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DIVIDING FERS and CSRS

RETIREMENT ANNUITIES

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DIVIDING FERS and CSRS RETIREMENT ANNUITIES

By Garrick G. Zielinski, CFP, CDFA

Discovery, analysis and evaluation should be completed before the negotiation and drafting begins.

Exemption from the Employee Retirement Income Security Act of 1974 (ERISA).

A substantial number of State court orders are drafted under the mistaken belief that ERISA applies to government retirement benefits. Sections 1003(b)(1) and 1051 of title 29, United States Code, exempt federal, state, county and city plans because they are “governmental plans” as defined in section 1001(23) of title 29, United States Code.

ERISA created the term “qualified domestic relations order” (QDRO) to describe a court order that summarizes the division of retirement benefits under ERISA plans. QDRO’s are not acceptable orders when dividing government benefits. All federal government plans such as the Federal Employees Retirement System (FERS), Civil Service Retirement System (CSRS) and all the Military branches have their own set of rules and requirements for dividing benefits incident to a domestic relations action. Most state plans have rules governing their plans, but many county and city plans have yet to adopt rules governing the division of their plans.

The provisions of law that govern FERS benefits are in sections 8401, 8424, 8444, 8445, 8467, and 8470 of title 5, of the United States Code. The provisions of law that govern CSRS are found in sections 8341, 8342, 8345 and 8346 of title 5, United States Code. The regulations covering both FERS and CSRS are in part 838 of title 5, Code of Federal Regulations.

Attorneys frequently prepare domestic relations orders regarding these plans based on the assumption that they can provide any type of benefit, or any benefit option to a non-employee spouse that is also available to the employee spouse. For example, the primary difference between ERISA plans and federal government plans is that under ERISA the non-employee spouse may begin to collect benefits at the date the employee spouse is eligible to collect benefits, regardless of whether or not the employee spouse actually begins to collect a benefit. The lack of availability of this benefit in a federal government plan can have serious consequences to your non-employee spouse client and affect the negotiation of the settlement agreement.

Most governmental plans will not accept an order that is labeled as a QDRO. Government plans use their own terminology and it is imperative that the attorney and government agency overseeing the processing of the order is speaking the same language. In fact, using the term QDRO will automatically disqualify the order within most agencies simply because they don't believe that the author understands that the plan is exempt from ERISA.

The most common governmental plans that you encounter are FERS, CSRS, The Thrift Savings Plan (TSP) and Military plans. Others include the Railroad Retirement Board, Wisconsin Retirement System, Milwaukee County and City of Milwaukee Plans.

FEDERAL EMPLOYEES RETIREMENT SYSTEM (FERS):

Information about retiree benefits or former employees can be obtained either through a signed release authorization by the employee participant or by subpoena. The release or subpoena should be sent to:

Associate Director for Retirement and Insurance
U.S. Office of Personnel Management (OPM)
Post Office Box 16
Washington, DC 20044-0016

The mailing address for delivery of a COAP is:

Office of Personnel Management
Retirement and Insurance Group
P.O. Box 17
Washington, DC 20044-0017

We suggest that the COAP be served a process server, express carrier, return receipt requested through US mail. OPM has a tendency to lose or misplace such items and if they involve time sensitive data such method of delivery is strongly recommended. The address is:

Court-ordered Benefits Section
Allotments Branch
Retirement and Insurance Group
Office of Personnel Management
1900 E Street N.W.
Washington, DC 20044

The above addresses also apply to CSRS.

There are three major provisions within the FERS that require evaluation and negotiation to effectively and efficiently divide the plan.

1. Section 8467 of title 5, United States Code, permits State courts to award a former spouse certain benefits in regard to an employee annuity. Any payment under this subsection (8467(a) to a person bars recovery by any other person.
2. Section 8444 and 8445 of title 5, United States Code, permits State courts to award a former spouse entitlement to a survivor annuity in the event that the employee predeceases the former spouse.
3. Section 8424(b)(1)(B) of title 5, United State Code, permits State courts to block payment of refunds of employee contributions, but only if the former spouse has been awarded a portion of the employee annuity or a survivor annuity.

A marital settlement agreement, which simply states that the FERS plan should be equally divided with the non-participant spouse are flawed and likely to spark post divorce negotiation and/or litigation. The three provisions are simplified as follows:

- You may draft an order that intends to divide only the employee annuity, if as and when payable to the employee spouse.
- You may draft an order that intends to award only a survivor annuity or divide an employee annuity and award a survivor annuity.
- You may draft an order that intends to disallow a refund of employee contributions, only if an employee annuity or survivor annuity is awarded.

A court order acceptable for processing (COAP) is administered by the OPM. OPM will honor *clear* instructions from the court. OPM will not supply missing provisions, interpret ambiguous language, or clarify the court's intent by researching individual State laws. The State court must resolve disagreements between the parties concerning the validity or the provisions of any court order. OPM is responsible for authorizing payments in accordance with clear, specific and express provisions of a COAP.

Dividing an Employee Annuity:

Payments from an employee annuity are subject to COAP only if the former employee has met certain conditions. They are:

- The former employee must be separated from the Federal employment that is covered by FERS.
- The former employee must have completed an application to receive an employee annuity.
- The former employee is immediately entitled to an employee annuity.

These provisions are much different than traditional ERISA type requirements. We refer to this type of order as an “if, as and when” order. That is, the employee annuity is payable to the non-employee spouse only “if” the employee spouse is receiving an employee annuity, “as” the employee spouse is receiving their annuity and “when” the employee spouse is receiving their annuity. Unlike an ERISA type order, the OPM will not make payments to a former spouse at any other time. Therefore under this scenario, the annuity payments to a former spouse start upon commencement of benefits to the employee spouse and end upon the employee spouse’s death. From many people’s perspective this method results in the most equitable division possible.

There is a minimum awarded amount required (not less than one dollar) and no maximum amount required other than the order cannot require payment of more than the “net annuity”. “Net annuity” means the amount of monthly annuity payable after deducting from the gross annuity any amounts that are:

- Owed by the retiree to the United States
- Deductions for health benefits premiums under section 8906 of title 5, United States Code
- Deductions for life insurance premiums under section 8714a(d) of title 5, United States Code
- Deductions for Medicare premiums
- Federal income taxes if the amount withheld are not greater than they would be if the retiree claimed all dependants to which he or she was entitled.
- Net annuity would also include any lump sum payments received under the refund of employee contributions, if any

OPM will notify both the employee spouse and non-employee spouse upon receipt of a COAP. They will provide a myriad of information depending upon whether or not the annuity is in “pay status” or if the award is deferred to a later date. OPM will also acknowledge as to whether or not the COAP is an acceptable order for processing.

If the employee spouse and/or non-employee spouse disagree with the formula or OPM's interpretation, he or she must obtain an amended order clarifying the amount. If OPM receives a COAP that is not acceptable for processing, OPM will provide the specific reason(s) why OPM disapproved the application.

Payments made from an employee annuity will be suspended or terminated if the annuity payments are suspended or terminated to the retiree. If benefits are restored, such benefits will be restored to the non-employee spouse. Except as provided for under section 838.225(b), OPM will not increase a non-employee spouse's share of an employee annuity to make-up an arrearage that is due to the non-employee spouse. However, under section 838.225, OPM will prospectively honor the terms of an *amended* court order that either increases or decreases the non-employee spouse annuity.

Another area that differs substantially than ERISA type orders is the OPM will honor a court order that specifically awards a benefit payment based on a specific lump sum amount. For example, assume that the order states that the non-employee spouse is to receive \$10,000.00. OPM will automatically award 50% of the gross annuity payable each month or a fixed amount stated in the order, until the total of \$10,000.00 have been paid. At that time the annuity will cease being paid to the non-employee spouse. This provision could be used as a creative way to resolve other financial matters within the marital settlement agreement.

On the other hand, OPM will not honor any COAP that tends to prevent an employee spouse or delay an employee spouse from commencing an employee annuity so long as the employee meets the requirements necessary to commence an employee annuity. In addition, OPM will accept court orders that require the payment of an employee annuity that is in pay status to direct those payments to the clerk of court, officer of the court acting as fiduciary (GAL), or State or local government agency during the pendency of a divorce or legal separation proceeding.

Unless *otherwise stated* in the order, OPM will provide for cost of living adjustments to the non-employee spouse's payment. The amount of the cost of living adjustment will be the same percentage rate as the cost of living adjustment applied to the employee annuity. If the order states that the non-employee spouse is not entitled to a cost of living adjustment, the rate of adjustment applied to the gross annuity payable will be made part of the employee annuity. In other words, the participant spouse receives the full amount of the cost of living adjustment including the portion that would have been paid to the non-employee spouse annuity, had the order been silent.

Sometimes the amount of the awarded annuity to a non-employee spouse is calculated based upon a fraction formula. Typically in the form of a percentage of a fraction in which the numerator is the total number of months of marriage divided by the total number of months of service. OPM will not honor a fraction formula that requires a more precise calculation than the number of creditable months of service. Also, unused sick leave is *not* counted as creditable service on the date of separation for FERS participants. However, unused sick leave is counted for CSRS participants. Those CSRS employees that elected to switch to FERS, the unused sick leave will be counted for the period of sick leave earned under CSRS.

Unlike an ERISA plan, a COAP directing the OPM to pay benefits to a non-employee spouse over the non-employee's lifetime will not be honored. In order to receive benefits over the lifetime of the non-employee spouse, the employee spouse must be specifically directed to provide for a former spouse survivor annuity. As previously discussed, this is a negotiable benefit and consequences arise when requiring such language.

The COAP must state the non-employee spouses awarded portion of the employee spouse annuity in the following manner:

As previously stated, it could be a fixed amount if, as and when paid to the employee spouse, or it could be a fixed amount for a fixed period of time, or it could also be expressed in a fixed amount until a certain dollar amount is reached. This provision allows for creative ways to accomplish other financial goals within the marital settlement agreement.

It may be expressed in a percentage or a fraction formula of the employee annuity. A formula that does not contain any variables or values that cannot be readily ascertainable on the face of the court order. An example is that the payment of an employee annuity cannot be contingent upon the non-employee spouse's current employment status. A COAP that uses a fraction, percentage or formula must state the type of annuity to apply the calculation to. Unless the COAP states otherwise, the OPM will apply the fraction, percentage or formula to the gross annuity. There are three different variations that are allowable:

The net annuity, is defined as the amount of monthly annuity payable after deducting from the gross annuity any amounts that are owed by the retiree to the United States, deductions for health benefits premiums under section 8906 of title 5, United States Code, deductions for life insurance premiums under section 8714a(d) of title 5, United States Code, deductions for Medicare premiums, Federal income taxes if the amount withheld are not greater than they would be if the retiree claimed all dependants to which he or she was entitled. Net annuity would also include any lump sum payments received under the refund of employee contributions, if any

Gross annuity is defined as the amount of annuity payable after reducing the self-only annuity to provide for survivor annuity benefits, if any, but before any other deductions. The gross annuity is the most common form divided.

Self-annuity is defined as a single life only annuity payable over the retirees' lifetime unreduced.

Next month's article will focus on creativity surrounding survivor annuities, refunds of employee contributions, health and life benefits and the death of the non-employee spouse.