LEOFF Plan 2 Retirement Board

September 27, 2023

Overpayment Responsibility

COMPREHENSIVE REPORT

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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[1]; and,
- Erroneously reporting that an employee has separated from service.[2]

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."[3] 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

[1] RCW 41. 50.139
[2] RCW 41.50.139
[3] https://definitions.uslegal.com/m/manifest-injustice

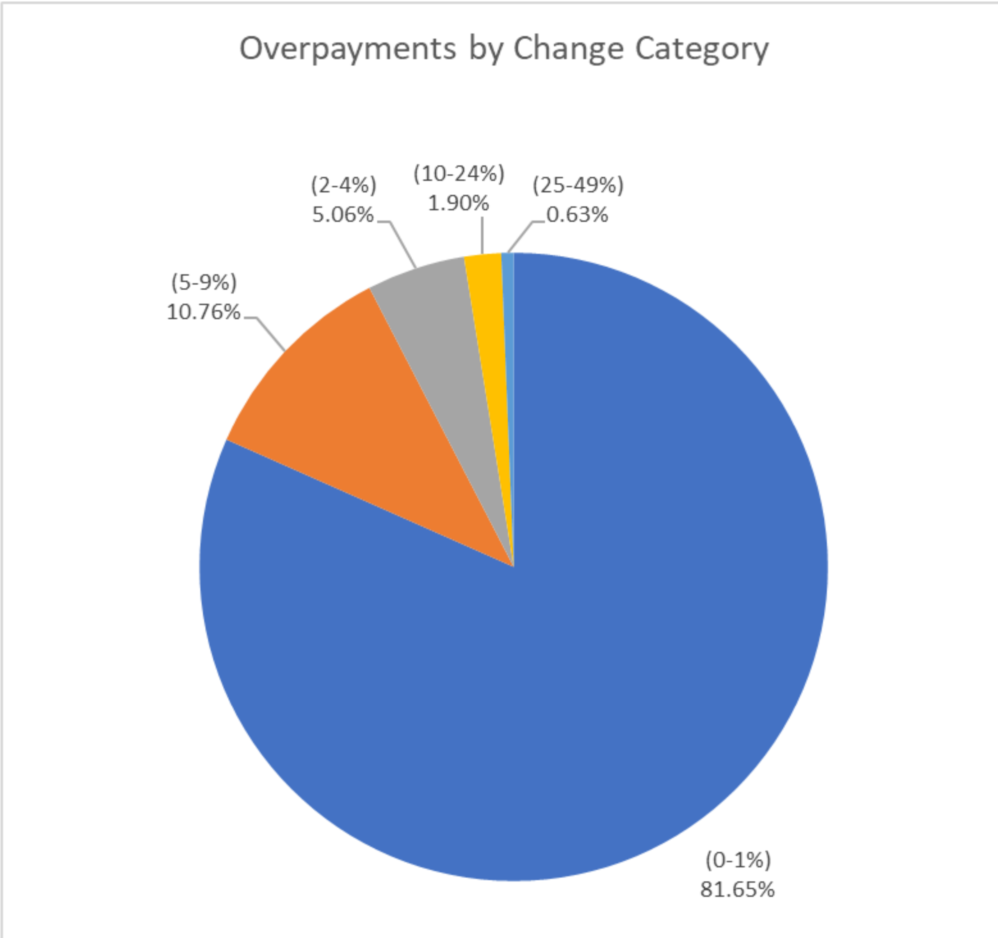
While the term is common in criminal law, it is also used in administrative law. For example, the Washington State Department of Social and Health Services (DSHS) uses the “manifest injustice” standard as an element of multi-factor test for waiving collection of certain client overpayments. DSHS has 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 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.[4]

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 150 resulted in overpayments. Below is a chart of the 150 overpayments percentage impact on member’s benefits:

[4] https://www.dshs.wa.gov/book/export/html/21



Of these 150 overpayments 27 had an impact to the members ongoing monthly benefit greater than 1%.

POLICY OPTIONS

Option 1: Employer Responsibility

Employer must pay back overpayments when the overpayment is due to an employer error.

Option 2: Shorten Statute of Limitations

Shorten the statute of limitations for collecting overpayments from 3 years to 1 year.

Option 3: Employer responsible and shorten statute of limitations

Employer must pay back overpayments when the overpayment is due to an employer error and the statute of limitations for collecting overpayments is shortened from 3 years to 1 year.

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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

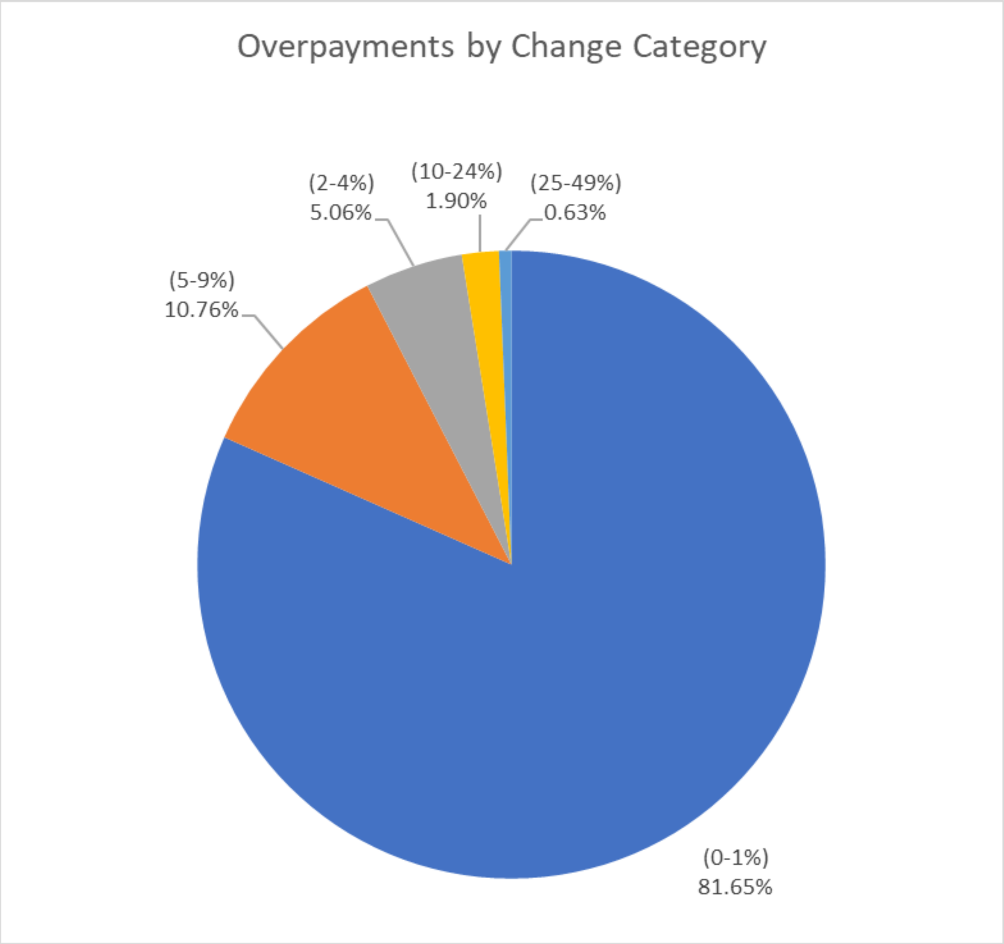
- RCWs, WACs
- DRS Employer Support Division provides:
  - Employer Notices
  - Employer Handbook
  - Employer Trainings
  - Staff available to answer questions and review language

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 L2 Data – Last 5 years

- 3,485 recalcs resulting in benefit change
- 150 overpayments
- 27 overpayments greater than 1% change in benefit



DRS L2 Data – Last 5 years (con’t)

- 20 months – Average time between retirement and recalc for the 150 overpayments
- 76 of the 150 recalcs were completed within 1 year
- 130 of the 150 recalcs were completed within 3 years

Policy Options

1. Employer Responsibility: Employer pays the overpayment when the overpayment is due to an employer error
2. Shorten the Statute of Limitations: from 3 years to 1 year when collecting overpayments
3. Combine Options 1 and 2: Employer must pay back overpayments when the overpayment is due to an employer error and the statute of limitations for collecting overpayments is shortened from 3 years to 1 year
4. No action

Next Steps

1. No action at this time
2. Final briefing

Thank You

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