



September 28, 2022

## Survivor Option Reelection

### COMPREHENSIVE REPORT

By Jacob White

Senior Research & Policy Manager

360-586-2327

[jacob.white@leoff.wa.gov](mailto:jacob.white@leoff.wa.gov)

### ISSUE

Retirees are not able to change their survivor option, beyond 90 days from their first retirement payment, even if a post-retirement recalculation due to an employer error causes a change in their pension.

### OVERVIEW

This report will provide information on the irrevocable election of a retiree's survivor options and why they are typically irrevocable. It will also explain why retirement benefits may be recalculated and the impacts of a recalculation to retirees' benefits.

### BACKGROUND AND POLICY ISSUES

#### What is a survivor option?

LEOFF Plan 2 retirees may elect to take a reduction in their monthly benefit 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 retiree 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 retiree's lifetime. No one will receive an ongoing benefit after the retiree dies. If the retiree dies before the benefits they received equals their contributions plus interest (as of the date of their retirement), the difference will be paid in a lump sum to the retiree's 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 retiree is married, they are required to provide 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 Plan 1 has an automatic joint and 100% survivor benefit. In LEOFF Plan 1 the retiree does not take a reduction in their benefit to leave this survivor benefit.

### **How much of a reduction in benefit will a retiree 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 retiree change their survivor benefit election?**

In 2020 the Board endorsed SB 6417, which gave retirees a 90-day window after the receipt of their first retirement payment to change their survivor election. This bill was signed into law and has been in effect since June 2020.

### **Can a retiree's benefit change after retirement?**

When DRS receives additional information about an employee's final average salary or service credit, they are required under RCW 41.50.130 to recalculate the retiree's retirement benefit. This is referred to as a "recalc". Current law does not allow a retiree to change their survivor option after a recalc. A recalc may result in either an increase or a decrease to a retiree's benefit. The recalc is both retrospective and prospective. As a result, two things occur: first, the retiree's monthly benefit changes moving forward. Second, DRS must either pay the retiree an additional payment of the difference in pension payments the retiree received and should have received; or collect from the retiree the difference in the pension payments they have received, and the recalculated benefit amount they should have received.

DRS prioritizes recalcs that are a result of an audit finding, as those are most likely to have the largest impacts on members. However, DRS does not audit employers on a regular basis. In fact, there are some employers who have never been audited by DRS.

When a recalc occurs and a retiree's benefit is lowered, the retiree may also owe DRS an overpayment for the pension benefits they were incorrectly paid. The determination of whether the member or employer must pay the overpayment is governed by RCW 41.50.130 – 139. Typically, employers are only required to pay an overpayment in the following situations:

- Failure to properly report retiree return to work hours<sup>1</sup>; and,
- Erroneously reporting that an employee has separated from service.<sup>2</sup>

There is a statute of limitations of three years, under RCW 41.50.130. Under this statute of limitations, DRS can only bill the member for three years of overpayments from the discovery of the overpayment. For example, on January 1, 2022, DRS discovered that a retiree received 10 years of overpayments. These overpayments total \$10,000, \$1,000 a year. DRS cannot collect the full \$10,000. Instead, they may only collect \$3,000, for the last three years of overpayments.

In most instances, the member is responsible for repaying the overpayment. This includes overpayments for an employer misreporting earnable compensation to DRS. The Director of DRS, in certain instances, may waive the collection of an overpayment under RCW 41.50.138. However, this is limited to instances of “manifest injustice”.

DRS has not defined the term “manifest injustice” in WAC or in administrative policy. Generally, “manifest injustice” is used in criminal proceedings and “means something which is 'obviously unfair' or 'shocking to the conscience.' It refers to an unfairness that is direct, obvious, and observable.”<sup>3</sup> DRS has only utilized their ability to waive collection in limited circumstances. Below is a chart of the number of times they have granted waiver of overpayment in recent years:

Year	Approvals
1998	1
2006	2
2008	12
2010	1
2011	1
2012	4
2014	15
2015	2
2016	2
2017	11
2018	4
2021	2

---

<sup>1</sup> RCW 41.50.139

<sup>2</sup> RCW 41.50.139

<sup>3</sup> <https://definitions.uslegal.com/m/manifest-injustice/#:~:text=Manifest%20injustice%20means%20something%20which,direct%2C%20obvious%2C%20and%20observable.>

While the term is common in criminal law, it is also used in administrative law. For example, the Washington State Department of Social and Health Services (DSHS) uses the “manifest injustice” standard as an element of multi-factor test for waiving collection of certain client overpayments. DSHS has defined the term as:

The overpayment is clearly unfair to the client based on the way that it occurred and repayment would compromise the client's ability to meet basic needs.

Factors which can be used as evidence [...]:

The client cannot repay the overpayment without drawing on funds needed for basic requirements. Document income and expenditures. Verify only questionable amounts.

It is clear that the client acted in good faith by following the rules required to maintain eligibility for public assistance.

- a) The client reported income timely and accurately
- b) The overpayment was solely due to department error; and
- c) The client has "clean hands". That is, without fault. The client fulfilled all their responsibility to inform the department of changes in their circumstances.<sup>4</sup>

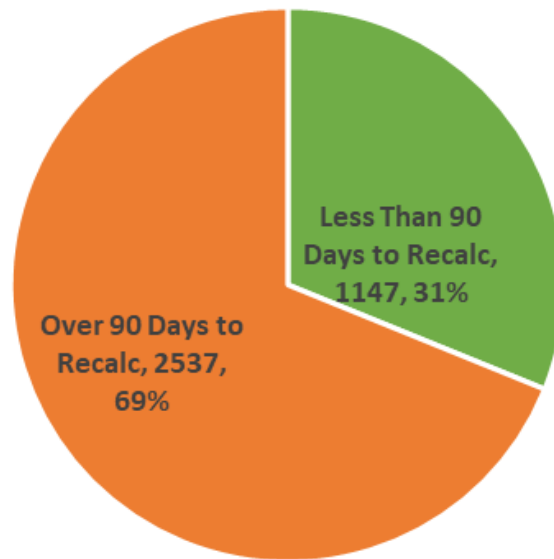
### **Data from DRS regarding Recalculation of Retiree Benefit**

DRS provided Board staff with the following charts with data from 2009 to 2021, showing the time from retirement that the recalculation occurred, and the number and size of those recalculations of retiree benefits.

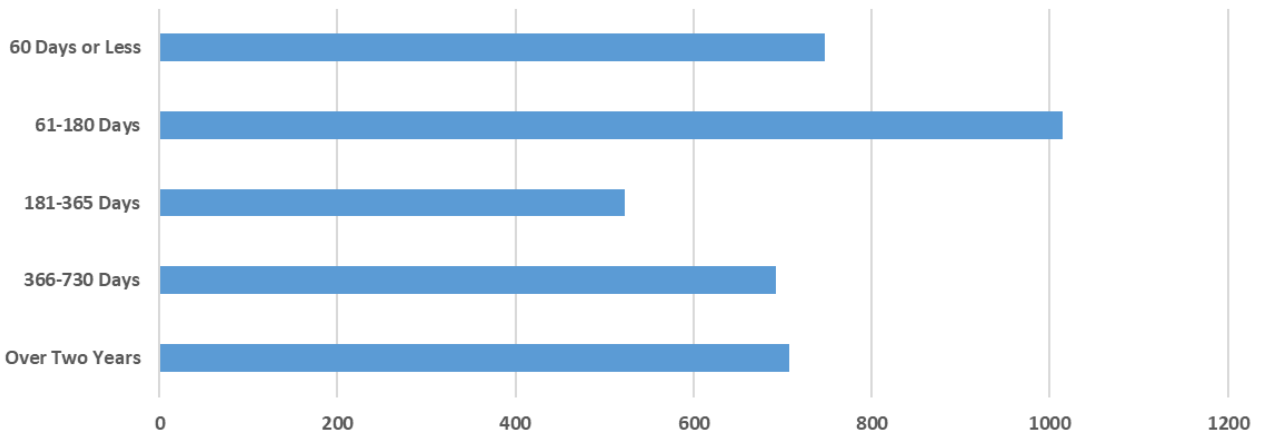
---

<sup>4</sup> <https://www.dshs.wa.gov/book/export/html/21>

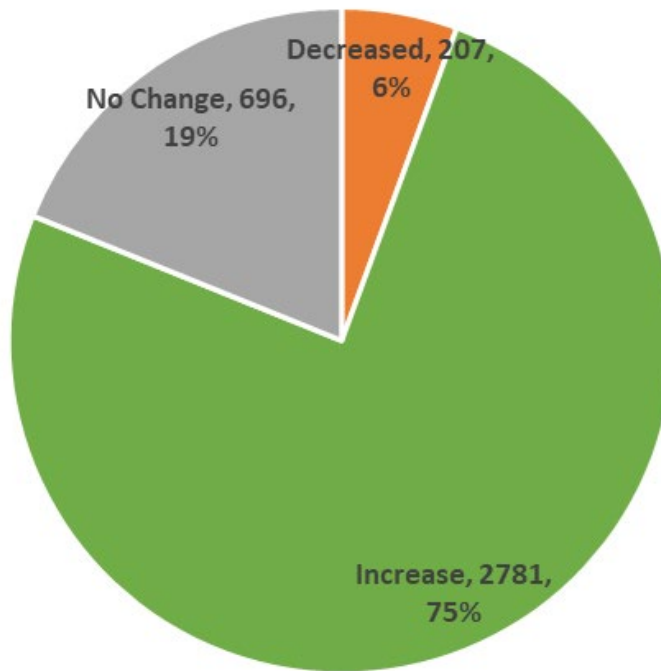
## Days from Calc to Recalc

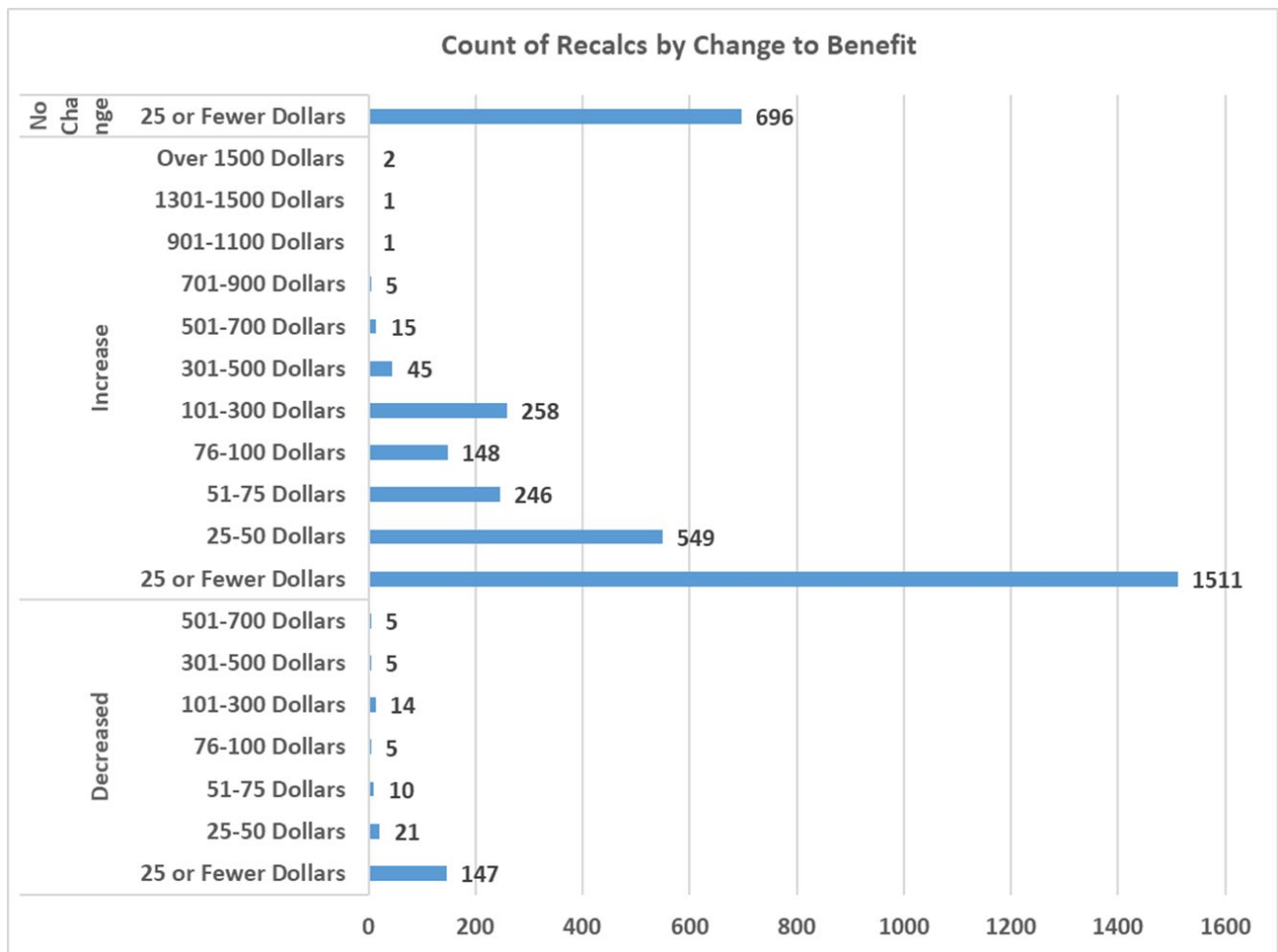


## Days from Calc to Recalc Detail



### Recalc Impact to Benefit





### **Why is the decision to change a survivor benefit irrevocable beyond 90 days when there has been a recalculation?**

The decision to leave a survivor benefit is in part irrevocable because it helps mitigate the risk of anti-selection. Anti-selection is the tendency of a person to recognize his or her health status in selecting the option under a retirement system which is most favorable to him or herself. If anti-selection risks are not effectively mitigated, it can increase the costs of the retirement system.

Since the survivor option administrative factors are based on average life expectancies, rather than individual life expectancies, the potential impact of anti-selection on LEOFF Plan 2 is retirees could “gaming the system” to their advantage and the detriment of LEOFF Plan 2. For example, if a retiree is aware they have a terminal disease, they could choose to leave a larger survivor benefit than they would have selected if not for their knowledge of their terminal disease.

Anti-selection may impact members through either increased contribution rates and/or less favorable administrative factors for survivor options. Since contributions into LEOFF Plan 2 are

paid by both employers and members, the impact of anti-selection risks are paid for by both. If a change in policy increased anti-selection risks to the point of impacting contribution rates, this would likely result in intergenerational inequity because the benefit being utilized by recent retirees would be funded by active members.

### **How does LEOFF Plan 2 mitigate the anti-selection risks of survivor benefits?**

Currently, the impact of anti-selection on LEOFF Plan 2 is minimized by requiring retirees to make an irrevocable survivor option election at the time of retirement. The more opportunity a retiree has to make or change that election, the more likely anti-selection risks to LEOFF Plan 2 will increase.

The risk of anti-selection is minimized in the post-retirement marriage survivor option provision by requiring the retiree to make the election after they have been married for a year, but prior to the second year of marriage. This helps mitigate the risk that a retiree finds out they have a terminal disease and decides to marry for the purpose of leaving a survivor benefit.

The requirement that the retiree make this decision prior to the second year of marriage further mitigates anti-selection risk by ensuring they do not prolong the decision until they become aware of additional information, such as a terminal disease.

### **Are there Federal Tax Law issues with allowing retirees to change their survivor option beyond 90 days when a recalculation of their benefit has occurred?**

SB 6417 (2020) was amended during session to require a determination from the IRS that the changes to the law conformed with federal law before the bill could take effect. DRS received a determination from the IRS that the bill conformed with federal law and implemented the legislation. The IRS determination was limited to the specific language of SB 6417.

At the May 2022 Board meeting, the Board requested that Board staff request legal advice from tax counsel regarding a post retirement window for a retiree to change their survivor option if a recalculation due to an employer error caused a change in their pension after 90 days from their retirement. Tax counsel responded with the following advice (see Appendix A):

To summarize, after the state law was changed to allow retirees to change their survivor option election within 90 days of the commencement of their retirement benefit, we approached the IRS seeking a Private Letter Ruling (“PLR”) that such a change would not run afoul of the required minimum distribution rules under Code Sec. 401(a)(9). In support of this position, we explained:

DRS provides benefit estimates to all members prior to retirement. Estimates may differ from the actual benefits paid to a retiree due to the actual retirement



date or survivorship option being different from that used to calculate the estimate. In addition, and particularly relevant to the reason for the Bill, DRS sometimes receives additional salary or service credit information after the member has retired and commenced a benefit or the final audit of a member's service record results in finalization of the benefit amount. Thus, a member's survivor option election is generally based on an estimated benefit.

When DRS receives additional information about a member's compensation or service credit they are required, under RCW 41.50.130, to recalculate the retiree's retirement benefit. A recalculation may result in either an increase or a decrease to a member's benefit. Most recalculations occur shortly after a member retires. ... With this Bill, even though the first retirement check has been received, retirees may modify their survivor option election within 90 days of the commencement of their retirement benefit.

We also confirmed to the IRS that the change to the retiree's survivor option election will apply prospectively and will establish a new annuity starting date. The IRS issued the PLR we requested. Importantly, the PLR states: "A participant's option to change the survivorship election within the first 90 days of receiving the first benefit payment does not cause the plans to fail to satisfy the underlying requirements of § 401(a)(9)(A)." Based on the above supporting information and our discussions with the IRS before they issued the PLR, the 90-day limited window for making the benefit option change was a key reason the change to the state law was approved under the PLR. The IRS views the option change during the window more as an "administrative" benefit recalculation. Allow survivorship election changes anytime beyond that "administrative" 90-day window would fall outside of what was approved under the PLR.

Under federal tax law in general, a delayed period for survivor option changes would raise the same concerns set forth in our Memo to Johnna Craig and Steve Nelsen, dated September 3, 2020 (attached for your reference). Specifically, under Code Sec. 401(a)(9), a member's annuity may be increased to the extent that a reduction was necessary to provide a survivor benefit only where the survivor has died or is no longer the member's beneficiary pursuant to a QDRO. Conversely, an annuity may be decreased to provide a survivorship benefit only upon marriage after retirement.

If the state law were to be changed, LEOFF could seek another PLR. However, we think it is unlikely the IRS will approve a delayed survivorship option change outside the 90-day window.

## POLICY OPTIONS

1. Create a window for retirees to change their survivor option, if a retiree's benefit is recalculated due to an employer error that results in:
  - A. Any change to the retirement benefit
  - B. 5% or greater change to gross retirement benefit
  - C. 10% or greater change to gross retirement benefit

## SUPPORTING INFORMATION

**Appendix A:** May 23, 2022 Legal Advice Memo from Ice Miller

**From:** [Lindsay.Knowles@icemiller.com](mailto:Lindsay.Knowles@icemiller.com)  
**To:** [White, Jacob \(LEOFF\)](#)  
**Cc:** [Nelsen, Steve \(LEOFF\)](#); [Jernudd, Tor I. \(ATG\)](#); [Merchant, Shawn \(DRS\)](#); [Robert.Gauss@icemiller.com](mailto:Robert.Gauss@icemiller.com)  
**Subject:** RE: [EXT] legal advice request -post-reclac survivor option change  
**Date:** Monday, May 23, 2022 8:51:19 AM  
**Attachments:** [Washington - DRS and LEOFF Analysis of 6417 \(4819-7939-7080.v1\)-c.docx](#)  
[Washington DRS PLR re benefit option change \(4810-7952-7925.v1\)-c.pdf](#)

---

## External Email

Jacob -

To summarize, after the state law was changed to allow retirees to change their survivor option election within 90 days of the commencement of their retirement benefit, we approached the IRS seeking a Private Letter Ruling (“PLR”) that such a change would not run afoul of the required minimum distribution rules under Code Sec. 401(a)(9). In support of this position, we explained:

DRS provides benefit estimates to all members prior to retirement. Estimates may differ from the actual benefits paid to a retiree due to the actual retirement date or survivorship option being different from that used to calculate the estimate. In addition, and particularly relevant to the reason for the Bill, DRS sometimes receives additional salary or service credit information after the member has retired and commenced a benefit or the final audit of a member's service record results in finalization of the benefit amount. Thus, a member's survivor option election is generally based on an estimated benefit. ...

When DRS receives additional information about a member's compensation or service credit they are required, under RCW 41.50.130, to recalculate the retiree's retirement benefit. A recalculation may result in either an increase or a decrease to a member's benefit. Most recalculations occur shortly after a member retires. ... With this Bill, even though the first retirement check has been received, retirees may modify their survivor option election within 90 days of the commencement of their retirement benefit.

We also confirmed to the IRS that the change to the retiree's survivor option election will apply prospectively and will establish a new annuity starting date. The IRS issued the PLR we requested. Importantly, the PLR states: “A participant's option to change the survivorship election **within the first 90 days** of receiving the first benefit payment does not cause the plans to fail to satisfy the underlying requirements of § 401(a)(9)(A).” Based on the above supporting information and our discussions with the IRS before they issued the PLR, the 90 day limited window for making the benefit option change was a key reason the change to the state law was approved under the PLR. The IRS views the option change during the window more as an “administrative” benefit recalculation. Allow survivorship election changes anytime beyond that “administrative” 90-day window would fall outside of what was approved under the PLR.

Under federal tax law in general, a delayed period for survivor option changes would raise the same concerns set forth in our Memo to Johnna Craig and Steve Nelsen, dated September 3, 2020 (attached for your reference). Specifically, under Code Sec. 401(a)(9), a member's annuity may be

increased to the extent that a reduction was necessary to provide a survivor benefit [only where the survivor has died or is no longer the member's beneficiary pursuant to a QDRO](#). Conversely, an annuity may be decreased to provide a survivorship benefit [only upon marriage after retirement](#).

If the state law were to be changed, LEOFF could seek another PLR. However, we think it is unlikely the IRS will approve a delayed survivorship option change outside the 90 day window.

Of course, if you would like to discuss the option change further, please do not hesitate to let us know.

Our Best Regards,  
Rob and Lindsay

---

**From:** White, Jacob (LEOFF) <[jacob.white@leoff.wa.gov](mailto:jacob.white@leoff.wa.gov)>

**Sent:** Thursday, May 19, 2022 2:07 PM

**To:** Gauss, Robert L. <[Robert.Gauss@icemiller.com](mailto:Robert.Gauss@icemiller.com)>

**Cc:** Nelsen, Steve (LEOFF) <[steve.nelsen@leoff.wa.gov](mailto:steve.nelsen@leoff.wa.gov)>; Jernudd, Tor I. (ATG) <[Tor.Jernudd@atg.wa.gov](mailto:Tor.Jernudd@atg.wa.gov)>; Merchant, Shawn (DRS) <[shawn.merchant@drs.wa.gov](mailto:shawn.merchant@drs.wa.gov)>

**Subject:** [EXT] legal advice request -post-reclac survivor option change

**EXTERNAL EMAIL WARNING! Use caution with links or attachments. DO NOT provide your credentials!**

---

The Board is studying whether to allow members to change their survivor option election if their pension benefit is recalculated due to an employer reporting error. As you are aware current state law allows the retiree to change their survivor option within 90 days of the receipt of their first pension payment. This issue is when the recalc occurs after 90 days. For example sometimes an employer will incorrectly report earnable compensation to the Department of Retirement Systems, and that error will not be caught until years after the member has retired. Under current law, the retiree's benefit will be recalculated to the correct amount based on the new information regarding their earnable compensation and if the recalc results in lowering the amount of the member's pension, the retiree will typically be required to pay back the money they received incorrectly. The Board believes that some members may want to change their survivor option because of the impact to their pension caused by the recalculation of their benefit.

The Board would like your advice on whether there would be any federal tax law issues with changing state law to allow the retiree to change their survivor option if an employer error has resulted in a recalculation of the member's pension benefit.

If you have any questions or need more information please let me know.

Thank you,

955 Malin Lane SW | PO Box 40918 | Olympia, WA 98501-0918

☎ Office 360.586.2327 | ☎ Mobile 564.999.0738 | ✉ [Jacob.White@LEOFF.wa.gov](mailto:Jacob.White@LEOFF.wa.gov)

\*\*\*\*\*  
\*\*\*\*\*  
\*\*\*

CONFIDENTIALITY NOTICE: This E-mail and any attachments are confidential and may be protected by legal privilege. If you are not the intended recipient, be aware that any disclosure, copying, distribution, or use of this E-mail or any attachment is prohibited. If you have received this E-mail in error, please notify us immediately by returning it to the sender and delete this copy from your system.

Thank you.

ICE MILLER LLP

\*\*\*\*\*  
\*\*\*\*\*  
\*\*\*

## INTERNAL REVENUE SERVICE

FAX TRANSMISSION  
Cover SheetDate: August 05, 2021**To: Robert Gauss**Address/Organization: Ice Miller LLPFax Number: 317-592-4668 Office Number: \_\_\_\_\_**From: Brandon Ford**Address/Organization: CC:EEE:EB:QP4

Fax Number: \_\_\_\_\_ Office Number: \_\_\_\_\_

Number of pages: 12 *Including cover page***Subject:** PLR-102960-21

This communication is intended for the sole use of the individual to whom it is addressed and may contain confidential information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited by the provisions of the Internal Revenue code. If you have received this communication in error, please contact the sender immediately by telephone. Thank you.

**Internal Revenue Service****Department of the Treasury**

Washington, DC 20224

Index Number: 401.06-00

Third Party Communication: None  
Date of Communication: Not ApplicableWashington Department of Retirement  
Systems

ATTN: Johnna Craig

P.O. Box 48380

Olympia, WA 98504-8380

Person To Contact:

Brandon Ford, ID No. 1003343965

Telephone Number:

(202) 317-4671

Refer Reply To:

CC:EEE:EB:QP4

PLR-102960-21

In Re: Washington Department of Retirement  
Systems

Date:

August 03, 2021

**Legend**

State X	=	State of Washington
Plan Administrator Y	=	Washington Department of Retirement Systems
Bill Z	=	Washington Senate Bill 6417

Dear Ms. Craig:

This is in response to your letter dated February 1, 2021, and subsequent correspondence dated June 18, 2021, submitted on your behalf by your authorized representative, in which you request a ruling under § 401(a)(9) of the Internal Revenue Code.

The following facts and representations have been submitted under penalties of perjury in support the of the rulings requested:

Plan Administrator Y administers retirement plans that are sponsored by State X on behalf of employees of State X. This ruling request involves eight defined benefit plans. Distributions under the plans are required to begin no later than the required beginning date (as that term is defined in § 401(a)(9)(C)). The laws of State X require that unless distributed in a lump sum, a participant's entire interest in any of the plans must be distributed over the participant's life or the lives of the member and a designated beneficiary, or over a period not extending beyond the life expectancy of the participant or of the participant and a designated beneficiary.

Participants in the plans may select one of the following four survivorship benefits upon their retirement: (1) Joint and 100%, a full survivorship benefit; (2) Joint and 66.67%, a two-thirds survivorship benefit; (3) Joint and 50%, a one-half survivorship benefit; and

PLR-102960-21

2

(4) Single Life, with no survivorship benefit. Currently, a participant's survivorship benefit election is irrevocable.

Plan Administrator Y provides benefit estimates to participants in the plans before their retirement. Estimates may differ from the actual benefits paid to a participant due to the actual retirement date or survivorship option being different from that used to calculate the estimate. In some cases, Plan Administrator Y receives additional salary information after the participant has retired but before the finalization of the benefit amount resulting in a final benefit amount different than the benefit estimate.

When Plan Administrator Y receives additional information about a participant's compensation or service credit, the laws of State X require Plan Administrator Y to recalculate the benefit amount. In most cases, the recalculation is finalized shortly after the participant's retirement.

State X enacted Bill Z in 2020 allowing participants in any of the plans up to 90 calendar days after the receipt of their first monthly retirement allowance to prospectively change their survivorship benefit election. If a participant changes the survivorship election, the change is effective the first day of the following month. The provisions of Bill Z become effective following the receipt of a favorable private letter ruling from the Internal Revenue Service that the limited ability to change a survivorship benefit election during the 90-day window conforms with federal law.

Based on the foregoing facts and representations, you have requested a ruling that the minimum distribution requirements of § 401(a)(9) are not violated due to Bill Z, which allows current and future participants in the eight affected defined benefit plans administered by Plan Administrator Y to change their survivor option election within 90 days after receipt of their first retirement allowance.

#### Law

Section 414(d) provides that the term "governmental plan" means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Section 401(a)(9)(A) provides, in general, that a trust will not be considered qualified unless the plan provides that the entire interest of each employee (i) will be distributed to such employee not later than the required beginning date, or (ii) will be distributed, beginning not later than the required beginning date, over the life of such employee or over the lives of such employee and a designated beneficiary or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary.



PLR-102960-21

3

Section 1.401(a)(9)-1, Q&A-2(d) of the Income Tax Regulations provides that a governmental plan (within the meaning of section 414(d)) is treated as having complied with § 401(a)(9) for all years to which § 401(a)(9) applies to the plan if the plan complies with a reasonable and good faith interpretation of § 401(a)(9).

### Ruling

In the present case, you have represented that the plans established and maintained by State X on behalf of certain employees of State X are governmental plans (as defined in § 414(d)). Accordingly, those plans are treated as having complied with § 401(a)(9) for all years to which § 401(a)(9) applies to the plan if the plan complies with a reasonable, good faith interpretation of § 401(a)(9).

A participant's option to change the survivorship election within the first 90 days of receiving the first benefit payment does not cause the plans to fail to satisfy the underlying requirements of § 401(a)(9)(A). Thus, the plans comply with a reasonable, good faith interpretation of § 401(a)(9)(A). Accordingly, the minimum distribution requirements of § 401(a)(9) are not violated due to Bill Z, which allows current and future participants in the plans administered by Plan Administrator Y to change their survivorship benefit election within 90 days after receipt of their first retirement allowance.

The rulings contained in this letter are based upon information and representations submitted by your personal representative and accompanied by a penalties of perjury statement executed by an appropriate party, as specified in Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 7.01(16)(b). This office has not verified any of the material submitted in support of the request for rulings, and such material is subject to verification on examination. The Associate office will revoke or modify a letter ruling and apply the revocation retroactively if there has been a misstatement or omission of controlling facts; the facts at the time of the transaction are materially different from the controlling facts on which the ruling was based; or, in the case of a transaction involving a continuing action or series of actions, the controlling facts change during the course of the transaction. See Rev. Proc. 2021-1, § 11.05.

Except as expressly provided above, no opinion is expressed or implied concerning the federal income tax consequences of any other aspects of any transaction or item of income described in this letter ruling.

This letter is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

PLR-102960-21

4

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Laura B.  
Warshawsky

Digitally signed by  
Laura B. Warshawsky  
Date: 2021.08.04  
16:28:34 -04'00'

Laura B. Warshawsky  
Branch Chief  
Qualified Plans Branch 1  
Office of Associate Chief Counsel  
(Employee Benefits, Exempt Organizations,  
and Employment Taxes)

cc: Robert Gauss, Ice Miller  
Audra Ferguson-Allen, Ice Miller  
Andrew J. Fedders, EP R&A  
Eric San Juan, TEGE

**Internal Revenue Service****Department of the Treasury**

Washington, DC 20224

Index Number: 401.06-00

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:EEE:EB:QP4

PLR-102960-21

Date:

August 03, 2021

In Re:

**Legend**

State X =

Plan Administrator Y =

Bill Z =

Dear :

This is in response to your letter dated February 1, 2021, and subsequent correspondence dated June 18, 2021, submitted on your behalf by your authorized representative, in which you request a ruling under § 401(a)(9) of the Internal Revenue Code.

The following facts and representations have been submitted under penalties of perjury in support the of the rulings requested:

Plan Administrator Y administers retirement plans that are sponsored by State X on behalf of employees of State X. This ruling request involves eight defined benefit plans. Distributions under the plans are required to begin no later than the required beginning date (as that term is defined in § 401(a)(9)(C)). The laws of State X require that unless distributed in a lump sum, a participant's entire interest in any of the plans must be distributed over the participant's life or the lives of the member and a designated beneficiary, or over a period not extending beyond the life expectancy of the participant or of the participant and a designated beneficiary.

Participants in the plans may select one of the following four survivorship benefits upon their retirement: (1) Joint and 100%, a full survivorship benefit; (2) Joint and 66.67%, a two-thirds survivorship benefit; (3) Joint and 50%, a one-half survivorship benefit; and (4) Single Life, with no survivorship benefit. Currently, a participant's survivorship benefit election is irrevocable.

PLR-102960-21

2

Plan Administrator Y provides benefit estimates to participants in the plans before their retirement. Estimates may differ from the actual benefits paid to a participant due to the actual retirement date or survivorship option being different from that used to calculate the estimate. In some cases, Plan Administrator Y receives additional salary information after the participant has retired but before the finalization of the benefit amount resulting in a final benefit amount different than the benefit estimate.

When Plan Administrator Y receives additional information about a participant's compensation or service credit, the laws of State X require Plan Administrator Y to recalculate the benefit amount. In most cases, the recalculation is finalized shortly after the participant's retirement.

State X enacted Bill Z in 2020 allowing participants in any of the plans up to 90 calendar days after the receipt of their first monthly retirement allowance to prospectively change their survivorship benefit election. If a participant changes the survivorship election, the change is effective the first day of the following month. The provisions of Bill Z become effective following the receipt of a favorable private letter ruling from the Internal Revenue Service that the limited ability to change a survivorship benefit election during the 90-day window conforms with federal law.

Based on the foregoing facts and representations, you have requested a ruling that the minimum distribution requirements of § 401(a)(9) are not violated due to Bill Z, which allows current and future participants in the eight affected defined benefit plans administered by Plan Administrator Y to change their survivor option election within 90 days after receipt of their first retirement allowance.

### Law

Section 414(d) provides that the term "governmental plan" means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Section 401(a)(9)(A) provides, in general, that a trust will not be considered qualified unless the plan provides that the entire interest of each employee (i) will be distributed to such employee not later than the required beginning date, or (ii) will be distributed, beginning not later than the required beginning date, over the life of such employee or over the lives of such employee and a designated beneficiary or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary.

Section 1.401(a)(9)-1, Q&A-2(d) of the Income Tax Regulations provides that a governmental plan (within the meaning of section 414(d)) is treated as having complied

PLR-102960-21

3

with § 401(a)(9) for all years to which § 401(a)(9) applies to the plan if the plan complies with a reasonable and good faith interpretation of § 401(a)(9).

### Ruling

In the present case, you have represented that the plans established and maintained by State X on behalf of certain employees of State X are governmental plans (as defined in § 414(d)). Accordingly, those plans are treated as having complied with § 401(a)(9) for all years to which § 401(a)(9) applies to the plan if the plan complies with a reasonable, good faith interpretation of § 401(a)(9).

A participant's option to change the survivorship election within the first 90 days of receiving the first benefit payment does not cause the plans to fail to satisfy the underlying requirements of § 401(a)(9)(A). Thus, the plans comply with a reasonable, good faith interpretation of § 401(a)(9)(A). Accordingly, the minimum distribution requirements of § 401(a)(9) are not violated due to Bill Z, which allows current and future participants in the plans administered by Plan Administrator Y to change their survivorship benefit election within 90 days after receipt of their first retirement allowance.

The rulings contained in this letter are based upon information and representations submitted by your personal representative and accompanied by a penalties of perjury statement executed by an appropriate party, as specified in Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 7.01(16)(b). This office has not verified any of the material submitted in support of the request for rulings, and such material is subject to verification on examination. The Associate office will revoke or modify a letter ruling and apply the revocation retroactively if there has been a misstatement or omission of controlling facts; the facts at the time of the transaction are materially different from the controlling facts on which the ruling was based; or, in the case of a transaction involving a continuing action or series of actions, the controlling facts change during the course of the transaction. See Rev. Proc. 2021-1, § 11.05.

Except as expressly provided above, no opinion is expressed or implied concerning the federal income tax consequences of any other aspects of any transaction or item of income described in this letter ruling.

This letter is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

PLR-102960-21

4

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Laura B. Warshawsky  
Branch Chief  
Qualified Plans Branch 1  
Office of Associate Chief Counsel  
(Employee Benefits, Exempt Organizations,  
and Employment Taxes)

cc:



**Department of the Treasury  
Internal Revenue Service**

**Mailing Date:**

08/05/2021

**Last date to request IRS review:**

08/25/2021

**Last date to request delay:**

10/04/2021

**Last date to petition Tax Court:**

10/04/2021

**Date open to public inspection:**

10/29/2021

**Person to contact:**

Chief, Disclosure Support Branch

**Contact telephone number:**

202-317-6840

**Notice of Intention to Disclose**

In accordance with Section 6110 of the Internal Revenue Code, we intend to make the enclosed copy of your ruling (with deletions) open to public inspection.

Section 6110 provides that copies of certain rulings, technical advice memoranda, and determination letters will be open to public inspection after deletions are made. These written determinations will be open to public inspection online in the Freedom of Information Act (FOIA) Reading Room at [www.irs.gov/privacy-disclosure/foia-library](http://www.irs.gov/privacy-disclosure/foia-library).

We made the deletions indicated in accordance with Section 6110(c), which requires us to delete:

1. The names, addresses, and other identifying details of the person the ruling pertains to, and of any other person identified in the ruling [other than a person making a "third party communication" (see back of this notice)].
2. Information specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and which is in fact properly classified under such Executive Order.
3. Information specifically exempted from disclosure by any statute (other than the Internal Revenue Code) which is applicable to the Internal Revenue Service.
4. Trade secrets and commercial or financial information obtained from a person that are privileged or confidential.
5. Information which would constitute a clearly unwarranted invasion of personal privacy.
6. Information contained in or related to examination, operating, or condition reports prepared by, or for use of, an agency that regulates or supervises financial institutions.
7. Geological and geophysical information and data (including maps) concerning wells.

These are the only grounds for deleting material. We made the indicated proposed deletions after considering any suggestions for deletions you may have made prior to issuance of the ruling.

**If you agree with the proposed deletions**

You do not need to take any further action. We will place the deleted copy in the online FOIA Reading Room on the "Date open to public inspection" shown on this notice.

**If you disagree with the proposed deletions**

Please return the copy and show, in brackets, any additional information you believe should be deleted. Include a statement supporting your position. Only material falling within the seven categories listed above may be deleted. Your statement should specify which of these seven categories is applicable with respect to each additional deletion you propose. Mail or fax your deleted copy and statement to:

**Internal Revenue Service**

Attention: Chief, CC:PA:LPD:DS  
Ben Franklin Station  
Post Office Box 7604  
Washington, DC 20044  
Fax: 855-592-8978

It must be faxed or postmarked no later than the "Last date to request IRS review" shown on this notice. We will give your submission careful consideration. If we determine we cannot make any or all of the additional deletions you suggest, we will so advise you not later than 20 days after we receive your submission. You will then have the right to file a petition in the United States Tax Court if you disagree with us. Your petition must be filed no later than the "Last date to petition Tax Court" shown on this notice, which is 60 days after the mailing date of this notice. If a petition is filed in the Tax Court, the disputed portion(s) of the ruling will not be placed in the Reading Room until after a court decision becomes final.

If no petition is filed in the Tax Court, the deleted copy of your ruling will be made open to public inspection on the date shown on this notice. If the transaction to which the ruling relates will not be completed by then, you may request a delay of public inspection.

**Request for delay of public inspection**

You may request a delay of public inspection of up to 90 days, or 15 days after the transaction is completed, whichever is later. The request for delay must be received by the IRS no later than the "Last date to request delay" shown on this notice, which is 60 days after the mailing date of this notice. Mail or fax your request for delay to:

**Internal Revenue Service**

Attention: Chief, CC:PA:LPD: DS  
Ben Franklin Station  
Post Office Box 7604  
Washington, DC 20044  
Fax: 855-592-8978

You may request a second delay of up to an additional 180 days (or 15 days after the completion of the transaction, whichever is earlier) if the transaction is not completed by the end of the original delay period and if good cause exists for additional delay. We must receive a request for a second delay at the above address at least 30 days before the original delay period ends.

**Requests for additional disclosure**

After the copy of your ruling, with deletions, is placed in our online FOIA Reading Room, any person may request us to make additional portions of the ruling open to public inspection. If we receive a request that involves disclosure of names, addresses, or taxpayer identifying numbers, we will deny the request and you will not be contacted. If that request involves disclosure of anything other than names, addresses, or taxpayer identifying numbers, we will contact you before taking action.



**Third party communication**

The enclosed copy of your ruling may contain the notation "Third Party Communication." This indicates that IRS received a communication (written or oral) regarding your ruling request from a person outside the IRS (other than you or your authorized representative). The date of the communication and the category of the person making the contact (such as "Congressional" or "Trade Association") will be indicated.

If you have any questions regarding this notice, please call us at 202-317-6840.



# Survivor Option Reelection

Comprehensive Report  
September 28, 2022

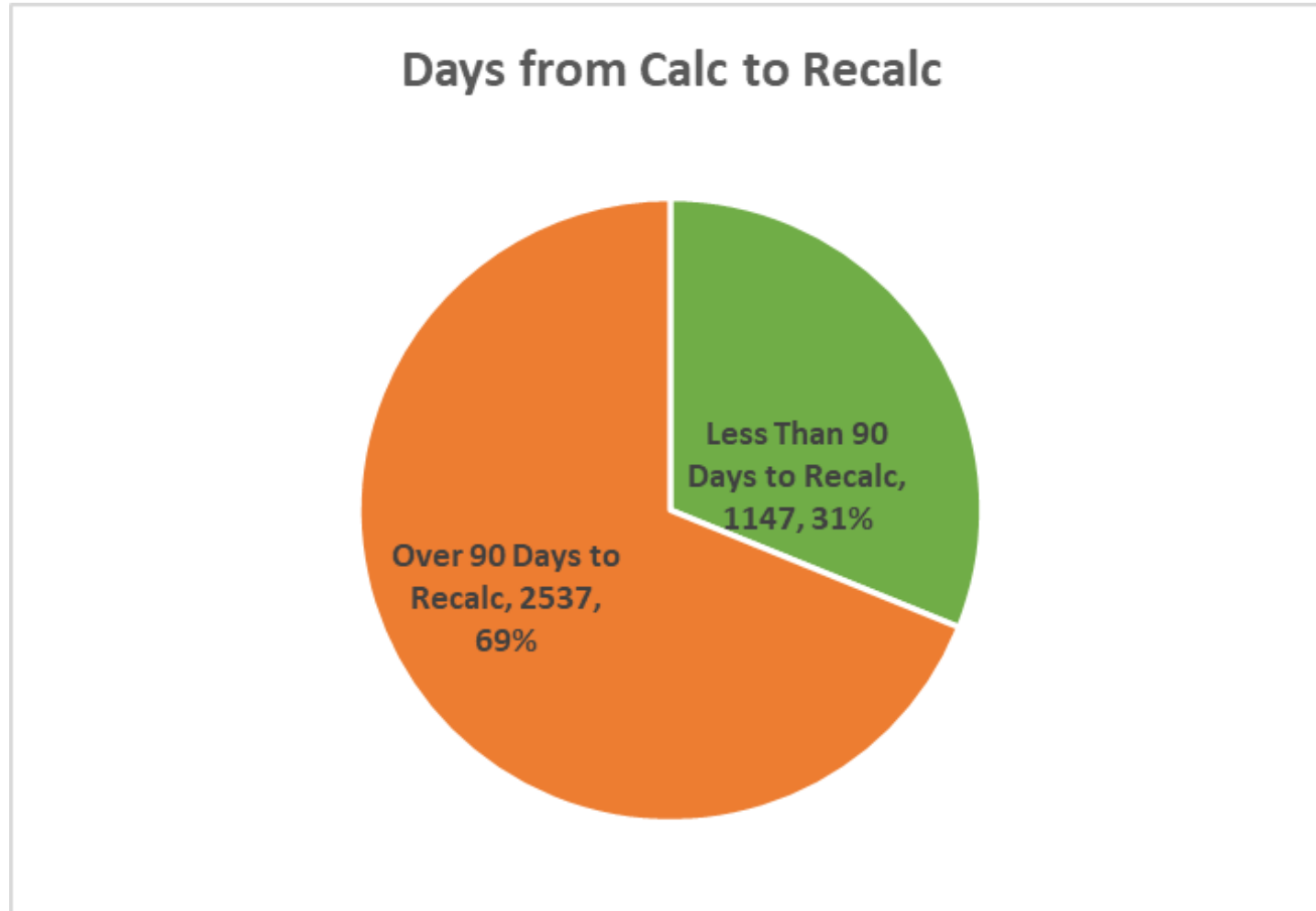
# Issue

- Retirees are not able to change their survivor option, beyond 90 days from their first retirement payment, even if a post-retirement recalculation causes a change in their pension

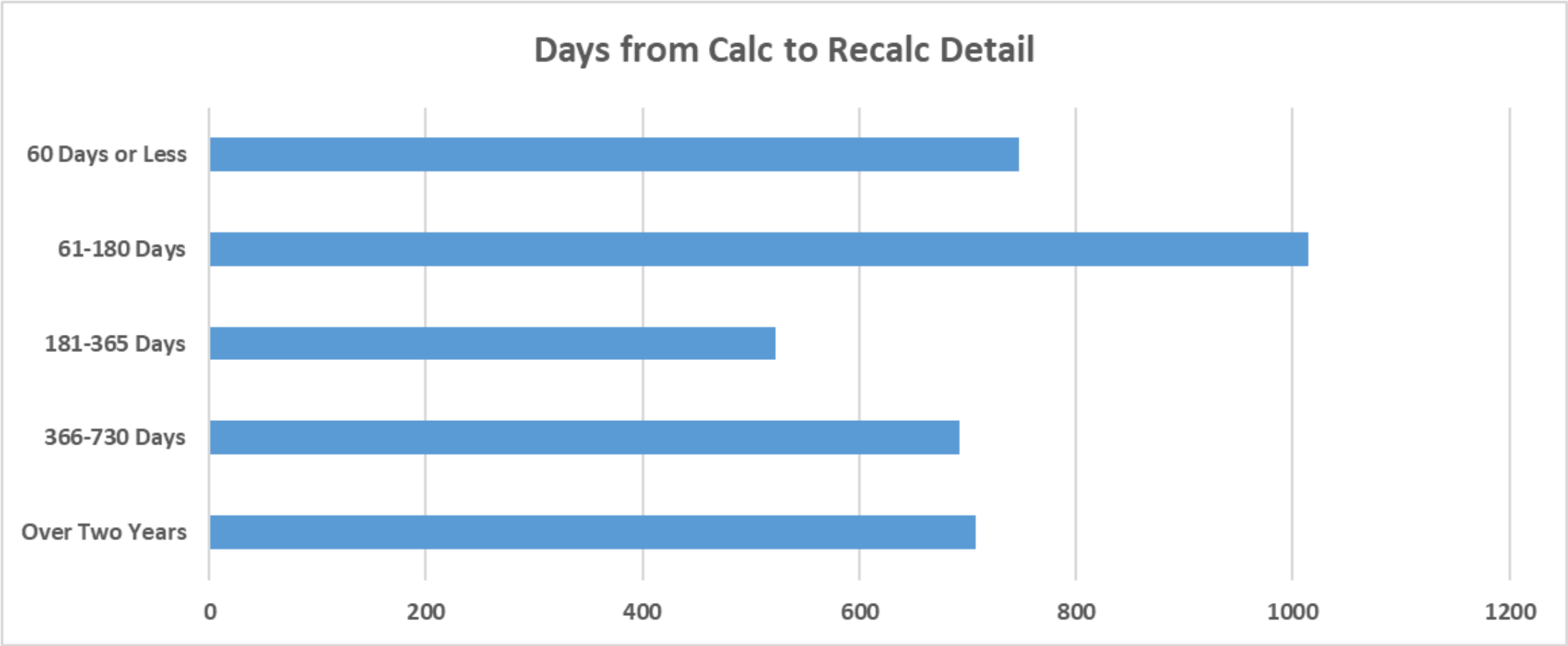
# Legal Advice

- Under Code Sec. 401(a)(9), a member's annuity may be increased to the extent that a reduction was necessary to provide a survivor benefit only where the survivor has died or is no longer the member's beneficiary pursuant to a QDRO
- Conversely, an annuity may be decreased to provide a survivorship benefit only upon marriage after retirement
- If the state law were to be changed, LEOFF could seek another PLR before law is implemented
- Ice Miller believes it is unlikely the IRS will approve a delayed survivorship option change outside the 90-day window

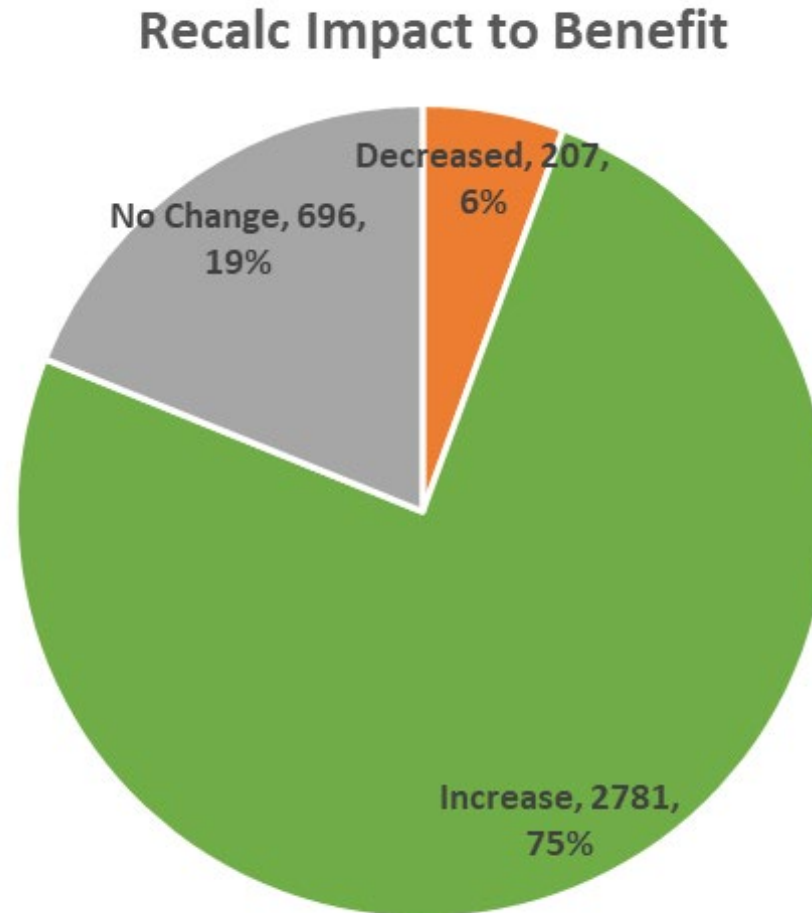
# Recalcs Beyond the 90-day Window, 2009-2021



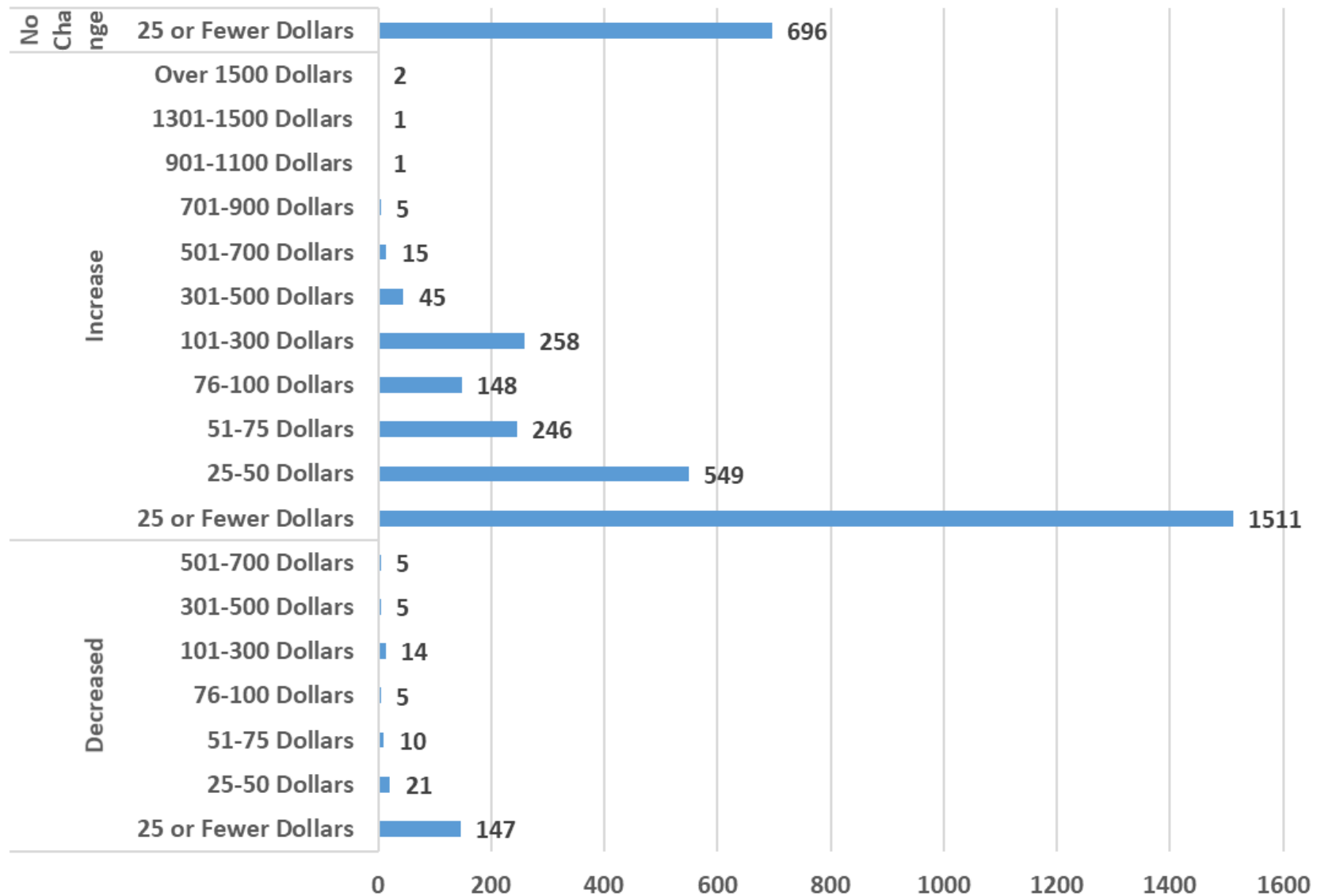
# Days to Recalc - Breakdown, 2009-2021



# Recalc Change to Benefit, 2009-2021



Count of Recalcs by Change to Benefit





# Greater than 5% Change to Benefit

- 61 LEOFF 2 retirees had their benefit recalculated after 90 days from their retirement which resulted in a change in benefit of 5% or more
  - 22 of those were decreases
  - Excluded retirees with a benefit of less than \$100
  - Excluded survivorships or disabilities

# Example

- 2016 retirement, Base benefit \$5247, selected Option 2 for benefit of \$4596
- In 2017 it was discovered that the employer was reporting contributions to a retirement fund that were in lieu social security contributions
  - New base benefit \$4971. Option 2 benefit \$4,328
- If a new law allowed them to change survivorship options, they could change their benefit amount to:
  - Option 1: \$4,971
  - Option 3: \$4,641
  - Option 4: \$4,542

# Anti-Selection Risk

- Anti-selection is the tendency of a person to recognize their health status in selecting the option under a retirement system which is most favorable to them
- The decision to leave a survivor benefit is in part irrevocable because it helps mitigate the risk of anti-selection
- Anti-selection may impact members through increased contribution rates and/or less favorable administrative factors for survivor options
  - Increase risk of intergenerational inequity

# Statute of Limitations

- DRS can only bill the member for 3 years of overpayments from the discovery of the overpayment
  - Example - On January 1, 2022, DRS discovered that a retiree received 10 years of overpayments. These overpayments total \$10,000, \$1,000 a year. DRS cannot collect the full \$10,000. Instead, they may only collect \$3,000, for the last 3 years of overpayments

# Repayment Options

- **Lump Sum Payment** – 90 days to make full lump sum payment
- **Installment Plan** – make installment payments through a reduction in pension for a limited number of months
- **Actuarial Reduction** – pension is actuarially reduced by an amount equal to the overpayment

# Who Should Pay for an Error?

- **Pension Overpayment**

- In most cases the member is responsible for paying back any overpayments they receive
- Employer responsible in limited circumstances

- **Contributions**

- Employer responsible for employer and member contributions not paid
- Employer can collect member contributions from members (“Employer pick-up”)

- **Lost investment earnings**

- DRS can charge employer or have the plan subsidize the cost

# DRS Director Overpayment Waiver

- DRS Director may waive overpayments, if:
  - The overpayment was not the result of the retiree's or the beneficiary's nondisclosure, fraud, misrepresentation, or other fault; and
  - The Director finds that recovery of the overpayment would be a manifest injustice
- “Manifest injustice” has not been defined by DRS
  - General definition is that it means something which is 'obviously unfair' or 'shocking to the conscience.' It refers to an unfairness that is direct, obvious, and observable

Year	Approvals
1998	1
2006	2
2008	12
2010	1
2011	1
2012	4
2014	15
2015	2
2016	2
2017	11
2018	4
2021	2

# Create Another Survivor Option Window

- **Pros**

- Creates opportunity for retiree to make the selection they would have made if not for the employer error in calculating their benefit
- Allows retiree to lessen the financial impact of the reduction to their benefit amount

- **Cons**

- Tax counsel believes IRS will not allow
- Increases anti-selection risk to the plan
- May not address the underlying issue of retiree being responsible for employer/DRS error



# Possible Board Action

1. Draft and price a bill for another window to change a survivor option to address retiree benefit recalculations due to an employer error that results in:
  - A. Any change to the retirement benefit
  - B. 5% or greater change to gross retirement benefit
  - C. 10% or greater change to gross retirement benefit
2. No action



**Thank You**

**Jacob White**

**Senior Research and Policy Manager**

**(360) 586-2327**

**[jacob.white@leoff.wa.gov](mailto:jacob.white@leoff.wa.gov)**