

Division of Retirement Benefits Upon Divorce

Authority

Authority includes but is not limited to: Family Code § 2610

- a) Except as provided in subdivision b), the court shall make whatever orders are necessary or appropriate to ensure that each party receives the party's full community property share in any retirement plan, whether public or private, including all survivor and death benefits, including, but not limited to, any of the following:
 1. Order the disposition of any retirement benefits payable upon or after the death of either party in a manner consistent with Section 2550.
 2. Order a party to elect a survivor benefit annuity or other similar election for the benefit of the other party, as specified by the court, in any case in which a retirement plan provides for such an election, provided that no court shall order a retirement plan to provide increased benefits determined on the basis of actuarial value.
 3. Upon the agreement of the nonemployee spouse, order the division of accumulated community property contributions and service credit as provided in the following or similar enactments:
 - a. Article 2 (commencing with *Section 21290*) of *Chapter 9 of Part 3 of Division 5 of Title 2 of the Government Code*.
 - b. Chapter 12 (commencing with *Section 22650*) of *Part 13 of the Education Code*.
 - c. Article 8.4 (commencing with *Section 31685*) of *Chapter 3 of Part 3 of Division 4 of Title 3 of the Government Code*.
 - d. Article 2.5 (commencing with *Section 75050*) of *Chapter 11 of Title 8 of the Government Code*.
 - e. Chapter 15 (commencing with *Section 27400*) of *Part 14 of the Education Code*.
 4. Order a retirement plan to make payments directly to a nonmember party of his or her community property interest in retirement benefits.
- b) A court shall not make any order that requires a retirement plan to do either of the following:
 1. Make payments in any manner that will result in an increase in the amount of benefits provided by the plan.
 2. Make the payment of benefits to any party at any time before the member retires, except as provided in paragraph (3) of subdivision (a), unless the plan so provides.

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Process

1. OCERS cannot provide legal advice to members, spouses of members, or former spouses of members. Retirement benefits paid by OCERS may constitute a substantial asset of the parties. OCERS advises that the parties consult an attorney who is knowledgeable in the areas of California community property law and division of retirement benefits for advice and assistance.
2. In all cases, OCERS must be joined in the parties' dissolution action so that the court will have proper jurisdiction over the benefits that OCERS administers. OCERS cannot pay a benefit to a non-member spouse or former spouse unless OCERS has been properly joined in the matter. (Gov. Code § 31452)
3. OCERS is not subject to the jurisdiction of out-of-state courts. Any judgments or Domestic Relations Orders (DROs) filed in out-of-state courts must be domesticated in a California court in order to be binding on OCERS.
4. Forms for joining OCERS as a party to a marital dissolution action in California are available on the California Judicial Council website located at www.courts.ca.gov in the forms area. The specific forms required for joining OCERS are: FL 370 (Pleading on Joinder – Employee Benefits Plan), FL 372 (Request for Joinder of Employee Benefit Plan and Order), and FL 375 (Summons – Joinder). These forms must be filled out by a party and filed with the court prior to service on OCERS.
5. After receipt of these forms, OCERS will file a Notice of Appearance and Response (FL 374). OCERS will serve the Notice of Appearance on the parties along with a letter providing information about OCERS.
6. A Domestic Relations Order (DRO) or Qualified Domestic Relations Order (QDRO) is required to divide benefits between the parties.
7. The DRO must provide a method for calculating the respective shares of the parties. The most common method for calculation is the "Time Rule" or *Judd* formula (*In re Marriage of Judd* (1977) 68 Cal.App.3d 515). Under the *Judd* formula, the number of months of the member's credited employment service during marriage is divided by the total number of months of his or her credited employment service. This amount is then multiplied by one-half to get the non-member's percentage. For example, if the member has 20 years of employment service and was married for 10 of those years, the non-member's share would be 25% of the member's retirement allowance:
$$\frac{120 \text{ months of service during marriage}}{240 \text{ total months of service}} \times .5 = 25\%$$
8. Parties may designate a different method for calculation of the parties' respective shares subject to approval by OCERS and the court.
9. OCERS encourages all parties and attorneys to submit a draft DRO to OCERS prior to filing with the court. If a DRO is filed with the court without approval by OCERS, OCERS may petition the court to set aside the DRO if it does not comply with plan rules.
10. Sample DROs for divorces prior to retirement and after retirement are available on the OCERS website located at www.ocers.org on the Forms and Publications page. OCERS does

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not make any representation that these DROs are appropriate for the unique circumstances of each individual case. The sample DROs contemplate retirement under the unmodified 60% joint and survivor payment option. This may not be the best option for the parties. Therefore, parties are advised to consult with counsel of their choice.

11. Under the unmodified payment option, OCERS will pay a 60% continuation of a deceased member's retirement allowance when the member is survived by a qualified spouse. In order to be a qualified spouse, the member and spouse must be married for at least one year prior to the member's retirement, or, if the member marries the spouse after retirement, the member and spouse must be married for at least two years prior to the member's death, and the spouse must be at least 55 years of age at the time of the member's death. (Gov. Code §§ 31760.1, 31760.2)
12. A former spouse is not a surviving spouse. A former spouse may, however, receive his or her community property share of any continuation payments made by OCERS to the qualified surviving spouse. For example:
 - a. Member's total retirement allowance is \$1,000 per month during the member's lifetime;
 - b. A former spouse is receiving 20% pursuant to a DRO;
 - c. During the member's lifetime, the member receives \$800 per month, and the former spouse receives \$200 per month;
 - d. Upon the death of the member, OCERS will pay a 60% continuation, or \$600;
 - e. The former spouse will receive his or her 20% community property portion or \$120 per month;
 - f. The qualifying spouse will receive 80% or \$480 per month.
13. Retirement benefit payment options available to OCERS members are found in Gov. Code §§ 31761 – 31764. Options 2, 3, and 4 provide payments to a designated beneficiary or, under Option 4, multiple beneficiaries for the life of the beneficiary or beneficiaries. Optional payments are calculated based on their being actuarially equivalent to the payments made under the unmodified option. Therefore, optional payments may be less than payments received under the unmodified option. This reduction of payments is considered the "cost" of the optional payment plan. If the parties wish to elect an optional retirement payment, the DRO must designate which party or parties will bear the cost of the optional election. There is no additional continuation payment made by OCERS if the parties select one of the optional payments.
14. OCERS will not pay any amounts to the non-member former spouse until the member actually retires and begins receiving a benefit. (*In re Marriage of Jensen* (1991) 235 Cal.App.3d 1137)
15. In the event that this procedure conflicts with statute or authoritative case law, the statute or case law will control.