

BOARD MEETING AGENDA

SEPTEMBER 23, 2020 • 9:30AM



LOCATION

STATE INVESTMENT BOARD
Large Conference Room, STE 100
2100 Evergreen Park Drive S.W.
Olympia, WA 98502

TRUSTEES

DENNIS LAWSON, CHAIR
Central Pierce Fire and Rescue

JASON GRANNEMAN, VICE CHAIR
Clark County Sheriff's Office

MARK JOHNSTON
Vancouver Fire Department

AJ JOHNSON
Snohomish County Fire

SENATOR JEFF HOLY
Spokane Police Department (Ret)

TARINA ROSE-WATSON
Spokane Int'l Airport Police Dept

ADE' ARIWOOLA
City of Federal Way

PAT MCELLIGOTT
City of Dupont

WOLF OPITZ
Pierce County

REPRESENTATIVE STEVE BERGQUIST
WA State Representative

SENATOR ANN RIVERS
WA State Senator

STAFF

Steve Nelsen, Executive Director
Tim Valencia, Deputy Director
Jessie Jackson, Executive Assistant
Jessica Burkhart, Administrative Services Manager
Jacob White, Senior Research and Policy Manager
Karen Durant, Senior Research and Policy Manager
Tammy Sadler, Benefits Ombudsman
Tor Jernudd, Assistant Attorney General

**THEY KEEP US SAFE,
WE KEEP THEM SECURE.**

- | | |
|--|-----------------|
| 1. Approval of Minutes | 9:30 AM |
| <i>July 22, 2020</i> | |
| 2. EMT Study | 9:35 AM |
| <i>Jacob White, Senior Research and Policy Manager</i> | |
| 3. Survivor Reelection | 10:00 AM |
| <i>Jacob White, Senior Research and Policy Manager</i> | |
| 4. Interruptive Military Service | 10:30 AM |
| <i>Jacob White, Senior Research and Policy Manager</i> | |
| 5. Seattle Police Plan Demographics | 11:00 AM |
| <i>Jacob White, Senior Research and Policy Manager</i> | |
| 6. OPMA & Ethics | 11:30 AM |
| <i>Tor Jernudd, AAG, AGO</i> | |
| 7. Administrative Update | 12:00 PM |
| <i>Steve Nelsen, Executive Director</i> | |
| 8. COVID-19 Update | 12:30 PM |
| <i>Steve Nelsen, Executive Director</i> | |

**Lunch is served as an integral part of the meeting.*

In accordance with RCW 42.30.110, the Board may call an Executive Session for the purpose of deliberating such matters as provided by law. Final actions contemplated by the Board in Executive Session will be taken in open session. The Board may elect to take action on any item appearing on this agenda.

Board Meeting Agenda

September 23, 2020



- 1. Approval of July 2020 Minutes**
- 2. EMT Study**
- 3. Survivor Reelection**
- 4. Interruptive Military Service**
- 5. Seattle Police Plan Demographics**
- 6. OPMA & Ethics**
- 7. Administrative Update**
- 8. COVID-19 Update**



September 23, 2020
King County EMT Study

INITIAL CONSIDERATION

By Jacob White

Senior Research & Policy Manager

360-586-2327

jacob.white@leoff.wa.gov

ISSUE STATEMENT

Are Emergency Medical Technicians (EMTs) who provided services from 1978 to 2003, in King County through intergovernmental consortiums, eligible for retirement service credit in the Public Employees Retirement System (PERS)?

OVERVIEW

King County was a pioneer in EMT services:

In 1970, the Seattle Fire Department, in cooperation with Harborview Medical Center and the University of Washington, trained the first class of firefighters as paramedics. The program was quite a success, and later classes soon followed. In 1977, the first paramedics came to work in King County.

The prehospital emergency medical care pioneered in Seattle has become famous around the world. The expression that "Seattle is the best place in the world to have a heart attack" was coined after a 1974 60 Minutes story that featured the fledgling paramedic program. King County Medic One continues this tradition. The Medic One programs throughout King County are considered models for much of the world.¹

In addition to having the first firefighter paramedics, King County, and other local governments, formed intergovernmental consortiums, also known as provider groups. These consortiums consist of counties, cities, and hospitals. They provide emergency medical services over their shared geographic area. The EMTs funded by the consortiums provide services to the citizens of all the consortium members. Some of the employees working for these consortiums did not receive service credit in a state retirement plan, while others did. This inconsistency has resulted in piece-meal legislation to provide retirement benefits to these EMTs on an employer by employer basis.

¹ <https://www.kingcounty.gov/depts/health/emergency-medical-services/medic-one/history.aspx>

The 2020 Supplemental Budget included a proviso of \$50,000 for the LEOFF Plan 2 Board to complete a:

study of the pension benefits provided to emergency medical technicians providing services in King county between October 1, 1978 and January 1, 2003. The board shall examine the legal and fiscal implications of extending membership in the plan for these periods, including King county employers that might be included, the benefits that would be paid to members on a prospective and retroactive basis, and the contribution requirements and plan liability that would be created for employers, employees, and the state.

BACKGROUND AND POLICY ISSUES

EMT LEOFF Plan 2 History

As described above, starting with King County, some local government EMTs had their jobs moved from various local government entities to fire departments. Upon meeting requirements to become firefighters, such as training and applicable examinations, these EMTs employed at fire departments become members of LEOFF Plan 2.²

In 2005, Substitute House Bill 1936, was enacted amending the definition of "fire fighter" in LEOFF to include any person employed on a full-time, fully compensated basis as an emergency medical technician by a city, town, county or district. Prior to 2005, EMTs employed by local governments in health departments or other divisions of local governments were members of PERS if their employer opted into PERS membership.

Members of PERS 2 employed as EMTs were transferred to LEOFF 2 for purposes of future service. An EMT transferred to LEOFF 2 could also elect to transfer past service earned as an EMT in PERS into LEOFF 2.³

² In 2003, House Bill 1202 was enacted, permitting members of LEOFF whose jobs as EMT's were moved into fire departments the opportunity to transfer past service credit from PERS into LEOFF. The LEOFF members who elect to transfer service credit earned as an EMT in PERS are required to pay the difference between the contributions they paid into PERS, and the contributions that they would have paid into LEOFF, plus interest.

³ For the period of past service a member transferred, the member was required to pay the difference between the employee contributions made to PERS, and the contributions that would have been made had the service been performed in LEOFF 2, plus interest. The employee was required to complete this payment within five years. Upon completing the required payment, the member's service credit and accumulated contributions, and an equal amount of employer contributions would be transferred from PERS 2 to LEOFF 2. Within five years of the completing payment for the transfer of service credit, the employer is required to pay into LEOFF 2 an amount sufficient to ensure that the contribution rates for LEOFF 2 plan will not increase due to the transfer of service.

After 2005, there remained a question of whether Public Hospital Districts met the definition of “employer” in LEOFF. In 2017, Substitute House Bill 2202 was enacted to clarify that Public Hospital Districts are LEOFF 2 employers and that their EMTs were eligible for past service credit retroactive to 2005, when they would have been made eligible under Substitute House Bill 1936 (2005). However, these EMTs would still not have been eligible for service credit in PERS prior to 2005 for their employment at the Public Hospital District, if the Public Hospital District had not opted into PERS.

Legislation regarding EMTs working for consortiums

In 2016, Senate Bill 6423, was enacted which provided that an employee providing emergency medical services to a consortium of local governments may choose to establish service credit in PERS for service performed prior to July 23, 2003, if the service was performed in Snohomish County.⁴

In 2020, Senate Bill 6616 sought to provide a similar benefit to a group of EMTs who had worked in King County. This group of EMTs worked for a consortium that included King County and Evergreen Public Hospital District. Evergreen Public Hospital District was not a PERS employer, while King County was a PERS employer. The consortium believed the EMTs were employees of Evergreen Public Hospital District and therefore, did not report them as PERS members.

During the legislative session legal concerns were raised regarding whether these EMTs were eligible to be allowed PERS membership. These legal concerns included whether the EMTs could receive service credit in PERS, if their employer was not a PERS employer. This raised the question of whether the EMTs’ employer, for purposes of determining eligibility in PERS, was Evergreen Public Hospital District or King County.

After this legal issue was raised, a second bill, House Bill 2902, was introduced. This bill sought to provide the same group of EMTs membership in LEOFF Plan 2, instead of PERS. Similar legal concerns were also raised regarding this bill. The legal concerns raised regarding these two bills and the ongoing issues that have been raised regarding EMTs in similar situations resulted in the legislature funding this LEOFF 2 Board Study.

⁴ The employee must pay both the employer and employee contribution, as calculated by DRS, within five years of making the election to establish service credit.

Determining Employer

The IRS and DRS use a “scope of control test” to determine whether someone is an employee of an organization or an independent contractor. In situations where there is an intergovernmental consortium, DRS and the IRS may rely on a similar scope of control test to determine who the employer is for purposes of eligibility in PERS or LEOFF Plan 2.

The general rule of the scope of control test is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work, not what will be done and how it will be done.⁵ To help determine this the IRS looks at the following three areas: Behavioral Control, Financial Control and Relationship of the Parties.

- **Behavioral Control:** A worker is an employee when the business has the right to direct and control the work performed by the worker, even if that right is not exercised. Behavioral control categories are:
 - Type of instructions given, such as when and where to work, what tools to use or where to purchase supplies and services. Receiving the types of instructions in these examples may indicate a worker is an employee.
 - Degree of instruction, more detailed instructions may indicate that the worker is an employee. Less detailed instructions reflects less control, indicating that the worker is more likely an independent contractor.
 - Evaluation systems to measure the details of how the work is done points to an employee. Evaluation systems measuring just the end result point to either an independent contractor or an employee.
 - Training a worker on how to do the job -- or periodic or on-going training about procedures and methods -- is strong evidence that the worker is an employee. Independent contractors ordinarily use their own methods.
- **Financial Control:** Does the business have a right to direct or control the financial and business aspects of the worker's job? Consider:
 - Significant investment in the equipment the worker uses in working for someone else.
 - Unreimbursed expenses, independent contractors are more likely to incur unreimbursed expenses than employees.
 - Opportunity for profit or loss is often an indicator of an independent contractor.
 - Services available to the market. Independent contractors are generally free to seek out business opportunities.

⁵ <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation>

- Method of payment. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time even when supplemented by a commission. However, independent contractors are most often paid for the job by a flat fee.
- Relationship: The type of relationship depends upon how the worker and business perceive their interaction with one another. This includes:
 - Written contracts which describe the relationship the parties intend to create. Although a contract stating the worker is an employee or an independent contractor is not sufficient to determine the worker's status.
 - Benefits. Businesses providing employee-type benefits, such as insurance, a pension plan, vacation pay or sick pay have employees. Businesses generally do not grant these benefits to independent contractors.
 - The permanency of the relationship is important. An expectation that the relationship will continue indefinitely, rather than for a specific project or period, is generally seen as evidence that the intent was to create an employer-employee relationship.
 - Services provided which are a key activity of the business. The extent to which services performed by the worker are seen as a key aspect of the regular business of the company.⁶

The Washington State Supreme Court addressed the issue of independent contractors being eligible for membership in PERS in *Dolan vs. King County*. In *Dolan*:

King County sought ways to provide legal defense services to indigent criminal defendants. The County settled on a system of using nonprofit corporations to provide services funded through and monitored by the County's Office of the Public Defender. Over time, the County took steps to improve and make these nonprofit organizations more accountable to the County. In so doing, it asserted more control over the groups that provided defender services. Respondents are employees of the defender organizations who sued the County for state employee benefits. They argued the County's funding and control over their "independent" organizations essentially made them state employees for the purposes of participating in [PERS]. Applying the pertinent statutes and common law principles, the Supreme Court agreed that employees of the defender organizations are "employees" under state law, and, as such, are entitled to be enrolled in the PERS.⁷

⁶ <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation>

⁷ <https://law.justia.com/cases/washington/supreme-court/2011/828423-opn.html#:~:text=King%20County,-Annotate%20this%20Case&text=King%20County%20sought%20ways%20to,services%20to%20indigent%20criminal>

After the Supreme Court’s decision in *Dolan*, the legislature passed Engrossed House Bill 2771 (2012). This bill clarified that a governmental contractor legal entity is not an employer for purposes of the Washington State Retirement Systems, and that employees of governmental contractors are not eligible for state retirement system membership. It also limited the determination of whether an employer-employee relationship exists solely to the relationship between a government contractor's employee and a retirement system employer, and not the relationship between a government contractor and a retirement system employer.

Unlike *Dolan*, the intergovernmental consortiums providing EMT services in King County were all public entities. Therefore, it is unclear what, if any, impact *Dolan* and Engrossed House Bill 2771 (2012) would have on the retirement system eligibility of the EMTs employed by these intergovernmental consortiums.

The AGO issued an opinion in 2007 (AGO 2007 No. 6⁸) regarding determining employer status for retirement system purposes of nonprofit corporations formed by cities and fire protection districts to carry out cooperative functions under the interlocal cooperation act. This opinion held that:

Cities and fire districts can qualify as “employers” under each of the retirement systems [...]. A nonprofit corporation formed by qualifying employers also would qualify as an “employer” under the retirement systems [...], if the agreement creating the nonprofit corporation delegates to the nonprofit, the retirement system obligations of the employers that form it. The nonprofit corporation must timely and fully satisfy those obligations. To the extent that either of these requirements is not satisfied, the cities and fire districts forming the nonprofit corporation would remain liable to fulfill the employers’ obligations under the relevant retirement system.

%20defendants.&text=They%20argued%20the%20County's%20funding,Employees%20Retirement%20System%20(PERS).

⁸ <https://www.atg.wa.gov/ago-opinions/employer-status-retirement-system-purposes-nonprofit-corporation-formed-cities-and-fire>



King County EMT Study

Initial Consideration
September 23, 2020

Issue

- Are Emergency Medical Technicians (EMTs) who provided services from 1978 to 2003, in King County through intergovernmental consortiums, eligible for retirement service credit in the Public Employees Retirement System (PERS)?

Overview

- King County was a pioneer in EMT services
 - "Seattle is the best place in the world to have a heart attack" - 60 Minutes story from 1974
- King County, and other local governments, formed intergovernmental consortiums providing emergency medical services over their shared area
 - Consists of counties, cities, and hospitals
 - Not all of these EMTs were enrolled in a state retirement system
 - This inconsistency has resulted in piece-meal legislation to provide retirement benefits to these EMTs on an employer by employer basis

Study

- The 2020 budget included a proviso of \$50,000 for the LEOFF Plan 2 Board to complete a study of the pension benefits provided to emergency medical technicians providing services in King county between October 1, 1978 and January 1, 2003
- The board shall examine the legal and fiscal implications of extending membership in the plan for these periods, including:
 - King county employers that might be included
 - the benefits that would be paid to members on a prospective and retroactive basis, and
 - the contribution requirements and plan liability that would be created for employers, employees, and the state

EMT LEOFF Plan 2 History

- In 2005, definition of "fire fighter" in LEOFF was amended to include EMTs employed by a city, town, county or district.
 - Prior to 2005, EMTs employed by local governments in health departments or other divisions of local governments were members of PERS if their employer was either mandated or opted into PERS membership
- In 2017, a bill passed clarifying that Public Hospital Districts are LEOFF 2 employers and that their EMTs were eligible for past service credit retroactive to 2005

Legislation regarding EMTs working for consortiums

- In 2016, a bill was passed which provided that an employee providing emergency medical services to a consortium of local governments may choose to establish service credit in PERS for service performed prior to July 23, 2003, if the service was performed in Snohomish County
- In 2020, SB6616 sought to provide a similar benefit to a group of EMTs who had worked in King County for a consortium that included King County and Evergreen Public Hospital District
 - During the legislative session legal concerns were raised regarding whether the EMTs' employer, for purposes of determining eligibility in PERS, was Evergreen Public Hospital District or King County

Legislation, continued

- In 2020, a second bill, House Bill 2902, sought to provide the same group of EMTs membership in LEOFF Plan 2, instead of PERS
- The legal concerns raised regarding these two bills and the ongoing issues that have been raised regarding EMTs in similar situations resulted in the legislature funding this LEOFF 2 Board Study

Determining Employer

- “Scope of control test” - The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work, not what will be done and how it will be done
- To help determine the IRS looks at:
 - Behavioral Control
 - Financial Control
 - Relationship of the Parties

Dolan vs. King County

- The Supreme Court found that employees of the public defender organizations hired by King County are "employees" under state law, and are entitled to be enrolled in the PERS
 - Supreme Court utilized a scope of control test
- After the Supreme Court's decision in *Dolan*, the legislature passed a bill in 2012 seeking to prevent situations like Dolan from occurring again

Next Steps

- The LEOFF 2 Board is working with tax counsel, Ice Miller, on completing the study
 - Ice Miller is currently working on their analysis and should have that completed before the Board's November Meeting
- The LEOFF 2 Board is also working with OSA and DRS on a fiscal analysis



Thank You

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September 23, 2020
Survivor Reelection

INITIAL CONSIDERATION

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ISSUE STATEMENT

Allowing members to change their survivor option election after retirement may raise plan qualification issues with the IRS.

OVERVIEW

The LEOFF 2 Board endorsed legislation (SB 6417/HB 2678) last year to give LEOFF 2 retirees 90 days to change their survivor option. Towards the end of the legislative session it came to the Board's attention that there may be IRS plan qualification issues with allowing retirees a post-retirement window to change their survivor option. To address this issue, SB 6417 was amended to include language that the bill does not take effect until the state receives determination from the IRS that these changes conform to federal law. The bill passed and LEOFF 2 Board staff, along with the Department of Retirement Systems (DRS), is working with tax counsel on seeking an IRS determination.

BACKGROUND AND POLICY ISSUES

Legislative Background

After studying the issue of allowing retirees to change their survivor option after retirement, the LEOFF 2 Board endorsed legislation (SB 6417/HB 2678) to allow LEOFF 2 retirees up to 90 calendar days after the receipt of their first retirement allowance to prospectively change their survivor election.

Early in the legislative session, the bill was amended to include all DRS covered retirement plans. LEOFF 2 Board staff testified, as the LEOFF 2 Board had instructed, that this amendment would be considered a friendly amendment from the LEOFF 2 Board's perspective.

Later in the legislative session DRS reached out to their tax counsel to review the legislation for any possible plan qualification issues. Their tax counsel let DRS know they believed there would be plan qualification issues with the bill. DRS notified LEOFF 2 Board staff and legislative staff of these concerns and the bill was amended to not take effect until the state received determination from the IRS that these changes conform to federal law. The amended bill passed and was signed into law.

Federal Law (Plan Qualification) Issues

LEOFF Plan 2 is a 401(a) retirement plan. A retirement plan that meets the requirements of Internal Revenue Code (IRC) Section 401(a) is referred to as a "qualified plan." IRC Section 401(a) sets standards for retirement plans including:

- Who is eligible for plan participation,
- When participants have a nonforfeitable right to their plan benefits,
- How much may be contributed to the plan by both participant and employer, and
- When and how distributions from the plan may be made.

If a retirement plan is in violation of IRC 401(a) it is subject to penalties from the IRS.

The LEOFF 2 Board and DRS requested a legal advice memo from tax counsel regarding the plan qualification issues that had been raised during legislative session regarding SB 6417 (see Appendix B). Tax counsel concluded that they believed SB 6417 is in violation of IRC Section 401(a). Specifically, their legal analysis identified possible violations of re-annuitization treasury regulations and nonincreasing annuity treasury regulations.

Re-annuitization treasury regulations (see Treas. Reg. § 1.401(a)(9)-6, Q&A-13(b)(3)) restrict the ability to re-annuitize a pension after payments have started. These regulations only allow for an annuity payment to be changed if:

1. The modification occurs at the time the employee retires or in connection with a plan termination;
2. The annuity payments prior to the modification are annuity payments paid over a period certain without life contingencies; or
3. The annuity payments after modification are paid under a qualified joint and survivor annuity over the joint lives of the employee and a designated beneficiary, the employee's spouse is the sole designated beneficiary, and the modification occurs in connection with the employee being married to such spouse.

Upon re-annuitization, the value of the entire benefit cannot be increased by the re-annuitization. Nonincreasing annuity treasury regulations (see Treas. Reg. § 1.401(a)(9)-6, Q&A-14) provide several exceptions to this, generally including:

1. An annual percentage increase under an approved cost-of-living adjustment (COLA);
2. A percentage increase at certain specified times which does not exceed an approved COLA;
3. A "pop-up" benefit increase if a beneficiary either dies or is no longer a beneficiary under a QDRO, to the extent the benefit was reduced to provide the survivor benefit;
4. A plan amendment;
5. A beneficiary's conversion of a survivor benefit to a lump sum distribution at the employee's death;
6. A constant percentage increase less than 5%, occurring at least annually;
7. A final payment of any remaining employee contributions or accrued benefit; and
8. Certain dividend payments.

Therefore, federal law does not identify an exception to the re-annuitization and nonincreasing annuity treasury regulations that would allow a retiree to change their survivor option within the first 90 days of retirement.

IRS Determination

The amended bill requires the state to receive a "determination from the IRS". Typically, DRS, as the plan sponsor, would be responsible for seeking a determination from the IRS. In this instance, LEOFF 2 Board staff have worked with DRS and tax counsel to determine the appropriate next steps in seeking a determination from the IRS, including what type of determination to seek and whether to seek one for all Washington state retirement plans at once or by individual plan.

Tax counsel has advised that the type of determination from the IRS that we should seek is a Private Letter Ruling. The IRS charges \$20,000 for a Private Letter Ruling. Tax counsel has advised that they believe the IRS may allow DRS to submit one request for all plans, as the language of the law is identical for each system. By consolidating our request to the IRS we may avoid being charged \$20,000 per individual plan. Instead the cost would be spread across all of the plans. However, tax counsel has warned that the IRS may still decide to charge for each plan.

Tax counsel has advised that the IRS is currently taking approximately 12 months to issue a Private Letter Ruling. The request to the IRS for a Private Letter Ruling will be drafted and submitted by tax counsel.

Alternative option

An alternative option to seeking IRS approval is to work with tax counsel to determine if the survivor option reelection law can be amended so that there are no longer plan qualification issues. LEOFF Plan 2 staff and DRS requested tax counsel to research this possibility. Tax counsel recommended that in order to comply with the re-annuitization and nonincreasing annuity treasury regulations a member could not commence their benefit until the benefit calculation has been finalized. This would allow the member more certainty about their benefit prior to making their survivor option election. However, it would delay the member receiving a retirement benefit.

What is a survivor option?

LEOFF Plan 2 members may elect to take a reduction in their monthly benefit in order to leave an ongoing benefit to a survivor. The survivor will receive the ongoing benefit for their lifetime. This feature of LEOFF Plan 2 is referred to as a survivor benefit option. The member must make this election when they apply for retirement. There are four options for a survivor benefit:

1. **Single Life** - This option pays the highest monthly amount of the four choices, but it only lasts for the member's lifetime. No one will receive an ongoing benefit after the retiree dies. If the retiree dies before the benefit they have received equals their

contributions plus interest (as of the date of their retirement), the difference will be paid in a lump sum to the retirees designated beneficiary.

2. **Joint and 100% Survivor** – The retiree's monthly benefit under this option is less than the Single Life Option. But after the retiree's death, the retiree's survivor will receive the same benefit the retiree was receiving during his or her lifetime.
3. **Joint and 50% Survivor** – This option applies a smaller reduction to the retiree's monthly benefit than option 2. After the retiree's death, the retiree's survivor will receive half the benefit the retiree was receiving during his or her lifetime.
4. **Joint and 66.67% Survivor** – This option applies a smaller reduction to the retiree's benefit than option 2 and a larger reduction than option 3. After the retiree's death, the retiree's survivor will receive 66.67% of the benefit the retiree was receiving during his or her lifetime.

The survivor is typically a spouse, but can be someone else. If a member is married they are required to get spousal consent to choose an option other than option 3.

What are the survivor options for other retirement plans?

Plans 1, 2, and 3 in PERS, SERS, and TRS all have the same survivor benefit options as LEOFF Plan 2. LEOFF 1 has an automatic joint and 100% survivor benefit. In LEOFF 1 the member does not take a reduction in their benefit to leave this survivor benefit.

How much of a reduction in benefit will a member take to leave a survivor benefit?

The amount of the reduction in benefit a member takes when selecting a survivor option benefit is based on administrative factors. These factors are recommended by the Office of the State Actuary and adopted by the LEOFF Plan 2 Board. The factors are based on various actuarial assumptions and assembled into a table categorized by the difference in age between the retiree and their survivor. If the survivor is younger than the retiree the reduction in benefit will be greater. If the survivor is older than the retiree there is still a reduction in benefit; however, the reduction will be less. The intent of these factors is to make the amount of pension funds paid over a single life (survivor option 1) equal to the amount of pension funds paid over two lives (survivor option 2, 3, or 4).

Can a member change their decision to leave, or not leave, a survivor benefit?

A retiree's survivor option choice is irrevocable unless the following occur:

1. They designated someone other than their spouse to receive their survivor benefit. The non-spouse survivor can be removed (option 1) only.
2. They marry or remarry after retirement. To qualify, they must request the change between their first and second years of marriage.
3. They chose a survivor option, and their survivor dies before they do. Their benefit is adjusted to option 1.
4. They return to membership. If they go back to work for any period of time as a contributing retirement plan member, they can retire again and select a new benefit option and/or survivor.

- a. PERS members must return to work for two years before they are able to re-retire and change their survivor option.

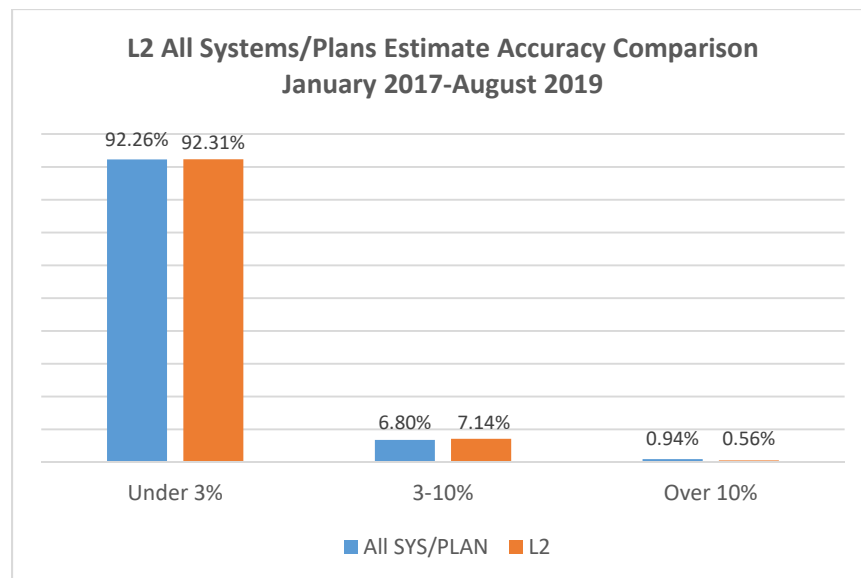
How does a member know what their benefit will be prior to retiring?

Members are encouraged by the DRS to request an estimate of their retirement benefit, within a year of when they plan to retire. If a member does not request an estimate, DRS still ensures they receive an estimate of their benefit before retiring. When members make their request, they may select multiple estimates based on different survivor options. In addition to what survivor option the member selects, the estimate is calculated based on multiple assumptions, including how long the member will continue to work and what their Final Average Salary will be.

How accurate are benefit estimates?

DRS tracks the accuracy of estimates as part of their ongoing performance metrics. From January 2017 to August 2019 there were 1,261 LEOFF Plan 2 retirements. Of those retirements:

- 1,164 (92.31%) estimates were within 3% of the member's actual benefit;
- 90 (7.14%) estimates were between 3% and 10% of the member's actual benefit; and
- 7 (.56%) were more than 10% different than the member's actual benefit.



There are many reasons an estimate could be different than a member's actual benefit. However, according to DRS, the most common reasons for an estimate to be more than 10% different than the actual benefit are when the member chooses a different retirement date or chooses a different survivor option than they requested for the estimate.

SUPPORTING INFORMATION

Appendix A: Ice Miller Legal Advice Memo

PRIVILEGED AND CONFIDENTIAL MEMORANDUM

TO: Johnna Craig (DRS) and Steve Nelsen (LEOFF)

FROM: Audra Ferguson-Allen and Robert L. Gauss, Ice Miller LLP

DATE: September 3, 2020

RE: SB 6417

This Memorandum is provided in confidence and subject to the attorney-client privilege. We have not provided copies to anyone other than the individuals named above. To preserve the attorney-client privilege, you should disclose the contents of this Memorandum only to persons making decisions on the matters discussed herein.

Please allow this memorandum to follow-up on our teleconference on August 13, 2020. Specifically, you asked us to provide an analysis of SB 6417 and the relevant federal tax law in order to consider whether new retirees can be offered an opportunity to change their selected form of benefit. As set forth in more detail below, SB 6417 does not comply with federal law because the ability to change a beneficiary after the benefit has commenced is more expansive than would otherwise be allowed under federal law. Accordingly, we are recommending possible changes to SB 6417 for your consideration.

I. SUMMARY OF SB 6417

SB 6417 amends RCW 41.26.460 as follows:

(6) Retirees have up to ninety calendar days after the receipt of their first retirement allowance to change their survivor election under subsections (1) and (2) of this section. If a member changes the member's survivor election under this subsection the change is effective the first of the following month and is prospective only.

II. FEDERAL LAW ANALYSIS

As set forth in more detail below, the ability to change beneficiaries and payment options after retirement and commencement of an annuity raises two considerations under federal law. First, Treasury Regulation Section 1.401(a)(9)-6, Q&A-13(a) provides that an annuity payment period only may be changed (also referred to as a "re-annuitization") in association with an annuity increase under Q&A-14 or in accordance with the options provided in Q&A-13(b). Second, Treasury Regulation Section 1.401(a)(9)-6, Q&A-14 prohibits increasing annuity payments except in certain circumstances.¹

¹ Treas. Reg. § 1.401(a)(9)-1, Q&A-2 provides that "a governmental plan . . . is treated as having complied with [Code] section 401(a)(9) . . . if the plan complied with a reasonable and good faith interpretation of [Code] section 401(a)(9)." See also PLR 200807023

The Code Section 401(a)(9) Regulations provide as follows:

In order to satisfy section 401(a)(9), except as otherwise provided in this section, distributions of the employee's entire interest under a defined benefit plan must be paid in the form of periodic annuity payments for the employee's life (or the joint lives of the employee and beneficiary) or over a period certain that does not exceed the maximum length of the period certain determined in accordance with A-3 of this section. The interval between payments for the annuity must be uniform over the entire distribution period and must not exceed one year. Once payments have commenced over a period, the period may only be changed in accordance with A-13 of this section. Life (or joint and survivor) annuity payments must satisfy the minimum distribution incidental benefit requirements of A-2 of this section. Except as otherwise provided in this section (such as permitted increases described in A-14 of this section), all payments (whether paid over an employee's life, joint lives, or a period certain) also must be nonincreasing.

Treas. Reg. § 1.401(a)(9)-6, Q&A-14(a) (emphasis added).

Because the Treasury Regulations provide that, under a lifetime annuity paid from a defined benefit plan, the member's annuity starting date must be treated as the required beginning date, these prohibitions apply once the member has commenced benefits, regardless of the member's age at commencement. Treas. Reg. § 1.401(a)(9)-6, Q&A-10.

Treas. Reg. § 1.401(a)(9)-6, Q&A-13: Annuity Period Changes ("Re-Annuityization")

In order for the annuity payment to be changed, the stream of annuity payments must otherwise satisfy Code § 401(a)(9) and the modification must not cause the distributions to fail to satisfy Code § 401(a)(9). Treas. Reg. § 1.401(a)(9)-6, Q&A-13(b). In order for an annuity payment to be changed, either:

- The modification occurs at the time the employee retires or in connection with a plan termination;
- The annuity payments prior to the modification are annuity payments paid over a period certain without life contingencies; or
- The annuity payments after modification are paid under a qualified joint and survivor annuity over the joint lives of the employee and a designated beneficiary, the employee's spouse is the sole designated beneficiary, and the modification occurs in connection with the employee being married to such spouse.

Treas. Reg. § 1.401(a)(9)-6, Q&A-13(b) (emphasis added). With respect to the third exception to the prohibition against changing the period of the benefit, the new spouse must be the "sole designated beneficiary" under the new benefit:

If, in a stream of annuity payments that otherwise satisfies section 401(a)(9), the annuity payment period is changed and the annuity payments are modified in association with that change, this modification will not cause the distributions to fail to satisfy section 401(a)(9) provided the conditions set forth in paragraph (c) of this A-13 are satisfied, and ... (3) the annuity payments after modification are paid under a qualified joint and survivor annuity over the joint lives of the employee and a designated beneficiary, the employee's spouse is the sole designated beneficiary, and the modification occurs in connection with the employee becoming married to such spouse.

Treas. Reg. § 1.401(a)(9)-6, Q&A-13(b)(3).

If changes are allowed, in order to modify a stream of annuity payments, the following conditions must be satisfied:

- The future payments under the modified stream satisfy Code § 401(a)(9) and Treas. Reg. § 1.401(a)(9)-6 (determined by treating the date of the change as a new annuity starting date and the actuarial present value of the remaining payments prior to the modification is the entire interest of the participant);
- For purposes of Code § 415, the modification is treated as a new annuity starting date;
- After taking into account the modification, the annuity stream satisfies Code § 415 (determined at the original annuity starting date, using the interest rates and mortality tables applicable to such date); and
- The end point of the period certain, if any, for the modified payment period is not later than the end point available under Code § 401(a)(9) to the employee at the original annuity starting date.

Treas. Reg. § 1.401(a)(9)-6, Q&A-13(c).

Thus, upon re-annuitization, the value of the entire benefit cannot be increased by the re-annuitization. Instead, the re-annuitization date must be established as a new annuity starting date and the requirements of Code Section 401(a)(9) and 415 are applied to the newly computed benefit.

Treas. Reg. § 1.401(a)(9)-6, Q&A-14: Nonincreasing Annuity

With respect to the prohibition against increasing annuity payments after commencement of the benefit, Treas. Reg. § 1.401(a)(9)-6, Q&A-14, provides several exceptions, generally including:

- An annual percentage increase under an approved cost-of-living adjustment (COLA);

- A percentage increase at certain specified times which does not exceed an approved COLA;
- A "pop-up" benefit increase if a beneficiary either dies or is no longer a beneficiary under a QDRO, to the extent the benefit was reduced to provide the survivor benefit;
- A plan amendment;
- A beneficiary's conversion of a survivor benefit to a lump sum distribution at the employee's death;
- A constant percentage increase less than 5%, occurring at least annually;
- A final payment of any remaining employee contributions or accrued benefit; and
- Certain dividend payments.

Treas. Reg. § 1.401(a)(9)-6, Q&A-14 (emphasis added).

The exception above which permits a "pop-up" benefit increase if a beneficiary either dies or is no longer a beneficiary under a QDRO is specifically limited to those circumstances—i.e., there is no exception in a situation where a retirant would be changing beneficiaries outside those parameters.²

III. APPLICATION OF FEDERAL LAW TO SB 6417

As set forth in more detail below, the provisions of SB 6417 allowing a retiree up to ninety (90) calendar days after receiving his/her first retirement allowance to change the survivor election does not comply with the federal law restrictions regarding when an annuity period may be changed or when an annuity payment may be increased.

A. Potential Violation of Re-Annuitization Treasury Regulations

As noted above, a pension is re-annuitized if the pension payment period is changed. If a LEOFF or DRS retiree changes his/her designated beneficiary, that would in almost all cases be a change in the pension payment and amount.

As noted above, the Treasury Regulations restrict the ability to re-annuitize a pension after payments have commenced. Thus, unless the re-annuitization occurs in association with an

² We would note that, based on the provisions of Treas. Reg. § 1.401(a)(9)-8, Q&A-6, we think that, assuming LEOFF or DRS recognize QDROs post-benefit commencement, it may be permissible to add a beneficiary if directed under a QDRO even after annuity payments have commenced (presumably decreasing the member's benefit). While it may be argued that such a change would violate the prohibition against changing the period of the benefit, it seems reasonable to take the position that, while not specified as an exception under Treas. Reg. § 1.401(a)(9)-6, Q&A-13, it is contemplated by Treas. Reg. § 1.401(a)(9)-8, Q&A-6.

annuity increase under Q&A-14 (discussed below), then LEOFF or DRS only would be allowed to re-annuitize a lifetime annuity if the re-annuitization was in connection with a marriage and the retiree's spouse is the sole designated beneficiary.

B. Potential Violation of Nonincreasing Annuity Treasury Regulations

As stated above, if beneficiary dies or is no longer a beneficiary under a QDRO, a joint and survivor annuity may "pop-up" to a single life annuity. However, there is no exception which would allow a retiree to change his or her benefit for any other reason outside of death of a beneficiary or QDRO. In addition, naming a new beneficiary, other than for a remarriage as discussed above in III.A, will result in an impermissible re-annuitization.

Further, we do not think this can be classified as a permissible increase based on a "plan amendment." The plan amendment exception focuses on increases in payment due to a plan amendment. It is not intended to encompass the prohibitions otherwise in place regarding changing beneficiaries and plan options post-retirement.

IV. CONCLUSION

We recommend amending SB 6417 to limit the changes to those permissible under the Treasury Regulations. For instance, a change is permissible if the member names his/her spouse as a survivor beneficiary, but the spouse is no longer the member's spouse due to divorce or other judicial decree. Otherwise, in order to comply with the requirements under Treas. Reg. 1.401(a)(9)-6, our recommendation would be that a member either (a) not commence his/her benefit until the benefit calculation has been finalized or (b) not be allowed an opportunity to change their form of benefit election.

Of course, if you would like to schedule a follow-up teleconference to discuss this Memorandum, please do not hesitate to let us know.



Survivor Reelection

Initial Presentation
September 23, 2020

Issue

- Allowing members to change their survivor option election after retirement may raise plan qualification issues with the IRS

Legislative Background

- The LEOFF 2 Board endorsed legislation to allow LEOFF 2 retirees up to 90 calendar days after the receipt of their first retirement allowance to prospectively change their survivor election
 - The bill was amended to include all DRS covered retirement plans
- Tax counsel identified possible plan qualification issues with the bill
 - The bill was amended to not take effect until the state received determination from the IRS that these changes conform to federal law. The amended bill passed and was signed into law

Plan Qualification Issues

- Re-annuitization treasury regulations
 - Restricts the ability to re-annuitize a pension after payments have started
- Nonincreasing annuity treasury regulations
 - Upon re-annuitization, the value of the entire benefit cannot be increased by the re-annuitization, except under limited exceptions

IRS Determination

- LEOFF 2 Board staff are working with DRS and tax counsel on next steps
- Tax counsel has advised that the type of determination from the IRS that we should seek is a Private Letter Ruling
- Seeking one Private Letter Ruling for all DRS systems/plans

Alternative option

- **A member could delay receiving their benefit until the benefit calculation has been finalized by DRS**
 - This would allow the member more certainty about their benefit amount prior to making their survivor option election
 - However, it would delay the member receiving a retirement benefit

Next Steps

- LEOFF 2 Board staff will continue to work with DRS and tax counsel to explore alternative options and to submit a request for Private Letter Ruling to the IRS



Thank You

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September 23, 2020

Interruptive Military Service Credit

FOLLOW-UP REPORT

By Jacob White

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ISSUE STATEMENT

The legislature required the Law Enforcement Officers' and Fire Fighters' (LEOFF) Plan 2 Retirement Board and the Select Committee on Pension Policy (SCPP) to complete a study of interruptive military service credit and the impact of expanding fully subsidized service credit eligibility to those who have been awarded an expeditionary medal.

OVERVIEW

LEOFF Plan 2 members may establish service credit for military service interrupting their LEOFF service. Member contributions are waived for LEOFF PLAN 2 members whose interruptive military service was: 1) during a period of war; or 2) during a specified conflict for which they earned a campaign badge or medal.

This report will provide information on interruptive military service credit; Department of Defense (DoD) regulations for awarding military service medals; and information on legislation in other states.

STUDY REQUIREMENTS

During the 2020 interim, the LEOFF PLAN 2 Board is required to study the impacts of providing fully subsidized interruptive military service credit, and the costs and difference in service credit to current members and retirees who received an expeditionary medal.

To encourage consistency among the treatment of military service throughout the Washington state retirement systems, the LEOFF PLAN 2 Board and the SCPP must communicate their preliminary recommendations to each other prior to October 30, 2020. Considering the preliminary recommendations of the other body, the LEOFF PLAN 2 Board and the SCPP must issue final reports containing recommendations and analysis of the potential cost of those recommendations to the appropriate committees of the legislature by January 2, 2021.¹

¹ SHB 2544, RCW 41.04.005, <http://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/House%20Bills/2544-S.pdf?q=20200908100212>

BACKGROUND AND POLICY ISSUES

General Background

Interruptive military service credit applies to all Washington State retirement systems, including LEOFF PLAN 2. A member qualifies for this benefit when they take a leave of absence from a DRS covered position to serve in the United States military, and the member returns to employment with their employer within 90 days of being honorably discharged. When this occurs, membership in the retirement system is considered to be interrupted.

There are two types of pension benefits for interruptive military service: fully subsidized (“no-cost interruptive military service credit”) and partially subsidized (“reduced-cost interruptive military service credit”).

No-cost interruptive military service credit is awarded if the service took place during a period of war, or certain armed conflicts in which an approved campaign medal or badge was obtained. A member can qualify for up to five years of no-cost interruptive military service credit. The employer and state pay their contributions plus interest and the system subsidizes the member contributions and interest.

Partially subsidized interruptive military service credit is awarded if the service did not take place during a period of war, or an armed conflict in which an approved campaign medal was obtained.² In order to receive partially subsidized credit, a member must have been honorably discharged from their service and unable to qualify for no-cost credit. A member can qualify for up to five years of partially subsidized military service credit. The member must pay the member contribution cost; however, the interest on the member contributions is subsidized by the plan. The member has five years from when they return to work to pay their contributions or they must pay those contributions prior to retirement, whichever occurs first. After the member pays their contributions, the employer and state are billed for the employer contributions plus interest.

A member may receive a total of 10 years of interruptive military service credit (up to 5 years no-cost interruptive military service credit and up to 5 years of partially subsidized). The member must fully pay the required contributions within 5 years of reemployment.

Qualifying for No-Cost Interruptive Military Service Credit

To qualify for no-cost interruptive military service credit the member’s service must have been during a “period of war”, as defined in RCW 41.04.005(2). “Period of war” is defined under this statute as:

² Responsibility for payment varies by the dates of service. If the military service was completed: Between October 1, 1977, and March 31, 1992, the member pays both the employer and member contributions plus interest; After March 31, 1992, and before October 6, 1994, the member pays the member contributions plus interest and the employer and state pay their contributions plus interest; After October 6, 1994, a member pays the member contributions (no interest) and the employer and state pay their contribution plus interest.

World War I; World War II; The Korean conflict; The Vietnam era³; The Persian Gulf War⁴; The period beginning on the date of any future declaration of war by the congress and ending on the date prescribed by presidential proclamation or concurrent resolution of the congress; and

Any armed conflicts, if the participant was awarded the respective campaign badge or medal, or if the service was such that a campaign badge or medal would have been awarded, except that the member already received a campaign badge or medal for a prior deployment during that same conflict.

The DoD awards a campaign badge or medal to service members who served during a specified conflict and were stationed in a designated war zone.⁵

Campaign medals, as defined by the DoD manual 1348.33 Volume 2, are medals which: “recognize service members who are deployed to the geographic area where the combat is actually occurring. Members awarded campaign medals have the highest degree of personal risk and hardship as they are conducting the combat operations and are deployed to the area where the combat is actually occurring.”

Interruptive military service that does not meet the definition of “period of war” does not qualify for no-cost interruptive military service credit. However, it does qualify for partially subsidized interruptive military service credit.

Legislative History

No-cost interruptive military service credit was created in 2009, with the passage of HB 1548. HB 1548 was endorsed by the SCPP and the LEOFF PLAN 2 Board. The legislative history of HB 1548 does not explicitly state the policy goals of the legislature in creating a no-cost interruptive military service credit benefit, or the reasons for placing the lines of demarcation between partially subsidized and no-cost interruptive military service credit at receiving a campaign badge.

In 2009, the LEOFF PLAN 2 Board report⁶ on this proposed benefit stated:

Arguments for eliminating the cost to the member include encouraging military service, supporting the ability to recruit military personnel into state/local government service, benefits (direct and indirect) to the State from military service rendered by public

³ Which means: The period beginning on February 28, 1961, and ending on May 7, 1975, in the case of a veteran who served in the Republic of Vietnam during that period; the period beginning August 5, 1964, and ending on May 7, 1975.

⁴ Which was the period beginning August 2, 1990, and ending on February 28, 1991, or ending on November 30, 1995, if the participant was awarded a campaign badge or medal for such period.

⁵ Defined conflicts include: the crisis in Lebanon, the invasion of Grenada, Operation Just Cause in Panama, Operation Restore Hope in Somalia, Operation Uphold Democracy in Haiti, Operation Joint Endeavor in Bosnia, Operation Noble Eagle, Operation Enduring Freedom in Southern or Central Asia, Operation Iraqi Freedom; Iraq and Syria, Operation Inherent Resolve; and Afghanistan, Operation Freedom’s Sentinel.

⁶ http://leoff.wa.gov/wp-content/uploads/2015/06/121708.6_Interruptive-Military-Service-Credit.pdf

employees, recognition and support for plan members serving the public at large in a high risk situation, and supplementing federal benefits which may be viewed as inadequate.

Some of the policy pros and cons of providing special or increased benefits to members based on military service, identified in presentations to the LEOFF PLAN 2 Board and the SCPP in 2008 and 2009, included:

No Additional Benefits	Additional Benefits
Members serve voluntarily; no draft requires them to leave employment	Encourage military service; help avoid need for a draft
Members already receive adequate federal compensation and benefits for military service	Support ability to recruit more military personnel into state service and more state personnel into military service
Other members and employers would not have to absorb extra costs for these members	Support view that all WA citizens benefit, directly or indirectly, from military service rendered by public employees
More favorable service credit treatment is already given to these members (partially subsidized service credit)	Recognize that members who serve in conflicts are at higher risk for injury or death; pension plans typically offer extra support for high risk occupations that serve the public at large
Military service is unrelated to the service rewarded by state pension plans	Supplement federal benefits, which may not be viewed as adequate

During the 2017 legislative session, SB 5661 required the LEOFF PLAN 2 Board to study interruptive military service credit for members not awarded a campaign badge or medal. The LEOFF PLAN 2 Board completed that study during the 2017 interim and submitted the report to the legislature on January 1, 2018.

As a result of that study the LEOFF PLAN 2 Board endorsed legislation (HB 2701) in 2018. This legislation added a provision to ensure that eligibility for no-cost interruptive military service credit for multiple deployments to the same conflict; added an end date in statute for the end of the Gulf War; and made two additional combat operations (Inherent Resolve, Iraq and Syria; and Freedom's Sentinel, Afghanistan) eligible for no-cost interruptive military service credit. This legislation became effective June 7, 2018.

The statute which defines "period of war", for purposes of not only receiving interruptive military service credit but also other non-pension benefits, has been amended eleven times since its adoption in 1969. The majority of these amendments have updated the list of periods of war and armed conflicts.

Most recently, HB 2544 (2020) redefined “period of war” in RCW 41.04.005 to no longer identify specific conflicts and instead recognize all service from which a campaign badge or medal was earned. The LEOFF Plan 2 Board endorsed this legislation because it removes the need to amend “period of war” for each new conflict that qualifies for no-cost interrupt military service credit.

Department of Defense

Campaign, Expeditionary, and Service (CE&S) medals recognize service members’ participation in military campaigns, expeditions, or other significant military operations, and for otherwise meritorious military service. Eligibility criteria for CE&S medals are based on a service member’s:

- Degree of personal risk (e.g., proximity to the enemy, service in a combat zone, imminent threat of hostilities);
- Degree of personal hardship;
- Participation in designated military operations; and,
- Extent of military service during specified time periods, duration, or types of duty.⁷

There are four categories of CE&S medals:

- **Campaign Medals** - Campaign medals recognize deployed participation in large-scale or long-duration combat operations. Campaign medals are associated with the highest level of personal risk and hardship. They are awarded to members who are deployed to the geographic areas where the combat is actually occurring. Service members deployed to areas where combat is occurring as a result of prolonged or large-scale military combat operations should be recognized with a separate and distinct campaign medal.
- **Expeditionary Medals** - Expeditionary medals recognize deployed participation in small scale and/or short-duration combat operations or military operations where there is an imminent threat of hostilities. Expeditionary medals are also awarded to members deployed in support of combat operations, but who are not in the geographic area where the actual combat is occurring. Expeditionary medals are associated with high levels of personal risk and hardship.
- **Deployed Service Medals** - Deployed service medals recognize deployment or assignment to a designated Area of Eligibility (AOE) to participate in, or directly support, a designated military operation where there is no foreign armed opposition or imminent threat of hostile action.
- **Individual Service Medals** - Individual service medals recognize individual merit, direct participation in a DoD approved military activity, undertaking, event or operation, or service during a specified period. Some individual service medals, such as the Prisoner of War (POW) medal, may recognize service involving significant personal risk and

⁷ DOD MANUAL 1348.33, VOLUME 2,
https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/1348.33_Vol2.pdf?ver=2018-03-29-102726-900

hardship, while others only recognize being in active military service during a particular period of time.⁸

Below is a table from the DoD Manual 1348.33, Volume 2, of current and recent CE&S medals:

Table 1: Categories of CE&S Medals

Title of Decoration ¹	Sub-category of CE&S Medals
Southwest Asia Service Medal ²	Campaign Medal
Kosovo Campaign Medal	Campaign Medal
Afghanistan Campaign Medal	Campaign Medal
Iraq Campaign Medal	Campaign Medal
Inherent Resolve Campaign Medal	Campaign Medal
Armed Forces Expeditionary Medal	Expeditionary Medal
Global War on Terrorism Expeditionary Medal	Expeditionary Medal
Antarctic Service Medal	Deployed Service Medal
Armed Forces Service Medal	Deployed Service Medal
Korea Defense Service Medal	Deployed Service Medal
National Defense Service Medal	Individual Service Medal
Armed Forces Reserve Medal	Individual Service Medal
Humanitarian Service Medal	Individual Service Medal
Prisoner of War Medal	Individual Service Medal
Military Outstanding Volunteer Service Medal	Individual Service Medal
Global War on Terrorism Service Medal	Individual Service Medal
<p>Note 1: This list is not all-inclusive. Military Departments also have CE&S medals (e.g., Navy Expeditionary Medal; Air Force Good Conduct Medal; Army Good Conduct Medal). Refer to each Military Department's specific award guidance for additional information.</p> <p>Note 2: Before DoD established comprehensive CE&S medal policy, the naming conventions for DoD CE&S medals were inconsistent. This resulted in several medals with names that do not match the CE&S medal category to which they are assigned.</p>	

LEOFF PLAN 2 Interruptive Military Service Credit Data

Between 2009 and 2019, 534 LEOFF PLAN 2 members received no-cost interruptive military service credit. Those members received an average of 9.75 months of service credit.

During that same time period, 24 LEOFF PLAN 2 members purchased partially subsidized interruptive military service credit. Those members purchased an average of 8.85 months of service credit. 40 LEOFF PLAN 2 members requested a bill from DRS to purchase partially subsidized interruptive military service credit, but elected not to purchase the service credit. Those members would have received an average of 11.68 months of service credit.

Cost of Expanding to Expeditionary Medals

⁸ DOD MANUAL 1348.33, VOLUME 2,
https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/1348.33_Vol2.pdf?ver=2018-03-29-102726-900

Last year, OSA analyzed the potential impact to LEOFF PLAN 2 of expanding no-cost interruptive military service credit to include interruptive military service for members earning an expeditionary medal. OSA did not have data to estimate how many members might meet the criteria under this component. Therefore, OSA found the cost to be indeterminate.

This interim, the LEOFF PLAN 2 Board, in coordination with OSA, gathered data to identify the cost of expanding this benefit to include interruptive military service from which the member earned an expeditionary medal.

OTHER STATES

LEOFF PLAN 2 contacted staff from other state retirement systems for information and data regarding their members' receipt of interruptive military service credit, as well as the requirements for receiving such credit.

Idaho PERS allows their members a maximum of five years of no-cost military service credit, similar to Washington.⁹ Wisconsin Retirement Systems allows a maximum of four years of no-cost military service credit, unless the service is involuntary.¹⁰ Minnesota Retirement Systems¹¹ and Oregon PERS¹² do not offer no-cost interruptive military service credit. Research and communications with staff members from other state retirement systems shows that none of these states require their members to have earned a specific medal, or to have served in a specific conflict in order to receive no-cost or partially subsidized interruptive military service credit. Among the states that provided information and offer no-cost interruptive military service credit, the requirements for earning no-cost credit are much broader than Washington.

Below is a comparison among other states based on total members, members receiving interruptive military service credit, average no-cost service credit received, maximum amount of no-cost service granted, and qualifications to receive no-cost military service credit.

⁹ See Appendix A

¹⁰ See Appendix B

¹¹ See Appendix C

¹² See Appendix D

STATE	TOTAL MEMBERS	MEMBERS WITH INTERRUPTIVE MILITARY SERVICE CREDIT	AVERAGE SERVICE CREDIT RECEIVED	MAXIMUM NO-COST SERVICE CREDIT GRANTED	QUALIFICATIONS FOR NO-COST SERVICE CREDIT
IDAHO (PERSI)	160,000	500	5-6 months	5 years	Member must enter military service within 90 days of leaving PERSI employment, and must return to PERSI employment within 90 day of release from active duty.
MINNESOTA (MSRS)	134,000	12	–	n/a	No-cost credit not offered.
OREGON (PERS)	374,000	1,083	–	n/a	No-cost credit not offered. Must be purchased by member or employer.
WASHINGTON (DRS)	523,000	8,339	9 months	5 years	Must have been awarded a campaign medal from serving in combat zones.
WASHINGTON (LEOFF 2)	24,000	574	10 months	5 years	Must have been awarded a campaign medal from serving in combat zones.
WISCONSIN (WRS)	642,000	784	2 years	4 years	Left WRS employment to serve in the armed forces and return to employment within 180 days. Member may be responsible for employee contributions, under some circumstances.

SUPPORTING INFORMATION

Appendix A: Public Employee Retirement System of Idaho

Appendix B: Wisconsin Retirement Systems

Appendix C: Minnesota Retirement Systems

Appendix D: Oregon Public Employee Retirement System

Public Employee Retirement System of Idaho

https://persi.idaho.gov/Documents/Brochures/Military_Service.pdf

“Military service” for PERSI purposes: Any active duty in the U.S. Armed Forces, including the National Guard and Reserves, which interrupts your PERSI employment, may be considered.

Military service does not include active duty service in excess of 5 years if it is at the convenience of the U.S. government, or 4 years if you voluntarily extend your duty, even if your rights to return to employment are extended under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

You may earn military service credit for the period while you are on active duty if:

- Called into military service while an active member and begin active duty within 90 days of leaving PERSI-covered employment, AND
- Return to PERSI-covered employment within 90 days of being released from active duty.

PERSI Service Credit if You Withdraw Your Base Plan Funds:

If you are called to active duty, terminate your employment, and withdraw your PERSI Base Plan funds as a separation benefit, you cannot receive the military service credit even if you return to your employer within 90 days after leaving the military

Email responses – Jenny Flint (Jenny.Flint@persi.idaho.gov):

How many total members does your retirement plan have and how many members have received free interruptive military service credit? **We can give you a general estimate of around 500 out of 160,000 that have received the credit. Without incurring a substantial cost we cannot provide a precise number for you. We can put together an estimated cost if you would like.**

Among the members who have received military service credit, what is the average amount of credit they receive? **The average is around 5 or 6 months of service.**

Do you know the specific requirements that would determine whether the member is or is not required to pay contributions? **The member would need to be on military service which is defined as any active duty in the U.S. armed forces, including the nation guard and reserves, that interrupts a member’s PERSI service. Also, the member would need to enter military service within 90 days of leaving PERSI employment, and they would need to return to PERSI employment within 90 day of release from active duty. If someone believes they are entitled to military service, we are happy to review their record. PERSI does request the member provides us with a DD214 for the time in question.**

What percent of members that have earned interruptive military service credit earned it for free? **Without incurring a substantial cost, we cannot provide a precise number for you, and we have no way to give you a reasonable estimate. We can put together an estimated cost if you would like.**

Does your legislature have plans to expand the free or partially subsidized credit that members can earn? **Not that we are aware of.**

Wisconsin Retirement Systems

<https://etf.wi.gov/publications/et4122/direct>

Generally, there are three ways in which someone may receive WRS military service credit:

1. Credit for military service prior to 1974.
2. Credit for military service that was a break in continuous WRS-covered employment.
3. Credit under the federal Uniformed Services Employment and Reemployment Rights (USERRA) law.

Email responses – Kyle Kundert (kyle.kundert1@etf.wi.gov):

WRS-creditable service is available for periods of active military service if certain eligibility requirements are met. Up to four (4) years of military service can be credited under Chapter 40 of the Wisconsin Statutes (more creditable service can be added if military service was involuntarily extended).

There are two ways to receive military service credit under the WRS: pre-1974 military service credit and continuous military service credit

Pre-1974 Military Service Credit is based on Wisconsin state law. It applies to military service in the U.S. Armed Forces prior to January 1, 1974, and provides you with a WRS service credit for your military service, up to a maximum of four years. It has the following requirements:

- You can receive one year of military service credit for each five-year period (5, 10, 15, or 20 years) of WRS creditable service, up to a maximum of four years; and
- The military discharge must have been something other than dishonorable.

Continuous Military Service Credit is based on Wisconsin state law. It applies to military service in the U.S. Armed Forces on or after January 1, 1974, and provides members with WRS service credit for military service, up to a maximum of four years. It requires that:

- member left the employment of a WRS employer to enter the U.S. Armed Forces;
- the member returns to their pre-service WRS employer within 180 days of release or discharge from the military, or within 180 days of release from hospitalization because of injury or sickness resulting from that service in the armed forces; and
- the military service discharge must have been something other than dishonorable.

How many total members does your retirement plan have compared to how many members have received free interruptive military service credit?

A: The Wisconsin Retirement System (WRS) has ~642,000 total participants (~258,000 active employees, ~175,000 inactive employees, and ~209,000 annuitants) as of 1/1/2019.

Based on our most recent data we have had 29,783 members receive pre-1974 military service credit and 784 members take advantage of continuous service (see chart below).

Minnesota State Retirement Systems

<https://www.msrs.state.mn.us/documents/10179/59038/General+Employees+Retirement+Plan/0bd69db3-6124-4284-83d0-78347f25b5d4>

To receive service credit for military leave,

- You may pay into the retirement fund the retirement salary deductions you would have contributed had you been employed by the State during your time of military service.
- Your employer will pay the employer share of the retirement contribution plus interest.

If you leave state service to serve in the military and return to state employment within 90 days of discharge, you may buy your service credit for that time.

You must make payment within a period equal to three times the length of the leave (not to exceed five years), or before you terminate state service, whichever is earlier. For example, if you were on leave for one year, payment for this time must be made within three years.

Email responses – Holly Dayton (HOLLY.DAYTON@MSRS.US):

Does your legislature have plans to expand the free or partially subsidized credit that members can earn? **No, not that I am aware of.**

How many total members does your retirement plan have compared to how many members have received free interruptive military service credit? **Combined, our defined benefit retirement plans have about 134,000 members. In an average year, only 12 or so members receive credit for military service.**

What are the requirements for free service credit? Do members need to have been awarded certain medals or have served in specific conflicts? **Our system does not have a “free” military service credit provision. Instead, members can purchase up to 5 years of service credit per deployment when they are otherwise suspended from making contributions to the pension plan during their military leave of absence. When a member purchases back their service credit in this way, they are responsible only for their employee portion (which is a set percentage of payroll, established in statute, multiplied by their months of leave). Then the employer pays for the employer portion and the interest on both the employer and employee contributions that were missed.**

Oregon Public Employee Retirement System

Email responses – Heather Case (heather.v.case@state.or.us):

My name is Heather Case, I am the Senior Policy Advisor here at Oregon PERS.

Sorry this took so long to get back to you, I spent some time learning more about our retirement service credit in order to answer all of your questions, as well as gathering the data that you requested.

Our military service credit is named after the act that it allowed under, the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Our total number of members in Oregon PERS, including active, inactive, and retired is 374,499 (This is as of the end of 2019). We currently have 1,083 members who have the USERRA marker on their case, meaning that they either have credit applied, or will have credit applied.

Our retirement system doesn't offer "free" military service credit. However, to be eligible for the military service credit, all PERS requires is that members be employed with a PERS participating employer, are deployed or serve in some capacity in any military branch, and come back to that same employer within a year after discharge from the military. There are no requirements or special credits for type of discharge or medals received or other commendations.

If those requirements are met, the member has the option to "purchase" their time in the military as service time. The member, or any person or organization on their behalf (including the employer), can purchase this credit any time after re-employment but before retirement. The credit is based on contributions attributable to what the member's salary was at the time they entered or reentered active service. One can only purchase the credit with one lump-sum payment.

To that end, the only way a member could earn USERRA time "free" would be to have their employer or someone else purchase it for them. We do not keep track of data on who pays for the service credit.

At this time, I am not aware of any plans by the legislature to institute a free military service credit, or to expand the current credit structure offered.

How does Oregon PERS know who has qualified for USERRA? Do members have to apply? So I clarified this with one of our subject matter experts. The way that Oregon PERS knows if a member has qualified for USERRA credit is through employer reporting. Because the member has to come back from military service through a qualifying employer, it works like this:

- Member leaves employer for active military service

- Member finishes military service and returns to the employer within one year after getting back from deployment

- At this time, the employer reports the "USERRA" designation for that member and the dates of deployment.

One thing I clarified, is that this design does not account for how many members actually end up purchasing their USERRA credit. Like I mentioned in the last email, the service time for military service is available, but must be purchased either by the employer or the member (and this is an agreement

between the employer and the member, so we're not involved in that). A member can purchase that service credit at any time before they retire. So, hypothetically, if a member were to choose not to purchase that credit and retire, that USERRA designation would have stayed on their file, but ultimately they would not have gotten that service credit. I do not have the numbers of who ultimately does not end up with that time on their retirement calculation. It is more common to have employers or members purchase that time soon after arriving back from deployment and becoming re-employed, because that is when they qualify for the credit.



Interruptive Military Service Credit

Follow-Up Report
September 23, 2020

Issue

- What is the impact of expanding no-cost interruptive military service credit to include those who have been awarded an expeditionary medal?

Interruptive Military Service

- A member qualifies for this benefit when they take a leave of absence from a DRS covered position to serve in the United States military and the member returns to their employer after their military service is complete
- Two types:
 - Fully subsidized (no-cost interruptive military service credit)
 - Partially subsidized (reduced-cost interruptive military service credit)

2020 Legislative Update

- HB 2544 redefined “period of war” to no longer identify specific conflicts and instead recognize all service from which a campaign badge or medal was earned
- HB 2544 initially proposed amending RCW 41.04.005 to expand the definition of “period of war” to include those who received an expeditionary medal
- The unknown cost of including to expeditionary medals resulted in an amendment requiring LEOFF 2 and the SSCP to study this expansion of no-cost service credit eligibility

No-Cost Interruptive Military Service Credit

- LEOFF 2 Board/SCCP endorsed 2009 legislation creating benefit
- To receive no-cost service credit, a DRS member must meet the definition of “veteran” under RCW 41.04.005 meaning the member:
 - Served during World War I, World War II, the Korean conflict, the Vietnam era, the Persian Gulf War, and any future period of war declared by Congress, or
 - Earned a campaign badge or medal

Department of Defense Categories of Medals

- **Campaign Medal**
 - Recognize the highest level of personal risk and hardship for members who are deployed to the geographic areas where the combat is actually occurring.
- **Expeditionary Medal**
 - Recognize high levels of personal risk and hardship for members deployed in support of combat operations, but who are not in the geographic area where the actual combat is occurring

Unknown Cost

- Estimated cost of providing no-cost interruptive military service credit to members who earned an expeditionary medal was indeterminate
- LEOFF 2 Board requested data at the federal, state, and local level

Other States

- We surveyed Idaho (PERSI), Minnesota (MSRS), Oregon (PERS), and Wisconsin (WRS) to gather data and improve our understanding of legislation in other states
- Among the surveyed states, none distinguish between medals, badges, or levels of personal risk or hardship endured by members in order to qualify for no-cost or partially subsidized interruptive military service credit
- Minnesota and Oregon do not offer no-cost service credit
- Idaho and Wisconsin have less stringent requirements for no-cost service credit than Washington State

Other States

STATE	TOTAL MEMBERS	MEMBERS WITH INTERRUPTIVE MILITARY SERVICE CREDIT	AVERAGE SERVICE CREDIT RECEIVED	MAXIMUM NO-COST SERVICE CREDIT GRANTED	QUALIFICATIONS FOR NO-COST SERVICE CREDIT
IDAHO (PERSI)	160,000	500	5-6 months	5 years	Member must enter military service within 90 days of leaving PERSI employment, and must return to PERSI employment within 90 day of release from active duty.
MINNESOTA (MSRS)	134,000	12	–	n/a	No-cost credit not offered.
OREGON (PERS)	374,000	1,083	–	n/a	No-cost credit not offered. Must be purchased by member or employer.
WASHINGTON (DRS)	523,000	8,339	9 months	5 years	Must have been awarded a campaign medal from serving in combat zones.
WASHINGTON (LEOFF 2)	24,000	574	10 months	5 years	Must have been awarded a campaign medal from serving in combat zones.
WISCONSIN (WRS)	642,000	784	2 years	4 years	Left WRS employment to serve in the armed forces and return to employment within 180 days. Member may be responsible for employee contributions, under some circumstances.

Study Requirements

- SHB 2544 requires LEOFF 2 and the SCPP to communicate their preliminary recommendations prior to October 30, 2020
- LEOFF 2 and the SCPP must issue final recommendations to the legislature by January 2, 2021

Next Steps

- Data gathered from other states has been provided to OSA
 - Preliminary pricing should be completed before November board meeting
- LEOFF 2 Board must share its preliminary report to SCPP in October



Thank You

Jacob White

Senior Research & Policy Manager

(360) 586-2327

jacob.white@leoff.wa.gov



Seattle Police Department Demographic Impacts

Educational Briefing
September 23, 2020

Issue

- At the July board meeting questions were raised regarding the potential impacts to LEOFF Plan 2 if there are significant layoffs and/or retirements at the Seattle Police Department

Actuarial Analysis

LEOFF 2 Board requested actuarial analysis of 4 hypothetical scenarios:

1. Termination of the 700 least senior, active members from the Seattle PD with no replacement members
2. Termination of the 90 least senior and retirement of the 90 most senior active members from the Seattle PD with no replacement members
3. Reduction in assumed future salary growth by 0.25 percent
4. Reduction in the number of assumed annual future hires by 0.25 percent

Actuarial Disclaimers

- Actuarial analysis can become quickly outdated. OSA intends this analysis to be used for education purposes during the September Board meeting. Please don't rely on this analysis beyond the 2020 Interim
- Please read the analysis shown in this communication as a whole. Distribution of, or reliance on, only parts of this communication could result in its misuse and may mislead others

Current Plan Demographics

Average LEOFF 2 Demographics				
	Count	Age	Service	Salary
All LEOFF 2	18,557	43	14	\$114,085
Seattle LEOs	1,358	44	15	\$137,966

Hypothetical #1

- Termination of the 700 least senior, active members from the Seattle PD with no replacement members, is projected to result in an overall savings to the plan:
 - 0.01% decrease to the contribution rate
 - 0.3% increase to the plan funded status

Hypothetical #2

- The termination of the 90 least senior and retirement of the 90 most senior active members from the Seattle PD with no replacement members, is projected to result in an overall cost to the plan:
 - No impact to the contribution rate
 - 0.2% decrease to the plan funded status

Hypothetical #3

- A reduction in assumed future salary growth by 0.25 percent, is projected to result in an overall savings to the plan:
 - 0.26% decrease to the contribution rate
 - 0.6% increase to the plan funded status

Hypothetical #4

- A reduction in the number of assumed annual future hires by 0.25 percent, is projected to result in an overall savings to the plan
 - OSA cannot at this time provide an analysis of the projected impact to the contribution rate and funded status of the plan until the 2019 projection system (AVR) is complete
 - OSA will follow-up with analysis for a future Board meeting once 2019 AVR is complete



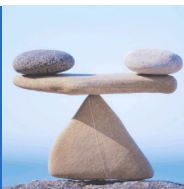
Thank You

Jacob White

Senior Research & Policy Manager

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jacob.white@leoff.wa.gov



Office of the State Actuary

"Supporting financial security for generations."

September 11, 2020

Mr. Steve Nelsen
Executive Director
LEOFF Plan 2 Retirement Board
P.O. Box 40918
Olympia, Washington 98504-0918

SUBJECT: ANALYSIS FOR LEOFF 2 SEPTEMBER BOARD MEETING

Dear Steve,

At your request, our office performed scenario analysis on reductions to the Seattle Police Department (Seattle PD) and changes to the salary and system growth assumptions. We performed this analysis for the Law Enforcement Officers' and Fire Fighters' (LEOFF) Plan 2 September Board Meeting. These scenarios are meant for educational purposes and are not intended to reflect actual policy decisions. In addition to the actuarial analysis, we included data for the average active member demographics of the LEOFF 2 Plan and the Seattle Law Enforcement Officers (LEOs).

Average LEOFF 2 Demographics				
	Count	Age	Service	Salary
All LEOFF 2	18,557	43	14	\$114,085
Seattle LEOs	1,358	44	15	\$137,966

The analysis includes the following four scenarios:

1. Termination of the 700 least senior, active members from the Seattle PD with no replacement members.
2. Termination of the 90 least senior and retirement of the 90 most senior active members from the Seattle PD with no replacement members.
3. Reduction in assumed future salary growth by 0.25 percent (25 basis points).
4. Reduction in the number of assumed annual future hires by 0.25 percent (25 basis points).



Summary of Results

We estimated how each scenario impacts our [2019 Actuarial Valuation Report](#) (AVR) results and the short-term impact could be a cost (or savings) dependent upon the scenario. The table below displays how the contribution rates and funded status are impacted under each scenario. For context, we also provided the current rates and funded status from the 2019 AVR.

Impact on Contribution Rates and Funded Status					
	2019 AVR	700 Terminations	90 Terminations, 90 Retirements	Reduction in System Growth*	Reduction in Salary Growth
Impact on Total Employer Contribution Rates					
Aggregate Rate	5.81%	-0.25%	+0.01%	N/A	-0.46%
100% Minimum Rate**	8.53%	-0.01%	0.00%	N/A	-0.26%
Impact on Funded Status					
Funded Status	111%	+0.3%	-0.2%	N/A	+0.6%

*System Growth assumption has no impact on the 2019 closed valuation. See explanation below.

**Calculated from Normal Cost of Entry Age Normal Cost Method.

Key Takeaways

The directional impact (cost or savings) of each scenario is dependent upon the members selected for each scenario.

- ❖ Termination of members who are early in their careers is a savings because these members will receive a lower benefit than if they remained active in the plan.
- ❖ More retirements of LEOFF 2 members than expected is a cost because they begin commencement of benefits earlier than we currently assume.
- ❖ Lowering future salary growth results in lower expected benefits upon retirement and is a savings to the plan. However, the system will also have lower future salary to collect contributions over, which creates a cost. The lower retirement benefit savings offset the cost from lower contributions to yield an overall contribution rate reduction.
- ❖ As of the delivery of this communication, our projections model based on the 2019 AVR is not complete. We will follow-up with analysis on the reduction in system growth for a future Board meeting.



Background Information – System Growth

The System Growth assumption reflects assumed growth in the LEOFF 2 active population. We use the System Growth assumption in our projection system, which estimates valuation results each year in the future after reflecting the growth in the active population. The projection system is used to estimate the future pathway of the plan, how risks may materialize, and long-term impacts of policies or assumptions. An example presented to the Board recently was the expected annual pathway of funded status under different minimum contribution rate policies.

The 2019 AVR is a closed valuation and changes to the System Growth assumption will not impact the results. A closed valuation relies on member data on a certain measurement date, June 30, 2019, in this case. The contribution rates, funded status, and other plan measures are determined for the population on that measurement date. The closed valuation does not consider any future benefits or salary from members that may join in the future. Put another way, we treat LEOFF 2 as a closed plan when performing the annual valuation. This means the contribution rates developed in the 2019 AVR are expected to fully fund all benefits from contributions collected over the careers of current members as of June 30, 2019.

The impact of a reduction in system membership growth will be realized in future AVRs as actual experience occurs. We can estimate the impact of lower system growth by looking at the results of our projection system; however, our 2019 projection system is not complete as of the September Board meeting so quantitative analysis was not available. We expect a reduction to this assumption would have a similar directional impact as the 700 Terminations scenario and lead to a modest decrease in contribution rates.

Disclosures

To perform this analysis, we made the following assumption, methodology, and data changes. Otherwise, we relied on the assumptions, methodology, and data documented in the 2019 AVR to prepare these estimates. Use of another set of assets, data, assumptions, and methods may also be reasonable, and might produce different results.

- ❖ **700 Terminations Scenario** – Based on your input, we assumed the 700 Seattle PD members with the least amount of service will no longer be active in LEOFF 2. Approximately half of this population had less than five years of service and would not be eligible for a monthly retirement benefit. For members not eligible for a future retirement benefit, we assumed they select a return of their contributions with interest (savings fund). If the member had accrued at least five years of service then we assumed they would defer their retirement benefit until normal retirement age (53).
- ❖ **90 Terminations, 90 Retirements Scenario** – Based on your input, we assumed the 90 Seattle PD members with the least amount of service within the plan will no longer be active in LEOFF 2. For members not eligible for a future retirement benefit, we assumed they



select a return of their contributions with interest (savings fund). We assumed the 90 oldest Seattle PD members eligible for retirement would immediately commence retirement.

- ❖ **Reduction in Salary Growth** - We assumed a lower future general salary growth of 3.25 percent (from 3.50 percent) for all active members.

Actuarial analysis can become quickly outdated. We intend this analysis to be used for education purposes during the September Board meeting. Please don't rely on this analysis beyond the 2020 Interim.

Please read the analysis shown in this communication as a whole. Distribution of, or reliance on, only parts of this communication could result in its misuse and may mislead others.

The undersigned, with actuarial credentials, meets the Qualification Standards of the American Academy of Actuaries to render the actuarial opinions contained herein.

Please let us know if we can be of any further assistance.

Sincerely,

Lisa Won, ASA, FCA, MAAA
Deputy State Actuary

cc: Kyle Stineman, ASA, MAAA
Senior Actuarial Analyst
Mitch DeCamp,
Senior Actuarial Analyst

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Open Public Meetings Act Update 2020



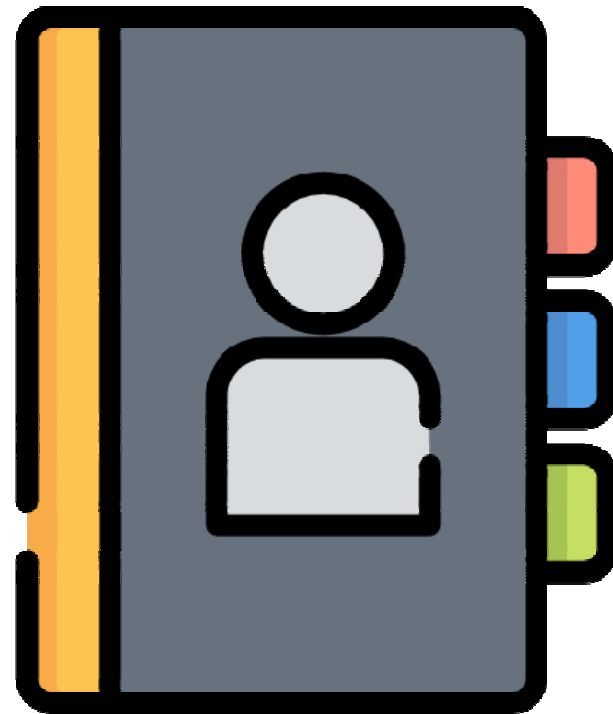
LEOFF 2 Board Meeting
September 23, 2020 – Online Only

Presented by Tor Jernudd / AAG.
Not legal advice. Not the official opinion of the:
Office of the Attorney General



Agenda

- History and Purpose of OPMA
- Covid-19
- Washington State Response
- Recent / Relevant Cases
- Challenges
- Lessons
- Resources
- Questions?



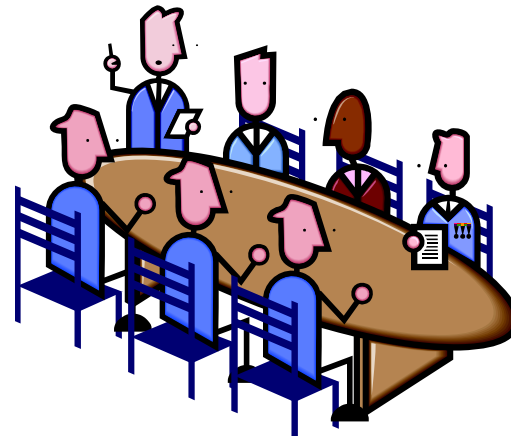
History and Purpose of OPMA

Open Public Meetings

RCW 42.30

Open Public Meetings Act (OPMA)

- “The people of this state do not yield their sovereignty to the agencies which serve them.”
- “The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”
- “The people insist on remaining informed so that they may retain control over the instruments they have created.”
- Liberal construction.



History and Purpose of OPMA

Open Public Meetings

RCW 42.30

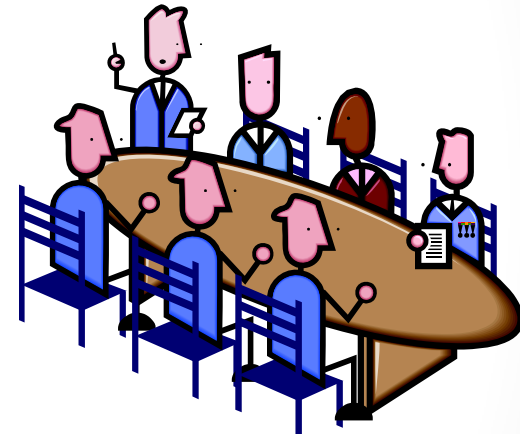
Open Public Meetings Act (OPMA)

Default rule is that all meetings are required to be open to public (unless limited exception applies)

What makes a meeting a meeting?

A majority or quorum -- need not be in same place, “serial meetings” possible

“Action” defined as “receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.”





- Uncertainty
- “Flu like,” high mortality, contagious
- First Reports December 2019 Hubei China
- First US case in Washington State January 2020 (Flu Study)
- Travel Bans / Late January 2020
- Person to person transmission
- <https://www.cdc.gov/>
- <https://www.doh.wa.gov/Emergencies/COVID19>
- Societal Impact

State Response

- RCW 43.06.220. Governor can declare state of emergency to mobilize response to an emergency. Permits the waiver/suspension of laws and rules that would “in any way prevent, hinder, or delay necessary action in coping with the emergency.”
- 30 day limit unless “extended in writing by the leadership of the senate and the house of representatives” RCW 43.06.220(4)
- February 29, 2020. Proclamation 20-05 State of Emergency declared in response to Covid-19 outbreak and person to person spread.
- March 24, 2020. Proclamation 20-28, waiving and suspending laws and rules concerning RCW 42.56, the Public Records Act, and RCW 42.30, the Open Public Meetings Act, that require any activity that occurs in an in-person setting to prevent further spread of the virus;
- Proclamation 20-28 states: “any public agency, subject to RCW 42.30, is: ***prohibited from conducting any meeting, subject to RCW 42.30 unless (a) the meeting is not conducted in-person and instead provides an option(s) for the public to attend the proceedings through, at minimum, telephonic access, and may also include other electronic, internet or other means of remote access, and (b) provides the ability for all attending the meeting to hear each other at the same time.***
- Proclamation 20-28 also ***prohibited agencies from taking “action,” as defined in RCW 42.30.020, unless those matters are necessary and routine matters or are matters necessary to respond to the COVID-19 outbreak and the current public health emergency, until such time as regular public participation under the Open Public Meetings Act is possible.***
- Proclamation 20-28 also waived requirement to physically post meeting notices.

State Response

- **TWO SUBSEQUENT CHANGES:**
 - The prohibition against non-routine action expired in June.
 - Limited exception subsequently created for in person meetings in “Phase 3 counties” for meetings with <10 persons, subject to significant restrictions, a requirement to also provide a “remote attendance option” and compliance with all applicable public health restrictions and guidelines, and subject to further requirement to immediately adjourn meeting if meeting became non-compliant (if eleventh person walks in door)
- Proclamation currently in effect through 11:59 p.m. on October 1, 2020

Recent /Relevant Cases



- ***Wood v. Battle Ground School District***

exchange of e-mails can constitute a “meeting”

but also

“...that the mere use or passive receipt of e-mail does not automatically constitute a “meeting.”

- ***Arthur West v. Seattle City Council , COA Div 1, 9/9/2020.***

COA Div 1 reverses and remands case that had been dismissed at summary judgment stage alleging that members of Seattle City Council violated the OPMA when they repealed the Employee Hour Tax.

“there are genuine issues of fact as to whether the seven council members, by agreeing to join the draft press release, collectively committed to vote to repeal the EHT and, thereby, took “action” in violation of the OPMA.”

Facebook Messages / Skype / Snapchat / Messenger / WhatsApp /

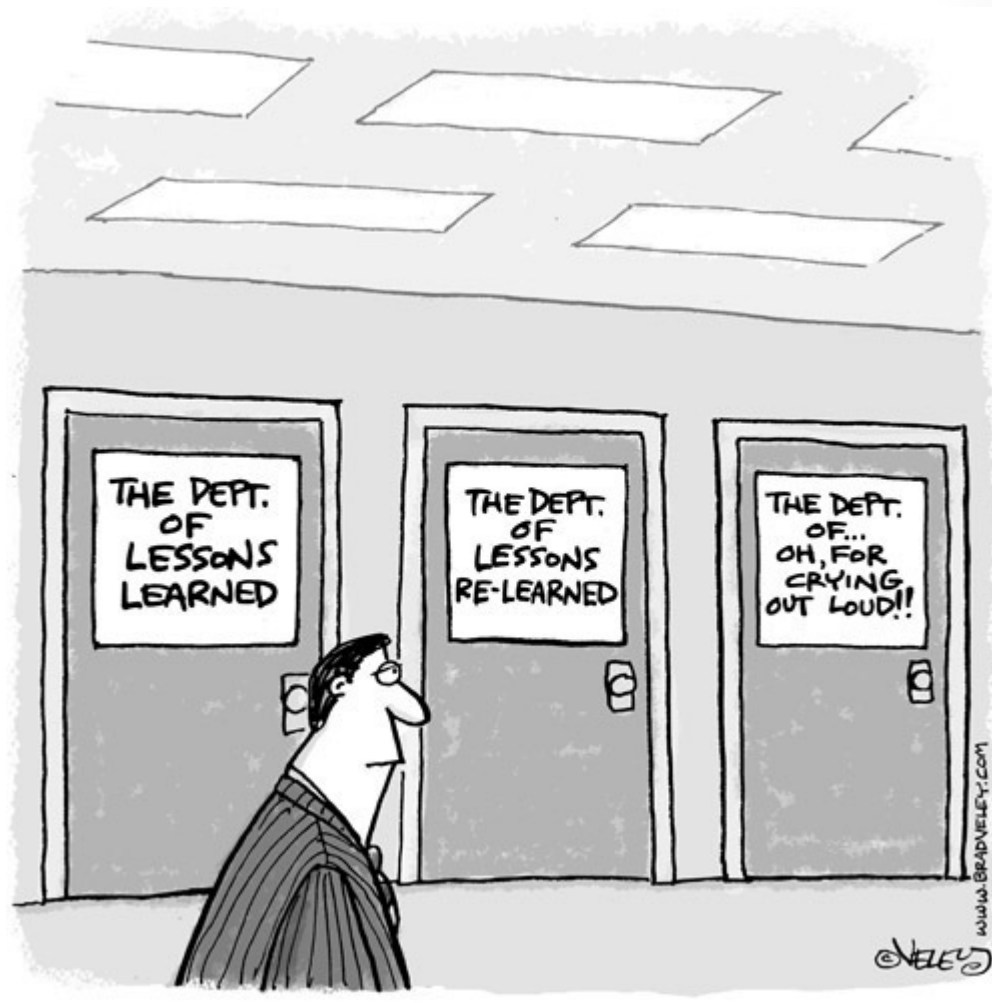
Competing Challenges

- Open Government
- Public Comment
- ADA
- Stakeholder expectations
- *Shifting requirements*
- *Conducting Agency Business*
- *Governance and Oversight in Remote only world*
- *Staying Safe*
- *Technology*



Lessons

- Liability is real, penalties plus attorney fees
- If it doesn't feel right....
- Common Sense
- Seek advice



Other Resources

- LEOFF 2 Board Assigned AAG: tor.Jernudd@atg.wa.gov
- <https://www.atg.wa.gov/opengovernment.aspx> AGO Open Government Resources Page.
- <http://mrsc.org/Home.aspx> The Municipal Research and Services Center (MRSC) is a nonprofit organization that helps local governments across Washington State better serve their citizens by providing legal and policy guidance on any topic.
- <https://coronavirus.wa.gov/> State Website.
- <https://www.governor.wa.gov/office-governor/official-actions/proclamations> Governor's Website (including proclamations).