



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

August 31, 2016

Senator Betsy Johnson
900 Court Street NE S209
Salem OR 97301

Re: Legality of PERS proposals

Dear Senator Johnson:

You asked about the constitutionality of several changes to the Public Employees Retirement System (PERS). First, we will discuss the Oregon Supreme Court's 2015 decision in *Moro v. State of Oregon*,¹ which provided a new standard for analyzing contract rights issues under PERS. Then we will apply the standard established by *Moro* to the specific proposals you asked about.

Moro v. State of Oregon

In *Moro*, the Supreme Court considered challenges by PERS benefit recipients to changes to PERS passed by the Legislative Assembly in 2013.² Senate Bill 822 (2013) and, later, Senate Bill 861 (2013 special session) reduced the maximum cost-of-living adjustment (COLA) to PERS benefits for all PERS members, including those who had already retired. Before the passage of SB 822 and SB 861, PERS benefit recipients were entitled to a maximum COLA of two percent, depending on the change in cost of living as measured under the Consumer Price Index. Senate Bill 822 and SB 861 reduced the COLA to 1.25 percent on the first \$60,000 of benefits and 0.15 percent on any benefits over \$60,000.

The petitioners in *Moro* argued that they had a contract right to the two percent COLA and that that right was unconstitutionally impaired by SB 822 and SB 861. The court agreed that existing PERS members have a contract right to the two percent COLA, and that SB 822 and SB 861 impaired that contract right as applied to retirement benefits earned *before* October 8, 2013.³ Significantly, however, the court disavowed its earlier view of PERS contract rights, which was based on the principle that "a right to pension benefits, including PERS benefits, 'vest[s] on acceptance of employment[.] . . . with vesting encompassing not only work performed but also work that has not yet begun.'"⁴ In other words, under previous case law, the legislature could not reduce accrued benefits *or benefits that had yet to accrue* during the career of a Tier 1

¹ *Moro v. State of Oregon*, 357 Or. 167 (2015).

² The Legislative Assembly passed two major changes to PERS in 2013: modification of the cost-of-living adjustment (COLA) and elimination of the tax benefit for certain out-of-state retirees. The analysis related to the tax benefit is not relevant to your questions, so this opinion focuses on the analysis related to the COLA.

³ *Moro* at 217, 235-236.

⁴ *Id.* at 222, quoting *Oregon State Police Officers' Assn. (OSPOA) v. State of Oregon*, 323 Or. 356, 371 (1996).

or Tier 2 employee.⁵ *Moro* changes that standard, stating that “[a]lthough the participating employers *can change the COLA offer as to benefits that might accrue in the future*, they cannot change the COLA contract as to benefits that have already accrued (emphasis added).”⁶ In a more general statement describing the court’s view of contract rights under PERS, the court stated:

[T]he PERS offer is a continuing offer. An employee’s acceptance of the offer does not preclude the employee from accepting the offer further by rendering additional services. Each additional rendition of service accepts any open offer for additional PERS benefits. The PERS contract reaches only as far as a member has accepted the offer, and a member’s acceptance reaches only as far as the work that the member has performed.⁷

Thus, under *Moro*, it appears that the legislature can make changes to contractual benefits in all three tiers of PERS (Tier 1, Tier 2 and the Oregon Public Service Retirement Plan (OPSRP)⁸) in accordance with the standard that has always applied to changes to benefits under OPSRP.⁹ The legislature can now make prospective changes to all tiers during the career of the employee as long as accrued benefits are protected.¹⁰

There are some considerations to bear in mind in applying the *Moro* standard. First, it is important to note that the *Moro* standard applies only to terms of the statutory PERS contract. If a change to PERS affects an element that is not part of the PERS contract, the legislature can make changes without protecting accrued benefits. Thus, the first question in analyzing the legality of a change to PERS is whether the change alters a term of the PERS contract.¹¹ In evaluating whether a provision is part of the PERS contract, the *Moro* court specified two lines of inquiry. First, the court indicated that remunerative provisions are often terms of the PERS contract: “[S]tatutes defining eligibility for, or the scope of, [PERS] benefits may be part of the PERS offer, unless the legislature expresses a contrary intent.”¹² Second, the court stated that

⁵ Note that under the Oregon Public Service Retirement Plan (OPSRP), the legislature could always make changes to the plan “as long as the change applies only to benefits attributable to service performed and salary earned on or after the date the change is made.” ORS 238A.470.

⁶ *Moro* at 226.

⁷ *Id.* at 201.

⁸ Tier 1 includes members who established membership before January 1, 1996. Tier 2 includes members who established membership between January 1, 1996, and August 28, 2003. OPSRP includes members who established membership on or after August 29, 2003.

⁹ ORS 238A.470. Note that this complies with the “anti-cutback” rule on plans governed by the federal Employee Retirement Security Income Act of 1974 and under the Internal Revenue Code. The anti-cutback rule provides that, with certain exceptions, an employee’s benefits may not be decreased or eliminated through a plan amendment once those benefits are vested. 29 U.S.C. 1054(g); section 411(d)(6) of the Internal Revenue Code.

¹⁰ Note that this rule precludes any change to the PERS contract that reduces the benefits payable to retired members, because those members’ benefits are entirely accrued.

¹¹ For example, the court held in *Moro* that the tax offsets that were denied to nonresidents in 2013 were not terms of the PERS contract that could be impaired, so the legislature was free to make changes to those offsets. *Moro* at 209. As another example, the court found in *Strunk v. PERB* that outdated actuarial equivalency factors used to make assumptions about mortality and earnings were not part of the PERS contract, and could be updated without impairing obligations of the PERS contract. *Strunk v. PERB*, 338 Or. 145, 172-176 (2005).

¹² *Moro* at 204.

“a remunerative provision will be a term of the offer only if it is mandatory, rather than optional or discretionary.”¹³

In addition, the court does note one exception to the new rule allowing prospective changes. A change to unaccrued benefits is impermissible if a benefit offer is irrevocable.¹⁴ A benefit offer can be explicitly irrevocable “if the irrevocability is an express term of the contractual rights.”¹⁵ The court does not detail what statutory language would create express irrevocability, although it does note that the “use of ‘shall,’ without more,” is not sufficient.¹⁶ There may be other language in the PERS statutes that creates an expressly irrevocable offer as to some benefits, but we will have to wait for a future case to learn more.

A benefit offer can also be impliedly irrevocable. According to the court, “the implied term of irrevocability . . . applies to only those offers that are accepted by performance that takes time to complete.”¹⁷ As an example, the court describes a circumstance in which an employee had to work for 20 years before pension benefits vested.¹⁸ The court distinguished the COLA benefit from this circumstance, stating that “[t]he member’s work continually and serially completes the performance necessary to accrue the benefits attributable to that work, thus eliminating the concern of uncompensated work.”¹⁹ The exact contours and reach of implied irrevocability are also unclear.

Any PERS change is certain to be challenged as either expressly or impliedly irrevocable, and the exception could be used by the court to invalidate changes in unexpected ways.

Specific proposals

1. Discontinue the pension program going forward

One proposal on the list you provided is to “freeze PERS liability by ending pension credit for salary or years of service earned on or after January 1, 2018.” We address this proposal first because it could be characterized as the purest test of the *Moro* standard—the proposal allows members to retain pension benefits accrued before January 1, 2018, and allows no further accrual of pension benefits after that date.

There is no doubt that this proposal affects terms of the PERS contract; it affects the most essential terms of the contract relating to contributions and calculation of the pension benefit. Under the view of the PERS contract as a continuing offer as described in *Moro*, this proposal seems permissible, because a member is not contractually entitled to benefits attributable to work not yet performed.

The next question is whether the irrevocability exception applies. Public employees are likely to argue that the contract right to receive a defined benefit based on some combination of salary and years of service is explicitly irrevocable as the essential foundation of PERS. Note that the 2005 case of *Strunk v. PERB*, which was not disavowed by *Moro*, concluded that the

¹³ *Id.* at 205.

¹⁴ *Id.* at 225.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 224.

¹⁸ *Id.* at 223, citing *Taylor v. Mult. Cty. Dep. Sher. Ret. Bd.*, 265 Or. 445, 450 (1973).

¹⁹ *Id.* at 225.

“1981 Legislative Assembly promised each eligible member that, at retirement, the member would be entitled to receive a service retirement allowance calculated under the formula that yielded the highest pension amount.”²⁰ This suggests an argument that the right to receive a defined benefit pension is an explicitly irrevocable term of the PERS contract.

Public employees might also argue that the right to receive a pension is implicitly irrevocable because it takes time to complete the years of service necessary to accrue the full promised retirement benefit. Public employers, on the other hand, would likely argue that retirees will receive all pension benefits that were serially and continually accrued through work performed before the change, so the irrevocability exception does not apply.

From the few paragraphs devoted to irrevocability in the *Moro* opinion, it is difficult to predict whether the court would apply the exception to this proposal. Because this proposal would essentially dismantle the current form of PERS for all tiers, however, the possibility that the court would invalidate it under the irrevocability exception is significant.

2. Reduce the factor for calculation of pension benefits

The basic formula for calculation of pension benefits under PERS is:

(Years of Service) x (Final Average Salary) x (the Factor)

The factor for Tier 1 and Tier 2 is 1.67 percent, and the factor for OPSRP is 1.5 percent. For police officers and firefighters, the factor for Tier 1 and Tier 2 is 2.0 percent and for OPSRP, 1.8 percent.²¹

This proposal would reduce the factor applied to service performed after the effective date of the change for all tiers, either to 1.0 percent or 0.25 percent, with a slightly higher factor for police officers and firefighters.

As discussed above, the defined benefit pension is one the essential terms of the PERS contract. Under the view of the PERS contract as a continuing offer as described in *Moro*, this proposal seems permissible, because it applies the lower factor only to service performed after the effective date of the change. The member continually and serially earns the salary and years of service, which multiply with the factor to calculate the pension. However, because the defined benefit pension is the foundation of PERS, the more the defined benefit is diminished, the closer the proposal resembles the complete elimination of the pension program described above. Thus, the lower the factor, the more likely the court is to find that the offer of the defined benefit pension is irrevocable and to invalidate the change.²²

3. Disallow use of future unused vacation and sick leave in calculation of pension benefits

²⁰ *Strunk* at 192.

²¹ The higher factor for police officers and firefighters accounts for the fact that police officers and firefighters have an earlier retirement age and thus generally have fewer years of service than other public employees.

²² Also note that, under Tier 1 and Tier 2, the member receives the higher of a pension calculated under the “full formula” described above or a pension calculated under the “money match” calculation. Changes to the factor discussed in 2 (and changes to the calculation of final average salary discussed in 3) do not affect the money match calculation. Thus, this proposal could funnel more members into the money match calculation and save less than it would initially appear.

Under current law, the calculation of final average salary includes unused vacation and sick leave for Tier 1 and unused sick leave for Tier 2. Under OPSRP, unused vacation and sick leave are not included in the calculation of final average salary. This proposal would disallow the use of unused vacation and sick leave accrued after the effective date of the change in the calculation of final average salary for Tier 1 and Tier 2.

The Supreme Court found in *OSPOA* that the use of sick leave in the final average salary calculation was part of the PERS contract.²³ It seems likely that, if the use of sick leave is part of the PERS contract, then the use of vacation leave is also part of the contract. The *OSPOA* court held that eliminating the use of sick leave in the calculation “would relieve the state of its contractual obligation to provide that promised benefit, even though the employees already have provided consideration for the promise by refraining from using the maximum permissible sick leave.”²⁴

While the court in *Moro* disavowed the reasoning in *OSPOA* that precluded prospective changes to retirement benefits, the *Moro* court noted in a footnote that “[o]ur holding does not reach, and we have not been asked to consider, the precedential value of *OSPOA* as it relates to the specific benefits at issue in that case.”²⁵ Despite this caveat, it seems likely that if the court revisited this issue under the *Moro* standard, it would reach a different result with regard to disallowing the use of sick and vacation leave accrued after the date of the change. Because the change is entirely prospective and does not affect accrued benefits—as the member would still be entitled to use sick and vacation leave accrued before the change in the calculation of final average salary—this proposal would likely be permissible under *Moro*.

In addition, the irrevocability exception does not appear to apply to the use of sick and vacation leave. The court notes in *Moro* that “[n]one of the claims in *OSPOA* . . . involved conditions that took time to complete, such as the vesting requirement in *Taylor*.”²⁶ The employee continually and serially earns the salary that forms the final average salary calculation, including sick and vacation leave, so the irrevocability exception described in *Moro* does not apply.

Note that determining what portions of sick and vacation leave were accrued and used before and after the effective date of the change could be complicated, and would likely require public employers to keep track of separate banks of leave accrued and used before and after the change.²⁷

4. Cap salary used in calculation of final average salary on or after January 1, 2018

This proposal would cap the amount used in the calculation of final average salary at \$100,000 per year for 2018 and beyond, but allow members to use salary over \$100,000 earned in years before 2018 in the calculation of final average salary.

Final average salary is one of the factors that is used to calculate the pension benefit under all PERS tiers. Final average salary is currently determined by taking the average salary paid to the member in the three calendar years of membership that produce the highest average

²³ *OSPOA* at 379.

²⁴ *Id.*

²⁵ *Moro* at 225 n. 35.

²⁶ *Id.* at 224.

²⁷ See note 22.

salary,²⁸ or by taking one-third of the total salary paid to the member in the last 36 months of membership.²⁹ Currently, there is no cap on salary for purposes of determining final average salary under Tier 1 and Tier 2, and there is a \$200,000 cap on salary under OPSRP.³⁰ This proposal would provide that, for 2018 and beyond, the annual salary amount used to determine final average salary could not exceed \$100,000, reducing pension benefits for some members.

The courts have not addressed whether the calculation of final average salary is part of the PERS contract, but because final average salary is one of the factors used in determining a person's pension benefit, it is remunerative and it seems likely that the court would find it to be part of the PERS contract. If the calculation of final average salary is part of the PERS contract, we believe that this change is likely permissible under the standard set forth in *Moro* because it changes only the use of salary earned in future years and does not affect accrued benefits.

In addition, the employee continually and serially earns the salary that forms the final average salary calculation, so the irrevocability exception described in *Moro* does not apply.³¹ If the proposal were to cap the use of salary earned before the effective date of the change, it would likely be unconstitutional under *Moro* because it would affect accrued benefits.

5. Calculate final average salary using five years of salary instead of three years

As discussed above, final average salary is currently calculated by taking the average salary paid to the member in the three calendar years of membership that produce the highest average salary,³² or by taking one-third of the total salary paid to the member in the last 36 months of membership. Increasing the averaged range to five years could lessen the impact of attempts to spike a member's pension by granting pay raises at the end of the member's career.

As noted above, the court has never addressed whether the method of calculating final average salary is a term of the PERS contract, but it seems likely that it is. If it is a term of the PERS contract, as discussed above, we believe that changes to the calculation of final average salary are permissible under *Moro* if the changes protect accrued benefits.

Protecting accrued benefits could be complicated under this proposal. At the very least, it would require the comparison of a member's final average salary as calculated by using three years before the change and by using five years after the change.

6. Make changes to retirement age

The normal retirement age is the age at which a member can retire with full pension benefits. The current normal retirement ages are 58 for Tier 1, 60 for Tier 2 and 65 for OPSRP.³³ The retirement ages are younger for police officers and firefighters.³⁴ Members can also retire with full benefits upon accruing 30 years of creditable service,³⁵ and members can

²⁸ Under OPSRP the three years must be consecutive. ORS 238A.130.

²⁹ ORS 238.005 (9), ORS 238A.130.

³⁰ ORS 238A.005 (17)(c)(I).

³¹ As discussed above, the court notes in *Moro* that none of the claims in *OSPOA*, including the claim relating to the use of sick leave to increase final average salary, would have been subject to the irrevocability exception. *Moro* at 224. Increases in pay that increase final average salary are likely subject to the same conclusion.

³² See note 28.

³³ ORS 238.005 (17), ORS 238A.160.

³⁴ ORS 238.005 (17), 238A.160.

³⁵ ORS 238.280. Under OPSRP, the member must have 30 years of retirement credit and reach the age of 58. ORS 238A.160.

retire at earlier ages with their benefits reduced to account for the extra payments members will receive by retiring early.³⁶ You propose raising the normal retirement age to up to 67 for all tiers, depending on the member's year of birth, and raising the early retirement age accordingly.

The court has not addressed whether the retirement age is a term of the PERS contract. However, because the retirement age affects a member's eligibility for and scope of benefits, and because the statutes make the retirement age mandatory, it seems likely that retirement age is a term of the PERS contract.

If the retirement age is a term of the PERS contract, then any change to it must protect accrued benefits, and that is a complicated proposition. This might be accomplished by allowing a member to retire at the current retirement age, but discounting benefits accrued after the date of the change. Another option might be to allow a member to receive some retirement benefits at the current retirement ages, but to require the member to continue working to receive retirement benefits accrued after the date of the change.

Furthermore, public employees are likely to argue that the retirement age is an irrevocable term of the PERS contract because, by its nature, it "involve[s] conditions that [take] time to complete."³⁷ As the court cautioned, "[w]hen the performance necessary to accept the offer takes time to complete, there is a concern that the offering party will revoke the offer after receiving partial performance but before receiving the complete performance necessary to form the unilateral contract."³⁸ Because it takes time to reach retirement age, the court may be disinclined to allow the legislature to "move the goalposts" before a member has a chance to complete performance by working until retirement age. This proposal has a high risk of invalidation by the court.

7. Use market rates to calculate annuities

This proposal would require the Public Employees Retirement Board to use a rate for valuing annuity benefits as published by the federal Pension Benefit Guaranty Corporation (PBGC) for calculating annuities payable to PERS benefit recipients.

Currently, the board uses the assumed interest rate for the entire PERS system to calculate annuities. The assumed interest rate for PERS is currently 7.5 percent. The PBGC rate for August 2016, however, is 2.5 percent. Using a lower rate would significantly reduce the annuities payable under the money match calculation (and other calculations providing annuities) because the amount in a member's member account, which is doubled and then annuitized to produce the money match calculation, would be predicted to earn less over time.

In *Strunk*, the court held that Tier 1 members did not have a contract right to the continued use of outdated actuarial equivalency factors (based on mortality tables and the assumed interest rate) in calculating annuities.³⁹ In fact, the board has recently reduced the assumed interest rate for PERS from 8 percent to 7.5 percent. Thus, it does not appear that members have a contract right to the use of any particular assumed interest rate.

³⁶ ORS 238.280, 238A.185.

³⁷ *Moro* at 224.

³⁸ *Id.* at 223.

³⁹ *Strunk* at 235-236.

Even if the assumed interest rate were part of the PERS contract, we believe that this change is likely permissible under the standard set forth in *Moro* because it is entirely prospective. In other words, this proposal does not alter the amount of benefits accrued by a retiring member before the change, but affects only predictions about the growth of those amounts in the future.

However, note that this proposal would create an unusual situation in which the board uses the PBGC rate to predict future growth for annuities, but may use a different assumed interest rate for other purposes, including the crediting of Tier 1 member accounts and the valuation of PERS for the purpose of setting employer contribution rates. One could argue that this difference in rates is unreasonable, especially because the use of the higher assumed interest rate would lower employer contribution rates, while the use of the lower assumed interest rate would reduce benefit payments.

8. Redirect employee contributions to pay for pension benefits accrued on or after the date of the redirection

Under the current system, all PERS members receive two types of benefits upon retirement: a defined benefit (the pension) and the balance of the member's individual account established under the defined contribution aspect of PERS, the individual account program (IAP).⁴⁰ The pension is funded through employer contributions (and employee contributions made before 2003), and the member's individual account is funded through the employee contribution of six percent of the member's salary required under ORS 238A.330.

Under the proposal you asked us to review, an active member would still be required to make the six percent employee contribution under ORS 238A.330, but the contributions would be placed in a new account that may only be applied to fund the member's pension benefits accrued on or after the date of the redirection. Thus, going forward, the member would make the same amount of contributions and the amount of the member's pension would be unchanged, but the member would not receive the balance of the member's employee contributions made after the date of the redirection and the earnings on those contributions upon retirement. If a member separated from public employment, the member could withdraw the amounts in the new account, but would not receive a pension.

The Supreme Court has already approved a redirection of the employee contribution. Before 2003, employee contributions were placed in the member account established under ORS 238.250. The amount in the member account is used to fund a pension calculated under the "full formula" for Tier 1 and Tier 2 members, or the amount in the member account is doubled to derive a member's pension under the "money match" calculation.

In 2003, the Legislative Assembly enacted legislation redirecting the employee contributions of Tier 1 and Tier 2 members into the IAP. This halted the growth of the member accounts, limiting the future impact of the money match calculation. The *Strunk* court held that members did not have a contract right to make employee contributions to the member accounts and upheld the validity of the redirection of the employee contributions.⁴¹ This suggests that perhaps the Legislative Assembly could further redirect employee contributions from the IAP to another account without implicating contract rights in any way.

⁴⁰ ORS 238A.350.

⁴¹ *Strunk* at 192-193.

The proposal you asked us to review would be somewhat similar to the situation that existed before the 2003 legislation, except that the amounts in the new account could not be used in the money match calculation. However, there is a fundamental difference between the redirection of employee contributions approved by the *Strunk* court and the redirection proposed here, and we believe one could make a persuasive argument that the proposed redirection does implicate the contract rights of members. Under the 2003 law, the employee contributions remained the property of the employee. This proposal would be a far more significant change to the employee contributions: If the employee eventually retires, the employee contributions would no longer go to the benefit of the employee, but instead be used solely for the purpose of reducing the employer's cost of providing a retirement allowance or other benefit.

If this proposal does implicate contract rights, then under *Moro*, benefits accrued before the date of the change must be protected. If this proposal required the use of employee contributions to pay for pension benefits accrued before the date of the redirection, we believe it would be unconstitutional under *Moro* because it would diminish the value of accrued pension benefits by requiring the employee to pay for them upon retirement, when the benefits previously would have been funded by the employer. However, because the proposal explicitly applies only to benefits accrued on or after the date of the change, we believe it is permissible under *Moro*. The irrevocability exception does not apply because the proposal does not involve conditions that take time to complete; the employee makes employee contributions continually and serially.

Note that, in the case of a member who accrues benefits both before and after the proposed change, it is unclear how one would calculate the amount of accrued benefits at the time of the change to determine how much of the member's pension the new account is responsible for funding. This could be a very complicated and controversial problem.

9. Create a new tier of benefits with only a defined contribution plan

This proposal would place all members hired after the effective date of the change in a new tier that offers a defined contribution benefit only. Because this change applies to only new members who have not accrued any benefits or accepted any contract offer, this change is permissible. In fact, this is how Tier 2 and OPSRP were created in 1996 and 2003.

10. Allow bargaining of the pickup

Currently, public employers can either pay, or "pick up," an employee's entire six percent employee contribution, or not pick up any of the employee contribution.⁴² In other words, the pickup is all or nothing. This proposal would allow public employers to bargain with employees to pick up any portion of the employee contribution, and would limit the duration of such agreements to five years.

The court in *OSPOA* addressed a proposal to prohibit employers from picking up employee contributions, and the court found that there is a contract right to the ability to bargain for the pickup.⁴³ Assuming the court would agree with this analysis if presented with the question again, this proposal retains the right to bargain for the pickup and arguably does not impair an obligation of the PERS contract. Furthermore, the changes you propose apply only to

⁴² ORS 238A.335.

⁴³ *OSPOA* at 376, citing *Hughes v. State of Oregon*, 314 Or. 1, 20-21 (1992).

contracts negotiated after the date of the change, so they are entirely prospective. We believe this proposal is permissible under *Moro*. The irrevocability exception does not apply because the proposal does not involve conditions that take time to complete.

We hope this is helpful. Please let us know if you have further questions.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

A handwritten signature in cursive script that reads "M. James".

By
Marisa N. James
Senior Deputy Legislative Counsel

Cc: Senator Tim Knopp