

GENERAL POINTS

The pension sharing legislation is quite complex. A number of problems of interpretation have been raised from time to time by firefighters and fire and rescue authorities.

This section of Annexe 14 –

- refers to problems and suggests possible answers
- adds general information related to the pension sharing process.

Divorce, dissolution of civil partnership, annulment, judicial separation General points

What if a previous order has been made?

An earmarking order cannot be made where a pension sharing order has been made in respect of the same marriage [Section 25B(7B), Matrimonial Causes Act 1973] or the same civil partnership [paragraph 8, Schedule 5, Civil Partnership Act 2004].

A pension sharing order cannot be made where there has been a previous earmarking order [Section 24B(5), Matrimonial Causes Act 1973 and paragraph 18(3), Schedule 5, Civil Partnership Act 2004]

These situations should not arise since the Pensions on Divorce etc. (Provision of Information) Regulations 2000 require that details of previous orders should be supplied by the pension scheme manager as part of the basic information. When an order is received, however, this should be checked along with the other terms of the order to ensure that compliance is possible. If there is a problem with the order, the court should be told.

Section 5 of Form P1 – Pension Sharing Annex under Section 24B of the Matrimonial Causes Act 1973 – gives the date the court has specified as the valuation date. Is this used in the apportionment of benefits?

No, it cannot be used for that purpose. Under Regulation 3 of the Divorce etc. (Pensions) Regulations 2000, it is the court that determines the value of pension rights at a specified date. In doing so the court may have regard to a valuation provided by the pension managers and the date at which they made the valuation. It is this latter date that should be entered in Section 5 of Form P1.

Unfortunately the inclusion of the space for a date on Form P1 has given rise to some confusion where firefighters, and sometimes legal advisers, believe that this is the date at which the order requires the benefits to be split. This is not the case. Other legislation explains the dates to be used for “splitting” and for valuation purposes. These are explained below in “Dates for use in calculations when pension sharing order is received”.

At the beginning of 2003, a revised Form P1 was provided by the Court Service. The revised Form no longer requires the inclusion of a date at Section 5. Hopefully the problems associated with the inclusion of the date will not arise in future. In December 2005, Form P1 was revised again. Like the 2003 version, it does not require the inclusion of a valuation date.

Dates for use in calculations when pension sharing order is received

There are two key dates to be determined when calculating the “split” of the value of pension rights for an active member – the **transfer day** and the **valuation day**. For deferred and pensioner members, the relevant dates will be the **last day of membership** and the **valuation day**. In all cases, regard must be had to the dates of the **implementation period**.

Divorce, dissolution of civil partnership, annulment, judicial separation General points

Dates for use in calculations when pension sharing order is received (continued)

The first stage in producing the CETV of pension rights is to have regard to the value of benefits at a particular date, i.e. the last day of membership where there is one, or a “hypothetical” last day as required by legislation where the person is still an active member.

Pensioner members and deferred members have already had a last day of membership and so there is no need for the legislation to define it. Use the retirement pension or deferred pension, as calculated at the actual last day of membership, as the basis for the CETV in accordance with GAD guidance.

In the case of an active member, the relevant date used for the assessment of benefits is the “transfer day”. Section 29(8) of the Welfare Reform and Pensions Act 1999 defines this as –

“ . . . the day on which the relevant order or provision takes effect”.

Section 24B(2) of the Matrimonial Causes Act 1973 says –

“A pension sharing order . . . is not to take effect unless the decree on or after which it is made has been made absolute.”

Paragraph 19 of Schedule 5 to the Civil Partnership Act 2004 says –

“A pension sharing order is not to take effect unless the dissolution or nullity order on or after which it is made has been made final.”

The transfer day, therefore, will be the later of –

- the date of the order, or
- the date of decree absolute or finalisation of the dissolution or nullity order.

How is the transfer day used? Unfortunately there appears to be conflict between the requirements of the Welfare Reform and Pensions Act 1999 and the Regulations made under that Act.

Regulation 4(2B) of the Pension Sharing (Valuation) Regulations 2000 says –

“Where the person with pension rights is an active member of an occupational pension scheme on the transfer day, the value of the benefits which he has accrued under that scheme shall be calculated and verified . . . on the assumption that the member had made a request for an estimate of the cash equivalent that would be available to him were his pensionable service to terminate on the transfer day.”

Divorce, dissolution of civil partnership, annulment, judicial separation General points

Dates for use in calculations when pension sharing order is received (continued)

However Section 29(4) of the Welfare Reform and Pensions Act 1999 says –

“Where the . . . transferor is in pensionable service under the scheme on the transfer day, the relevant benefits . . . are the benefits or future benefits to which he would be entitled under the scheme by virtue of his shareable rights under it had his pensionable service terminated immediately before that day.”

It would be advisable to use the date prescribed by the Act rather than the date given in the Regulations made under the Act. Consequently assume that the date to be used as “the last day of membership” for an active member will be the day before the transfer day.

Whether the person is an active, deferred or pensioner member, the CETV must be assessed in accordance with GAD guidance having regard to a “valuation day”. As explained in the previous section, this is not the date which may be put into a Pension Sharing Annex, it is a date selected by the pension scheme manager.

Section 29(7) of the Welfare Reform and Pensions Act 1999 says –

“For the purposes of this section, the valuation day is such day within the implementation period for the credit under subsection (1)(b) as the person responsible for the relevant arrangement may specify by notice in writing to the transferor and transferee”

and Section 34(1) of the same Act says –

“. . . the implementation period for a pension credit is the period of 4 months beginning with the later of –

(a) the day on which the relevant order or provision takes effect, and

(b) the first day on which the person responsible for the pension arrangement to which the relevant order or provision relates is in receipt of –

(i) the relevant documents, and

(ii) such information relating to the transferor and transferee as the Secretary of State may prescribe by regulations”.

Consequently, the implementation period commences when all the information requested in forms issued under the Pensions on Divorce, etc (Provision of Information) Regulations 2000 have been received. The valuation date can be any date chosen by the pension manager within the following 4 months. For consistency, you may wish to use the first day in all cases.

Divorce, dissolution of civil partnership, annulment, judicial separation General points

If an earmarking order is made, is the percentage quoted based on the gross pension or net pension?

Although an earmarking order is a form of “attachment” order there is often no clear guidance as to whether the percentage given is that of the gross pension (i.e. before tax) or of the net pension (i.e. after tax). For example, if a monthly instalment of pension is £1,000 before tax and £800 after tax, would “50%” mean payment to the former spouse or civil partner of £500 or £400? Fire and rescue authorities have been given both interpretations. If the order is unclear as to intent, the fire and rescue authority should check with the court.

HM Revenue and Customs guidance in respect of earmarking and pension sharing orders

Earmarking Order:

“When the member of the pension scheme becomes entitled to receive payment, the scheme trustees pay the amount specified in the order directly to the ex-spouse.

- The pension remains the income of the scheme member, and
- he or she is chargeable to income tax on the whole amount, and
- no deduction is available for the amount paid under the attachment order.

The pension received by the non-scheme member ex-spouse is tax-free in his or her hands.”

Apply similar principles to former civil partners.

Pension sharing order

“The court will actually make an order stating how much of an employee’s pension benefits must be shared with the ex-spouse although in some cases, in particular court orders under Scottish law, the pension sharing will be set out in a legally recognised “qualifying agreement” between the divorcing couple.

Under these provisions, the ex-spouse will be entitled to receive a pension, which will be taxable in his or her hands.”

Apply similar principles to former civil partners.

Should a retained or volunteer firefighter's injury award be treated as a "shareable benefit"?

This question was raised before the New Firefighters' Pension Scheme 2006 came into effect. The RDS firefighter referred to here was entitled to injury and ill-health benefits under the Firefighters' Pension Scheme 1992 before the removal of the injury provisions from that Scheme. He had not been an active member.

Divorce, dissolution of civil partnership, annulment, judicial separation General points

Should a retained or volunteer firefighter's injury award be treated as a "shareable benefit"?
(continued)

The answer should be 'No'. However, the person requesting the valuation may -

(a) state that the injury benefits should be considered a "pension arrangement" for Pensions on Divorce, etc purposes, or

(b) concede the point in respect of the part of the award which is called an "injury pension" but insist that the part called an "ill-health pension" should be considered a shareable benefit.

Looking at (b) first, even though the retained or volunteer firefighter receives a pension based on the same principles as would apply in the assessment of an ill-health pension, it is still an injury award. The firefighter would not have entitlement to the award had he/she not suffered a qualifying injury.

On page Annexe 9-4 of the Commentary there is an extract from HM Revenue and Customs Assessment Procedures –

"The position with regard to the fire service is . . . ordinary, short service and ill-health pensions are taxable, "injury" pensions are not. Pensions awarded to fire service personnel solely on the grounds of injury whilst on duty, even if they are called ill-health pensions, are not treated as income for tax purposes . . . These individuals will either not be regular firefighters or will not have served two . . . years."

So HM Revenue and Customs deemed all elements of the award paid under Rule J4 of the FPS to be an injury award.

As regards (a), although the cover given to retained and volunteer firefighters by the FPS can be considered an occupational pension scheme according to the definition in the Pension Schemes Act 1993 (it is a scheme arrangement which is comprised in one or more instruments and agreements and which would provide benefits on death) the definition of non-shareable benefits given in Regulation 2 of the Pension Sharing (Valuation) Regulations 2000 would cover the retained or volunteer firefighter's injury award.

The definition of non-shareable benefits includes "any rights which do not result in the payment of relevant benefits". "Relevant benefits" are defined in Regulation 1 as those which have the meaning given by Section 612 of the Income and Corporation Taxes Act 1988. Section 612 excludes from the definition "any benefit which is to be afforded solely by reason of the disablement by accident of a person occurring during his service or of his death by accident so occurring and for no other reason."

This interpretation makes the injury award a non-shareable benefit in the case of a former retained firefighter.

**Divorce, dissolution of civil partnership, annulment, judicial separation
General points**

**Should a retained or
volunteer firefighter's
injury award be treated
as a "shareable benefit"?
(continued)**

As regards completion of the model forms provided in Annexe 14B –

(a) If the person is a former regular firefighter receiving both an ill-health and an injury pension, value the ill-health pension only. Tick the box in Part 5 of model Form Fire Div 5 to explain that the injury element is non-shareable.

(b) If the person is

- a former regular firefighter with insufficient service to be entitled to an ill-health award other than in circumstances of injury, or
- a retained firefighter receiving both an ill-health and an injury pension as a result of an injury (i.e. no ill-health pension entitlement as a member of the Scheme)

the applicant should be told that both the ill-health and injury pensions are non-shareable.