, interprets, or clarifies any such order, **must** be: (1) issued prior to retirement or death of an

employee; or (2) the first order dividing the marital property of a *retiree* and former spouse.

5. How about if there was a first order, but it has been vacated or set aside? Well, the second order is then OK, *unless*: (1) it is issued after the date of retirement or death of the retiree; (2) changes any provision of a former spouse survivor annuity order that was vacated, etc., and (3) *either* it is effective prior to its date of issuance, *or* the retiree and former spouse do not compensate OPM for any uncollected costs relating to the vacated, etc., order.
6. The short version is that any practitioner drafting a COAP for a retired Civil Service worker pretty much has to get it right the first time, because the niceties of altering such an order are horribly complex, and often impossible.

H. Health Benefits under the Federal Civil Service Retirement System

1. Federal employment carries with it coverage for health insurance.
2. Post-divorce coverage requires prompt application. Within 60 days of the divorce, the spouse must apply for continuation of “FEHB” (“Federal Employees Health Benefits”) and must receive a portion of the retiree’s annuity under a valid COAP.
 - a. FEHB coverage is in effect if the spouse is awarded *either* a portion of the annuity upon retirement *or* a survivorship interest, under § 890.803(3)(i). [Note: prior versions of this outline erroneously stated that if the former spouse is awarded only a survivor annuity, health insurance did not go into effect until the survivor’s annuity payments begin.]
3. Spouse loses eligibility to continue with the insurance if the spouse remarries prior to age 55.
4. Spouses ineligible for any of the benefits qualify for a COBRA-like program of carry-over coverage for 3 years.

[If left-over time, talk about FEGLI – hard to use, and combining military & Civil Service – 2 ways]

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