

Uniformed Services Former Spouse Protection Act (USFSPA) and Retirement Pay

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Background:

In 1982, Congress passed the Uniformed Services Former Spouse Protection Act (the "Act"). The Act was passed in response to the U. S. Supreme Court's ruling in the 1981 case of *McCarty v. McCarty*. In *McCarty*, the court prohibited state courts from dividing military retirement pay in divorce proceedings. Therefore, in order to preempt the Court's decision, the Act provided the state courts with the authority to treat military retired pay as marital property and divide it between the spouses.

It is important to understand that retired military pay is an entitlement program and is not subject to the provisions of the Employee Retirement Income Security Act (ERISA). Under the Act, a former spouse will only be entitled to a portion of the service member's retired pay if they receive it.

Statutory Requirements:

Before any retirement payments are dispersed, the Act requires several statutory requirements to be met. The failure to meet any of these requirements may delay or preclude a former spouse's receipt of retirement payments or benefits. The Act requirements are: (1) all applications for payments must be served on DFAS; (2) a court order awarding the former spouse a portion of the member's "gross retired pay" will be calculated using disposable retired pay (gross retired pay less the authorized deductions); (3) a court-ordered award can only be enforced up to a maximum of 50 percent of the member's disposable military retired pay (increased to 65 percent if DFAS is also served with a withholding order for child or spousal support); (4) special jurisdictional requirements must be met separate from and in addition to any state or local rules; (5) the couple must have been married for ten years, during ten years of creditable military service, in order for the former spouse to receive direct retirement payments; (6) the property division must be expressed as either a percentage, fixed amount, a formula or hypothetical award (must be based on at least 15 years of service); and (7) the court order must contain all pertinent information.

It is important to understand that a military retiree's gross retired pay will be calculated using disposable retired pay (gross retired pay less the authorized deductions). Federal and state income taxes will not be deducted for orders entered after 3 February 1991. Each party will also receive his/her own 1099 from DFAS. Court orders will be honored by DFAS on a first-come, first-served basis up to 50 percent of a member's disposable pay. In addition, the Act requires the court to have jurisdiction over the member by reason of his/her residence (other than his/her military assignment); their domicile; or with the member's consent. If these special jurisdictional requirements are not met, DFAS will have no authority to make direct payments to the former spouse.

Property Division & Distribution:

In order for a former spouse to receive direct retirement payments, the parties must have been married for ten years during ten years of creditable military service. This requirement only applies to awards of military retired pay as a division of property and not

support obligations. If the ten year term is not met, the former spouse will have to seek the payments directly from the member. The payment amount must also be expressed as either a percentage or a fixed amount. A former spouse will only be entitled to a cost of living increase if the award is expressed as a percentage and not a fixed amount.

Other Property Division Options:

Parties may divide marital property using a marital fraction formula. A simple formula includes the number of months of marriage divided by the number of months of military service. This result is multiplied by 50 percent to arrive at a percentage, and that percentage may be the former spouse's award. However, in order to use this method, the court order must include all elements of the formula, including the total number of months of marriage. If the member is a Reservist, the court order must include the points earned during the marriage. Upon request, DFAS will supply the total retirement points earned by a Reservist if that element is missing from the formula.

Alternatively, parties may use a hypothetical method to address awards when a marriage ends while the member is still active. This type of award is based on a member's rank and years of service at the time of the divorce. This method may only be used when the member has at least 15 years of service. Upon retirement, the hypothetical award is converted to a percentage of the member's retired pay. It is important to understand that post divorce increases in rank will be apportioned only to the member.

Issues:

Disability Payments

Disability retired pay is a continuing payment to a service member separated from service due to a physical or mental disability. Both VA disability compensation and DoD disability retired pay will be excluded from the former member's gross income for federal income tax purposes. The Act also excludes both DoD disability retired pay and VA disability compensation from the definition of "disposable retired pay," therefore, neither is subject to allocation to a service member's former spouse.

It is important to understand that a retired service member may receive disability compensation from the VA while receiving retired pay. The service member must file a "waiver" of a portion of the military retired pay equal to the amount of VA disability compensation. The waiver will result in a reduction in disposable retired pay equal to the award of VA disability compensation. This reduction will reduce the amount available to a former service member's spouse and can be done without the consent of either the former spouse or a court.

Voluntary Separation Incentive (VSI):

Voluntary Separation Incentives ("VSI") are annual payments, also known as "buy-outs" that are not subject to division under the Act. A member may elect this option if a court has awarded his/her former spouse a portion of his/her retired pay. Under this election, since the member did not retire, the former spouse will be entitled to nothing. A member may also opt to accept VSI payments in lieu of retired pay.

This program includes the Special Separation Bonus (SSB) option that induces members with 15 to 19 years of service to separate from active duty. The member will then receive a lump sum payment in lieu of military retired pay. SSB payments are not subject to division under the Act and will also not entitle a former spouse to anything.

Court Order Language:

Any award of military retired pay must be statutorily expressed as either a percentage or a fixed amount. The simpler an order is drafted will increase the probability that DFAS will not reject it for failing to comply with the Act. However, be advised that DFAS is only concerned with ensuring compliance with the Act and receiving an order with a clearly expressed award. The court order must include the following information: (1) Name, address and Social Security number of each of the parties; (2) Dates of the marriage, divorce, military service, and retirement; (3) An award expressed as either a percentage, fixed amount, specific formula or a hypothetical; and (4) Number of military reserve points earned during the marriage.

The order may also designate the former spouse as the member's SBP beneficiary. This election must be made within one year of the divorce.

It is important to understand that DFAS will not pre-approve a court order. The government does not represent either party in the divorce proceedings and has no interest in the outcome.

Additionally, it is important to recognize that most court orders fail to address the possibility of VA waivers, disability retirement, VSI, or SSB payments. These possibilities may preclude a former spouse from receiving any retirement payments from the retired military spouse.

Commencement and Termination of Payments:

A retired Reservist is not eligible for his/her retired pay until they reach the age of 60. If the service member should become divorced before his/her retirement and the court orders a division of his/her retirement benefits, it is advisable for the former spouse to contact DFAS upon the retirement of the member. This will insure that the former spouse receives the court awarded percentage, if any, of the member's retirement pay.

Payments under the Act will terminate upon the death of either party. Upon the member's death, the former spouse, if a beneficiary, will receive payments under SBP. Alternatively, the former spouse's payments may terminate in accordance with the terms of the court order.

Conclusion:

Divorce and the division of marital assets is never a fun issue to discuss. It is important that any division of future military benefit be properly drafted to insure that each party receives what the court has ordered. DFAS is only responsible to ensure compliance with the Act upon receipt of the court order and will not attempt to interpret a court order. ↴