

Retirement Division Basics Bench Card

Purpose	To maintain status quo pending judgment; make enforceable orders in the judgment; ensure retirement benefits are properly divided (FC §2610).
Maintain Status Quo	• The retirement plan does not know that the parties are in the process of divorce unless notified. It will allow the in-spouse¹ to violate the ATROs by cashing out their plan or retiring which destroys community property value and may eliminate the out-spouse's ability to receive survivor benefits. • Ordering the parties to join the plan or serve it with a Notice of Adverse Interest (NAI) helps maintain status quo. Both Joinders and NAIs may trigger a hold on benefits until a QDRO/DRO² is done. • Joinders are required for all California Public Plans. See Form FL-318. Click here for more information on whether to order Joiinders or NAI. • There is no way to place a hold for military or federal pensions. Once the parties are divorced, there are no protections in place for the out-spouse without the DRO. • To ensure status quo until the benefits are divided, order the parties to prepare the QDRO/DRO concurrently with the judgment.
Make Enforceable Orders	• Ensuring that the precise plan name is included in the order is crucial. The name may be on a plan statement, the plan's QDRO procedures, or the Summary Plan Description. Ensuring the correct plan name is in the order is just as important as including the legal description for a piece of real property or the license plate number of a vehicle. • The plan type defines the division methods available. The three most common plan types are: defined benefit plans (e.g. pension, cash balance), defined contribution plans (e.g. 401k, Savings Plan), and IRAs. Click here for more information on each Plan type. For plan type specific order templates see the Retirement Benefit Order Drafting Tool. • If the division method in the order is improper, the QDRO/DRO cannot effectuate the court's intent. • Omitted plans are a significant source of post-judgment controversy since they fail to divide the community property. Most mid-to-large employers offer at least two types of retirement plans: a defined benefit plan (e.g. CalSTRS) and a defined contribution plan (e.g. 401k plan). • All employers in California are required to offer a defined contribution plan or CalSavers.³ Even employers with only one employee are still required to offer a defined contribution plan.

¹ Depending on the plan, the party whose name is on the plan/account is called the in-spouse, Participant, Member, or Employee. The party whose name is NOT on the plan/account is called the out-spouse, Alternate Payee, Nonmember, or Former Spouse.

² The division orders for private plans are called Qualified Domestic Relations Orders ("QDROs") and the division orders for public plans are called Domestic Relations Orders ("DROs"). The division orders for IRAs are called §408 Orders.

³ See California Government Code §100000 *et. seq.*

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Ensure Retirement Benefits are Properly Divided

- A separate QDRO/DRO is required to divide each retirement plan, even if offered by the same employer.
- Plans are permitted by law to reject QDROs/DROs that are inconsistent with their procedures.⁴ Most plans will review a draft QDRO/DRO (i.e. preapproval) to determine whether it meets the plan's guidelines. Order the parties to obtain preapproval if applicable to ensure the plan can implement the QDRO/DRO.
- The appropriate time for the parties to conduct discovery and make claims about separate property in retirement benefits (especially for defined contribution plans and IRAs) is pre-trial, not after Judgment or when the QDRO process begins. Pursuant to *In re Marriage of Mix*⁵, the in-spouse bears the burden of proof regarding separate property in their retirement plans.
- Assuming they can prove it up, an in-spouse's premarital separate property interest in a defined contribution plan or IRA includes not just the funds in the account as of the date of marriage, but also gains/losses on those premarital funds accrued during the marriage.
- If parties wish to equalize & offset retirement assets against other property (including other retirement assets), the retirement benefits should be properly valued. Defined benefit plans are frequently misvalued for a lump sum return of employee contributions rather than as a present value of a future annuity.
- Survivor/death benefits (i.e., payments after the in-spouse passes away) are a separate right from payments made while the in-spouse is alive. They are not automatically conferred and must be SPECIFICALLY awarded. **Failing to specifically award survivor/death benefits to the out-spouse in the pre-QDRO order/Judgment may result in their loss.**⁶
- Judgment language matters; awarding "50% of the community interest" in a retirement benefit is not sufficient. Different plan types have different award requirements. See the Retirement Benefit Order Drafting Tool for more help.
- Bad things happen when parties wait to have their QDRO entered: death, remarriage, malfeasance, account transfers, withdrawals, loans, and investment choices can all materially affect a party's rights. Consider ordering that the Judgment and QDRO be entered concurrently; a specific timeframe for the parties to have the QDRO prepared; or even setting an OSC re Entry of QDRO for 6-8 months after entry of Judgment.

⁴ See, e.g., 29 U.S.C. §1056(d)(3)(D); California Government Code §§21290-21298.

⁵ *In re Marriage of Mix* (1975) 14 Cal.3d 604.

⁶ See, e.g., *Carmona v. Carmona* (9 Cir 2010) 603 F.3d 1041; 10 U.S.C. §1450(f)(3); 5 CFR §838.806(b).