

# BOARD MEETING AGENDA

JULY 26, 2023 • 9:30AM



## LOCATION - Hybrid Meeting

In-Person:  
Washington State Investment Board  
2100 Evergreen Park Drive SW, Suite 100  
Olympia, WA 98502

Or Virtual Meeting Information at  
[www.leoff.wa.gov](http://www.leoff.wa.gov)

## 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*

TARINA ROSE-WATSON  
*Spokane Int'l Airport Police Dept*

PAT MCELLIGOTT  
*East Pierce County Fire*

JAY BURNEY  
*City of Olympia*

WOLF OPITZ  
*Pierce County*

REPRESENTATIVE STEVE BERGQUIST  
*WA State Representative*

SENATOR JEFF HOLY  
*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. | <b>Approval of Minutes</b>   | <b>9:30 AM</b>  |
| 2. | <b>DRS Public Records Privacy</b><br><i>Shawn Merchant, DRS</i>  | <b>9:35 AM</b>  |
| 3. | <b>Overpayment Responsibility – Initial</b><br><i>Jacob White, Sr. Research &amp; Policy Manager</i>     | <b>10:05 AM</b> |
| 4. | <b>Lump Sum Special Death Benefit - Initial</b><br><i>Jacob White, Sr. Research &amp; Policy Manager</i> | <b>10:35 AM</b> |
| 5. | <b>DRS Appeal Deadlines - Initial</b><br><i>Jacob White, Sr. Research &amp; Policy Manager</i>           | <b>11:05 AM</b> |
| 6. | <b>Ombuds Video Premiere</b>   | <b>11:35 AM</b> |
| 7. | <b>Administrative Update</b>   | <b>11:45 AM</b> |
| 8. | <b>Public Comment</b>  | <b>12:00 PM</b> |

\*Public comment can be provided to the Board in writing 24 hours prior to the meeting via our reception mailbox:

[recep@leoff.wa.gov](mailto:recep@leoff.wa.gov).

Department of Retirement Systems

# Proposed Legislation

*Shawn Merchant, Legislative and Stakeholder Relations Director*

LEOFF Plan 2 Retirement Board

July 26, 2023



# Proposed Legislation Summary

## An exception to the Public Records Act:

- ❑ Specific to DRS
- ❑ Exempts the release records for specific groups:
  - Retirees/Payees
  - Active Members
  - Inactive Members
- ❑ Prohibits release of names with dates of birth
- ❑ Public retains ability to seek information regarding an individual member or retiree.
- ❑ A person named in a record request retains the ability to enjoin the release of records under RCW 42.56.540.

# Issue Summary

- ❑ Large public records requests impede DRS' ability to:
  - Properly apply exemptions to the Public Records Act
  - Protect our customers from identity theft/elder fraud
- ❑ Public records requests processed by DRS in the last two years:
  - Eight requests for groups of individuals
  - Groups range in size from a few dozen to over 800,000
- ❑ Release can include:
  - Name
  - Date of Birth
  - Retirement Amounts
  - Retirement Date
  - Last Employer
- ❑ Some data recipients publish records

# Challenges in Administering Exemptions

- ❑ DRS collects retirement information but does not collect information that might trigger an exemption:
  - Domestic violence victims
    - Participants in address confidentiality program (Chapter 40.24 RCW)
    - Registered with employer (ESHB 1533)

# Identity Theft and Elder Fraud Impacts

- ❑ Cybercrime for people over 60 is a national problem, the FBI reports:
  - 88,262 complaints in 2022
  - \$3.1 Billion in losses, 84% increase over 2021
- ❑ Washington ranks:
  - 12<sup>th</sup> for number of victims
  - 5<sup>th</sup> for total losses
- ❑ Other state retirement systems report that public plan retirees are targets for identity theft/elder fraud.

# Surge in Attempts at DRS

- ❑ DRS is experiencing more identity theft events
  - For FY23 the number of reported identity theft and attempts on DRS benefits are up 900% over FY22. (8 in FY22, 72 in FY 23)
- ❑ Would-be thieves are targeting:
  - State agency retirees
  - High value targets
  - Recently retired
  - Lifetime Savings in DC Plans (Over \$12.6 Million targeted)
- ❑ Utilizing publicly available information coupled with stolen or purchased PII

# DRS' Countermeasures and Safeguarding Efforts

- Public records team attempts to identify every PRA exemption
- Changed processes
- Redirected resources
- Revised online access
- Proposed legislation
- Budget Request



Questions?





July 26, 2023

## Overpayment Responsibility

### INITIAL CONSIDERATION

By Jacob White

Senior Research & Policy Manager

360-586-2327

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

### ISSUE STATEMENT

When employers make an error that causes a retiree to receive an overpayment the member is responsible for paying back the overpayment they incorrectly received.

### OVERVIEW

In most cases members are responsible for paying back any overpayments they receive. However, there are situations where the employer is responsible for paying back overpayments, as well circumstances where portions of the overpayment, or other financial impacts caused by the employer misreporting information to DRS, is subsidized by the pension plan.

### BACKGROUND AND POLICY

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". 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. Instead, DRS relies on its Employer Support Division to answer employer questions and provide employer education and outreach to ensure that reporting is as accurate as possible.

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. The remaining portion of the overpayment, as well as any lost investment earnings, is subsidized by the plan.

### Waiver 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>

### **Overpayment Data**

DRS provided the Board with five years of LEOFF 2 Member overpayment data. The data showed that there were 3,485 recalcs that resulted in a benefit change. Of those recalcs 3,327 resulted in overpayments. Those overpayments had the following percentage impact on member’s benefits:

- 1,885 members – 0 to 1% decrease in benefit
- 255 members – 2 to 4% decrease in benefit
- 1,176 members – 5 to 9% decrease in benefit
- 11 members – 10 to 24% decrease in benefit

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



# Overpayment Responsibility

Initial Consideration  
July 26, 2023

# Issue

- **When employers make an error that causes a retiree to receive an overpayment the member is responsible for paying back the overpayment they incorrectly received**

# 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

# What causes these overpayments?

- Typically misreported earnable compensation causes the largest overpayments
- What is and is not considered earnable compensation can be complex
- Typically, different types of pay (such as holiday, annual leave, overtime, etc.) are bargained between employer and employees
- No requirements to have DRS review the language of CBAs to determine how pay should be reported



# Employer Resources

- **RCWs, WACs**
- **DRS Employer Support Division provides:**
  - Employer Notices
  - Employer Handbook
  - Employer Trainings
  - Staff available to answer questions and review language

# 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**
- **The rest of the overpayment, as well as any lost investment earnings, is subsidized by the plan**

# DRS LEOFF 2 Data – Last 5 years

- 3,485 recalcs resulting in benefit change
- 3,327 overpayments
  - 1,885 – 0 to 1% decrease in benefit
  - 255 – 2 to 4%
  - 1,176 – 5 to 9%
  - 11 – 10 to 24%
- 7 - Monthly benefit difference of more than \$1,000
- 1,830 - Monthly benefit difference of less than \$100

# 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

# 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

# Next Steps

1. Board may make a motion to receive a Comprehensive Report
2. No action



**Thank You**

**Jacob White**

**Senior Research and Policy Manager**

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July 26, 2023

## Lump Sum Special Death Benefit

### INITIAL CONSIDERATION

By Jacob White

Senior Research & Policy Manager

360-586-2327

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

### ISSUE STATEMENT

LEOFF Plan 2 beneficiaries have been denied a one-time special death benefit because they missed the Department of Labor and Industries deadline for application.

### OVERVIEW

LEOFF Plan 2 beneficiaries are eligible for a one-time lump sum special death benefit if the member died as a result of a workplace injury or occupational disease. The Department of Labor and Industries (LNI) determines the beneficiary's eligibility for this benefit while the Department of Retirement Systems (DRS) pays the benefit. LEOFF Plan 2 beneficiaries have been denied this benefit because they missed LNI's application deadline.

### BACKGROUND AND POLICY ISSUES

Beneficiaries of LEOFF Plan 2 members have several benefits available to them should the member die in the line of duty. One benefit is the "special death benefit," a one-time, lump sum payment established in 1996 and payable to the member's estate or person (or persons) designated by the member as beneficiary.<sup>1</sup> If the member did not designate a beneficiary in writing, then the surviving spouse or legal representative receives payment. This benefit was initially paid only if the member sustained workplace injuries that resulted in death but, with the Board's endorsement, expanded in 2006 to include deaths from occupational disease or infection.<sup>2</sup>

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<sup>1</sup> [1996 Wash. Laws ch. 226.](#)

<sup>2</sup> [2006 Wash. Laws ch. 351.](#)



For several years the benefit amount was \$150,000, but in 2010 the Board endorsed legislation to increase the minimum benefit to \$214,000, with an annual cost of living adjustment.<sup>3</sup> The benefit payout is currently \$287,781.<sup>4</sup>

Procedurally, DRS provides the application for this benefit to the beneficiary or survivor only when it is notified of a potential line of duty death. The beneficiary must return the completed application to DRS along with the death certificate and if available, autopsy report or other medical records supporting the claim that the death resulted from a workplace injury or illness. DRS forwards the application and supporting documents to LNI for review and determination of eligibility. LNI determines eligibility “consistent with Title 51 RCW”<sup>5</sup> and is in the process of reviewing the timeframe for filing; currently this benefit has a one-year (from the date of death) statute of limitations. LNI then provides written notice of its decision to both DRS and the beneficiary.

If the application is approved, DRS provides payment to the beneficiary or surviving spouse. If the application is denied, the beneficiary may protest or appeal the decision through LNI’s administrative process. LNI provides notice of this process with its determination.

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<sup>3</sup> [2010 Wash. Laws ch. 261](#)

<sup>4</sup> For deaths occurring after July 1, 2023. For deaths occurring July 1, 2022 through June 30, 2023, the benefit payout was \$279,399.

<sup>5</sup> [RCW 41.26.048\(2\)](#).



# Lump Sum Special Death Benefit

Initial Consideration  
July 26, 2023

# Issue

- **LEOFF Plan 2 beneficiaries have been denied a one-time special death benefit because they missed the Department of Labor and Industries deadline for application**

# Special Death Benefit

- **LEOFF Plan 2 beneficiaries are eligible for a one-time lump sum special death benefit (currently \$287,781) if the member died as a result of a workplace injury or occupational disease**
  - LNI determines the beneficiary's eligibility for this benefit
  - DRS pays the benefit out of the pension
- **Beneficiaries have been denied this benefit because they missed LNI's application deadline**

# Legislative History

- Established in 1996
- In 2006, Board endorsed legislation that expanded the benefit to include deaths from occupational disease or infection
- In 2010, Board endorsed legislation increased the minimum benefit from \$150k to \$214k, with an annual COLA

# Was the intent of this statute to apply LNI deadlines to the Special Death Benefit?

- “The determination of eligibility for the benefit shall be made consistent with Title 51 RCW by [...]” LNI
- Pension benefits typically do not have deadlines, you are paid what you have earned
  - Special Death Benefit is paid out of pension trust fund not LNI
- LNI Benefits typically have a statute of limitations to apply for the benefit, in part due to the increasing difficulty of determining the cause of an injury the further away from it occurring

# Current Status

- **DRS and LNI are currently reviewing their current practices to determine if LNI deadlines should apply to this pension benefit or if a legislative change would be needed to correct the issue**

# Next Steps - Options

1. **Motion for staff to provide a Comprehensive Report**
2. **Motion for a Comprehensive Report contingent on DRS and LNI discussions not resolving the issue**
3. **No action - Board can wait until after an update has been provided on the outcome of the DRS and LNI discussions before making a decision on whether to receive a Comprehensive Report**





**Thank You**

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July 26, 2023

## DRS Appeal Deadlines

### INITIAL CONSIDERATION

By Jacob White

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360-586-2327

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### ISSUE STATEMENT

Some LEOFF 2 members have missed their deadline to file an administrative appeal with DRS and expressed concerns regarding a lack of clarity on the deadline.

### OVERVIEW

Recently there have been two instances of LEOFF 2 members missing the deadline to appeal a DRS administrative decision. During the 2023 legislative session there was a bill which in part sought to remedy this issue by extending the deadline to file an appeal and requiring tolling of the deadline when DRS requests the member provide additional records in support of their appeal.

### BACKGROUND AND POLICY ISSUES

#### Background

The Administrative Procedures Act (APA) sets the minimum agency requirements for adjudicative proceedings. Regarding the deadline to file an appeal of an agency decision, the APA reads: "The agency shall allow at least twenty days to apply for an adjudicative proceeding from the time notice is given of the opportunity to file such an application."

The process of requesting an administrative appeal with DRS is typically a multi-step process. The first step of that process is requesting an administrative decision. There is no deadline for a member to request an administrative decision. An administrative decision is usually signed by a Plan Administrator at DRS. Administrative decisions for members typically are made within the Retirement Services Division and administrative decisions impacting employers are made by the Employer Support Division. Earlier this month DRS began a reorganization splitting what has traditionally been the Retirement Services Division into two separate divisions: Member Experience Division, and Member Operations Division.

Once a member receives an administrative decision, they must “Petition” that decision before they can request an administrative appeal. The administrative decision issued by the Plan Administrator includes language identifying the deadline to file what is called a Petition:

If you believe this decision was reached in error or you have new information that was not available when the Administrative Decision was made, you have a right to file a petition asking for further review. Your petition must be filed within 120 days from the date you receive this decision. For information about the petition process, including a description of the information you must include in your petition, you should review Ch. 415-04 WAC. Send your petition to: Petitions Coordinator, Department of Retirement Systems, PO Box 48380, Olympia, WA 98504-8380 or email your petition to: [drs.petitions@drs.wa.gov](mailto:drs.petitions@drs.wa.gov).

The Petition process is not required by the APA and has been put into rule by DRS.<sup>1</sup> Members have 120 days to file a Petition. A Petition is similar to an alternative dispute resolution process, designed to help resolve issues in a format that is intended to be less formal and easier for members without legal representation to navigate. Instead of filing legal motions and briefs, the member can simply provide a letter to the Petition’s Officer explaining their situation and why they believe DRS has erred in their administrative decision. The member can also provide additional records that support their case. DRS has given a 120-day deadline to help facilitate a more collaborative process of assisting member’s with gathering records and providing information to the Petition’s Officer. This process helps DRS ensure they are making the legally correct decision, while also helping the member better understand why DRS has reached their conclusion.

The DRS Petition decision, includes the following language identifying that the member has 60 days to file an administrative decision:

**YOU HAVE THE RIGHT TO APPEAL THIS DECISION**

If you disagree with this petition decision, you may file an appeal with the DRS Presiding Officer within 60 days of the date of this decision. DRS must receive your notice of appeal within that 60-day timeframe. The DRS appeal rules are in chapter 415-08 WAC. For questions about the appeal process, contact the DRS Presiding Officer at (360) 664-7294.

Send your notice of appeal ATTN: DRS PRESIDING OFFICER using one of the following methods:  
Mail: **Department of Retirement Systems / PO Box 48380 / Olympia, WA 98504-8380**

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<sup>1</sup> Chapter 415-04 WAC

In addition to this notice regarding the right to appeal an administrative decision, the information is available on the DRS website at <https://www.drs.wa.gov/sitemap/appeals>.

### **Policy Issues**

During the 2023 legislative session SB 5625 was proposed. This bill sought to address multiple concerns, including instances where LEOFF 2 members missed their deadline to file an appeal with DRS. If passed, SB 5625 would have:

- Increased the deadline to file an appeal from 60 days to 90 days;
- Allowed for tolling no less than 90 additional days when DRS requests additional records from members; and,
- Allowed retirees to refile a claim that previously dismissed for failing to file a timely notice after additional information was requested.

SB 5625 received a public hearing in the Senate Ways and Means Committee but did not move forward to executive action in the committee.

In the last 5 years DRS has received 75 petition requests, 25 of those were from LEOFF 2 members. None of those petitions were denied for not being filed timely. In the last 5 years DRS has received 37 appeal of petition decisions, 14 of those were from LEOFF 2 members. There is only one instance of a member being denied an appeal based on missing the deadline to file the appeal, that member was in LEOFF 2. This case is still in active litigation and is currently with the Court of Appeals. There is an additional case that is currently with the DRS Appeals Officer with the issue of whether it was filed timely, that member was also LEOFF 2.



# DRS Appeals Deadlines

Initial Consideration  
July 26, 2023

# Issue

- **Some LEOFF 2 members have missed their deadline to file an administrative appeal with DRS and expressed concerns regarding a lack of clarity on the deadline**

# Administrative Procedures Act

- The APA sets minimum agency standards for adjudicative proceedings
  - “At least 20 days to apply for an adjudicative proceeding from the time notice is given of the opportunity to file such an application”

# DRS Administrative Decision Process

- DRS Plan Administrator Decision – No deadline to request
- Petition – 120 days to file
- Appeal – 60 days to file
- Superior Court



# How does DRS communicate those deadline?

- The DRS petition and appeal deadlines are in WAC
- At each step of the process a decision denying a member's request includes language regarding the next step in the process and the deadline

# LEOFF 2 Member Concerns

- The deadline to file an appeal and to file a petition are different
- The deadline to file an appeal does not include tolling to gather and provide additional records

# Legislative History

- **SB 5625 (2023) would have:**
  - Increased deadline to file an appeal to 90 days
  - Allowed for tolling no less than 90 additional days when DRS requests additional records from member
  - Allowed retirees that previously filed a claim that was dismissed for failing to file a timely notice after additional information was requested may refile that claim

# DRS Data

- In the last 5 years how many petitions has DRS received? 75 (25 LEOFF 2)
- How many of those petitions were denied for not being timely? 0
- In the last 5 years how many appeals of petition decisions has DRS received? 37 (14 LEOFF 2)
- How many of those appeals were denied for not being timely? 1 (1 LEOFF 2)

# Next Steps

- Motion for Comprehensive Report
- No action



**Thank You**

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