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## Disabled Members Return to Work

### FINAL PROPOSAL

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### ISSUE STATEMENT

Members who recover from their disabilities are stuck in limbo if their previous employer refuses to hire them back.

### OVERVIEW

This is one of the issues that came out of working with the Department of Retirement Systems (DRS) on the duty disability rule making project, as an issue that they were hoping that policymakers would take notice of. Current disability statute for LEOFF 2 members states that when a member is determined to have recovered from their disability, the members' previous employer is required to hire them back at their previous rank. They will begin earning service credit again and become eligible for an active member benefit.

Issues arise when the employer disagrees with the DRS decision that the member has fully recovered from their disability. This leaves the member in limbo pending the appeals decision because:

- Duty Disability payments have been stopped.
- They are not earning a salary, because their previous employer refuses to hire them back.

### BACKGROUND

#### **Disability Payments Stopped**

Any member who receives a disability allowance is subject to comprehensive medical examinations as required by DRS. If those medical examinations reveal that the member has recovered from their incapacitating disability, they are no longer entitled to their duty disability pension benefit. The members' retirement allowance is therefore canceled and the member shall be restored to duty.

## **Previous Employer**

Once the determination has been made that the member has recovered from their disability, the member's previous employer is required to hire them back at the same civil service rank they held at the time of their disability retirement<sup>1</sup>. The employer may appeal if they disagree with the DRS determination.

## **Current Case**

DRS is aware of one current case where they have made the determination that the member has recovered from their disability, but the previous employer has refused to hire them back. DRS has chosen to continue paying the members disability benefit while the appeal works its way through the process.

## **Who determines that the member is no longer disabled?**

All pension statutes are written giving DRS that determination authority. As soon as DRS says the member is no longer disabled, all of the pension statutes are written to say that the member's disability benefit is terminated. In this instance, there are two parties trying to decide whether the member is disabled: DRS and the previous employer.

These parties have a differing opinion about whether the member is actually recovered from their disability. This is the area in statute where the member can be caught in limbo. Sometimes it's a good faith disagreement between the two parties on the member's level of recovery. Sometimes, though, it's the employer not wanting to follow the statute, so they use the appeal process to delay their rehiring as long as possible.

The question then is: If DRS determines the member has recovered, what do they do in the situation where the employer disagrees? If the determination is upheld during the appeal process, who pays for those extra disability payments? The way it works now, the benefits are paid for by the fund, which means all the other members, employers, and state pay for those extra disability payments that were made during the appeals process.

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<sup>1</sup>RCW 41.26.470 (2)

## **POLICY OPTIONS**

1. A member will continue to receive their disability benefit while they are in the appeals process
2. The employer will be billed for the disability payments made to the member while they were in the appeals process
3. Take No Action At This Time

## **SUPPORTING INFORMATION**

Appendix A: Bill Language

Appendix B: Different types of disabilities

## APPENDIX A: BILL LANGUAGE

### Disabled Member Return to Work [Clarification of Statute/Practice]

RCW 41.26.470 is amended to read as follows:

Earned disability allowance—Cancellation of allowance—Reentry—Receipt of service credit while disabled—Conditions—Disposition upon death of recipient—Disabled in the line of duty—Total disability—Reimbursement for certain payments—Disabled while providing emergency management services.

(1) A member of the retirement system who becomes totally incapacitated for continued employment by an employer as determined by the director shall be eligible to receive an allowance under the provisions of RCW 41.26.410 through 41.26.550. Such member shall receive a monthly disability allowance computed as provided for in RCW 41.26.420 and shall have such allowance actuarially reduced to reflect the difference in the number of years between age at disability and the attainment of age fifty-three, except under subsection (7) of this section.

(2) Any member who receives an allowance under the provisions of this section shall be subject to such comprehensive medical examinations as required by the department. If such medical examinations reveal that such a member has recovered from the incapacitating disability and the member is no longer entitled to benefits under Title 51 RCW, the retirement allowance shall be canceled and the member shall be restored to duty in the same civil service rank, if any, held by the member at the time of retirement or, if unable to perform the duties of the rank, then, at the member's request, in such other like or lesser rank as may be or become open and available, the duties of which the member is then able to perform. In no event shall a member previously drawing a disability allowance be returned or be restored to duty at a salary or rate of pay less than the current salary attached to the rank or position held by the member at the date of the retirement for disability. If the department determines that the member is able to return to service, the member is entitled to notice and a hearing. Both the notice and the hearing shall comply with the requirements of chapter 34.05 RCW, the administrative procedure act. If the member's previous employer appeals the department's findings in their medical examinations and refuses to hire the member back, the department may continue to pay the members' disability allowance until the appeal is decided.

(3) Those members subject to this chapter who became disabled in the line of duty on or after July 23, 1989, and who receive benefits under RCW 41.04.500 through 41.04.530 or similar benefits under RCW 41.04.535 shall receive or continue to receive service credit subject to the following:

(a) No member may receive more than one month's service credit in a calendar month.

(b) No service credit under this section may be allowed after a member separates or is separated without leave of absence.

(c) Employer contributions shall be paid by the employer at the rate in effect for the period of the service credited.

(d) Employee contributions shall be collected by the employer and paid to the department at the rate in effect for the period of service credited.

(e) State contributions shall be as provided in RCW 41.45.060 and 41.45.067.

(f) Contributions shall be based on the regular compensation which the member would have received had the disability not occurred.

(g) The service and compensation credit under this section shall be granted for a period not to exceed six consecutive months.

(h) Should the legislature revoke the service credit authorized under this section or repeal this section, no affected employee is entitled to receive the credit as a matter of contractual right.

(4)(a) If the recipient of a monthly retirement allowance under this section dies before the total of the retirement allowance paid to the recipient equals the amount of the accumulated contributions at the date of retirement, then the balance shall be paid to the member's estate, or such person or persons, trust, or organization as the recipient has nominated by written designation duly executed and filed with the director, or, if there is no such designated person or persons still living at the time of the recipient's death, then to the surviving spouse or domestic partner, or, if there is neither such designated person or persons still living at the time of his or her death nor a surviving spouse or domestic partner, then to his or her legal representative.

(b) If a recipient of a monthly retirement allowance under this section died before April 27, 1989, and before the total of the retirement allowance paid to the recipient equaled the amount of his or her accumulated contributions at the date of retirement, then the department shall pay the balance of the accumulated contributions to the member's surviving spouse or, if there is no surviving spouse, then in equal shares to the member's children. If there is no surviving spouse or children, the department shall retain the contributions.

(5) Should the disability retirement allowance of any disability beneficiary be canceled for any cause other than reentrance into service or retirement for service, he or she shall be paid the excess, if any, of the accumulated contributions at the time of retirement over all payments made on his or her behalf under this chapter.

(6) A member who becomes disabled in the line of duty, and who ceases to be an employee of an employer except by service or disability retirement, may request a refund of one hundred fifty percent of the member's accumulated contributions. Any accumulated contributions attributable to restorations made under RCW 41.50.165(2) shall be refunded at one hundred percent. A person in receipt of this benefit is a retiree.

(7) A member who becomes disabled in the line of duty shall be entitled to receive a minimum retirement allowance equal to ten percent of such member's final average salary. The member shall additionally receive a retirement allowance equal to two percent of such member's average final salary for each year of service beyond five.

(8) A member who became disabled in the line of duty before January 1, 2001, and is receiving an allowance under RCW 41.26.430 or subsection (1) of this section shall be entitled to receive a minimum retirement allowance equal to ten percent of such member's final average salary. The member shall additionally receive a retirement allowance equal to two percent of such member's average final salary for each year of service beyond five, and shall have the allowance actuarially reduced to reflect the difference in the number of years between age at disability and the attainment of age fifty-three. An additional benefit shall not result in a total monthly benefit greater than that provided in subsection (1) of this section.

(9) A member who is totally disabled in the line of duty is entitled to receive a retirement allowance equal to seventy percent of the member's final average salary. The allowance provided under this subsection shall be offset by:

(a) Temporary disability wage-replacement benefits or permanent total disability benefits provided to the member under Title 51 RCW; and

(b) Federal social security disability benefits, if any;

so that such an allowance does not result in the member receiving combined benefits that exceed one hundred percent of the member's final average salary. However, the offsets shall not in any case reduce the allowance provided under this subsection below the member's accrued retirement allowance.

A member is considered totally disabled if he or she is unable to perform any substantial gainful activity due to a physical or mental condition that may be expected to result in death or that has lasted or is expected to last at least twelve months. Substantial gainful activity is defined as average earnings in excess of eight hundred sixty dollars a month in 2006 adjusted annually as determined by the director based on federal social security disability standards. The department may require a person in receipt of an allowance under this subsection to provide any financial records that are necessary to determine continued eligibility for such an allowance. A person in receipt of an allowance under this subsection whose earnings exceed the threshold for substantial gainful activity shall have their benefit converted to a line-of-duty disability retirement allowance as provided in subsection (7) of this section.

Any person in receipt of an allowance under the provisions of this section is subject to comprehensive medical examinations as may be required by the department under subsection (2) of this section in order to determine continued eligibility for such an allowance.

(10)(a) In addition to the retirement allowance provided in subsection (9) of this section, the retirement allowance of a member who is totally disabled in the line of duty shall include reimbursement for any payments made by the member after June 10, 2010, for premiums on employer-provided medical insurance, insurance authorized by the consolidated omnibus budget reconciliation act of 1985 (COBRA), medicare part A (hospital insurance), and medicare part B (medical insurance). A member who is entitled to medicare must enroll and maintain enrollment in both medicare part A and medicare part B in order to remain eligible for the reimbursement provided in this subsection. The legislature reserves the right to amend or repeal the benefits provided in this subsection in the future and no member or beneficiary has a contractual right to receive any distribution not granted prior to that time.

(b) The retirement allowance of a member who is not eligible for reimbursement provided in (a) of this subsection shall include reimbursement for any payments made after June 30, 2013, for premiums on other medical insurance. However, in no instance shall the reimbursement exceed the amount reimbursed for premiums authorized by the consolidated omnibus budget reconciliation act of 1985 (COBRA).

(11) A member who has left the employ of an employer due to service in the national guard, military reserves, federal emergency management agency, or national disaster medical system of the United States department of health and human services and who becomes totally incapacitated for continued employment by an employer as determined by the director while performing service in response to a disaster, major emergency, special event, federal exercise, or official training on or after March 22, 2014, shall be eligible to receive an allowance under the provisions of RCW 41.26.410 through 41.26.550. Such member shall receive a monthly disability allowance computed as provided for in RCW 41.26.420 except such allowance is not subject to an actuarial reduction for early retirement as provided in RCW 41.26.430. The member's retirement allowance is computed under RCW 41.26.420, except that the member shall be entitled to a minimum retirement allowance equal to ten percent of such member's final average salary. The member shall additionally receive a retirement allowance equal to two percent of such member's average final salary for each year of service beyond five.

## APPENDIX B: DIFFERENT TYPES OF DISABILITIES<sup>2</sup>

### Temporary Duty Disability

If you do not earn full service credit because of leave associated with a duty disability, you have the option to purchase up to 24 months of service credit for each covered duty disability. To establish service credit, you must meet the following criteria:

- Your disability must have occurred in the line of duty.
- You must have received your injury on or after July 1, 2002, and be eligible to receive workers' compensation benefits.
- You and your employer must make employer and member contributions on the compensation you would have earned had you been working. If the payments are made for a retroactive period, interest is charged. If your employer offers a disability leave supplement or similar benefit, your first six months of service credit are interest free.

If your duty disability occurred between July 23, 1989, and June 30, 2002, the amount of service credit you can purchase is limited to six months and requires that you be receiving a disability leave supplement or similar benefit from your employer.

### Duty Disability

If your disability occurred in the line of duty, you may choose between a nontaxable:

- One-time payment equal to 150% of your eligible retirement contributions
- Minimum monthly benefit of at least 10% of your FAS

If you have fewer than 60 service credit months when you become disabled, the average will be based on your actual total of service credit months. If the normal retirement benefit calculation rule yields a monthly benefit greater than 10% of your FAS, you will receive the higher benefit amount. However, only the amount equal to 10% of your FAS is nontaxable. Contributions made to restore service credit after the deadline are refunded at 100% only.

### Disaster Response Disability

There are certain circumstances, on or after March 22, 2014, when you might qualify for disaster response benefits and service credit. In the two situations listed below, your disability must have occurred while you were in eligible federal service providing eligible emergency management services.

*Working for a LEOFF Plan 2 employer:* You might qualify for a disability benefit if you leave the employment of your LEOFF Plan 2 employer to provide a disaster response, and you become

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<sup>2</sup> <http://www.drs.wa.gov/publications/member/leoff/leoff2disability.htm>

disabled on or after March 22, 2014. Your benefit won't be reduced if you retire early. The benefit will be a minimum 10% of your Final Average Salary.

*Working in eligible federal service:* You might qualify for service credit for a leave of absence if you become disabled when you leave the employment of your LEOFF Plan 2 employer to provide a disaster response, on or after March 22, 2014.

### **Non-duty Disability**

If your disability didn't occur in the line of duty, you might receive a monthly benefit calculated as follows:  $2\% \times \text{FAS} \times \text{service credit years}$

Final Average Salary (FAS) is the monthly average of your 60 consecutive, highest-paid service credit months. Your monthly benefit will be reduced to reflect the difference between your age at the time of your disability retirement and age 53. If you are age 50 and have 20 years of service credit, the reduction is 3% per year (prorated monthly) from age 53.

### **Catastrophic Duty Disability**

If your disability occurred in the line of duty and is so severe it prevents you from performing substantial gainful activity or substantial gainful employment in any capacity in the future, you might be entitled to receive a catastrophic duty disability benefit.

The Social Security Administration defines "substantial gainful employment" as working in a position whose average earnings are more than a set dollar amount each month, a figure it updates annually.

The catastrophic duty disability benefit can be calculated in three ways:

- 70% of your FAS
- 100% of your FAS, offset by Social Security disability and workers' compensation disability payments
- $<2\% \times \text{FAS} \times \text{service credit years}$

In addition to your monthly benefit, you will be reimbursed for premiums you pay for employer-provided health insurance, COBRA, and Medicare Parts A and B.

If you are entitled to Medicare, you must enroll and maintain enrollment in both Medicare Parts A and B to remain eligible for the reimbursement. These premium reimbursements are not taxable. Medical insurance reimbursements are available for current, past and eligible COBRA enrollees. Reimbursement for these members is never greater than the COBRA coverage they are eligible for.





# Disabled Members Return to Work

Final Proposal – December 20, 2017

# Issue

- Members who recover from their disabilities are stuck in limbo if their previous employer refuses to hire them back.

# Overview

- **Issue came out of working with the Department of Retirement Systems (DRS) on the duty disability rule making project.**
- **Current disability statute for LEOFF 2 members.**
  - When a member is determined to have recovered from their disability, the members' previous employer is required to hire them back at their previous rank.
- **Issues arise when the employer disagrees with DRS decision that the member has fully recovered from their disability.**
- **This leaves the member in limbo pending the appeals decision because:**
  - Disability payments have been stopped.
  - They are not earning a salary, because their previous employer refuses to hire them back.

# Limbo

## Disability Payments Stopped

- Any member who receives a disability allowance is subject to comprehensive medical examinations as required by DRS.
- If those medical examinations reveal that the member has recovered from their incapacitating disability, they are no longer entitled to their duty disability benefit.
- The members' retirement allowance is canceled and the member shall be restored to duty.

# Limbo cont.

## Previous Employer

- Once the determination has been made that the member has recovered from their disability, the member's previous employer is required to hire them back at the same civil service rank they held at the time of their disability retirement. 41.26.470 (2)

# Background

## Current Case

- DRS is aware of one current case where they have made the determination that the member has recovered from their disability, but the previous employer has refused to hire them back.
- DRS has chosen to continue paying the members disability benefit while the appeal works its way through the process.

# Who determines that the member is no longer disabled?

- **All pension statutes are written giving DRS disability determination authority.**
  - As soon as DRS says the member is no longer disabled, all of the pension statutes are written to say that the member's disability benefit is terminated.
- **In this instance, there are two parties trying to decide whether the member is disabled:**
  - DRS
  - Previous employer
- **These parties have a differing opinion about whether the member is actually recovered from their disability.**

# Determination cont.

- **This is the area in statute where the member can be caught in limbo.**
  - Could be a good faith disagreement between the two parties on the member's level of recovery.
  - Or the employer not wanting to follow the statute and is using the appeal process to delay their rehiring as long as possible.
- **The question: If DRS determines that the member has recovered, what do they do in the situation where the employer disagrees?**
  - If the determination is upheld during the appeal process, who pays for those extra disability payments?
  - The way it works now, the benefits are paid for by the fund, which means all the other members, employers, and state pay for those extra disability payments that were made during the appeals process.



# Policy Options

1. A member will continue to receive their disability benefit while they are in the appeals process.
2. The employer will be billed for the disability payments made to the member while they were in the appeals process.
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# Questions?

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