



PREVENTIVE LAW SERIES

UNIFORMED SERVICES FORMER SPOUSE PROTECTION ACT: DIVISION OF RETIREMENT PAY



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WHAT DOES THE UNIFORMED SERVICES FORMER SPOUSE PROTECTION ACT (USFSPA) DO?

USFSPA allows **states**, not the federal government, to treat disposable military retired pay as community property and divide it between the spouses. It also allows spouses or former spouses to receive military retired pay that would otherwise have been terminated due to a member or former member's misconduct involving abuse of a spouse or dependent child. It also allows for direct payment of current child support/alimony from the member's military retired pay to the former spouse. Finally, it allows for former spouses to be designated beneficiaries of a Survivor Benefit Plan. USFSPA excludes DoD and VA disability pay from the definition of disposable retired pay.

BASICS OF MILITARY RETIRED PAY

Active duty service members become entitled to a pension after 20 years of active service. Retirement pay does not begin until after the servicemember is discharged from active duty. The amount of retired pay per month is based on the term of service and the member's basic pay at the time of retirement.

DIVISIBILITY OF MILITARY RETIRED PAY AS COMMUNITY/SEPARATE PROPERTY

Most states have ruled that military retired pay is divisible for property settlement purposes, although Arkansas, Indiana, North Carolina, and Mississippi may require that the pension be vested before it can be divided as marital property. An unvested pension is treated as separate property and thus not divisible. A vested pension, on the other hand, constitutes marital property. If a court intends to divide disposable military retired pay because it is marital community property, then the court must acquire jurisdiction over the servicemember either through

1. The service member's domicile in the territorial jurisdiction of the court, or
2. The service member's residence within the state for reasons other than military assignment in the territorial jurisdiction of the court, or
3. The service member's consent to jurisdiction

THE CALIFORNIA FORMULA:

$$\frac{1}{2} \times \frac{\text{Length of marriage overlapping military service}}{\text{Total Length of Military Service}} \times 100\% = \text{Ex-Spouse's \% of Servicemember's Retirement Pay}$$

In California, disability pay is **not** included as disposable retired pay and is not divisible as community property. Thus, any disability pay that a retired military member receives as part of his/her retirement cannot be divided as marital community property according to USFSPA. This includes any compensation for disability received through the VA. However, in the event that a member or former member converts or causes retired pay to be converted to disability pay, the California courts, and courts of many other jurisdictions tend to then make an award of spousal support (alimony) to compensate the non-member spouse for his or her share of the retirement payment that he or she would have received but for the conversion to disability pay.

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DIRECT PAYMENT OF DISPOSABLE RETIRED PAY TO SPOUSE

In order to get a **direct payment** from Defense Finance and Accounting Service (DFAS) of retired pay as property to the spouse, the spouse must have been married to the servicemember for at least ten years and for those ten years, the servicemember was in the service (commonly called a "10/10 Spouse"). Further, the court order must provide for payment from military retired pay, and the amount must be a specific dollar figure or specific percentage of disposable retired pay. The order must also show that the court has jurisdiction over the servicemember in accordance with USFSPA provisions. Generally this is accomplished by a special document called a Qualified Domestic Relations Order ("QDRO"). A private attorney must be hired to prepare a QDRO. There are no direct payments in excess of 50% if there is more than one divorce; it is based on a first-come first-serve basis. However, in cases where there are payments both under USFSPA and pursuant to a garnishment for child or spousal support, the total amount of direct payments to the former spouse may not exceed sixty-five percent of the disposable retirement pay.

USFSPA AND DEPENDENT ABUSE

A spouse/former spouse has a right to retired pay lost as a result of a member's misconduct involving dependent abuse. Thus, when a retirement-eligible servicemember receives a punitive discharge by court-martial for dependent-abuse offense(s) and his/her eligibility to retired pay is terminated as a result of that misconduct, a spouse or former spouse may still be able to receive payments from retired pay that the member would have been entitled to "but for" the misconduct. **Only** victim-spouses who were married to the military member for at least ten years while the member was performing military service creditable for retirement will be eligible for direct payment of a portion of retired pay. This is the "10/10 spouse" criterion that is required for direct payments of a portion of retired pay. If the victim-spouse is not a 10/10 spouse, he/she is ineligible to receive direct payment.

MILITARY RETIRED PAY AND CHILD SUPPORT OR SPOUSAL SUPPORT

USFSPA permits direct payment of current child support or spousal support by a court order from a servicemember's retired pay. The jurisdictional requirements that apply for dividing military retired pay as community property do NOT apply to the direct payment of child support or spousal support. USFSPA cannot be used to enforce arrearages (past amounts) of child and spousal support – only support that is currently due or will be due in the future. In order to obtain arrears, you must file an action in the court to determine arrears and then obtain a Garnishment or Wage and Earnings Assignment Order against the member or retired member's income.

SURVIVORS' BENEFIT PLAN (SBP)

The Survivors' Benefit Plan is a program enabling a spouse or former spouse to continue to receive a portion of the member's retirement pay even after the retired member dies. The court can order a retiring servicemember to designate a former spouse as an SBP beneficiary – the election does not have to be voluntary. The election is not automatic. It must be triggered by a request from the former spouse and the request must be sent to the appropriate military finance center not later than one year after the date of the court order. Once a timely request is made, the military finance center will flag the servicemember's records. Upon the member's retirement, the former spouse will be designated as an SBP beneficiary. The former spouse and the member or retired member must decide whether they will share the cost of the SBP election or whether only one of them will pay the charges incurred to reserve this election.

LEGAL ASSISTANCE SERVICES

A legal assistance attorney is available by appointment Monday from 0800 - 1100 and 1300 - 1500, Tuesday through Thursday (excluding the fourth Wednesday of the month) from 0900 - 1100 and 1300 - 1500 and Friday from 0900 - 1045. Powers of attorney and notaries are available at the same times. For more information, please contact the Legal Assistance Office, located in Building 56, 32nd Street Naval Station, San Diego, CA, by telephone at (619) 556-2211, or our office at Naval Air Station North Island – Coronado, Building 318 – Second Deck, above the Fleet and Family Support Center, Saufley Road, by telephone at (619) 545-6437.

RESOURCES:

Defense Finance and Accounting Service: (888) 332-7411; www.dfas.mil

10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, 1451 (2012)

32 C.F.R. Part 63 (2013)

Cal. Prac. Guide Family L. Ch. 8-E

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