

NEGOTIATING MILITARY RETIREMENT BENEFITS IN DIVORCE PRACTITIONER HANDBOOK

This article is applicable to Military divorces subsequent to December 23, 2016 as a result of the National Defense Authorization Act of 2017 (Act).¹

This article offers guidance to the practitioner as to how to evaluate the two Settlement Options (indicated below) to decide which is the preferred option for your client. It is emphasized that this article is for attorney guidance and need not represent the views of Troyan.

The two settlement Options available to divide a military pension are:

- Immediate Offset
- Drafting a Qualified Domestic Relations Order (Deferred Distribution)

Immediate Offset, begins with a calculation of the present cash value of the Member's monthly benefit as of your jurisdiction's End of Marriage Date. Pursuant to this Settlement Option, the Former Spouse then accepts cash or other asset(s) of equivalent value in exchange for a full waiver of claims to the Member's Retirement Benefits.

Deferred Distribution, begins with rejection of the Immediate Offset method. Instead, the parties agree that the Former Spouse is to receive, *upon the Member's retirement*, a percentage of the Member's monthly retirement benefit.

For the attorney representing the Military Member, this task is quick and simple. Absent compelling circumstances to the contrary, the attorney representing the Member, elects the Deferred Distribution Settlement Option. This blunt advisory will be justified by the discussion that follows. Alternatively, the objective of the attorney representing the Former Spouse is to avoid a Deferred Distribution Settlement.

Commentary.

Because of the adverse impact to the financial wellbeing of the Former

¹ PUBLIC LAW 114-328.

Spouse, the attorney representing a Former Spouse will be highly motivated to use the Immediate Offset Method whenever possible. Alternatively, because of the substantial financial advantage of Deferred Distribution to the Member, the Member's attorney will strive to implement the Deferred Distribution form of settlement.

The Illustrations that follow make clear that §641 of the National Defense Authorization Act, 2017,² results in severe financial damage to a divorcing Former Spouse. Because, federal law preempts state family law, attorney efforts toward mitigation of the financial damage to Former Spouse resulting from the Act are not likely to succeed.

The following fact pattern is offered to illustrate the difference in the size of the Former Spouse's Retirement Benefit under:

- Division of a Military Pension in Divorce Prior to December 24, 2016
- Division of a Military Pension in Divorce Subsequent to December 23, 2016

Alert:

The attorney representing Former Spouse will focus on the percentage of loss to the Former Spouse resulting from application of the Act (shown below). The attorney representing the Member will focus on the percent of gain to the Member due to the Act.

Circumstances at Time of Divorce.

Military Member	Tom Walther
Date of Birth	May 1, 1982
Entered Military Service	May 1, 2004
Married	May 1, 2006
Divorced	May 1, 2017
Pay Grade at Divorce	O-4
Average Monthly Pay at Divorce	\$7,094.00
Accrued Monthly Benefit at Divorce	\$2,305.55
Coverture Fraction at Divorce (11 years ÷ 13 years)	84.62%
Marital Monthly Benefit at Divorce	\$1,950.85

² Effective Date December 23, 2016.

If Half to Jane (Former Spouse) \$975.43
Tom is Regular Component Military

The statistics used to illustrate Tom's Retirement Allowance at Retirement are based on traditional military pay, overtime and promotion policies. The pay calculations are derived from the published military pay tables for the applicable years.

Circumstances at Time of Tom's Retirement.

Tom Retires at Age	47
Average Monthly Pay at Divorce	\$9,426.55
Accrued Monthly Benefit at Divorce	\$5,891.55 ³
Coverture Fraction at Divorce (11 years ÷ 25 years)	44%
Marital Monthly Benefit at Divorce	\$2,592.30
If Half to Jane (Former Spouse)	\$1,296.15

RESULTS

Pre December 24, 2016 Law:

When Tom retires at age 47, Jane will begin to receive a monthly Retirement Allowance from the Military of: \$1,296.15

Clarification.

From the time of divorce up to actual retirement the size of the Former Spouse's benefit is increasing because Tom's pay is increasing and his rank may increase (as it did in our illustration: from O-4 to O-5).

Post December 23, 2016 Law:

When Tom retires at age 47, Jane will begin to receive a monthly Retirement Allowance from the Military of: \$975.43

Clarification.

Because of the Act, Tom's pay at the time of divorce is required to be the basis for this calculation. Jane's benefit is essentially "frozen" as of the date of divorce.⁴

³ For the details of this calculation or any given in this article, contact Troyan.

⁴ Technically, the size of Jane's monthly benefit will increase *slightly* due to COLA increases to Tom's pay at the time of divorce. This point is more complex than the prior sentence indicates. For clarification and a

Result.

Because Jane's divorce is subsequent to December 23, 2016, the monthly benefit that will be paid to Jane has been reduced by: 24.74%.

Benefit Reductions of this magnitude are the rule, because the new military law has been in effect since December 23, 2016. **State Law cannot change this outcome.** Federal Law now mandates this drastic reduction in the monthly retirement benefit paid to a Military Member's Former Spouse.

Reason for the Dramatic Reduction in Former Spouse's Share of a Member's Military Retirement Allowance. ⁵

The new definition of "disposable retired pay" which is found at 10 U.S.C. 1408(a)(4)(B):

...For purposes of subparagraph (A), the total monthly retired pay to which a member is entitled shall be (i) **the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order** (emphasis mine), as increased by (ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement...

The impact of this change in the definition of "basic pay" that can be recognized for calculation of the members retirement benefit was given above. In our illustration the reduction of the Former Spouse's retirement benefit was 24.74%.

This loss to the Former Spouse does not occur if the settlement method is Immediate Offset. Whenever possible, the attorney representing Former Spouse will endeavor to use this settlement option. Alternatively, it is to the benefit of the Member for her or his attorney to use the Deferred Distribution Method.

For analysis of your specific matter in order to demonstrate the adverse (or positive) impact of new §1408(a)(4)(B), contact Troyan.

more detailed explanation of this point contact Troyan.

⁵ "Retirement Allowance" and "Pension" are interchangeable terms for purposes of this article.

