

Changes and Issues in the New Military Pension Law

By Pamela K. Squires

I have recently become aware of a major change in Federal law pertaining to the division of military pensions upon divorce, which was passed and made effective as of 12/23/16. Although I was aware of the changes to military retirement benefits for some members quite some time ago, I was not aware until very recently that this law also in many respects revises certain provisions of the Uniformed Services Former Spouses Protection Act.

The Federal law was passed on 12/23/16 and will dramatically affect how to divide a military pension upon divorce. Although the Federal law was passed on 12/23/16, DFAS has not yet provided additional information or regulations as to how this Federal law will affect the regulations currently in place. The new legislation is effective immediately, with no mention of a “grace period.” The aforementioned Federal law is the most significant change in dividing military pensions in the past 35 years (since the Uniformed Services Former Spouses Protection Act was passed). DFAS will presumably soon be revising their rules and regulations to take into consideration the new law. This legislation will presumably also require a re-write of state law pertaining to the division of military pensions.

Although we don't yet know the exact specifics, it appears that DFAS will no longer honor an award of a portion of the pension based on the normal coverture fraction, with the denominator being the total number of months of creditable service **at retirement**. Instead, it appears that DFAS will be requiring that a former spouse's share be calculated based on the base pay and rank of the member at the time of divorce (or possibly date of separation). This has always been an option (a “hypothetical award”) but is rarely used in Virginia since it freezes the benefit at the date of divorce (or separation). In addition, it will require obtaining additional information regarding a member before the Agreement, FOD, and/or Qualifying Court Order setting forth a former spouse's entitlement is drafted. This major change is very concerning since it is inconsistent with current Virginia Court of Appeals case law against any attempt to freeze a benefit at the time of the divorce (or separation).

Again, the full details regarding how this new legislation will impact cases in Virginia is not yet known; however, it is very likely that any order which uses the typical marital share fraction will be rejected. I wanted you to be aware of the foregoing as you negotiate terms of settlement in cases involving military pensions. It is still not known whether, if an Agreement or QCO was signed before 12/23/16, those documents will be honored.