Life in the Post-DOMA/*Windsor* World

NAPPA Annual Conference
Nashville, TN
June 26, 2014

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Overview

- *Windsor* Background
- Revenue Ruling 2013-17
- Notice 2014-19
- Notice 2014-1
- *Post-Windsor* Litigation
- Action Steps for Qualified Plans
- Action Steps for Welfare Plans

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U.S. v. Windsor: The Decision

- Section 3 of the Defense of Marriage Act ("DOMA")– which limited the definition of a "spouse" or "marriage" to a person of the opposite sex – is unconstitutional
- But Section 2 of DOMA – which allows states to refuse to recognize the validity of same-sex marriages that were legally performed in other states – remains
- Key issue: *Post-Windsor*, how must employee benefit plans treat same-sex marriages?

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Revenue Ruling 2013-17

- For purposes of federal tax law:
  - "Spouse," "marriage," "husband," and "wife" will include spouses of the same-sex, if couple is legally married under state or federal law
  - *Place of celebration* controls the definition of spouse; do not look to law of place of residence (or work)
  - "Marriage" does not include domestic partnerships or civil unions under state law
- Effective date: September 16, 2013

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Notice 2014-19

- Provides guidance in three important areas for section 401(a) Plan:

1. Key Code Provisions Impacted by DOMA
2. Effective Date of the Windsor decision
3. Need For (and Timing of) Plan amendments

Notice 2014-19

- Key Code Provisions Impacted by DOMA
  - QJSA/QPSA (Code § 401(a)(11))
  - Spousal Death Benefit for Profit-Sharing Exception Plans (Code § 401(a)(11)(B)(ii))
  - Required Minimum Distributions (Code § 401(a)(9))
  - Eligible Rollover Distribution Rules (Code § 402(c))
  - Controlled Group (Code § 414(b))
  - Top-Heavy Provisions (Code § 416)
  - ESOPs (Code § 409(n), (p))
  - QDROs (Code § 401(a)(13)(B))

Impact on Qualified Plans

	DOMA	Post-DOMA
1. QJSA (Qualified Plans and ERISA 403(b))	Same-sex spouse treated as non-spouse beneficiary – not required to consent to single life annuity, lump sum, etc. payouts (though plan may require)	Same-sex spouse now entitled to 50% survivor annuity protection (and participant may elect 75% survivor annuity), unless consent to form of payout other than QJSA
2. QPSA (Qualified Plans and ERISA 403(b))	Same-sex spouse not treated as spouse for qualified pre-retirement survivor annuity protection (though plan may allow)	Same-sex spouse now entitled to 50% survivor annuity protection unless consent to waive (where plan doesn't subsidize cost)
3. 401(k) Plans – Payment of Account Balance at Death	Same-sex spouse treated as non-spouse beneficiary – not required to consent to another beneficiary designated by participant [illegible]	Same-sex spouse now entitled to 100% of account balance at death unless consent to another beneficiary
4. Hardship Distribution (401(k) and 403(b) Plans)	If plan allows, participant may designate same-sex spouse as primary beneficiary when electing hardship distribution for medical, tuition and funeral expenses of such spouse	Plans now required to recognize same-sex spouse as primary beneficiary for purposes of these hardship distributions

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Impact on Qualified Plans

	DOMA	Post-DOMA
5. Rollovers (all Plans)	Same-sex spouse may make direct rollover only to an inherited IRA	Same-sex spouse now able roll over plan distribution to own IRA or employer plan account
6. Loans (mainly money purchase pension plans)	Same-sex spouse is not required to consent to a plan loan	Same-sex spouse must consent to a plan loan. (Similarly, all Plans that require spousal consent to a Plan distribution will now need consent from the same-sex spouse.)
7. QDROs (all Plans)	Same-sex spouse does not have rights of "alternate payees" to obtain QDROs awarding share of participant's benefits	Same-sex spouse now able to obtain QDRO if state law recognizes the rights of same-sex spouse (or is entitled to share in community property states)

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Impact on Fringe Benefits

	DOMA	Post-DOMA
1. *No Additional Cost Services* (e.g., excess capacity services such as airline, bus, or train tickets, hotel rooms)	No additional cost services provided to a same-sex spouse resulted in imputed income to the employee.	Same-sex spouse may be provided such services on a tax-free basis the same as opposite-sex spouse.
2. *Employee Discounts*	Employee discount offered to a same-sex surviving spouse, of an employee or former employee who retired or left on disability resulted in imputed income to the employee or former employee.	Same-sex surviving spouse may be provided such services on a tax-free basis the same as opposite-sex surviving spouse.
3. Retirement Planning Services	These services provided to a same-sex spouse resulted in imputed income to the employee.	Same-sex spouse may be provided such services on a tax-free basis the same as opposite-sex spouse.

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Notice 2014-19

- Effective Date of the *Windsor* decision
  - June 26, 2013
    - Can apply the place of celebration rule under Rev. Rul. 2013-17 for entire period
    - Can apply the place of celebration rule under Rev. Rul. 2013-17 as of September 16, 2013, and prior to such date apply the laws for the state of domicile of the participant
  - Can elect an earlier date (optional) for some or all plan qualification purposes
    - This may result in unintended consequences, and Code section 436/432 benefit restrictions may apply

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Notice 2014-19

- Plan amendments – may be required, depending on the existing plan language
  - Required if definition of spouse is:
    - Consistent with Section 3 of DOMA (e.g., references DOMA or limited to a person of the opposite sex),
    - Otherwise inconsistent with the outcome of Windsor, Revenue Ruling 2013-17 or this Notice 2014-19, or
    - Effective date before June 26, 2013 (for some or all plan purposes).
  - A clarifying amendment may still be useful for purposes of plan administration
- Amendment Deadline
  - later of (1) the interim amendment deadline pursuant to section 5.05 of Rev. Proc. 2007-44 (e.g., the tax filing deadline (including extensions) for the year the change is effective), or (2) December 31, 2014
  - Special rule for governmental plans – rather than 12/31/2014 – close of the first regular legislative session of the legislative body with the authority to amend the plan that ends after December 31, 2014

IRS FAQ

- FAQ-1: How does Windsor affect beneficiary designations for Profit Sharing Exception Plans? *The death benefit must be paid to the same-sex spouse (unless consent) for deaths after the applicable effective date*
- FAQ-2: Can the plan document limit the definition of spouse in accordance with a choice of law provision to exclude same-sex spouses? *No*
- FAQ-3: How is a retroactive Windsor plan amendment implemented? *EPCRS correction steps should be applied*
- FAQ-4: Can a plan be amended to provide new rights or benefits for participants with same-sex spouses? *Yes (subject to nondiscrimination and other qualification requirements)*
- FAQ-5: How does this impact 403(b) plans? *Notice 2014-19 applies*
- FAQ-6: Do the restrictions of Code section 432 apply to this amendment of multiemployer plans? *No, if a June 26, 2013 effective date is used*

Health & Welfare Plans: IRS Notice 2014-1

- Effective date: 12/16/13
- Amplifies Rev. Rul. 2013-17
- Addresses cafeteria plan treatment of same-sex spousal coverage
  - Mid-Year Election Changes
  - FSA Reimbursements
  - Contribution Limits for HSAs and Dependent Care FSAs
  - Written Plan Amendments

Notice 2014-1

- Mid-Year Election Changes
  - *Windsor* decision treated as a change in status event (i.e., change in legal marital status) for spouses lawfully married as of the date of the decision (June 26,2013) and after
  - Change in tax treatment alone does not constitute a "significant change in the cost of coverage" under cafeteria plan regulations but transition relief provided for 2013

Notice 2014-1

- Mid-Year Election Changes
  - Cafeteria Plan election with respect to coverage for same-sex spouse made between 6/26/13 and 12/16/13 must be effective no later than the later of:
    - the date the election would be effective under the cafeteria plan, or
    - a reasonable period of time after 12/16/13
  - Cafeteria Plan election made after 12/16/13 must be effective on the date that any other change becomes effective

Notice 2014-1

- Mid-Year Election Changes
  - Employer must begin to treat health coverage for a same-sex spouse as a pre-tax election under cafeteria plan as of the later of:
    - The date that an employer is required to be reflected for income tax withholding purposes, or
    - A reasonable period after 12/16/13.
  - Employee can exclude and/or apply for refund for income and employment taxes

Notice 2014-1

- FSA Reimbursements
  - May reimburse covered expenses of the same sex spouse or the same-sex spouse's dependent beginning on the first day of the cafeteria plan year that includes the date of the Windsor decision (6/26/13), or, if later, the date of the marriage
  - FSA election need not specifically identify same-sex spouse in order for employee to receive reimbursement

Notice 2014-1

- Contribution Limits for HSAs and Dependent Care FSAs
  - HSA: Same-sex spouses must comply with family contribution limit of $6,450 beginning in 2013
  - Dependent Care FSA: Same sex spouses are subject to DCAP contribution limits of the lesser of $5,000 ($2,500 for married, filing separately) or the employee or spouse's earned income

Notice 2014-1

- Written Plan Amendments
  - Cafeteria Plan may not need to be amended
  - If plan sponsor chooses to permit election changes that were not previously provided in plan document, those changes must be in writing
    - Transition relief for plan amendments (until 12/31/14 for calendar year plans)
    - Amendments can be retroactive to 2013

Update on Employee Benefits Litigation

- Challenges to state "mini-DOMA" laws
- Retroactive effect of *Windsor*
- Can health plans limit spouses to only those of the opposite sex?

Patchwork of State Laws Re: Same-Sex Marriage

- Same-sex marriage licenses issued in: CA, CT, DE, HI, IL*, IA, MA, ME, MD, MN, NH, NJ, NM, NY, RI, VT, WA and DC
  Note: Some states have "civil union" spousal equivalents
- States that *prohibit* same-sex marriages (and recognition of such marriages that were performed in other states)
  - AL, AK, AZ, AR, CO, FL, GA, ID, IN, KS, KY†, LA, MI††, MS, MO, MT, OR, NE, NV, NC, ND, OH^, OK†, PA, SC, SD, TN^^, TX†, UT#, VA†, WI, WV, WY
- Foreign countries permitting such marriages include: Argentina, Brazil, Canada, Denmark, England, France, Iceland, Spain, South Africa, Sweden

*Cook Co. as of 2/21/2014; rest of IL 6/1/2014
† Federal court ruled that state ban was unconstitutional; ruling stayed pending appeal.
++Federal court ruled MI ban on SSM unconstitutional and more than 300 same-sex marriage licenses were issued before the Sixth Cir. issued a stay; ruling now on appeal.
^Federal court announced OH ban on recognition of out-of-state SSMs unconstitutional.
^^Federal court issued preliminary injunction banning enforcement of anti-recognition law, but ruling does not have state-wide effect.
#Federal court struck down UT ban on SSM, and marriage licenses issued between 12/20/13 & 1/6/2014. Stay of ruling subsequently entered, and now on appeal to 10th Cir.

Litigation Issues

- Post-*Windsor*, federal district courts have unanimously found state "mini-DOMA" laws to be unconstitutional—even under rational basis review.
  - *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah Dec. 20, 2012) (Utah ban on SSM unconstitutional)
  - *Obergefell v. Wymyslo*, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013) (Utah ban on recognition of out-of-state SSM unconstitutional)
  - *Bishop v. U.S.*, 962 F.Supp.2d 1252 (N.D. Okla. Jan. 14, 2014) (OK ban on same-sex marriage unconstitutional)
  - *Bourke v. Beshear*, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (KT anti-recognition law unconstitutional)
  - *Bostic v. Rainey*, 2014 WL 561978 (E.D. Va. Feb. 13, 2014) (VA ban on SSM unconstitutional)
  - *Lee v. Orr*, 2014 WL 683680 (N.D. Ill. Feb 21, 2014) (IL ban on SSM until 6/1/2014 unconstitutional as applied to Cook County, IL)
  - *DeLeon v. Perry*, 2014 WL 715741 (Feb,. 26, 2014) (PI barring TX from enforcing prohibition on recognizing out-of-state SSMs)
  - *DeBoer v. Snyder*, 2014 WL 1100794 (E.D. Mich. March 21, 2014)
  - *Henry v. Wymyslo*, 2014 WL 1418395 (April 14, 2014) (state ban on recognition of out-of-state SSM unconstitutional)
- Officials in OR, VA, and NV have refused to defend state bans on SSMs. *Geiger v. Kitzhaber* case pending in Oregon.
- Appeals filed in Fourth, Fifth, Sixth, and Tenth Circuits. Pre-*Windsor* decision on NV SSM ban pending before Ninth Circuit (*Sevcik v. Sandoval*)

Litigation Issues

- Retroactive changes to pre-*Windsor* pension benefit distributions, such as:
  - Payment of single-life annuity to married participant
  - Denial of survivor annuity to surviving same-sex spouse
  - Form of distribution to same-sex surviving spouse under defined contribution plan
  - Distribution from defined contribution plan to non-spouse beneficiary without spousal consent
- IRS Notice 2014-19 addresses retroactivity for purposes of plan qualification only; claims for benefits under terms of plan still possible

Litigation Issues

- First post-*Windsor* employee benefits decision: *Cozen O'Connor P.C. v. Tobits*, 2013 WL 3878688 (E.D. Pa. July 29, 2013)
- Widow of same-sex couple who married in Canada and resided in IL is entitled to surviving spouse benefit under pension plan
- ERISA and the IRC establish the "floor" for spousal rights in pension plans; *Windsor* "leveled the floor"
- Administrator of PA-based plan not bound by PA law, notwithstanding PA choice of law provision

Litigation Issues

- Does ERISA require health plans to cover same-sex spouses?
  - Self-funded plans
  - Insured plans
  - Participant communication issues
- Gender discrimination claims under Title VII or state law?
  - *Hall v. BNSF Railway Co.*, 13-cv-02160 (W.D. WA)
  - *In re Fonberg*, 736 F.3d 901 (9th Cir. 2013)

Action Steps – Qualified Plans

- Decide on an Effective Date. The Plan sponsor has a number of options:
  - June 26, 2013 – place of celebration definition
  - June 26, 2013 – September 15, 2013 if same-sex marriage is recognized in the participant's place of domicile; September 16, 2013, follow place of celebration definition
  - Prior to June 26, 2013 – for all or selected purposes (e.g., QJSA, QPSA, MRD or rollover purposes)
- Adopt Plan Amendment. The Plan amendment, if any, should generally be adopted by December 31, 2014, which may impact the SPD/SMM
- Operational Compliance – EPCRS. Ensure that the Plan was in operational compliance with the Plan amendment (and applicable effective date), and if not take corrective action pursuant to Rev. Proc. 2013-12

Action Steps – Qualified Plans

- Operational compliance beginning June 26, 2013 (unless elect an earlier date) – treat all same-sex spouses as "spouses" for plan purposes, regardless of plan terms
  - Review/update enrollment package and distribution forms
  - Review/update Plan polices/procedures for impact of same-sex spouse, including
    - Plan rollovers
    - Minimum Required Distributions
    - QDROs
    - Hardships
    - HCE/Key Employee designations
    - QJSA/QOSA/QPSA benefits
- Consider participant communication – update participant records (e.g., update their beneficiary designation forms), indicate marital status on the distribution forms, and provide spousal consent, when required

Action Steps – Health/Welfare Plans

- Check plan documents/SPDs to determine how "spouse" is defined
  - Distinguish between same-sex spouses and domestic partners/civil unions
  - Clarify that "spouse" is not restricted to opposite sex spouse (or clarify that it is, pending further changes in the law)

Action Steps— Health & Welfare Plans

- Uniform definition of "spouse"
  - Plan Document
  - Trust agreement
  - Insurance policies
  - ASO agreements
  - Beneficiary forms

Action Steps – Health/Welfare Plans

- Stop imputing income for cafeteria plan benefits, including health coverage, provided to same-sex spouse as soon as reasonably possible following 12/16/13 (other benefits 9/16/13)
  - But check state law if in state that doesn't recognize same-sex marriages
- COBRA rights
- HIPAA special enrollment rights

Action Steps – Health/Welfare Plans

- Cafeteria Plans
  - Add same-sex spouse to flexible spending arrangements
  - Allow mid-year change to salary reduction related to spousal coverage
  - Complete amendments by last day of first plan year beginning after 12/16/13 (i.e., 12/31/14 for calendar year plans)

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Action Steps – Health/Welfare Plans

- Health Savings Account/ Dependent Care Assistance Plan
  - Same-sex spouse will be considered a "spouse" for contribution limits *and* tax-free distributions
- Health Reimbursement Arrangement
  - Clarify whether a same-sex spouse will be considered a "spouse"

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Action Steps – FMLA

- Re-visit FMLA policy
  - FMLA rights **must** be extended to employees with same-sex spouses if employees reside in states recognizing such marriages;
  - Does employer want uniform policy?
  - Watch for changes to FMLA regulations

Questions and Answers

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Rev. Rul. 2013-17

ISSUES

1. Whether, for Federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" include an individual married to a person of the same sex, if the individuals are lawfully married under state[1] law, and whether, for those same purposes, the term "marriage" includes such a marriage between individuals of the same sex.

2. Whether, for Federal tax purposes, the Internal Revenue Service (Service) recognizes a marriage of same-sex individuals validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the state in which they are domiciled does not recognize the validity of same-sex marriages.

3. Whether, for Federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" include individuals (whether of the opposite sex or same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the

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[1] For purposes of this ruling, the term "state" means any domestic or foreign jurisdiction having the legal authority to sanction marriages.

laws of that state, and whether, for those same purposes, the term "marriage" includes such relationships.

LAW AND ANALYSIS

1. Background

In Revenue Ruling 58-66, 1958-1 C.B. 60, the Service determined the marital status for Federal income tax purposes of individuals who have entered into a common-law marriage in a state that recognizes common-law marriages.[2] The Service acknowledged that it recognizes the marital status of individuals as determined under state law in the administration of the Federal income tax laws. In Revenue Ruling 58-66, the Service stated that a couple would be treated as married for purposes of Federal income tax filing status and personal exemptions if the couple entered into a common-law marriage in a state that recognizes that relationship as a valid marriage.

The Service further concluded in Revenue Ruling 58-66 that its position with respect to a common-law marriage also applies to a couple who entered into a common-law marriage in a state that recognized such relationships and who later moved to a state in which a ceremony is required to establish the marital relationship. The Service therefore held that a taxpayer who enters into a common-law marriage in a state that recognizes such marriages shall, for purposes of Federal income tax filing status and personal exemptions, be considered married notwithstanding that the

[2] A common-law marriage is a union of two people created by agreement followed by cohabitation that is legally recognized by a state. Common-law marriages have three basic features: (1) A present agreement to be married, (2) cohabitation, and (3) public representations of marriage.

taxpayer and the taxpayer's spouse are currently domiciled in a state that requires a ceremony to establish the marital relationship. Accordingly, the Service held in Revenue Ruling 58-66 that such individuals can file joint income tax returns under section 6013 of the Internal Revenue Code (Code).

The Service has applied this rule with respect to common-law marriages for over 50 years, despite the refusal of some states to give full faith and credit to common-law marriages established in other states. Although states have different rules of marriage recognition, uniform nationwide rules are essential for efficient and fair tax administration. A rule under which a couple's marital status could change simply by moving from one state to another state would be prohibitively difficult and costly for the Service to administer, and for many taxpayers to apply.

Many provisions of the Code make reference to the marital status of taxpayers. Until the recent decision of the Supreme Court in United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013), the Service interpreted section 3 of the Defense of Marriage Act (DOMA) as prohibiting it from recognizing same-sex marriages for purposes of these provisions. Section 3 of DOMA provided that:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

In Windsor, the Supreme Court held that section 3 of DOMA is unconstitutional because it violates the principles of equal protection. It concluded that this section "undermines both the public and private significance of state-sanctioned same-sex marriages" and found that "no legitimate purpose" overcomes section 3's "purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect[.]" Windsor, 133 S. Ct. at 2694-95. This ruling provides guidance on the effect of the Windsor decision on the Service's interpretation of the sections of the Code that refer to taxpayers' marital status.

2. Recognition of Same-Sex Marriages

There are more than two hundred Code provisions and Treasury regulations relating to the internal revenue laws that include the terms "spouse," "marriage" (and derivatives thereof, such as "marries" and "married"), "husband and wife," "husband," and "wife." The Service concludes that gender-neutral terms in the Code that refer to marital status, such as "spouse" and "marriage," include, respectively, (1) an individual married to a person of the same sex if the couple is lawfully married under state law, and (2) such a marriage between individuals of the same sex. This is the most natural reading of those terms; it is consistent with Windsor, in which the plaintiff was seeking tax benefits under a statute that used the term "spouse," 133 S. Ct. at 2683; and a narrower interpretation would not further the purposes of efficient tax administration.

In light of the Windsor decision and for the reasons discussed below, the Service also concludes that the terms "husband and wife," "husband," and "wife" should be interpreted to include same-sex spouses. This interpretation is consistent with the

Supreme Court's statements about the Code in Windsor, avoids the serious constitutional questions that an alternate reading would create, and is permitted by the text and purposes of the Code.

First, the Supreme Court's opinion in Windsor suggests that it understood that its decision striking down section 3 of DOMA would affect tax administration in ways that extended beyond the estate tax refund at issue. See 133 S. Ct. at 2694 ("The particular case at hand concerns the estate tax, but DOMA is more than simply a determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous Federal regulations that DOMA controls are laws pertaining to . . . taxes."). The Court observed in particular that section 3 burdened same-sex couples by forcing "them to follow a complicated procedure to file their Federal and state taxes jointly" and that section 3 "raise[d] the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses." Id. at 2694-2695.

Second, an interpretation of the gender-specific terms in the Code to exclude same-sex spouses would raise serious constitutional questions. A well-established principle of statutory interpretation holds that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems," a court should "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). "This canon is followed out of respect for Congress, which [presumably] legislates in light of constitutional limitations," Rust v.

Sullivan, 500 U.S. 173, 191 (1991), and instructs courts, where possible, to avoid interpretations that "would raise serious constitutional doubts," United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994).

The Fifth Amendment analysis in Windsor raises serious doubts about the constitutionality of Federal laws that confer marriage benefits and burdens only on opposite-sex married couples. In Windsor, the Court stated that, "[b]y creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of Federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect." 133 S. Ct. at 2694. Interpreting the gender-specific terms in the Code to categorically exclude same-sex couples arguably would have the same effect of diminishing the stability and predictability of legally recognized same-sex marriages. Thus, the canon of constitutional avoidance counsels in favor of interpreting the gender-specific terms in the Code to refer to same-sex spouses and couples.

Third, the text of the Code permits a gender-neutral construction of the gender-specific terms. Section 7701 of the Code provides definitions of certain terms generally applicable for purposes of the Code when the terms are not defined otherwise in a specific Code provision and the definition in section 7701 is not manifestly incompatible with the intent of the specific Code provision. The terms "husband and wife," "husband," and "wife" are not specifically defined other than in section 7701(a)(17), which provides, for purposes of sections 682 and 2516, that the terms "husband" and "wife" shall be

read to include a former husband or a former wife, respectively, and that "husband" shall be read as "wife" and "wife" as "husband" in certain circumstances. Although Congress's specific instruction to read "husband" and "wife" interchangeably in those specific provisions could be taken as an indication that Congress did not intend the terms to be read interchangeably in other provisions, the Service believes that the better understanding is that the interpretive rule set forth in section 7701(a)(17) makes it reasonable to adopt, in the circumstances presented here and in light of Windsor and the principle of constitutional avoidance, a more general rule that does not foreclose a gender-neutral reading of gender-specific terms elsewhere in the Code.

Section 7701(p) provides a specific cross-reference to the Dictionary Act, 1 U.S.C. § 1, which provides, in part, that when "determining the meaning of any Act of Congress, unless the context indicates otherwise, . . . words importing the masculine gender include the feminine as well." The purpose of this provision was to avoid having to "specify males and females by using a great deal of unnecessary language when one word would express the whole." Cong. Globe, 41st Cong., 3d Sess. 777 (1871) (statement of Sen. Trumbull, sponsor of Dictionary Act). This provision has been read to require construction of the phrase "husband and wife" to include same-sex married couples. See Pedersen v. Office of Personnel Mgmt., 881 F. Supp. 2d 294, 306-07 (D. Conn. 2012) (construing section 6013 of the Code). The Dictionary Act thus supports interpreting the gender-specific terms in the Code in a gender-neutral manner "unless the context indicates otherwise." 1 U.S.C. § 1. "'Context'" for purposes of the Dictionary Act "means the text of the Act of Congress surrounding the word at issue, or

the texts of other related congressional Acts." Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 199 (1993). Here, nothing in the surrounding text forecloses a gender-neutral reading of the gender-specific terms. Rather, the provisions of the Code that use the terms "husband and wife," "husband," and "wife" are inextricably interwoven with provisions that use gender-neutral terms like "spouse" and "marriage," indicating that Congress viewed them to be equivalent. For example, section 1(a) sets forth the tax imposed on "every married individual (as defined in section 7703) who makes a single return jointly with his spouse under section 6013," even though section 6013 provides that a "husband and wife" make a single return jointly of income. Similarly, section 2513 of the Code is entitled "Gifts by Husband or Wife to Third Party," but uses no gender-specific terms in its text. See also, e.g., §§ 62(b)(3), 1361(c)(1).

This interpretation is also consistent with the legislative history. The legislative history of section 6013, for example, uses the term "married taxpayers" interchangeably with the terms "husband" and "wife" to describe those individuals who may elect to file a joint return, and there is no indication that Congress intended those terms to refer only to a subset of individuals who are legally married. See, e.g., S. Rep. No. 82-781, Finance, Part 1, p. 48 (Sept. 18, 1951). Accordingly, the most logical reading is that the terms "husband and wife" were used because they were viewed, at the time of enactment, as equivalent to the term "persons married to each other." There is nothing in the Code to suggest that Congress intended to exclude from the meaning of these terms any couple otherwise legally married under state law.

Fourth, other considerations also strongly support this interpretation. A gender-neutral reading of the Code fosters fairness by ensuring that the Service treats same-sex couples in the same manner as similarly situated opposite-sex couples. A gender-neutral reading of the Code also fosters administrative efficiency because the Service does not collect or maintain information on the gender of taxpayers and would have great difficulty administering a scheme that differentiated between same-sex and opposite-sex married couples.

Therefore, consistent with the statutory context, the Supreme Court's decision in Windsor, Revenue Ruling 58-66, and effective tax administration generally, the Service concludes that, for Federal tax purposes, the terms "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if they were lawfully married in a state whose laws authorize the marriage of two individuals of the same sex, and the term "marriage" includes such marriages of individuals of the same sex.

3. Marital Status Based on the Laws of the State Where a Marriage Is Initially Established

Consistent with the longstanding position expressed in Revenue Ruling 58-66, the Service has determined to interpret the Code as incorporating a general rule, for Federal tax purposes, that recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile. The Service may provide additional guidance on this subject and on the application of Windsor with respect to Federal tax administration. Other agencies may

provide guidance on other Federal programs that they administer that are affected by the Code.

Under this rule, individuals of the same sex will be considered to be lawfully married under the Code as long as they were married in a state whose laws authorize the marriage of two individuals of the same sex, even if they are domiciled in a state that does not recognize the validity of same-sex marriages. For over half a century, for Federal income tax purposes, the Service has recognized marriages based on the laws of the state in which they were entered into, without regard to subsequent changes in domicile, to achieve uniformity, stability, and efficiency in the application and administration of the Code. Given our increasingly mobile society, it is important to have a uniform rule of recognition that can be applied with certainty by the Service and taxpayers alike for all Federal tax purposes. Those overriding tax administration policy goals generally apply with equal force in the context of same-sex marriages.

In most Federal tax contexts, a state-of-domicile rule would present serious administrative concerns. For example, spouses are generally treated as related parties for Federal tax purposes, and one spouse's ownership interest in property may be attributed to the other spouse for purposes of numerous Code provisions. If the Service did not adopt a uniform rule of recognition, the attribution of property interests could change when a same-sex couple moves from one state to another with different marriage recognition rules. The potential adverse consequences could impact not only the married couple but also others involved in a transaction, entity, or arrangement. This would lead to uncertainty for both taxpayers and the Service.

A rule of recognition based on the state of a taxpayer's current domicile would also raise significant challenges for employers that operate in more than one state, or that have employees (or former employees) who live in more than one state, or move between states with different marriage recognition rules. Substantial financial and administrative burdens would be placed on those employers, as well as the administrators of employee benefit plans. For example, the need for and validity of spousal elections, consents, and notices could change each time an employee, former employee, or spouse moved to a state with different marriage recognition rules. To administer employee benefit plans, employers (or plan administrators) would need to inquire whether each employee receiving plan benefits was married and, if so, whether the employee's spouse was the same sex or opposite sex from the employee. In addition, the employers or plan administrators would need to continually track the state of domicile of all same-sex married employees and former employees and their spouses. Rules would also need to be developed by the Service and administered by employers and plan administrators to address the treatment of same-sex married couples comprised of individuals who reside in different states (a situation that is not relevant with respect to opposite-sex couples). For all of these reasons, plan administration would grow increasingly complex and certain rules, such as those governing required distributions under section 401(a)(9), would become especially challenging. Administrators of employee benefit plans would have to be retrained, and systems reworked, to comply with an unprecedented and complex system that divides married employees according to their sexual orientation. In many cases, the tracking of

employee and spouse domiciles would be less than perfectly accurate or timely and would result in errors or delays. These errors and delays would be costly to employers, and could require some plans to enter the Service's voluntary compliance programs or put benefits of all employees at risk. All of these problems are avoided by the adoption of the rule set forth herein, and the Service therefore has chosen to avoid the imposition of the additional burdens on itself, employers, plan administrators, and individual taxpayers. Accordingly, Revenue Ruling 58-66 is amplified to adopt a general rule, for Federal tax purposes, that recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile.

4. Registered Domestic Partnerships, Civil Unions, or Other Similar Formal Relationships Not Denominated as Marriage

For Federal tax purposes, the term "marriage" does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under that state's law, and the terms "spouse," "husband and wife," "husband," and "wife" do not include individuals who have entered into such a formal relationship. This conclusion applies regardless of whether individuals who have entered into such relationships are of the opposite sex or the same sex.

HOLDINGS

1. For Federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if the

consequences of retroactive application to all taxpayers involved, including the plan sponsor, the plan or arrangement, employers, affected employees and beneficiaries. The Service anticipates that the future guidance will provide sufficient time for plan amendments and any necessary corrections so that the plan and benefits will retain favorable tax treatment for which they otherwise qualify.

DRAFTING INFORMATION

The principal authors of this revenue ruling are Richard S. Goldstein and Matthew S. Cooper of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue ruling, contact Mr. Goldstein and Mr. Cooper at 202-622-3400 (not a toll-free call).

Strategies and Structures for Direct Investment in Real Estate

Ideas to Promote Discussion among the Panelists

Thomas J. Masenga and Joel D. Rubin

Generally, investments in real estate by public pension funds are made through investment advisers in the case of direct investments, one-off joint ventures, "club" deals (more than one pension investor in a particular transaction), and programmatic joint ventures (where there is expected to be series of investments over time following a similar format). The other vehicle for investments would be through funds focused on real estate investments. We will be focusing on non-fund investments--those where the pension can have input into the structure of the transactions.

The investment vehicles most suited for these types of direct investments are 501(c)(25) corporations (not available if the investment is being made into a joint venture), limited liability companies (which will be treated for governmental plans as corporations under the Treasury Regulations, and while not being disregarded entities for tax purpose, will be tax exempt as 501(c)(25) corporations (assuming other requirements are met) or as tax exempt instrumentalities of the State or local government under Section 115), limited partnerships (which for tax purposes are not ignored but are pass-through entities) and private REITs (which zero out their current taxable income by paying dividends). (Private REITs are used, mostly, to avoid local taxes or as a result of a specialized structure needed to help the seller reduce its tax burden).

Lastly, we have assumed for the purposes of this discussion that public funds are not subject to tax on unrelated taxable income, but nothing herein should be construed as an opinion to that affect.

The discussion will focus on some of the legal considerations which are involved in real estate transactions to assist pension fund lawyers in explaining the nuances of the various structures that may be used in a real estate transaction to their investment officers and also help in providing guidance to the outside adviser.

I. Direct purchases/sales of real estate:

   A. Assuming an interest in real estate is being purchased, the importance of title insurance

   B. Representations and Warranties: with short survival periods and caps on seller's surviving liability, are they meaningful or window dressing?

   C. Financing: Responsibility for non-recourse carve outs --Does this increase the exposure of the pension fund beyond its original commitment and what

authority does the adviser have to commit the pension fund to such obligations?

D. Estoppel letters:

1. Are they meaningful or window dressing?

2. Verification of the rental terms or more?

3. What controls: an estoppel letter or the language in the lease itself?

E. Understanding seller's pre-closing covenants: what is the remedy for breach?

F. Defaults and loss of buyer's deposit.

G. Seller is a single asset entity:

1. What happens when the selling entity distributes its assets and dissolves?

2. Does it matter if it dissolves?

II. Joint ventures:

A. How well do you know your partner?

B. Sponsor capital contributions: skin in the game. Deferral of fees and possible capital gain treatment for developer.

C. Timing of funding.

D. Partner loans and cram downs when the market/investment is depressed.

E. Waterfall of distributions: preferred returns and IRR's

F. Management: Sponsor or pension fund? Are major decisions really a control factor?

G. Exit strategies:

1. Buy-sell: a game of trickery (especially, where Sponsor has more "inside information" or method of determining "true value".

2. Appraisal issues: baseball arbitration, independence of appraisers in today's market.

3. Ability to take to market: can a pension fund make a commitment for a possible buyout in the future?

4. Pension fund's desire to move property from a value-add investment to core.

H. What have we learned from the downturn?

1. Is the partner's default clear on its face, and what is the cost of litigation and the delay that ensues?

2. Ability to terminate the relationship without cause?

3. Default remedies where developer is the party in default do not work as expected: in waterfall developer could end up with money even if it is the defaulting party. Do the agreement terms force the investor member to pay the developer at the point of its termination at a price determined by the amount invested and not the market value of the investment, or is the payment deferred to the final dissolution and based on final proceeds received? Putting developer in the first loss position makes tax lawyers nervous.

4. Bringing in a substitute partner is not so easy. Instead of being admitted as member, compensation in the form of fees, including incentive fees, may work more efficiently.

5. What happens when there is more than one investor and there is no agreement on the forward path, i.e., some investors may be willing to put up more money and others are not, no matter how great a deal it is?

6. What is the pension fund's adviser's willingness as well as capability of taking over? How is adviser to be compensated? Asset management fees which are based on asset value go down substantially and any incentive fee is worth zero. Does the adviser having skin in the game really matter? Should the pension fund be willing to recut the deal with the same adviser or is forced to reevaluate the existing adviser's performance?

III. Development Management Agreement as an alternative to a joint venture agreement, especially based on what was experienced in the downturn.

A. The only skin in the game is possible deferral of a portion of developer's fee until hurdles are met. Does that make a difference to the pension fund?

B. Incentive fee is taxed to developer at ordinary income rates (may not make a difference if tax laws are changed).

C. More control in the owner and easier to terminate, although still difficult to prove cause and in many cases there is a penalty for non-cause

terminations, but still may be cheaper in terms of litigation costs and the cost of delay. And, lastly, there is no capital to be repaid when the investor is not receiving any money.

D. May be easier to remove and appoint a substitute.

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SIGNIFICANT PUBLIC PENSION DECISIONS
JUNE 2013 – APRIL 2014
Presented by
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Constitutional

(1) AFT Michigan, et al. v. State, --- N.W.2d ----, 2014 WL 128086

Plaintiffs, consisting of dozens of unions and teacher groups, filed two separate suits against the State of Michigan and others, including the Public School Employees Retirement System and Board, challenging provisions of 2012 PA 300, which amended the Public School Employees Retirement Act and altered future healthcare and retirement benefit plans available to public school employees for services performed after December 1, 2012. The Court of Claims dismissed both suits and the Michigan Court of Appeals affirmed.

Plaintiffs appealed on four separate provisions of 2012 PA 300: (1) requiring a 3% contribution towards retiree healthcare; (2) requiring a 4% contribution to pension to remain in the Basic Plan; (3) providing a "sanction" of reduced multiplier in calculating pension benefits for those individuals who opt-out; and (4) providing the mechanism for refunding contributions to individuals who opted into the retiree healthcare plan but who ultimately fail to qualify to receive such benefits.

Within the two separate actions, plaintiffs filed complaints alleging breach of contract and diminishment of contract, unconstitutional diminishment of members' accrued financial benefits, denial of substantive due process, and unjust enrichment to the state. The Court of Claims consolidated the two cases and considered the parties' competing motions for summary disposition. The Court of Claims concluded that even though the State was unjustly enriched by keeping the money on healthcare, it was acceptable because it was just one of a number of choices, and it was made with consent. Regarding the retirement provisions, the court stated that because there was delineation between vested and non-vested benefits, those provisions, too, were acceptable.

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[1] The views expressed are solely those of the author and do not necessarily represent the position of her employer. The author extends her appreciation to Kathleen Billings for assisting in the composition of these case summaries, NAPPA members who submitted cases, and Rosemarie Hewig for her invaluable assistance.

The court held that the Legislature, in enacting 2012 PA 300, set forth a legitimate governmental purpose to help fund retiree healthcare benefits while ensuring the continued financial stability of public schools. It further held that pension benefits are protected only to the extent that they are for past services and that 2012 PA 300 does nothing to impact or impair members' vested pension benefits.

(2) Bartlett v. Cameron, 316 P.3d 889, (N.M., 2013)

Petitioners, a group of retirees, challenged the constitutionality of a recent legislative amendment that reduces the future amounts all educational retirees might receive as a COLA. The narrow question before the New Mexico Supreme Court was whether the New Mexico Constitution grants retirees a right to an annual cost-of-living adjustment to their retirement benefit, based on the COLA formula in effect on the date of their retirement, for the entirety of their retirement.

From 2001-2012, ERB funding status fell from 86.8% to 60.7%. While in earlier years the COLA was occasionally modified as to the impact of the consumer price index, at this time the new reduction was tied to ERB's funded status. The court addressed whether the COLA change violated the New Mexico Constitution which provides, "Upon meeting the minimum service requirements of an applicable retirement plan...a member...shall acquire a vested property right with due process protections under the applicable provisions of the New Mexico and United States constitutions."

When analyzing whether the legislature intended the COLA to be a property right, the court held, "that in the absence of any contrary indication from our Legislature, any future cost-of-living adjustment to a retirement benefit is merely a year-to-year expectation that, until paid, does not create a property right under the Constitution. Once paid, of course, the COLA by statute becomes part of the retirement benefit and a property right subject to those constitutional protections."

(3) Carmichael, et al. v. State of Illinois, Case No. 12 CH 37712 (Circuit Court of Cook County)

Plaintiffs filed suit seeking an injunction against the State of Illinois in the Circuit Court of Cook County arguing that Public Act 97-0651, which eliminated the right of members of Chicago Municipal, Chicago Laborer's, and Chicago Teachers' Retirement Systems to earn service credit for time spent as a union representative, based upon a variety of state and federal constitutional bases. The State moved to dismiss the lawsuit and Cook County granted the State's motion in part and denied it in part.

The court held the plaintiffs' challenge of the General Assembly's clarification of the prohibition against members simultaneously contributing to union and public pension funds was not legally cognizable; therefore, the court dismissed that portion of the plaintiffs' complaint. The court also dismissed all claims premised upon "equal protection" and "separation of powers" guaranteed by the Illinois and U.S. Constitutions. The court denied the remainder of defendant's motion to dismiss.

Plaintiff's claims regarding the definition of "salary" and the accumulation of service credit while on union related leave of absence were allowed to move forward. The court's discussion of the "Pension Protection Clause" (Article XIII, Section 5) of the Illinois Constitution indicated the plaintiffs were on legally solid ground and that their claims based upon the State and Federal "Contracts Clauses" and "Takings Clauses" were well-founded.

(4) Fields v. Elected Officials' Retirement Plan, --- P.3d ----, 2014 WL 644467

Appellants, retired judges, brought this action individually and as representatives of a class of Elected Officials' Retirement Plan members and beneficiaries of the Plan against EROP and its Board of Trustees, alleging newly implemented S.B. 1609 violated articles of both the Arizona Constitution and the United States Constitution, both of which prohibit the enactment of laws impairing contract obligations. The State intervened to defend S.B. 1609. Appellants moved to preliminarily enjoin implementation of S .B. 1609, and the trial court consolidated the hearing on the preliminary injunction with a trial on the merits.

Arizona Revised Statutes Section 38–818 establishes a formula for calculating pension benefit increases for retired members of EROP. In 2011, the legislature modified that formula by enacting S.B. 1609.

The benefit increase formula in § 38–818 is tied to EROP's return on investments. A benefit increase is determined by multiplying the amount by which the yearly total investment return exceeds 9% times the actuarial present value of pensions in payment status, subject to a statutory cap of 4%. Any return in excess of the amount necessary to pay for the benefit increase in any given year is placed in a reserve fund to be used for future benefit increases, including years in which the return itself is not sufficient to provide an increase.

In 2011, the legislature enacted S.B. 1609, which amended § 38–818 by prohibiting the transfer of any investment earnings that exceed the 9% rate of return to the reserve fund, and instead provided that such earnings would fund the basic retirement plan. As a result, retired plan members received only a 2.47% benefit increase in July 2011 rather than the anticipated 4% increase, and did not receive any benefit increases in 2012 or 2013.

Effective July 1, 2013, S.B. 1609 also changed the formula used to calculate permanent benefit increases. The new formula increased the rate of return necessary to trigger a benefit increase from 9% to 10.5% and also tied the availability of benefit increases to the Plan's overall funding ratio. If the funding ratio is 60% or less, EROP will not fund a benefit increase; if the funding ratio is between 60% and 65%, EROP will fund a 2% benefit increase; and for each 5% increase in the funding ratio over 65%, EROP will increase the amount of the benefit increase by 0.5% up to a maximum of 4%. Appellants claimed that S.B.1609 violated state constitution that "public retirement system benefits shall not be diminished or impaired."

The court found that S.B. 1609 did violates the state constitution's command that "public retirement system benefits shall not be diminished or impaired" for two reasons: (1) because S.B. 1609 retroactively prevented the transfer of approximately $31 million to the reserve, the Plan could fund only a 2.47% benefit increase in 2011, rather than the expected 4% increase; and

(2) S.B. 1609 makes it more difficult for retired members to receive future benefits by increasing the rate of return required to fund an increase from 9% to 10.5%. S.B. 1609 also makes it less likely that retired members will receive the maximum 4% increase in benefits by tying increases to EROP's funding ratio. The court reasoned that § 38–818's required benefit increase was a vested financial benefit that was directly and adversely affected by S.B. 1609. The court did not address plaintiffs' contentions that S.B. 1609 violated the Contract Clauses of the state and federal constitutions.

(5) Firemen's Retirement System v. City of St. Louis, Missouri Circuit Court (22nd Cir.), June 3, 2013.

Plaintiffs, Retirement System trustees and members of the Retirement System, filed suit against the City for freezing benefit accruals under the old Retirement System, instituting a new Firefighters' Retirement Plan, and modifying trustee powers so that their ability to challenge the validity of the new law was limited. The court found that notwithstanding other changes, the cost of continuing FRS would lead to severe financial stress for the City and the City has consistently reserved the right to amend or repeal FRS and replace it with a new plan. The court noted that the FRS statute was silent on this issue and "silence is not tantamount to prohibition." Further, the court held that in establishing a dual plan and freezing benefit accruals under FRS, the obligations of contract of retirees or vested FRS members is not impaired.

(6) Teamsters Local 97 v. State, 434 N.J.Super. 393, 84 A.3d 989 (N.J.Super.A.D., 2014)

Plaintiffs, consisting of unions representing employees of state and local units of government, brought actions against the State, seeking injunctive relief and challenging the constitutionality of three statutes governing state retirement systems, eligibility for state employee health benefits, and other public employee benefits. The superior court's law division dismissed the unions' consolidated complaints for failure to state a claim. The unions appealed. The superior court's appellate division, held that: (1) statute requiring employees to make contribution in order to be eligible for health benefits did not violate right to organize; (2) statute did not violate equal protection; (3) amendment to statute governing calculation of retirement benefits did not violate equal protection; and (4) contribution statute did not unconstitutionally impair contracts.

In the consolidated appeal, plaintiffs argued that the trial court misapplied the standard for evaluating a motion to dismiss a complaint under Rule 4:6–2(e) for failure to state a claim upon which relief can be granted. Plaintiffs also argued that the trial court erred when it concluded that Chapters 1, 2, and 3 did not violate either the state or federal constitution. The court concluded that the trial court properly construed and applied Rule 4:6–2(e) and that plaintiffs did not demonstrate that the laws are unconstitutional and affirmed the trial court's ruling.

On February 8, 2010, the New Jersey Legislature introduced three senate bills designed to improve the fiscal strength of state and local government, reduce taxpayer burdens, and ensure the health and pension systems remain viable for current and future employees. The bills implemented some of the recommendations of a Special Session Joint Legislative Committee on Public Employee Benefits Reform, which was created pursuant to a Concurrent Resolution on

the state's high property taxes. The resolution created four legislative committees, including one on public employee benefits, tasked with developing proposals to reduce property taxes.

In its final report, the Special Joint Committee recommended forty-one reforms to public employee pensions, health care benefits, and other employee benefits including that all employees share in the cost of their health benefits at some level and that local governments be accorded increased flexibility when negotiating cost sharing with local employees. In particular, it recommended that the legislature require all active public employees and future retirees to pay some portion of the cost of health care insurance premiums, but deferred to the various public employers and employee representatives to determine the appropriate level of premium sharing through collective bargaining.

One of the bills required retirees to contribute an amount equal to 1.5 percent of the retiree's monthly retirement allowance, if the retirees became a member of a state or locally-administered retirement system on or after the effective date. The State Department of the Treasury, Division of Pensions and Benefits (DPB) estimated that the 1.5% contribution under would result in a savings to those entities and boards of $314 million in State Fiscal Year 2011, $324 million in Fiscal Year 2012, and $333 million in Fiscal Year 2013." Plaintiffs asserted that the provisions requiring the 1.5% contribution and those that bind local employees to changes in health care benefits negotiated by State employees, violated rights guaranteed by the state and federal constitutions.

On June 28, 2011, after the trial court dismissed plaintiffs' complaints, the legislature enacted the Pension and Health Care Benefits Act, L. 2011, c. 78 (Chapter 78), which required all public employees to pay a sliding scale percentage of the cost of health benefits for themselves and their dependents, but maintained a "floor" for employee contributions of 1.5% of base salary. The defendants argued that Chapter 78 superseded and rendered moot plaintiffs' constitutional challenges.

After the Governor signed the bills into law, plaintiffs filed complaints seeking injunctive relief and judgments declaring the laws unconstitutional and unenforceable. Trial Court Judge Linda R. Feinberg denied plaintiffs' motions for injunctive relief and defendants moved to dismiss the consolidated complaints for failure to state a claim upon which relief can be granted. Judge Feinberg issued a comprehensive written opinion granting defendants' motions and dismissing the complaints and this appeal followed. The court concluded from its de novo review of the record on appeal that the trial court correctly stated and applied the standard of review for evaluating a Rule 4:6–2(e) motion. Plaintiffs argued that defendants' motions should have been denied because provisions in the new bills were unconstitutional.

Plaintiffs challenged the 1.5% contribution and defendants asserted that the provisions of the bill respected the rights guaranteed to public employees by the State Constitution. The superior court agreed with defendants stating that with Chapter 78, the legislature vested certain design committees with the "sole discretion" to create, modify, or terminate any plan or component, and make changes in the respective healthcare plans, such changes are no longer effectuated through collective negotiations between the State and its employees.

Plaintiffs contended that the 1.5% contribution requirement violated the federal and state equal protection guarantees because they created arbitrary classifications among employees. The court stated that the law does not affect a fundamental right or target a suspect class, but bears a rational relation to legitimate State interests of controlling the cost of providing health care benefits to public employees; reducing administrative expenses; and ensuring consistency in health benefit coverage and costs for public employees and were enacted to improve the fiscal strength of state and local governments; reduce taxpayer burdens; and ensure that the health and pension systems remain viable for current and future employees.

The court also stated that the law satisfies Article I, Paragraph 1 of the New Jersey Constitution that an "appropriate governmental interest suitably furthered by the differential treatment involved," and that the State's interests are furthered by the 1.5% contribution requirement, which it considered as minimal. It held that for the same reasons, it rejected arguments that Chapter 1, which changes the definition of "final compensation" used to calculate retirement benefits, violates the equal protection guarantees of the federal and state constitutions because it results in arbitrary classifications among employees.

The court rejected plaintiffs' remaining contentions stating that they did not warrant further discussion in a written opinion and that the legislation furthered legitimate State interests and violated neither the New Jersey Constitution nor the United States Constitution.

(7) Tulsa Stockyards, Inc. v. Clark, --- P.3d ----, 2014 WL 930965

Plaintiffs filed suit on the constitutionality of 2013 HB 2201, which mutualized and privatized the state's workers' compensation insurance program, known as CompSource Oklahoma. The new legislation required CompSource Oklahoma be restructured as CompSource Mutual Insurance Company and do business as a domestic mutual insurer without capital stock or shares, effective January 1, 2015. Part of the Act related directly to the Oklahoma Public Employees Retirement System and required employees of CompSource Mutual hired before August 23, 2013, to remain members of OPERS, with CompSource Mutual continuing to pay contributions. Employees hired on or after August 23, 2013 could not participate in OPERS.

Plaintiffs challenged the Act on several grounds unrelated to retirement issues. The Oklahoma Supreme Court concluded the Act to be constitutional. The court's decision made it clear that under the Act, CompSource Mutual was no longer a governmental entity which excluded it from the definition of employer in the OPERS statutes. In footnote 10 of the opinion, the Court stated: "As a continuation of CompSource, the Act provides that persons who are employed by CompSource and participate in [OPERS] shall, as employees of CompSource Mutual, remain members of OPERS. We note this could, if applied, create State liability for retirement benefits earned in private employment, an issue not before us today."

The Court viewed CompSource Mutual as a non-governmental, private entity in contrast to CompSource Oklahoma, which the Court viewed as a state entity. Continued participation by employees of the privatized CompSource Mutual raises qualification issues for OPERS under Code Section 401(a) and 414(d).

Participation

(8) Brothman v. DiNapoli, 114 A.D.3d 1072 (2014)

Petitioner was an attorney who provided legal services to the Lake Shore School District on a part-time basis from 1969 until his retirement in 2006. The comptroller determined that petitioner was an independent contractor and was not entitled to membership in the New York State and Local Employee's Retirement System.

The hearing officer found that petitioner was an independent contractor and the comptroller adopted the findings. The supreme court reversed, holding that "the absence of direct control is not dispositive of the existence of an employer-employee relationship" but "over-all control is sufficient to establish the employee relationship where professional work is concerned." The court relied on the following facts: the superintendent worked with petitioner for nearly 40 years and testified that he supervised all staff, including petitioner, petitioner was required to attend regular and special meetings, his biweekly paycheck included withholdings for FICA, Medicare, and federal and state income taxes, petitioner received health insurance and participated in a tax shelter annuity program through the school district, and although he did not have set hours, petitioner was available on an as-needed basis, and would still receive a paycheck for a pay period even if he did not perform work during that period. Petitioner was required to report to the superintendent and Board of Education, he was reappointed annually and took an annual oath of office, and was provided with school stationary and occasionally used school facilities and resources.

(9) E.E.O.C. v. Baltimore County, --- F.3d ----, 2014 WL 1273650

Plaintiff Equal Employment Opportunity Commission was granted summary judgment in a dispute over the Baltimore County employee retirement benefit plan because the plan violated the Age Discrimination in Employment Act by determining employee contribution rates based on age. The court of appeals affirmed the district court's ruling as to the issue of liability and the matter was remanded for consideration of damages.

The court of appeals considered whether the Baltimore County employee retirement benefit plan unlawfully discriminated against older county employees based on their age, in violation of the ADEA. The challenged plan provision involved the different rates of employee contribution to the plan, which required that older employees pay a greater percentage of their salaries based on their ages at the time they enrolled in the plan.

The district court initially determined that the plan did not violate the ADEA, holding that the disparate rates were based on permissible financial objectives involving the number of years an employee would work before reaching "retirement age." In the first appeal, the court of appeals concluded that the district court failed to consider a critical component of the plan regarding retirement eligibility, namely, that an employee's years of service could qualify the employee to retire regardless of the employee's age. The court of appeals vacated the initial judgment and remanded the case to the district court.

On remand, the district court concluded that the plan violated the ADEA, and awarded partial summary judgment in favor of the EEOC on the issue of the County's liability. The County appealed. The court of appeals reviewed and held that the district court correctly determined that the County's plan violated the ADEA, because the plan's employee contribution rates were determined by age, rather than by any permissible factor. It further concluded that the ADEA's "safe harbor provision" applicable to early retirement benefit plans does not shield the County from liability for the alleged discrimination.

(10) Kennebec County v. Maine Public Employees Retirement System, --- A.3d ---- 2014 WL 644499

Petitioners, employees of Kennebec County, were informed of their option to elect to participate in MPERS at some point between 1985 and 2002, but the County did not have a standardized system for disseminating MPERS information to the newly hired and for documenting elections until 2002. After a presentation by MPERS in 2008, three employees of the County, hired in 1986, 1987, and 2000, claimed they had not been informed about their option to join MPERS. The County claimed that they must have been informed, but could not provide documentation satisfactory to MPERS regarding information that had been provided eight, 21 and 22 years previously.

The County argued that MPERS lacked jurisdiction to decide disputes relating to information that was or was not given to County employees at the time of hire, but that MPERS only had authority to make decisions affecting MPERS "members," rather than "employees."

MPERS concluded that Kennebec County failed to adequately advise employees of their option to join MPERS and ordered the County to pay the local government contribution plus interest, and the interest on each employee's contribution for the years between the employees' hire dates and the time they were informed of their eligibility to enroll in MPERS. The superior court affirmed the MPERS' determination.

The Supreme Judicial Court of Maine reversed, holding that the employer is responsible for providing election procedures, maintaining all records regarding the election, informing MPERS of the election, and for making all administrative decisions in disputes related to an employee's election. MPERS lacked authority to decide a dispute about the county's alleged failure to inform employees, and the case was remanded with directions to dismiss the matter for want of jurisdiction.

Service Credit

(11) Slocum v. Board of Trustees of State Universities, et al., 1 N.E.3d 102, 376 Ill.Dec. 769, 300 Ed. Law Rep. 430 (2013)

Plaintiffs were employed as part-time adjunct professors at the College of Du Page for several years before becoming full-time professors in the late 1980s. As part time employees, the plaintiffs were not eligible to participate in SURS. During the 1980s, the College implemented policy 4456 governing part-time assignments: "[a]ll part-time assignments for individuals who

are otherwise not gainfully employed will not exceed two-thirds of a normal teaching load." "Teaching load" referred to the number of credit hours taught in a given quarter; full-time loads were 15 hours per quarter, part-time loads were less than 10 or two-thirds of 15 hours.

At some point in time, the College's director of human resources, Howard Owens, created his own formula for calculating part-time work. The Owens formula was based on the assumptions that a full-time professor's 40 hour work week, included teaching, preparing and grading lessons, maintaining office hours, and working on committee assignments, and a part-time professors' 15 hour work week did not. Owens believed the actual teaching load accounted for 25/40 or 62.5% of a full-time professor's 40-hour work week. Thus, when calculating a part-time adjunct's workload, the Owens formula discounted the teaching load formula by multiplying .625, because, in his opinion, full-time faculty worked a 40-hour week and part-time faculty did not have office hours or perform committee work.

SURS participants may purchase service credit for prior work performed prior to becoming a participant. In the late 1990s, Plaintiff's purchased some, but not all, quarters of service credit for the adjunct work they performed in the 1980s, before they were SURS participants. The College used the Owens formula to calculate which quarters were part-time and eligible for purchase, and reported that to SURS.

In 2006, a faculty member filed a grievance with the review board regarding policy 4456 and the Owens formula, and the review board issued a recommendation that the Owens formula no longer be used. In 2007, after the review board's recommendation, plaintiffs, as well as three other College employees, applied to purchase the quarters that were not considered part-time during the 1990s purchases. The College calculated plaintiffs' time using the teaching load formula. SURS inquired as to why the College was reporting the quarters now for the 2007 service purchase, but they had not been reported during the 1990s service purchases. The College then reverted back to using the Owens formula, which made the service no longer eligible for purchase.

SURS argued that the percentage of employment should be determined by the formula in place at the time the service was rendered. Plaintiffs petitioned SURS for an administrative hearing, and the case was remanded back with instructions to determine what methodology was employed by the College in the 1980s. The only additional evidence SURS gathered was an email from an employee of the College to SURS' employer representative wherein the employee stated the Owens formula was used during the 1980s. Plaintiffs appealed, objecting to the employee's belief that the Owens formula was utilized by the College in the 1980s, arguing she provided no foundation. SURS denied the appeal, concluding plaintiffs had "purchased all of the eligible prior service credit that has been verified with our system."

In June 2011, plaintiffs filed a statement of claim requesting to purchase service credit. Each plaintiffs argued (1) she "should be permitted to purchase service credit for the nine quarters because under the only applicable [College] policy during the time she performed the work, she was employed at least one-half time, and (2) by permitting other similarly situated [College] employees to purchase service credit, while denying her the same opportunity, SURS is violating her right to Equal Protection under the Constitution." The claims panel denied the appeal,

relying on the employee's email, and a portion of the Pension Code which leaves the determination of the employment status up to the employer.

Plaintiffs sought judicial review relying on the grievance review board's 2006 recommendation, and argued that it retroactively invalidated the Owens formula. The circuit court found that the College provided two different employment records to SURS. SURS staff sought clarification, and the College reported that the plaintiffs did not work half-time for the relevant time periods, and denied the plaintiff's complaint.

The Appellate Court of Illinois affirmed, holding that plaintiffs were denied the opportunity to purchase service in the 1990s because it did not qualify, and the only reason they were eligible to purchase service in 2007, after having once been denied, was because of the erroneously retroactive application of the calculation by the College. Once the College reported the discrepancy after inquiry from SURS, the percentages were corrected and the service was denied. The court also dismissed the equal protection argument, finding that plaintiffs had no evidence that they were treated differently from similarly-situated individuals, therefore, the court held that with only allegations and unsupported conclusions, the plaintiffs could not make a prima facie case of an equal protection violation.

(12) West Virginia Consolidated Public Retirement Bd. v. Wood, --- S.E.2d ---- 2014, WL 1272860

Public Retirement Board denied military service to five employees of the state of West Virginia covered by the Public Employees Retirement System. The Retirement System Board found that they were not entitled to military service despite their active service during several recognized periods of armed conflict and their honorable discharge from the U.S. military. The circuit court held that the employees were entitled to the credit they sought and the Supreme Court of Appeals of West Virginia affirmed.

Five employees of the state of West Virginia covered by the Retirement System served in various capacities in the U.S. military subsequently entered public service with the state of West Virginia and sought military service credit through PERS. Four of the individuals sought five years of military service, and the fifth individual sought four years of military service. PERS denied a majority of the military service, awarding eight months of service to two individuals.

When the West Virginia Code was originally enacted in 1961, state employees participating in PERS were entitled to receive military service only if they actively served in the military during a time of compulsory service. In 2000, the legislature revised that provision, granting up to five years of military service to PERS members who served on active duty during a "period of armed conflict," which included a detailed definition specifying the names of conflicts and specific beginning and ending dates for each period. The list also included "any other period of armed conflict by the United States, including but not limited to those periods sanctioned by a declaration of war by the U.S. Congress or by...order of the President." In October 2001, the Board determined that military service would also be awarded for active duty service after September 11, 2001.

Respondents argued that the legislature clearly did not intend military service credit to be limited to the specific conflicts identified in the statute, as evidenced by the "and any other" language. The Board argued that weight should be given to its own interpretation of the requirements of the provision. The circuit court stated that the Board's decision to provide military service credit for some military campaigns, but not for others, had no rationale and was not explained during the hearing. The supreme court affirmed and awarded all five employees the entirety of their military service. The court agreed with the proposition that the Board's interpretation is entitled to deference, but noted that it is imperative that the court consider the possibility that the Board's interpretation is erroneous.

The court considered the definition of "period of armed conflict" ambiguous because after including specific periods, the statue also provides the "other periods" language, and the inclusion of such broad and unspecific language renders the statute capable of varying interpretations. It ultimately held that the Board's interpretation was clearly erroneous and severely limited in scope. The phrase "period of armed conflict" is not limited to the specifically delineated engagements, but also includes other periods as evidence presented in each individual case may dictate.

Salary & Benefit Computation

(13) City of Oakland v. Oakland Police and Fire Retirement System, --- Cal.Rptr.3d ----, 2014 WL 800988

Plaintiff, the City, argued that the Oakland Police and Fire Retirement System's Board impermissibly included holiday premium pay and shift differential pay in the calculation of PERS retirement benefits. The trial court ordered the Board to correct the calculations and collect overpayments made to retirees.

PFRS covers only members of the police and fire departments hired before July 1, 1976, and is a closed system with a dwindling number of retirees, funded by member contributions, investment returns and additional money supplied by the City as necessary. Pension benefits paid to retirees increases or decreases as compensation paid to active members similarly rises or falls; thus, a PFRS retiree receives benefits based on the compensation currently paid to the active personnel who hold the rank that the member held prior to retirement.

The question of whether holiday pay is "compensation attached to rank" for purposes of calculating PFRS benefits has a long and disputed history, which the court found relevant. In response to previous court rulings, the City attempted to avoid the inclusion of holiday pay by altering the pay structure for active members, which led to additional lawsuits and memoranda of understanding and the application of holiday premium pay to various shifts worked by active members became more complex. In contrast, the inclusion of shift differential pay in the calculation of PFRS retirement benefits does not have such a history.

In February 2010, the City and the Retired Oakland Police Officers Association appeared before the Board to discuss a temporary reduction in holidays implemented by the 2006-2013 memorandum of understanding for active members. The City argued that the reduction should

be reflected in the calculation of PFRS benefits for the years affected. The Association argued that the 2006-2013 memorandum of understanding contained conflicting provisions, which should be resolved in a way most beneficial to retirees. The Board agreed with the Association's position and did not reflect the holiday reduction in retirees benefit calculations.

In October 2012, the City informed the Board that retirees were overpaid for holidays because they were receiving holiday premium pay (time and one-half) rather than straight time holiday pay, and asking for assistance in recovering overpayments. The Board requested a hearing in which the City argued that a distinction between members who worked on the holiday (and received time and one-half) and members who did not (receiving straight holiday pay) should be considered and calculations should be based on straight holiday pay because retirees do not work. The Association argued that police departments must be adequately staffed for public safety reasons and holiday work is a matter of course.

The Board found that (1) compensation paid to active officers for working a holiday constitutes compensation attached to rank even though retirees do not work on holidays, and (2) treating holiday premium pay earned for working a holiday as compensation is consistent with the underlying purposes of a system like PFRS.

The City appealed to the Alameda County Superior Court claiming the Board was overcompensating retirees in four ways: (1) by paying retirees at an excessive rate for holidays, (2) by paying retirees for too many holidays, (3) by including shift differential pay in the calculation, (4) by paying retirees who retired above the rank of captain at an excessive rate for holidays. PFRS, the Board and the Association, argued the opposite. The trial court granted the City's petition holding that holiday pay at the rate of time and one-half was not "compensation attached to rank," but retirees were entitled to straight holiday pay, and that shift differential pay was also not "compensation attached to rank" and should not be used in calculations of benefits.

The court relied on 40 years of litigation history wherein active members have the right to holiday pay for working on holidays, and retirees have been entitled to have that pay included in the calculation of benefits, and held that the City failed to make any showing that a material change in circumstances occurred since the initial court decision and is barred by res judicata from re-opening the issue of holiday premium pay. The court held that the City and the Board are estopped from requiring PFRS retirees to repay any retirement benefits based on the improper inclusion of shift differential pay as compensation attached to rank. But, in contrast, there were no facts suggesting that they should be estopped from subsequently correcting the erroneous failure to reduce the number of holidays when calculating benefits.

(14) Stoker v. Milwaukee County, 352 Wis.2d 125 (2013)

Respondent Milwaukee County was granted "home rule" authority over MCERS, which allowed the County to alter MCERS by ordinance rather than by legislation. In 2001, the County implemented a recruitment and retention incentive ordinance that allowed members to acquire an additional .5% for each year of service after 2001, which applied to prior years of service at the rate of eight previous years for each year served after 2001. By 2006, a multiplier of 2.0% (original 1.5% and additional .5%) applied to all of petitioner's service.

In 2011, the local union and Milwaukee County entered into a memorandum of agreement that set the multiplier at 1.6% for all creditable service. Petitioner filed an injunction on behalf of herself and similarly-situated members. The circuit court held that petitioner and members of the class had vested rights to the 2% multiplier that could not be reduced through collective bargaining. The court of appeals affirmed.

Death Benefits, Survivor Benefits & Refunds

(15) Ayers v. Public School Employees Retirement System of Georgia, --- S.E.2d ----, 2014 WL 999096

Respondent PSERS filed suit against appellant to recover three months of benefit payments to his mother mistakenly made after her death. Appellant counterclaimed for breach of contract, PSERS moved for summary judgment. The trial court denied the motion and a jury ultimately returned a $5,000 verdict in appellant's favor.

Appellant's mother, Esther Ayers, worked as a cafeteria manager for nearly 30 years before her retirement in 1982 at age 66. Her Application for Retirement offered three plan options: maximum monthly benefit, Option A (a joint annuity option), or Option B (a life certain option). Ms. Ayers selected Option A and named her husband as joint annuitant to receive a lifetime benefit in the event of her death. Her husband predeceased her and Ms. Ayers then died in March 1999. Unaware of her death, PSERS continued to make payments to her account in April, May, and June 1999, totaling $1,064.91. After years of attempts to collect the overpayment from appellant, PSERS sued seeking damages and pre- and post-judgment interest and costs. Appellant argued that the retirement forms completed by his mother were confusing and created a contractual hybrid retirement option that would allow him, as secondary beneficiary, to replace his father as joint annuitant in the event of his mother's death.

The court of appeals held that the trial court erred in denying PSERS' motion for a directed verdict and reversed the judgment. The Supreme Court of Georgia found that the PSERS Act itself supplied the terms of the written contract between PSERS and Ms. Ayers; the extra-statutory documents could not, as a matter of law, vary the terms of the retirement contract between Ms. Ayers and the State established by the PSERS Act. PSERS was not legally authorized to give an employee the hybrid option, and even if PSERS had made errors in its administration of the benefits, it would not be estopped from correcting any deviations from the statutory scheme.

Employment after Retirement

(16) Nevada Public Employees Retirement Board v. Smith, 310 P.3d 560 (2013)

Appellant Nevada Public Employees Retirement System determined that respondent was not permitted to retire while he was actively employed in a different PERS-eligible position. The district court reversed the Board's decision, PERS appealed, and the Nevada Supreme Court reversed the district court. Respondent sat as a justice of the peace with 23 years of PERS

service. He ran for and was elected to the district court in November 2008. He planned to retire as justice of the peace, receive benefits from PERS, take office as district court judge, and then elect to participate in JRS instead of PERS, so that he could receive PERS benefits and his district judge salary while accruing a second set of retirement benefits under JRS.

Though he received his final paycheck from the County on December 19, 2008, for the purposes of continuing insurance, respondent's resignation letter to the County designated January 4, 2009 as his last day as justice of the peace. He was sworn in as district judge on January 5, 2009. He filed his retirement papers with PERS on January 8, 2009, and because he was a sitting district court judge at that time, PERS staff denied his application for retirement benefits.

PERS argued that a member who goes from one PERS-eligible job to another without a break in service and retiring from PERS may not thereafter retire and receive benefits from PERS until the member effectively retires from his or her new PERS-eligible job. A contrary position would allow an in-service distribution violating IRC plan qualification provisions.

The district court held that the Board was required to grant respondent equitable relief, and accept the application for retirement benefits as if it had been submitted prior to his swearing in as district court judge. The supreme court reversed. The Board is not required to rewrite its records to establish an earlier retirement date than the true record would dictate.

(17) Prazen v Shoop, 2013 IL 115035, 998 N.E.2d 1, 375 Ill.Dec. 709

Retiree appealed circuit court's decision of Illinois Municipal Retirement Fund's determination that he forfeited his early retirement incentives in the amount of $307,100.50, by returning to work for an IMRF employer. IMRF found that appellant created a "guise" corporation to avoid statutory return to work prohibitions. The appellate court reversed holding that IMRF did not have the authority to determine whether appellant's actions were a guise for circumventing the forfeiture provisions. The Supreme Court of Illinois affirmed.

Appellant worked in an IMRF-covered position as Superintendent of the Electrical Department of the City of Peru performing electrical work for a real estate business he created with the mayor of the City through his own business. Appellant opted to take an early retirement incentive with a retirement date of December 31, 1998. Two weeks prior to his retirement date, he incorporated his business. Three days after incorporation, appellant entered into an agreement with the City for the operation of the electrical department to begin January 1, 1999, one day after his retirement.

(18) Whitsitt v. Public School Employees Retirement System, Not Reported in N.W.2d, 2013 WL 3836003

Petitioner appealed Retirement System's determination that she returned to work for employer before completing her mandatory 30 day break in service. Petitioner submitted her application for retirement with a termination date of June 30, 2007, and retirement effective date of August 1, 2007. After discussions with her employer, petitioner contacted the Office of Retirement Service and indicated that her employer might be interested in having her return to work part

time at a lower rate. Her email stated, "I assume my effective date is June 30, 2007. So, I would not be able to work for the month of July, is that correct?" An ORS representative responded that was correct, she could not work during July, but could return August 1. Petitioner returned to work with the same employer on August 27, 2007.

In 2009, petitioner received a letter from ORS informing her that she had not established a retirement effective date of August 1, 2007, because she returned to work. ORS adjusted petitioner's actual retirement effective date to July 1, 2008, because it was the first full 30 day period in which she did not work for any Michigan public school. ORS requested $28,587.83 in overpaid benefits for the period between August 2007 and June 2008.

The ALJ affirmed ORS's determination, concluding that petitioner never intended to retire, and the Retirement Board adopted the ALJ's decision. The circuit court reversed, holding that the Retirement Board's decision was not supported by sufficient evidence, and it was arbitrary and capricious to charge petitioner a full year's benefits for working four half-days in August 2007. The court held that petitioner should repay the $532.28 she improperly earned in salary during August 2007. The court of appeals affirmed.

Matrimonial

(19) Barker v. Barker, --- So.3d ----, 2013 WL 6654381

Appellant worked for the Baton Rouge City Police Department, a position covered by the City Parish Employee Retirement System from September 1, 1978 until March 11, 1985. During all but the first of those covered years, she was married to Appellee. After her resignation in March 1985, CPERS refunded all of the contributions made. Appellant went back to CPERS-covered employment in October 1986, and on January 15, 1987, she signed an authorization to purchase her prior service via payroll deduction of $250.00 per month.

The petition for divorce was filed on June 16, 1988, at which time appellant had repaid $3,750 of the repurchase amount. She used $5,668.97 of her separate funds, after the divorce was filed, to continue the purchase. The divorce was finalized on April 2, 1990, and the service purchase was completed and credited on May 15, 1990. The court of appeals affirmed the trial court, holding that the retirement credits earned during the marriage, including credits earned and cashed in during the marriage but repurchased after the divorce, retained their character as community property to be divided and required appellee to reimburse appellant half of the separate funds used during the purchase.

(20) Glossip v. Missouri Dept. of Transp. And Highway Patrol Employees' Retirement System, 411 W.W.3d 796 (2013)

Appellant is the same-sex partner of a deceased highway patrolman who brought action against the Missouri Department of Transportation and Highway Patrol Employees' Retirement System (MPERS) after he was denied survivor benefits. The circuit court denied the petition and the partner appealed. The supreme court held that: (1) the partner had standing to challenge survivor benefits statute; but, (2) the partner lacked standing to challenge ban on survivor

benefits for same-sex married couples; (3) the statute did not discriminate on the basis of sexual orientation, rather it drew a distinction on the basis of marital status; (4) spousal requirement in statute had a reasonable relation to legitimate state interests; and (5) statute was not a special law.

Appellant challenged two statutes. The first provides benefits to a surviving spouse of a state highway patrolman who is killed in the line of duty and the second provides that the word "spouse" in the first statute shall refer only to a marriage between a man and a woman.

The Missouri Supreme Court held that appellant was denied benefits because he and the patrolman were not married, not because of his sexual orientation. The survivor benefits statute provides benefits only to the patrolman's surviving spouse or surviving minor children. The court stated that even if appellant and the patrolman had been of different sexes, appellant would have been denied benefits because the statute discriminates solely on the basis of marital status, not sexual orientation. Appellant's case did not challenge Missouri's constitutional amendment prohibiting same-sex marriage.

The court held that appellant was not eligible for survivor benefits because he was not married to the patrolman and if they had been married in another state, appellant could have challenged the statute that prohibits recognizing same-sex marriages for purposes of Missouri benefits. The court stated that neither the United States Supreme Court nor the court, itself, has applied heightened scrutiny to laws requiring persons to be married to obtain benefits, so the survivor benefits statute is subject to a rational basis review. Under that standard, the court found the statute to be constitutional because it is reasonably related to a legitimate state interest in assisting some of the people who are financially dependent on deceased patrolmen.

(21) In re Marriage of Green, 56 Cal. 4th 1130 (Cal. 2013)

The trial court ordered a firefighter to pay his wife one-half of the amount, plus interest, that the community expended during the marriage to obtain a retirement credit for the husband's premarital military service, characterizing the military service credit as the husband's separate property. The husband had served in the military prior to the marriage and then worked for a fire authority that participated in the California Public Employees' Retirement System. During the marriage, he exercised his right to buy four years of service credit for his military service and used $11,462.56 of community funds toward that purchase. The court of appeal reversed.

The supreme court reversed the judgment of the court of appeal and remanded the matter to that court for further proceedings. The court held that because the husband rendered his military service before the marriage, the four years of additional credit for military service were his separate property except for the community's contribution to the cost of obtaining the credit. The characterization of the credit is based on the employee spouse's marital status at the time of the service. In the current case, the difference in value between the four years' worth of credit and the cost of obtaining it was not due to what the community contributed toward the purchase, but rather to what husband brought to the community, his military service. Thus, the difference in value was husband's separate property, subject to reimbursement for the community's contribution.

(22) In re Marriage of Hammond and Abrams-Hamond, Not reported in P.3d, 2014 WL 1004169

Appellant argued that a portion of his Washington Law Enforcement Officers' and Fire Fighters' Retirement Plan that represents the amount of Social Security he would have otherwise received should be deducted as his own separate property prior to dividing the LEOFF plan as community property.

The LEOFF plan rendered appellant ineligible for federal Social Security benefits which his spouse will receive as her sole property because, despite being a pension, social security benefits are not divisible in a marital dissolution. The court stated it could not divide Social Security income, but it could consider a spouse's Social Security income within the parameters of the court's power to formulate an equitable division of the marital property. The court held that characterizing a pension received in lieu of Social Security as separate property is not mandatory in Washington, and because appellant lacked sufficient evidence regarding his anticipated Social Security benefits and corresponding loss, the entire LEOFF account is considered marital property.

Benefit Forfeiture

(23) Herrick v. Essex Regional Retirement Board, 465 Mass. 801 (2013)

Appellee was charged with sexually assaulting his daughter, resigned his position, and applied for a voluntary superannuation retirement under Massachusetts law. He appeals the forfeiture of his benefit after pleading guilty to two counts of indecent assault and battery on a child under fourteen years of age, and was sentenced to two and a half years in jail. Although he met the age and service requirements for superannuation retirement benefits, the Retirement Board denied his application under state pension law based on a finding of forfeiture due to moral turpitude.

The Contributory Retirement Appeal Board affirmed the forfeiture and the member appealed. The superior court overturned CRAB's decision, stating that a member who resigns his position is entitled to superannuation retirement benefits for which he qualifies regardless of what motivated his resignation. The appeals court affirmed the superior court. The Retirement System paid the member his benefit without interest.

The appellee then submitted an appeal requesting 12% interest under a state law provision that provides 12% interest in "any action in which damages are awarded, but in which interest on said damages is not otherwise provided by law." The court concluded that the catch-all provision did not apply to member's judgment because the interest rate that yields the "actuarial equivalent," applies when a retirement Board makes an error regarding a benefit determination or calculation.

(24) Public Employee Retirement Admin. Com'n v. Bettencourt, 81 Mass.App.Ct. 1113, 2012 WL 414034 (Mass.App.Ct.)

The Retirement Administration Commission appealed the district court's holding that police officer's pension forfeiture after his conviction of twenty-one counts of accessing an unauthorized computer system violated the officer's constitutional right to be free from excessive fines under the Eighth Amendment of the U.S. Constitution. The Commission sought relief from the district court decision, suggesting that its holding was based on a substantial error of law.

The superior court found no state or federal authority that considered forfeiture of a pension to be a payment to a sovereign eligible for treatment as a "fine" for the purposes of the Eighth Amendment. The court concluded that forfeiture of a pension pursuant to stated law was not a payment to a sovereign considered as a fine for the purposes of the Eighth Amendment. Massachusetts law conditions the right to a pension on public service free from criminal convictions related to an employee's office or position. Failure to satisfy that condition means the officer had no right to a pension.

(25) Somerville Retirement Bd. V. Buonomo, Not Reported in N.E.2d, 30 Mass.L.Rptr. 10, 2012 WL 2913491 (Mass.Super.)

Retirement Board appeals finding that member was eligible for his pension despite being convicted of multiple crimes, including larceny and embezzlement. Member held office as register of probate of Middlesex County and had previously been a member of the Board of aldermen for the city of Somerville and was receiving a pension from Somerville. The superior court found that he had not forfeited his Somerville pension because his crimes were committed while in his position at Middlesex County. The supreme judicial court stated that there was no requirement in state law that the public office to which a member's criminal convictions relate be the same as the public office from which that member is receiving a retirement allowance and reversed the superior court stating that by pleading guilty to the crimes committed while register of probate of Middlesex County, plaintiff violated the laws applicable to a position of public trust, and thereby forfeited his entitlement to any retirement allowance under state law.

The supreme judicial court found that when the statute says "office or position" it does not necessarily mean the "office or position" upon which your retirement allowance was based.

Freedom of Information/Open Meetings

(26) Howe v. Retirement Bd. of Firemen's Annuity and Ben. Fund of Chicago, 996 N.E.2d 664, 374 Ill.Dec. 969, 973 (Ill.App. 1 Dist., 2013)

Plaintiff, a former Chicago firefighter, appealed the Board's denial of his application for disability benefits. After all evidence was presented and with the Board's deliberation complete, a motion was made and seconded to grant plaintiff a line-of-duty disability benefit. When the question was called to vote on the motion it failed because only two trustees voted in favor of granting the benefit and five voted against it. Without taking any other action, the Board told

plaintiff his application for a line-of-duty disability benefit was denied; the Board then issued a written decision and order.

Plaintiff filed a complaint in the Circuit Court of Cook County, which affirmed the Pension Board's decision on the merits. Plaintiff appealed to the appellate court. The appellate court ordered the parties to file briefs regarding two procedural concerns: "1) whether the Board took valid final action on the application when it never adopted any motion on the application with a majority of 'yes' votes; and 2) whether the Board's decision was invalid... because it was never adopted by a public vote as required by the Open Meetings Act." Both the Board and plaintiff argued the proceedings before the Board were properly conducted.

The appellate court chose not to decide the case on the merits even though the parties agreed to the proceedings before the Board. Instead, the appellate court decided the procedural errors were fatal to its consideration of the appeal. The court noted that a decision of an administrative agency must be in writing. However, the Board never met to approve the written decision in open session. In a footnote, the court took notice of the fact the Board failed to cite to a specific exemption allowing it to adjourn into closed session. While the court held this was immaterial to its decision, it highlighted this fact to note another defect in the Board's proceedings.

The court took exception with the Board's failure to vote on approving its written decision and order. The court stated that a written decision must be prepared and provided to each Board member at or before the time the Board votes to take final action on an application. It further stated, "No public body in Illinois subject to the Open Meetings Act can take final action by merely circulating some document for signature without voting on it publicly." The court concluded the Board never issued a valid and final administrative decision. As such, it remanded the case back to the Pension Board to issue a final decision and order to be voted upon publicly.

(27) Public Employees' Retirement System of Nevada v. Reno Newspapers, Inc., 313 P.3d 221 (2013)

The Reno Gazette–Journal submitted a public records request to PERS seeking the names of all individuals who were collecting pensions, the names of their government employers, their salaries, their hire and retirement dates, and the amounts of their pension payments. PERS denied the request, the paper appealed, and the district court granted its writ of mandamus. PERS appealed, arguing that disclosure of the requested information would subject retired employees to a higher risk of identity theft and elder abuse.

The Nevada Supreme Court rejected PERS' argument and held that the district court correctly interpreted the system's confidentiality statute that (1) only retirees' files themselves, and not all information contained in the files, were confidential under the Public Records Act, and (2) public interest in access outweighed state interest in nondisclosure. The court also held that PERS was not required to create new documents or customized reports by searching for and compiling information from individuals' files or other records.

(28) Regents of California v. Superior Court of Alameda County & Reuters America LLC, 222 Cal.App.4th 383 (2013)

Publisher petitioned for writ of mandate under the California Public Records Act requesting individual fund information for investments made by state university. The superior court granted the petition and denied university's request to have the clerk return the unredacted documents lodged by the university and not place them in the file. University petitioned for writ of mandate and/or prohibition Holdings: The court of appeal held that: (1) documents about university's venture capital investments held by private equity firms were not public records, and (2) university was not judicially estopped from requesting return of documents upon trial court's partial denial of university's motion to seal. Petition was granted.

Reuters America LLC filed a petition in the superior court under the Public Records Act requesting individual fund information for investments made by the Regents of the University of California. The superior court granted the writ and found that the Regents were required to use "objectively reasonable efforts" to obtain from two venture capital investment managers individual fund information for the Regents' current investments even though the Regents had not prepared, owned, used, or retained this fund information. The trial court also ordered certain information lodged conditionally under seal with the trial court pursuant to California Rules of Court, rule 2.551, as part of the Regents' opposition to the writ petition under the CPRA, be deemed public rather than returned to the Regents. The Regents sought a writ of mandate and/or prohibition in the court of appeal directing the trial court to set aside the trial court order. The court of appeal stayed the trial court's order and issued an order to show cause.

Regents conceded that the information sought related to the public's business. But, because it was not prepared, owned, used, or retained by the Regents, the court of appeal held that records reflecting such information in the hands of investment managers are not public records within the meaning of the CPRA. The court of appeal also held that the trial court's decision to defer ruling on the Regents' motions to seal until deciding the merits of Reuters' petition did not relieve the trial court of its obligation to return the lodged records as required at the conclusion of the case by the California Rules of Court.