PENSION RIGHTS CENTER

The Initiative on Women and Retirement and Divorce
A common ground project convened by the Pension Rights Center

Are You Thinking About or Facing Divorce?

Here's What You and Your Lawyer Need to Know About Getting Your Share of Your Spouse's Retirement Benefits

If you are thinking about or facing a divorce, legal separation, or family support proceeding, it is important to know that you may be **legally entitled** to a share of your spouse's retirement benefits. Retirement benefits owed to your spouse by the spouse's employer may include retirement savings accounts (such as a 401(k)-type plan) and pension benefits.

Share this document with your lawyer or advisor. The information in this fact sheet and accompanying check list will give you facts you need to know to get a share of your ex-spouse's benefits. However, this information applies only to retirement plans covered by the federal private pension law called ERISA (the Employee Retirement Income Security Act). If you are under a federal, state, or municipal plan, there will be other rules that apply.

Under the law in most states, retirement accounts and benefits earned during a marriage are marital property that should be divided during a divorce or may be used to satisfy marital support obligations. It is therefore important to make sure these assets are addressed in your property settlement agreement and divorce and/or support decree.

Retirement benefits are likely to be among the **most valuable financial assets** in a marriage. Not receiving your rightful share of these assets can make the difference between a financially secure or insecure future—**so don't miss out.**

This brochure and check list explain how to protect your legal rights to a portion of your spouse's retirement accounts and benefits. **Here are some tips to keep in mind:**

To receive your share of your spouse's retirement benefits, there must be a legal proceeding in state court (like a divorce, legal separation, or family support proceeding). You must obtain from the court a judgment, order or decree, or approval of a property settlement agreement that specifically awards you a share of your spouse's retirement benefit.

This court order is called a "domestic relations order," or "DRO."

Under federal law, the retirement plan or plans, not your spouse's employer, must review, accept, and honor the DRO before they will pay out your share of the benefits. If the DRO is accepted and "qualified" by the plan(s), it is called a "Qualified Domestic Relations Order," or "QDRO."

You will need specific information about your spouse's retirement plan and your spouse's benefits to draft the DRO for the state court's approval. If you are a current spouse or already involved in a divorce or support proceeding, you are entitled to this information, including a copy of the plan's federally required QDRO procedures, a copy of the plan document, summary plan description, and specific financial information about your spouse's retirement accounts and benefits.

If you have a lawyer, they can help you get the necessary information. Your spouse may have more than one retirement plan or account so be sure you identify all the plans and get information about each of them.

A DRO must meet legal requirements and the terms of any retirement plan to qualify as a QDRO. If it does, the retirement plan's administrator is required to accept and honor the DRO as a QDRO.

If for any reason the plan administrator does not accept your DRO, you may be able to address any problems with the DRO. You also have a right to go to federal court to challenge the plan's decision.

Divorce, Family Support, and Retirement Benefits: Know Your Rights

You need to take steps to obtain your share of retirement benefits: You must be awarded a share of your spouse's retirement benefits in a state legal proceeding (like a divorce, legal separation, or family support proceeding). There must be a "judgment, order, or decree, or approval of a property settlement agreement," that awards you a share of the benefits. This court order is called a "domestic relations order," or "DRO." Your spouse's retirement plan (not employer) must recognize and honor the DRO before paying your share of retirement benefits. A "DRO" must comply with federal law and be consistent with the terms of your spouse's retirement plan, in which case it is called a "Qualified" DRO, or "QDRO." Under federal law you are known as an "alternate payee," and your spouse is referred to as the plan "participant."

More about QDROs: You will need a QDRO to get a share of your spouse's retirement benefits from private employer-provided pensions or retirement savings plans like 401(k) and 403(b) plans, which are protected by the federal law known as the Employee Retirement Income Security Act of 1974 (ERISA).

If your spouse has an IRA or a retirement plan through the federal, state or local government, a church, or a tribal employer, you may need a different type of DRO to receive your share of those types of your spouse's retirement benefits.

DID YOU KNOW

If you're getting a divorce or legal separation or are involved in a family support proceeding, you have a **legal right** to all or a portion of your spouse's retirement benefits, including retirement savings accounts (such as a 401(k)-type plan), and pension benefits. Your spouse may have more than one type of these retirement benefits with a current or former employer(s). Retirement accounts and benefits may be one of the biggest financial assets in your marriage, **so don't miss out.**

How do I get started?

Gather basic information about your spouse's retirement plans. Your spouse may have retirement benefits from their current or former employers.

- → Make a list of the different places your spouse worked.
  - Make a list of the retirement plans, including 401(k)s, 403(b)s, profit-sharing plans, cash balance plans, SEPs (simplified employee pension plans), or defined benefit pensions, from each workplace.

Each retirement plan will be administered by a *plan administrator* (not necessarily the employer your spouse worked for). Each retirement plan may be administered by a different entity. Assume that they are all administered by different companies. Look for contact information for each retirement plan.

- → You can check paystubs, paper statements, or look online (including the employer's website).
- → You can also look for other retirement plan documents, like booklets or brochures, describing the plan that may have come in the mail.

Request specific information about each of your spouse's retirement plans from each plan administrator.

You will need information about each of your spouse's retirement plans and specific financial information about the account or benefits to which your spouse is entitled as a plan participant. This information is necessary to draft a DRO for the state court's approval (that later will be reviewed by the plan administrator).

If you are already involved in a divorce or support proceeding or can provide information showing that you are asking for information in connection with a pending or possible domestic relations proceeding, you are entitled to receive this information. For example, you are entitled to a copy of the plan's federally required QDRO procedures, a copy of the plan document, the summary plan description (SPD), and specific financial information about your spouse's retirement accounts and benefits. As a spouse of a plan participant, you are also independently entitled to this information. If the plan administrator will not give you this information, you should contact your local U.S. Department of Labor's Employee Benefits Security Administration (EBSA) for assistance.

Share this information with the state court.

After you've gathered the retirement plan information, to get the retirement benefits you're entitled to, your divorce or support agreement must award you a share of the retirement benefits, and you must obtain a DRO.

You and your attorney will use the information to draft a proposal for dividing your spouse's retirement benefits. This proposal will be part of a proposed divorce or support decree or settlement agreement that your attorney will present to the court. Your attorney and your spouse's attorney may negotiate the DRO, but the state court will ultimately decide how to divide the benefit.

Your attorney will need to verify that the DRO complies with state and federal law and that it accurately describes the retirement plan's benefits. A DRO is a complicated document that must meet various legal and factual requirements, and can have different purposes, depending on your circumstances. The DRO should be prepared by someone who has experience doing them. Ask your lawyer if they have such experience or can refer you to someone who does.

TIP

The retirement plan may ask you to verify your identity before giving you any information, so be ready with proof of the marriage or relationship.

Should I share a draft of my proposed DRO with the plan administrator?

You are not required to get the plan administrator's pre-approval of the proposed DRO before you submit it in the state court proceeding. Although the plan administrator is not required to pre-approve the DRO, it is often a good idea to discuss the DRO with the plan administrator before it is submitted as a proposed QDRO. If you have any questions, discuss the questions with your attorney before submitting the DRO to the plan administrator.

What if the retirement plan offers a model or template QDRO?

These may be helpful but may not be required by the plan. As long as your DRO satisfies the requirements to be a QDRO, the plan must honor it. Using the plan's model document may expedite the process.

Similarly, the DRO does not need to be a separate document as long as it contains the necessary information. It can be included in the divorce decree or judgment. In addition, a single DRO may be a QDRO for more than one retirement plan as long as it clearly identifies each plan, specifies the share of benefits, and provides the other required information for each plan.

Talk to your attorney about your options.

If you find out about another retirement plan after the divorce is final, contact your attorney.

This may sound like a lot of work, but you can do this. And it's worth it for you and your family's future financial security.

What happens next?

If you can, you should have your DRO processed during the state court proceeding. Sometimes a DRO isn't finalized before your court proceeding is complete. In that case, you should finalize the DRO as quickly as you can and submit it to the retirement plan administrator as soon as possible. Do not wait to submit it until you want to collect the benefit so that the plan knows that a portion of the benefit must go to you as the ex-spouse. Otherwise, the participant could elect to collect the entire benefit himself or herself or direct that it be paid to another person and there will be no benefit left for you.

If for any reason the plan administrator does not accept your DRO as qualified, you are entitled to a written explanation. You may be able to resolve the questions or problems raised by the plan administrator. You also have a right to go to federal court to challenge the plan administrator's decision not to accept your DRO as a QDRO.

If the plan administrator determines that your DRO is qualified, you will have an approved QDRO.

Once you've gotten your QDRO... what's next?

When the plan administrator approves the QDRO and divides the retirement benefits, you may have options as to what to do with your share. Depending on the retirement plan and your age, you may be able to:

→ Take out the funds under a distribution form provided under the plan,

→ Roll the funds over into your own retirement plan or into an IRA, or

→ Leave your share in your spouse's plan until later.