CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM

TEACHERS' RETIREMENT LAW | VOL II

January 1, 2013

CALSTRS

HOW WILL YOU SPEND YOUR FUTURE?

TEACHERS' RETIREMENT LAW

As of January 1, 2013

Volume 2

CALSTRS

HOW WILL YOU SPEND YOUR FUTURE?

TEACHERS' RETIREMENT LAW

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FOREWORD

The Legislature, at the special session of June 1944, revised the State Teachers' Retirement Act. Benefits and contributions were increased and the System was placed on a better financial basis. Amendments to the law were made in 1945, 1947, 1951, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1961, 1963, 1965 and annually starting in 1967. The 1959 session renumbered the sections of the code. The 1969 and 1994 sessions recodified the law. In 1995, the Legislature established the Cash Balance Benefit Program, which is contained in Part 14. In 1999, the Legislature added Part 13.5, which provides for a Health Benefits Program.

Volume 1 of this edition of the Teachers' Retirement Law contains all of the provisions set forth in Parts 13, 13.5 and 14 of Division 1 of the California Education Code along with the rules and regulations of the Teachers' Retirement Board, which are in the California Code of Regulations. Volume 2 of this edition contains various pertinent code sections from California statute and from the United States Code. The Teachers' Retirement Law is issued for the convenience of all persons interested in the California State Teachers' Retirement System who have a need to reference or work with the up-to-date provisions of the law. It is intended particularly to assist school administrators and public officials who have duties to perform in connection with the System. In the event that this publication conflicts with actual statute, the statute takes precedence.

TEACHERS' RETIREMENT BOARD

CALSTRS

HOW WILL YOU SPEND YOUR FUTURE?

VOLUME 2

TABLE OF CONTENTS

EXTRACTS FROM THE CODE OF CIVIL PROCEDURE

§ 473. Amendment of pleadings 1

EXTRACTS FROM THE EDUCATION CODE

§ 80. "Any school district" and "all school districts" 5
§ 7000. Enrollment of retired employees and spouses in plan 5
§ 7000.3. Prerequisites for enrollment 6
§ 7000.5. Exclusions 7
§ 7002.5. Duty to contact retired teachers 7
§ 7003. Impairment of existing regulations or contracts; Provision of other benefits 7
§ 7004. Definitions 8
§ 7005. Application of article 8
§ 7007. Health benefits plan for qualified organization 8
§ 7008. Continuation of coverage following disabling injury resulting from violent act against employee performing duties of employment; School members; Local police officers; Applicability 9
§ 14502.1. Review and report on financial and compliance audits; Contents of audit reports; Audit guide 10
§ 37200. School year 11
§ 37201. School month 12
§ 41320.1. Acceptance by district as agreement to specified conditions; Monitoring and review of district by trustee 12
§ 42122. Contents of budget 15
§ 42123. Itemization of revenues and expenditures 16
§ 42124. General reserve 16
§ 42125. Designated fund balance 16
§ 42126. Form of budget 17
§ 42127. Procedure for formulation and adoption of budget; Computation of tax rates; Public review 18
§ 42127.1. Formation of budget review committee on disapproval of budget; Regional review committee 23
§ 42127.2. Selection of review committee; Review of proposed budget and recommendations 24
§ 42127.3. Acceptance of recommendation of approval; Proposed alternative budget; Actions by Superintendent 25
§ 42127.4. Continued operation under last adopted budget 27
§ 42127.5. Statement concerning negative unrestricted fund balance or negative cash balance 27
§ 42127.6. Determination and notice of fiscal distress of district; Report and proposed remedial actions; Appeal; Reorganized school districts; Authority of Superintendent 27
§ 42127.8. Establishment of County Office Fiscal Crisis and Management Assistance Team; Members; Governing board; Functions; Assessments; Reimbursement to department; Regional teams of education finance experts 32
§ 42127.9. Appeal of changes in district's budget 34
§ 42128. Effect of neglect or refusal to make a budget 35
§ 42129. Submission of required reports; Delinquent reports 35
§ 44041. Deductions in salary payment as requested by employee 36

§ 44041.5. Contract with a third-party administrator regarding annuity contract and custodial account or deferred compensation plan 37
§ 44043. Temporary disability 39
§ 44044. Retention of temporary disability checks 40
§ 44252.5. Administering state basic skills assessment test; Agreements with other states; Proficiency 40
§ 44830. Employment of certificated persons; Basic skills proficiency test; Emergency substitute teachers; Exemptions 41
§ 44830.3. Employment of district interns; Requirements; Assistance and guidance; Professional development plan; Compensation; Credentialing of district interns 45
§ 44856. "Sojourn certificated employees" 49
§ 44907. Effect of retirement 49
§ 44917. Classification of substitute employees; Temporary employment deemed probationary employment 50
§ 44922. Regulations allowing reduction of workload to part–time duties 51
§ 44929. Credit for additional years to encourage retirement of certificated employees 53
§ 44929.1. [Section repealed 2005.] 55
§ 44957. Rights of probationary employee terminated due to reduction in employees 55
§ 44965. Granting of leaves of absence after pregnancy and childbirth 57
§ 44966. Leaves of absence for study and travel 57
§ 44967. Time qualifications for leaves of absence for travel and study 58
§ 44968. Service and compensation during leaves of absence for travel and study 59
§ 44968.5. Agreement not to receive compensation during leave of absence 59
§ 44969. Manner of payment for leave of absence time 59
§ 44970. Pro rata reduction of payment and division of bond proceeds upon partial default 60
§ 44984. Required rules for industrial accident and illness leaves of absence 60
§ 44987. Leave of absence for service as elected officer of public employee organization 61
§ 44987.3. Leave of absence to serve on certain boards or committees 63
§ 45025. Part–time employees 64
§ 45028. Teachers; Technical assistance and planning grant funding 65
§ 45134. Age limits; Employment of persons receiving retirement allowance 69
§ 47605. Petition to establish school; Public hearing; Grounds for grant or denial; Requirements for school; Oversight by local education agency; Teacher qualifications; Audit report (Charter schools) 71
§ 47611. Participation in State Teachers' Retirement Plan 78
§ 47611.3. Creation of reports required by retirement systems by school district or county office of education; Condition 78
§ 48927. Application of chapter to "state special schools" 79
§ 52055.57. Identification of program improvement local educational agencies; Notification; Self-assessment; Sanctions; Federal improvement funding; Funds available for agencies not identified as program improvement local educational agency 80
§ 52055.58. Transmission of final evaluation of pilot project involving district assistance and intervention teams 85
§ 52055.59. Evaluation of corrective actions taken by local educational agencies identified for corrective action 85

§ 52055.60. Certain schools, county offices of education, or charter schools identified for program improvement or corrective action allowed to utilize certain categorical program flexibility provisions (Inoperative July 1, 2013; Repealed January 1, 2014) ... 86
§ 84040. Strengthening fiscal accountability; Requirement for annual audit ... 86
§ 84040.5. Statements and information in audit reports; Development of audit procedures; Costs ... 87
§ 87002. "Administrator"; "Educational administrator"; "Classified administrator" ... 88
§ 87040. Deduction in salary payment as requested by employee ... 89
§ 87040.5. Contract with a third-party administrator regarding annuity contract and custodial account or deferred compensation plan ... 90
§ 87482.5. Classification of certain instructors as temporary employees; Effect of service as substitute; Service in professional ancillary activities ... 92
§ 87483. Regulations allowing reduction of workload to part–time duties ... 93
§ 87488. Credit of additional years to encourage retirement of academic employees; Conditions ... 95
§ 87488.1. [Section repealed 2005.] ... 96
§ 88001. Definitions ... 96
§ 88033. Age limits ... 97

EXTRACTS FROM THE GOVERNMENT CODE

§ 1243. Effects of conviction for crimes arising out of official duties as public official [Section renumbered Gov C § 7522.70 effective January 1, 2013] ... 99
§ 3540.1. Definitions ... 99
§ 6254. Records exempt from disclosure requirements ... 103
§ 6254.26. Disclosure of specified records regarding alternative investments in which public investment funds invest ... 138
§ 7480. Exempted disclosures (First of two) ... 139
§ 7480. Exempted disclosures (Second of two) ... 147
§ 7500. Sex differential in contribution rate ... 152
§ 7501. Legislative intent ... 152
§ 7502. Review of financial reports and triennial valuations of public retirement systems; Advisory committee ... 153
§ 7503. Preparation of annual report by state and local public retirement systems ... 153
§ 7504. Services to be performed by enrolled actuary; Submission of audited financial statements ... 154
§ 7505. Direct transmission of benefits into payee's bank account ... 155
§ 7506. Direct deposit of beneficiary's funds ... 155
§ 7506.5. Agreements regarding direct deposits programs ... 155
§ 7507. Actuarial evaluations of future annual costs; Applicability ... 155
§ 7507.2. California Actuarial Advisory Panel ... 157
§ 7507.5. Notice to Legislature concerning proposed changes in University of California Retirement System ... 158
§ 7508. Service on public boards by retired members of state retirement system ... 158
§ 7508.5. Representation before retirement board prohibited ... 158
§ 7509. Exemption from interest rate restrictions ... 159
§ 7510. Investments by public retirement systems in real property ... 159
§ 7511. Authority to purchase insurance for fiduciaries ... 160
§ 7512. Provision of annual report to members ... 161
§ 7513. Election to have distribution paid directly to eligible retirement plan; Direct rollover ... 161

§ 7513.5. Compliance with nondiscrimination laws by corporations doing business in Northern Ireland in which systems have invested assets 161
§ 7513.6. Investments in Sudan prohibited in specified circumstances 162
§ 7513.7. California Public Divest from Iran Act (Operative term contingent) 165
§ 7513.8. Definitions for Sections 7513.85, 7513.86, 7513.87, 7513.9, 7513.95 169
§ 7513.85. Disclosure of payments to placement agents; Violation 170
§ 7513.86. Placement agent registered as lobbyist 170
§ 7513.87. Filing of reports by person acting as placement agent 171
§ 7513.9. Campaign contributions by placement agent 171
§ 7513.95. Provision of investment product prohibited 172
§ 7513.97. Investment in bonds or other evidences of indebtedness unconditionally guaranteed by foreign governments 172
§ 7514. Investment in bonds or other evidences of indebtedness unconditionally guaranteed by foreign governments 172
§ 7514.1. Investment of state or local retirement system in obligations of international financial institutions 173
§ 7514.2. Prioritization of investment in in-state infrastructure projects 173
§ 7514.3. Establishment of credit enhancement programs by state pension systems 174
§ 7514.5. Membership in another retirement system; Specified period of time 174
§ 7515. Intent of chapter 174
§ 7516. Confidential information 174
§ 7520. Deposits with savings and loan associations in exchange for residential construction loans 175
§ 7522. Citation of article 175
§ 7522.02. Applicability of article; Retirement plan for individuals employed by subsequent employer for first time or after specified date; Defined benefit pension plan; Defined contribution plan 175
§ 7522.04. Definitions 176
§ 7522.10. Modification of plans required; Pensionable compensation; Limitations on defined or combination of defined benefits; Employer contributions 177
§ 7522.15. Offer of defined benefit formulas 178
§ 7522.18. Offer of supplemental defined benefit plan 178
§ 7522.20. Formula for retirement systems offering a defined benefit plan for nonsafety members; Pensionable compensation; New members of State Teachers' Retirement System 179
§ 7522.25. Formula for retirement systems offering a defined benefit plan for safety members; Basic Safety Plan; Safety Option Plan One; Safety Option Plan Two; Duties of employer; Pensionable compensation 180
§ 7522.30. Equal sharing of normal costs between public employers and public employees; Standard; Contribution rate; Prior contract 183
§ 7522.32. Determination of retirement benefit for new member of public retirement system; Final compensation 184
§ 7522.34. "Pensionable compensation" of new member of public retirement system 184
§ 7522.40. Limitations on health benefit vesting schedule or other specified retirement benefits for manager or employee or officer excluded from collective bargaining 185
§ 7522.42. Determination of retirement benefit for new member of public retirement; Maximum salary, compensation, or payrate taken into account under plan 185
§ 7522.43. Plan of replacement benefits for members, survivors or beneficiaries 185
§ 7522.44. Enhancement to public employee's retirement formula or retirement benefit 185
§ 7522.46. Purchase of nonqualified service credit 186

§ 7522.48. Final compensation of pension or benefit for elective or appointed officer on city council or county board of supervisors 186
§ 7522.52. Employer's contribution to defined benefit plan in combination with employee contributions; Suspension of contributions..... 187
§ 7522.56. Provisions applicable to person receiving pension benefit from public retirement system; Section supersedes conflicting provisions 187
§ 7522.57. Provisions applicable to retired person receiving pension benefit appointed to salaried position on state board or commission after specified date; Section supersedes conflicting provisions..... 188
§ 7522.66. Provisions applicable to safety member retired for industrial disability..... 189
§ 7522.70. Effects of conviction for crimes arising out of official duties as public official..... 189
§ 7522.72. Provisions applicable to employee first employed by public employer or first elected or appointed to office before January 1, 2013; Applicability of certain laws 190
§ 7522.74. Provisions applicable to employee first employed by public employer or first elected or appointed to office on or after January 1, 2013; Applicability of certain laws..... 191
§ 11126. Closed session on issues relating to public employee; Employee's right to public hearing; Closed sessions not prohibited by article; Abrogation of lawyer-client privilege..... 192
§ 16642. Indemnification for decisions pursuant to Government Code §§ 7513.6, 7513.7..... 202

CHAPTER 7. THE CALIFORNIA PENSION OBLIGATION FINANCING ACT
PART 3 OF DIVISION 4
TITLE 2 OF THE GOVERNMENT CODE

ARTICLE 1. GENERAL PROVISIONS..... 203

§ 16910. [Section repealed 2010.]..... 203
§ 16911. [Section repealed 2010.]..... 203
§ 16912. [Section repealed 2010.]..... 203
§ 16913. [Section repealed 2010.]..... 203

ARTICLE 2. ISSUANCE OF BONDS TO FINANCE THE PROGRAM 203

§ 16920. [Section repealed 2010.]..... 203
§ 16921. [Section repealed 2010.]..... 203
§ 16922. [Section repealed 2010.]..... 203
§ 16923. [Section repealed 2010.]..... 204
§ 16924. [Section repealed 2010.]..... 204
§ 16925. [Section repealed 2010.]..... 204
§ 16926. [Section repealed 2010.]..... 204
§ 16927. [Section repealed 2010.]..... 204
§ 16928. [Section repealed 2010.]..... 204
§ 16929. [Section repealed 2010.]..... 204

ARTICLE 3. MISCELLANEOUS PROVISIONS 204

§ 16930. [Section repealed 2010.]..... 204

§ 16931. [Section repealed 2010.] ... 204
§ 16932. [Section repealed 2010.] ... 205
§ 16933. [Section repealed 2010.] ... 205
§ 16934. [Section repealed 2010.] ... 205
§ 16935. [Section repealed 2010.] ... 205
§ 20098. Compensation for specified investment officers and portfolio managers; Principles; Civil service appointments; Limits on taking specified actions for two years after leaving such positions in certain circumstances ... 205
§ 20309. Election as to retirement system ... 206
§ 20309.5. Subsequent employment of members ... 207
§ 20343. Forfeiture of position ... 207
§ 21267. Authorization for direct deposit of benefits; Refunds of deposits after date of death ... 207
§ 22009.03. Public agency ... 207
§ 22009.1. What is included in "retirement system" ... 208
§ 22150. Divisions of retirement system ... 209
§ 22155. Modification to agreement for transfer to division of retirement system ... 210
§ 22156. Medicare coverage through the State Teachers' Retirement Plan ... 210
§ 22201. Application; Execution of agreement with federal agency for coverage of employees of applicant public agency under federal insurance system ... 211
§ 22202. When application deemed made by public agency ... 211
§ 22203. Agreement between public agency and board ... 212
§ 22208. Formal application to board for inclusion of employees in groups included in agreement ... 212
§ 22302. Referendum for specified employees ... 213
§ 22308. Inapplicability of article to divided system ... 214
§ 22560. Reimbursements of costs to state ... 214
§ 22849. Public school employees health care pool feasibility study ... 215
§ 31563. Forfeiture of position ... 215
§ 31565. Election to transfer membership to State Teachers' Retirement System; Withdrawal of accumulated contributions ... 215
§ 82002. "Administrative action"; "Ratemaking proceeding"; "Quasi–legislative proceeding" ... 216
§ 82013. "Committee" ... 217
§ 82023. "Elective office" ... 218
§ 82024. "Elective state office" ... 218
§ 82025.3. "External manager" ... 219
§ 82036. "Late contribution" ... 219
§ 82036.5. "Late independent expenditure" ... 220
§ 82039. "Lobbyist"; When proceeding before commission constitutes "administrative action" ... 220
§ 82047.3. "Placement agent" ... 222
§ 84101. Filing organizational statement; Recipient committee; Independent expenditure committee; Payments ... 223
§ 84101.5. Filing fees ... 224
§ 84200.5. Preelection statements ... 225
§ 84200.9. Filing of preelection statements for Board of Administration of Public Employees' Retirement System or Teachers' Retirement ... 228
§ 84215. Filing; Copies ... 228
§ 84225. Applicability of title; Adoption of regulations ... 230
§ 85204. "Election cycle" ... 230

§ 86206. Payment of fees for contractual services provided by placement agent 231
§ 87314. Appendix of public officials who manage public investments 231
§ 87408. Representation, appearance or communication with influential purpose 232
§ 87409. Aiding, advising, consulting, or assisting a business entity in obtaining award or negotiating a contract 232
§ 87410. Acceptance of compensation for providing services as a placement agent in connection with investments or other business 233

EXTRACTS FROM THE PENAL CODE

§ 2054. Establishing and maintaining classes for inmates by Department of Corrections 234

EXTRACTS FROM THE PROBATE CODE

§ 13100. Collection or transfer of personal property without probate (Payment of death benefit to beneficiary) 236

EXTRACTS FROM THE PUBLIC CONTRACT CODE
DIVISION 2. GENERAL PROVISIONS
PART 1. ADMINISTRATIVE PROVISIONS
CHAPTER 2.7. IRAN CONTRACTING ACT OF 2010

§ 2200. Citation of chapter (Operative term contingent) 237
§ 2201. Legislative findings and declarations (Operative term contingent) 237
§ 2202. Definitions (Operative term contingent) 238
§ 2202.5. Engagement in investment activities in Iran (Operative term contingent) 239
§ 2203. Ineligibility to bid due to engaging in investment activities with Iran; List of ineligible persons; Exceptions (Operative term contingent) 239
§ 2204. Certification requirement; Applicability (Operative term contingent) 241
§ 2205. Violations; Report to Attorney General (Operative term contingent) 241
§ 2206. Preemption (Operative term contingent) 242
§ 2207. Written notice of description of chapter to U.S. Attorney General (Operative term contingent) 243
§ 2208. Severability (Operative term contingent) 243

EXTRACTS FROM THE PUBLIC RESOURCES CODE

§ 6217.5. Deposit of funds in State Treasury; Crediting Teachers' Retirement Fund 244
§ 6475. Citation of chapter 244
§ 6477. Reports required by commission 244
§ 7301. Lands authorized to be sold; Payment 245
§ 7303. Exchange of public lands; Sale of lands acquired 248
§ 7303.5. Exchange for other purposes 248
§ 7304. Use of lands as bases for indemnity scrip 248
§ 7305. Right to patent 249
§ 7306. Sale of timber separately from land 249
§ 7401. "Permanent reservation" and "temporary reservation" 249
§ 8700. Citation of division 249
§ 8701. Legislative findings and declarations 250
§ 8702. Definitions 250
§ 8703. Acquisitions; Eminent domain 251
§ 8704. Acquisition of mineral and other subsurface rights 251
§ 8705. Jurisdiction and authority to administer fund and interest in real property 251

§ 8706. Holding of land by state in sovereign capacity 251
§ 8707. Commission's acceptance of conveyances..... 252
§ 8708. Deposit of money in Pooled Money Investment Fund..... 252
§ 8709. Acquisition costs; Maximum amount..... 252
§ 8709.5. Payment for management and remediation efforts..... 252
§ 8710. Exemption of actions from specified statutes..... 252
§ 8711. School Land Bank Fund; School Land Bank Trustee 253
§ 8712. Trustee's authority to acquire real property or interest therein 253
§ 8713. Open meetings..... 253
§ 8715. Nonexclusivity of provisions 253
§ 8716. Authority of trustee to accept gifts of real property or money 253
§ 8720. Legislative findings and declarations..... 253
§ 8721. "California desert"..... 254
§ 8722. Memorandum of agreement; School land consolidation efforts; Report 254
§ 8723. Submission of land exchange proposal; Priority; Considerations; Report; Costs and expenses; Final approval..... 255

EXTRACTS FROM THE UNITED STATES CODE

TITLE 26. INTERNAL REVENUE CODE 256

§ 401. Qualified pension, profit-sharing, and stock bonus plans *(only subdivision (a) included)*..... 256
§ 402. Taxability of beneficiary of employees' trust 317
§ 403. Taxation of employee annuities 341
§ 408. Individual retirement accounts..... 353
§ 414. Definitions and special rules 377
§ 415. Limitations on benefits and contributions under qualified plans 404
§ 457. Deferred compensation plans of State and local governments and tax-exempt organizations 417
§ 503. Requirements for exemption 424

TITLE 42. THE PUBLIC HEALTH AND WELFARE 428

§ 402. Old-age and survivors insurance benefit payments *(only selected subdivisions included)*..... 428
§ 415. Computation of primary insurance amount *(only selected subdivisions included)*..... 439

INDEX 445

EXTRACTS FROM THE CODE OF CIVIL PROCEDURE

§ 473. Amendment of pleadings

(a)(1) The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

(2) When it appears to the satisfaction of the court that the amendment renders it necessary, the court may postpone the trial, and may, when the postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of any costs as may be just.

(b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. However, in the case of a judgment, dismissal, order, or other proceeding determining the ownership or right to possession of real or personal property, without extending the six–month period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, dismissal, order, or other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her attorney of record, if any, that the order, judgment, dismissal, or other proceeding was taken against him or her and that any rights the party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of the notice, then the application shall be made within 90 days after service of the notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310.

(c)(1) Whenever the court grants relief from a default, default judgment, or dismissal based on any of the provisions of this section, the court may do any of the following:

(A) Impose a penalty of no greater than one thousand dollars ($1,000) upon an offending attorney or party.

(B) Direct that an offending attorney pay an amount no greater than one thousand dollars ($1,000) to the State Bar Client Security Fund.

(C) Grant other relief as is appropriate.

(2) However, where the court grants relief from a default or default judgment pursuant to this section based upon the affidavit of the defaulting party's attorney attesting to the attorney's mistake, inadvertence, surprise, or neglect, the relief shall not be made conditional upon the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or upon compliance with other sanctions ordered by the court.

(d) The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.

Enacted by 1872. Amended by by Code Amdts 1873–74 ch 383 § 60; Code Amdts 1880 ch 14 § 3; Stats 1917 ch 159 § 1; Stats 1933 ch 744 § 34; Stats 1961 ch 722 § 1; Stats 1981 ch 122 § 2; Stats 1988 ch 1131 § 1; Stats 1991 ch 1003 § 1 (SB 882); Stats 1992 ch 427 § 16 (AB 3355), ch 876 § 4 (AB 3296) (ch 876 prevails); Stats 1996 ch 60 § 1 (SB 52).

Historical Derivation: Former CCP § 900a, as added Stats 1919 ch 353 § 1.

Amendments

1873–74 Amendment: Prior to 1873–74 the section read: "The court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may, upon like terms, allow an answer to be made after the time limited by this code; and may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and when, for any cause satisfactory to the court, or the judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or the judge at chambers, in vacation, may grant the relief upon application made within a reasonable time, not exceeding five months after the adjournment of the term. When, from any cause, the summons and a copy of the complaint in an action have not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representative, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action."1873–74 Amendment amended the section to read: "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may, upon like terms, allow an answer to be made after the time limited by this Code, and also relieve a party, or his legal representative, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and when, for any reason satisfactory to the court or the judge thereof, the party aggrieved has failed to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or the judge thereof, in vacation, may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term. When, from any cause, the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond is sued for taking the same, the officer or sureties may, in their answer, set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit, and give judgment according to the right of possession of said property at the time the affidavit was made."

1880 Amendment: Amended the section to read: "The court may in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code; and may, also upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other pro-

ceeding taken against him though his mistake, inadvertence, surprise, or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit, and give judgment according to the right of possession of said property at the time the affidavit was made."

1917 Amendment: Added a second proviso at the end of the second sentence to read: "and provided, further, that said application must be accompanied by a copy of the answer, or other pleading proposed to be filed therein, otherwise said application shall not be granted."

1933 Amendment: Amended the section to read: "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code."When it appears to the satisfaction of the court that such amendment renders it necessary, the court may postpone the trial, and may, when such postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of such costs as may be just."The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken."The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

1961 Amendment: Added "; provided, however, that in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, without extending said six months period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, order or other proceeding has been taken, and upon his attorney of record, if any, notifying said party and his attorney of record, if any, that such order, judgment or other proceeding was taken against him and that any rights said party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of said notice, then such application must be made within 90 days after service of such notice upon the defaulting party or his attorney of record, if any, whichever service shall be later." in the third paragraph.

1981 Amendment: Amended the third paragraph by adding **(1)** "or her" wherever it appears; and **(2)** the last sentence.

1988 Amendment: In addition to making technical changes, added **(1)** the fourth and fifth sentences of the third paragraph; and **(2)** the fourth paragraph.

1991 Amendment: In addition to making technical changes, **(1)** substituted "shall" for "must" wherever it appears in the second sentence of the third paragraph; **(2)** substituted "made no more than six months after entry of judgment, is" for "timely," in the fourth sentence of the third paragraph; **(3)** added "is" after "form, and" in the fourth sentence of the third paragraph; **(4)** added "(1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2)" in the fourth sentence of the third paragraph; **(5)** added "a default or" after "relief from" in the fourth paragraph; and **(6)** added the fifth paragraph.

1992 Amendment: In addition to making technical changes, **(1)** added "dismissal" wherever it appears; **(2)** added the last sentence at the end of the third paragraph; and **(3)** deleted "defaulting" before "party, (2)" in the fourth paragraph.

1996 Amendment: (1) Added subdivisions designations (a)(1), (a)(2), (b), (c)(1), (c)(2), and (d); **(2)** substituted "do any of the following: (A)" for ": (1)"; **(3)** substituted ". (B)" for ", (2)"; and **(4)** substituted ". (C)" for ", or (3)".

EXTRACTS FROM THE EDUCATION CODE

§ 80. "Any school district" and "all school districts"

"Any school district" and "all school districts" mean school districts of every kind or class, except a community college district.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977.

Notes of Decisions

A school district is an independent and separate governmental agency, distinct from the city, town, or county, in which it is situated. Gould v. Richmond School Dist. (1943, Cal App) 58 Cal App 2d 497, 136 P2d 864, 1943 Cal App LEXIS 68.

A school district is a political division of a county, but is not a municipal corporation. Butler v. Compton Junior College Dist. (1947, Cal App) 77 Cal App 2d 719, 176 P2d 417, 1947 Cal App LEXIS 1328.

Public school district is public entity with limited powers. Uhlmann v. Alhambra City High School Dist. (1963, Cal App 2d Dist) 221 Cal App 2d 228, 34 Cal Rptr 341, 1963 Cal App LEXIS 2135.

School district is agency of limited authority and may exercise only statutory powers. Yreka Union High School Dist. v. Siskiyou Union High School Dist. (1964, Cal App 3d Dist) 227 Cal App 2d 666, 39 Cal Rptr 112, 1964 Cal App LEXIS 1226.

School districts are state agencies for local operation of state school system. Yreka Union High School Dist. v. Siskiyou Union High School Dist. (1964, Cal App 3d Dist) 227 Cal App 2d 666, 39 Cal Rptr 112, 1964 Cal App LEXIS 1226.

A community college should be considered a school district within the meaning of statutes regulating the processes of making budgets and levying taxes for the benefit of school districts. San Francisco Community College Dist. v. City and County of San Francisco (1976, Cal App 1st Dist) 58 Cal App 3d 387, 129 Cal Rptr 918, 1976 Cal App LEXIS 1524.

§ 7000. Enrollment of retired employees and spouses in plan

(a) Notwithstanding Article 1 (commencing with Section 53200) of Chapter 2 of Part 1 of Division 2 of Title 5 of the Government Code, a county superintendent of schools, a school district, or a community college district, which provides health and welfare benefits or dental care benefits for the benefit of its certificated employees, shall permit enrollment in, respectively, the health and welfare benefit plan or dental care benefit plan currently provided for its current certificated employees by any former certificated employee thereof who retired therefrom under any public retirement system and his or her spouse and by any surviving spouse of a former certificated employee thereof who either retired therefrom under any public retirement system or was, at the time of death, both employed thereby in a position requiring contributions to the State Teachers' Retirement System and a member of the State Teachers' Retirement System.

This subdivision does not apply to either the new spouse upon the remarriage of a surviving spouse of a former certificated employee or the children of a certificated or former certificated employee.

(b) A county superintendent of schools or district may develop an experience claims rating for the persons specified in subdivision (a) and may, if appropriate, require those persons to pay different rates as a class. Any plan pursuant to this article shall provide separate single and two–party rates for at least the following classes: for those under 65, for those over 65 who have Medicare A and B, and for those over 65 who do not have Medicare A.

(c) The county superintendent of schools, school district, or community college district shall annually select a one–month period during which persons described by subdivision (a) may elect to enroll in, respectively, the health and welfare benefit plan or the dental care benefit plan or change their enrollment from one to another health and welfare plan or dental care benefit plan, respectively.

(d) A certificated school employee who retired on or before August 24, 1986, the effective date of Chapter 561 of the Statutes of 1986, or the surviving spouse of a certificated employee retired as of

August 25, 1986, shall be permitted to enroll in any district health and dental care plan during the 1986, 1987, and 1988 enrollment periods.

(e) A certificated school employee who retires after August 24, 1986, the effective date of Chapter 561 of the Statutes of 1986, or the surviving spouse of a certificated employee retired as of August 25, 1986, shall be allowed to enroll in the coverage provided by this article within 30 days of losing active employee coverage, but if the retiree does not enroll in a district health or dental care plan during this initial enrollment period, the retiree may be denied further opportunity to do so.

The enrollment period for retirees under this subdivision shall correspond to that provided to active employees, unless a district chooses to offer an additional enrollment period.

(f) This article shall permit enrollment into any district health and dental care plan only once. A retiree or spouse or surviving spouse of a certificated employee who has been previously covered under this article and who has voluntarily terminated that coverage, thereafter may be excluded from obtaining coverage under this article. This subdivision does not apply to a person who is changing plans within a district during an open enrollment period.

(g) Retirees or surviving spouses of certificated employees may be enrolled in a medical care plan pursuant to this section during periods other than those specified therein if they lose their coverage. With documentation of prior coverage, they may be allowed to enroll in a medical care plan, if they do so within 31 days of losing their other coverage.

(h) Any person described by subdivision (a) who elects, pursuant to this article, to be covered by, respectively, a health and welfare benefit plan or dental care benefit plan, may be required to pay all premiums, dues, and other charges, including any increases in the rate of premiums or dues for these persons, and all costs incurred by the district or county superintendent of schools in administering this article.

Added by Stats 1985 ch 991 § 1. Amended by by Stats 1986 ch 235 § 1, ch 561 § 2, effective August 25, 1986, ch 1077 § 1; Stats 1990 ch 1372 § 42 (SB 1854).

Former Sections: Former § 7000, relating to legislative findings, was enacted Stats 1976 ch 1010 § 2, operative April 30, 1977, and repealed Stats 1981 ch 470 § 11.

Historical Derivation: Former Ed C §§ 7001, 7002, as added Stats 1985 ch 991 § 1.

Amendments

1986 Amendment (ch 561): (1) Added the second paragraph of subd (a); and **(2)** added the last sentence of subd (b).

1986 Amendment (ch 1077): Amended the first paragraph of subd (a) by adding **(1)** "either" before "retired therefrom"; and **(2)** "or was, at the time of death, both employed thereby in a position requiring contributions to the State Teachers' Retirement System and a member of the State Teachers' Retirement System" at the end.

1990 Amendment: Added subds (c)—(h).

§ 7000.3. Prerequisites for enrollment

Enrollment in Medicare A shall not be a prerequisite for enrollment in any district health plan pursuant to this article. However, the purchase of Medicare B may be required for enrollment if the participant qualifies to purchase it. In addition, a district health plan may be restructured to pay benefits as if each participant is enrolled in Medicare B as soon as the participant qualifies to purchase Medicare B.

A health plan may condition eligibility for enrollment on the effective assignment of any Medicare benefits for which the enrollee would be eligible.

Added by Stats 1986 ch 561 § 3, effective August 25, 1986.

§ 7000.5. Exclusions

(a) Any health benefits plan provided by any county superintendent of schools, school district, or community college district pursuant to this article may contain a preexisting condition exclusion, as follows:

(1) The coverage of any person who has a break in coverage, may, for the first three months after reenrollment, exclude any care received for a condition which is caused by, or results from, a condition existing at the time of reenrollment or for which the person received medical advice or treatment during the six–month period immediately preceding reenrollment.

(2) Coverage of any person who is confined to a hospital or his or her home for medical treatment at the time of enrollment in a health plan pursuant to this section shall exclude any benefits until the period commencing on the 15th day following the termination of that confinement.

(b) This section does not apply to any entity which provides a health benefits plan which contains a preexisting condition exclusion.

(c) This section does not apply to any changes in enrollment by a person currently enrolled in a school district's health benefits plan or due to any change in enrollment or coverage caused by the retirement of a person.

Added by Stats 1986 ch 561 § 4, effective August 25, 1986.

§ 7002.5. Duty to contact retired teachers

(a) This article does not create a vested retirement right in health and dental care benefits.

(b) The individual districts, the county office, a health plan, an entity providing or arranging a health plan, and the State Teachers' Retirement System do not have any legal duty to contact retired teachers or surviving spouses of certificated employees with regard to this article.

Added by Stats 1986 ch 561 § 6, effective August 25, 1986. Amended by by Stats 1988 ch 985 § 2; Stats 2006 ch 538 § 86 (SB 1852), effective January 1, 2007.

Amendments

1988 Amendment: Added "or surviving spouses of certificated employees" in subd (b).

2006 Amendment: Substituted "providing" for "proving" after "health plan, an entity" in subd (b).

§ 7003. Impairment of existing regulations or contracts; Provision of other benefits

(a) Nothing in this article shall be construed as requiring or permitting the impairment of any contract, board rule, or regulation affecting retired certificated personnel, in existence on the effective date of this article.

(b) Nothing in this article is intended to reduce or conflict with any benefit provided in the federal Consolidated Omnibus Budget Reconciliation Act of 1986 (Public Law 99–272).

(c) Nothing in this article mandates the provision of life insurance or vision care.

Added by Stats 1985 ch 991 § 1. Amended by by Stats 1986 ch 561 § 7, effective August 25, 1986.

Former Sections: Former § 7003, relating to suspension and dismissal, was enacted Stats 1976 ch 1010 § 2, operative April 30, 1977, and repealed Stats 1981 ch 470 § 11.

Amendments

1986 Amendment: (1) Designated the former section to be subd (a); and **(2)** added subds (b) and (c).

§ 7004. Definitions

As used in this article:

(a) "Certificated employee" means a member, as defined by Section 22146, of the State Teachers' Retirement System.

(b) "School district" means that district from which the member of the State Teachers' Retirement System last made contributions to the system before retirement.

(c) "Spouse" means a spouse as defined by Section 22171.

Added by Stats 1986 ch 561 § 8, effective August 25, 1986. Amended by by Stats 2004 ch 896 § 5 (AB 2525), effective September 29, 2004.

Former Sections: Former § 7004, relating to appearance before legislative committees, was enacted Stats 1976 ch 1010 § 2, operative April 30, 1977, and repealed Stats 1981 ch 470 § 11.

Amendments

2004 Amendment: Substituted **(1)** "Section 22146" for "Section 22133" in subd (a); and **(2)** "Section 22171" for "Section 22152" in subd (c).

§ 7005. Application of article

This article does not apply to persons receiving benefits pursuant to the Public Employees' Medical and Hospital Care Act (Chapter 1 (commencing with Section 22750) of Part 5 of Division 5 of Title 2 of the Government Code) and to the employers on which their benefits are based.

For purposes of this section, "employer" means a county superintendent of schools, a school district, or a community college district irrespective of whether employees may be represented by different bargaining groups. Notwithstanding any other provision of this part, this article does not apply to employers for those groups of employees for whom coverage under the Public Employees' Medical and Hospital Care Act (Part 5 (commencing with Section 22750) of Division 5 of Title 2 of the Government Code) is provided by contract.

Added by Stats 1986 ch 1280 § 1. Amended by by Stats 2004 ch 69 § 1 (SB 626), effective June 24, 2004.

Former Sections: Former § 7005, relating to appearance before governing boards, was enacted Stats 1976 ch 1010 § 2, operative April 30, 1977, and repealed Stats 1981 ch 470 § 11.

Amendments

2004 Amendment: Substituted "Section 22750" for "Section 22751" throughout the section.

§ 7007. Health benefits plan for qualified organization

(a) Any qualified organization, as defined in subdivision (b), in cooperation with the Public Employees' Retirement System, may develop a health benefits plan which would be available to persons who are members of those organizations, with equal premiums for both active and retired teachers. The plan would be available, on an optional basis, to each school district, county board of education, and a county superintendent of schools which becomes a contracting agency with the Public Employees' Retirement System pursuant to Section 22857 of the Government Code.

(b) "Qualified organization" means an exclusive representative of the certificated or classified employees, as defined by Section 3540.1 of the Government Code, or any organization with a membership of at least 1,000 members who are retirees of the State Teachers' Retirement System, or any or-

ganization with a membership of at least 1,000 members who are faculty members in the California Community Colleges.

(c) This section shall not apply to any contracting agency unless and until the agency elects to be subject to this section pursuant to Section 22857 of the Government Code.

Added by Stats 1987 ch 728 § 11. Amended by Stats 2004 ch 896 § 6 (AB 2525), effective September 29, 2004.

Former Sections: Former § 7007, relating to unprofessional conduct of certificated employees, was enacted Stats 1976 ch 1010 § 2, operative April 30, 1977, and repealed Stats 1981 ch 470 § 11.

Amendments

2004 Amendment: Substituted "Section 22857" for "Section 22857.1" in subds (a) and (c).

§ 7008. Continuation of coverage following disabling injury resulting from violent act against employee performing duties of employment; School members; Local police officers; Applicability

(a) Notwithstanding any other provision of law, a member of the Defined Benefit Program of the State Teachers' Retirement Plan who is disabled as a result of an injury that is a direct consequence of a violent act perpetrated on his or her person while performing duties in the scope of employment, and the employment is creditable under the provisions of the Teachers' Retirement Law (Part 13 (commencing with Section 22000)), may, upon qualifying for a disability under Section 24001 and while receiving an allowance under Section 24002, continue in the district's health care plan and dental care plan by paying all of the employer's and employee's premiums and all of the related administrative costs of the employer.

(b) Notwithstanding any other provision of law, a school member as defined in Section 20370 of the Government Code, or a local police officer as defined in Section 20430 of the Government Code, who is disabled as a result of an injury that is a direct consequence of a violent act perpetrated on his or her person while performing duties in the scope of employment, and the employment is creditable under the Public Employees' Retirement Law (Part 3 (commencing with Section 20000) of Division 5 of Title 2 of the Government Code), may, upon qualifying for a disability and while receiving an allowance under Chapter 12 (commencing with Section 21060) of Part 3 of Division 5 of Title 2 of the Government Code, continue in the employer's health care plan and dental care plan by paying all of the employer's and employee's premiums and all of the related administrative costs of the employer.

(c) Subdivisions (a) and (b) do not apply to any member who is employed by a school district that contracts with the Public Employees' Retirement System for health care coverage under the Public Employees' Medical and Health Care Act, (Part 5 (commencing with Section 22750) of Division 5 of Title 2 of the Government Code).

Added by Stats 1988 ch 1587 § 1. Amended by Stats 1989 ch 177 § 1; Stats 2004 ch 69 § 2 (SB 626), effective June 24, 2004.

Amendments

1989 Amendment: Added subd (c).

2004 Amendment: (1) Amended subd (a) by **(a)** substituting "a member of the Defined Benefit Program of the State Teachers' Retirement Plan" for "a member of the State Teachers' Retirement System"; **(b)** deleting "State" before "Teachers' Retirement Law"; **(c)** substituting "Section 24001 and while receiving an allowance under Section 24002" for "Section 23902 and while receiving an allowance under Section 23903"; and **(d)** deleting the comma after "dental care plan"; **(2)** amended subd (b) by **(a)** substituting "Section 20370 of the Government Code, or a local police officer as defined in Section 20430 of the Government Code" for "Section 20013 of the Government code, or a local policeman as defined in Section 20020.8 of the Government Code"; **(b)** substi-

tuting "Chapter 12 (commencing with Section 21060" for "Chapter 8 (commencing with Section 20950"; and **(c)** deleting the comma after "dental care plan"; and **(3)** amended subd (c) by substituting **(a)** "member who is employed by a school district that contracts" for "member who is employed by a school district which contracts"; and **(b)** "Section 22750" for "Section 22751".

§ 14502.1. Review and report on financial and compliance audits; Contents of audit reports; Audit guide

(a) The Controller, in consultation with the Department of Finance and the State Department of Education, shall develop a plan to review and report on financial and compliance audits. The plan shall commence with the 2003–04 fiscal year for audits of school districts, other local education agencies, and the offices of county superintendents of schools. The Controller, in consultation with the Department of Finance, the State Department of Education, and representatives of the California School Boards Association, the California Association of School Business Officials, the California County Superintendents Educational Service Association, the California Teachers Association, the California Society of Certified Public Accountants, shall recommend the statements and other information to be included in the audit reports filed with the state, and shall propose the content of an audit guide to carry out the purposes of this chapter. A supplement to the audit guide may be suggested in the audit year, following the above process, to address issues resulting from new legislation in that year that changes the conditions of apportionment. The proposed content of the audit guide and any supplement to the audit guide shall be submitted by the Controller to the Education Audits Appeal Panel for review and possible amendment.

(b) The audit guide and any supplement shall be adopted by the Education Audits Appeal Panel pursuant to the rulemaking procedures of the Administrative Procedure Act as set forth in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. It is the intent of the Legislature that, for the 2003–04 fiscal year, the audit guide be adopted by July 1 of the fiscal year to be audited. A supplemental audit guide may be adopted to address legislative changes to the conditions of apportionment. It is the intent of the Legislature that supplements be adopted before March 1 of the audit year. Commencing with the 2004–05 fiscal year, and each fiscal year thereafter, the audit guide shall be adopted by July 1 of the fiscal year to be audited. A supplemental audit guide may be adopted to address legislative changes to the conditions of apportionment. The supplements shall be adopted before March 1 of the audit year. To meet these goals and to ensure the accuracy of the audit guide, the process for adopting emergency regulations set forth in Section 11346.1 of the Government Code may be followed to adopt the guide and supplemental audit guide. It is the intent of the Legislature that once the audit guide has been adopted for a fiscal year, as well as any supplement for that year, thereafter only suggested changes to the audit guide and any additional supplements need be adopted pursuant to the rulemaking procedures of the Administrative Procedure Act. The audit guide and any supplement shall be issued in booklet form and may be made available by any means deemed appropriate. The Controller and consultants in the development of the suggested audit guide and any supplement shall work cooperatively on a timeline that will allow the education audits appeal panel to meet the July 1 and March 1 issuance dates. Consistent with current practices for development of the audit guide before the 2003–04 fiscal year, the Controller shall provide for the adoption of procedures and timetables for the development of the suggested audit guide, any supplement, and the format for additions, deletions, and revisions.

(c) For the audit of school districts or county offices of education electing to take formal action pursuant to Sections 22714, 22714.5, 44929, and 44929.1, the audit guide content proposed by the Controller shall include, but not be limited to, the following:

(1) The number and type of positions vacated.

(2) The age and service credit of the retirees receiving the additional service credit provided by Sections 22714, 22714.5, 44929, and 44929.1.

(3) A comparison of the salary and benefits of each retiree receiving the additional service credit with the salary and benefits of the replacement employee, if any.

(4) The resulting retirement cost, including interest, if any, and postretirement health care benefits costs, incurred by the employer.

(d) The Controller shall annually prepare a cost analysis, based on the information included in the audit reports for the prior fiscal year, to determine the net savings or costs resulting from formal actions taken by school districts and county offices of education pursuant to Sections 22714, 22714.5, 44929, and 44929.1, and shall report the results of the cost analysis to the Governor and the Legislature by April 1 of each year.

(e) All costs incurred by the Controller to implement subdivision (c) shall be absorbed by the Controller.

(f) This section shall become operative July 1, 2003 and shall apply to the preparation of the audit guide for school district audits commencing with the 2003–04 fiscal year.

Added by Stats 2002 ch 1128 § 4 (AB 2834), operative July 1, 2003. Amended by Stats 2003 ch 313 § 2 (AB 1207), operative July 1, 2003.

Amendments

2003 Amendment: Substituted "Sections 22714, 22714.5, 44929, and 44929.1" for "Section 22714 and 44929" in subds (c), (c)(2), and (d).

§ 37200. School year

The school year begins on the first day of July and ends on the last day of June.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977.

Notes of Decisions

There are no constitutional or statutory provisions making the operation of summer school classes or programs a mandatory requirement for a California school district. Under the Education Code the establishment and maintenance of summer school classes and programs is only permissive, rather than mandatory, and provisions of that code make summer school a discretionary matter with the governing board of education for each school district. The mere fact that there has been a traditional offering of summer school, without fee, by a public school district, does not transform the permissive nature of summer school under the statutes permitting the offering of summer school by a school district to a mandatory requirement that summer school be offered by that school district. California Teachers Assn. v. Board of Education (1980, Cal App 2d Dist) 109 Cal App 3d 738, 167 Cal Rptr 429, 1980 Cal App LEXIS 2197.

The trial court properly denied the petition of a teacher's association and students in a school district for a writ of mandate and their motion for a preliminary injunction to compel a school board to operate free summer school classes and programs in lieu of the operation of such classes and programs by a private organization on public school premises, in exchange for tuitional fees, pursuant to the board's agreement granting the use of the school district facilities for that purpose. The writ and preliminary injunction were sought in connection with the association's and students' complaint alleging four causes of action for the compelling of the board's operation of the summer school classes and programs. In support of the first cause of action for a writ of mandamus and the second cause of action for injunctive relief, the complaint alleged students in the board's district were being deprived of their constitutional and statutory right to a district-operated free summer school. In support of the third cause of action for a writ of mandate, the complaint alleged the board's grant of the use of its facilities for a privately operated summer school violated its collective bargaining agreement with the association. In support of the fourth cause of action for declaration relief the complaint alleged as a basis therefor essentially the same facts as alleged in support of the other causes. Implicit in the trial court's denial of a writ of mandate and injunctive relief was its conclusion that the operation of the summer school by the private organization was a completely separate and distinct operation from that of the school district. In the absence of findings, on appeal every intendment is in favor of the judgment, as it is presumed that every act or inference essential to support of the judgment and warranted by the evidence was found by the trial court. California Teachers Assn. v. Board of Education (1980, Cal App 2d Dist) 109 Cal App 3d 738, 167 Cal Rptr 429, 1980 Cal App LEXIS 2197.

In serving a teacher with written notice of charges of incompetency on the 87th of 176 student class days scheduled for that school year, a school district whose school year was not divided into terms or semesters fully complied with the requirement of Ed. Code, § 44938 (formerly § 13407) that the teacher be given written notice "during the preceding term of half school year." Under § 44938, which is part of a scheme that contemplates that a school district will have the opportunity to observe a teacher instructing classes prior to a determination to send her a notice of incompetency, the educational year is the appropriate period of time in which to calculate the "preceding half school year", for the notice preliminary to a dismissal proceeding, rather than the defined "school year" in Ed. Code, § 37200, beginning in July and ending in June, which is intended to deal with fiscal considerations. McKee v. Commission on Professional Competence (1981, Cal App 2d Dist) 114 Cal App 3d 718, 171 Cal Rptr 81, 1981 Cal App LEXIS 1354.

§ 37201. School month

(a) A school month is 20 days or four weeks of five days each, including legal holidays but excluding weekend makeup classes. For the purposes of counting attendance only in providing for a school calendar the winter vacation period, or any portion thereof, may be excluded by the school district in the definition of a school month.

(b) The provisions of subdivision (a) of this section are limited to defining a school month for attendance–counting purposes only.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended by Stats 1983 ch 915 § 1; Stats 1987 ch 1452 § 244.

Amendments

1983 Amendment: Divided former subd (a) into the first and second sentences by substituting "but excluding weekend makeup classes pursuant to Section 37228." for "; provided, however, that".

1987 Amendment: (1) Amended subd (a) by **(a)** deleting "pursuant to Section 37228" at the end of the first sentence; and **(b)** substituting "winter" for "Christmas" before "vacation" in the second sentence; and **(2)** deleted the former second sentence of subd (b) which read: "A school month for employee pay purposes may be designated by the governing board to begin on any day of the week."

§ 41320.1. Acceptance by district as agreement to specified conditions; Monitoring and review of district by trustee

Acceptance by the school district of the apportionments made pursuant to Section 41320 constitutes the agreement by the school district to all of the following conditions:

(a) The Superintendent shall appoint a trustee who has recognized expertise in management and finance and may employ, on a short-term basis, staff necessary to assist the trustee, including, but not limited to, certified public accountants, as follows:

(1) The expenses incurred by the trustee and necessary staff shall be borne by the school district.

(2) The Superintendent shall establish the terms and conditions of the employment, including the remuneration of the trustee. The trustee shall serve at the pleasure of, and report directly to, the Superintendent.

(3) The trustee, and necessary staff, shall serve until the school district has adequate fiscal systems and controls in place, the Superintendent has determined that the school district's future compliance with the fiscal plan approved for the school district under Section 41320 is probable, and the Superintendent decides to terminate the trustee's appointment, but in no event, for less than three years. The Superintendent shall notify the county superintendent of schools, the Legislature, the Department of Finance, and the Controller no less than 60 days before the time that the Superintendent expects these conditions to be met.

(4) Before the school district repays the loan, including interest, the recipient of the loan shall select an auditor from a list established by the Superintendent and the Controller to conduct an audit of its fiscal systems. If the fiscal systems are deemed to be inadequate, the Superintendent may retain the

trustee until the deficiencies are corrected. The cost of this audit and any additional cost of the trustee shall be borne by the school district.

(5) Notwithstanding any other law, all reports submitted to the trustee are public records.

(6) To facilitate the appointment of the trustee and the employment of necessary staff, for purposes of this section, the Superintendent is exempt from the requirements of Article 6 (commencing with Section 999) of Chapter 6 of Division 4 of the Military and Veterans Code and Part 2 (commencing with Section 10100) of Division 2 of the Public Contract Code.

(7) Notwithstanding any other law, the Superintendent may appoint an employee of the department to act as trustee for up to the duration of the trusteeship. The salary and benefits of that employee shall be established by the Superintendent and paid by the school district. During the time of appointment, the employee is an employee of the school district, but shall remain in the same retirement system under the same plan as if the employee had remained in the department. Upon the expiration or termination of the appointment, the employee shall have the right to return to his or her former position, or to a position at substantially the same level as that position, with the department. The time served in the appointment shall be counted for all purposes as if the employee had served that time in his or her former position with the department.

(b) (1) The trustee appointed by the Superintendent shall monitor and review the operation of the school district. During the period of his or her service, the trustee may stay or rescind an action of the governing board of the school district that, in the judgment of the trustee, may affect the financial condition of the school district.

(2) After the trustee's period of service, and until the loan is repaid, the county superintendent of schools that has jurisdiction over the school district may stay or rescind an action of the governing board of the school district that, in his or her judgment, may affect the financial condition of the school district. The county superintendent of schools shall notify the Superintendent, within five business days, if he or she stays or rescinds an action of the governing board of the school district. The notice shall include, but not be limited to, both of the following:

(A) A description of the governing board of the school district's intended action and its financial implications.

(B) The rationale and findings that support the county superintendent of school's decision to stay or rescind the action of the governing board of the school district.

(3) If the Superintendent is notified by the county superintendent of schools pursuant to paragraph (2), the Superintendent shall report to the Legislature, on or before December 30 of every year, whether the school district is complying with the fiscal plan approved for the school district.

(4) The Superintendent may establish timelines and prescribe formats for reports and other materials to be used by the trustee to monitor and review the operations of the school district. The trustee shall approve or reject all reports and other materials required from the school district as a condition of receiving the apportionment. The Superintendent, upon the recommendation of the trustee, may reduce an apportionment to the school district in an amount up to two hundred dollars ($200) per day for each late or unacceptable report or other material required under this part, and shall report to the Legislature a failure of the school district to comply with the requirements of this section. If the Superintendent determines, at any time, that the fiscal plan approved for the school district under Section 41320 is unsatisfactory, he or she may modify the plan as necessary, and the school district shall comply with the plan as modified.

(c) At the request of the Superintendent, the Controller shall transfer to the department, from an apportionment to which the school district would otherwise have been entitled pursuant to Section 42238, the amount necessary to pay the expenses incurred by the trustee and associated costs incurred by the county superintendent of schools.

(d) For the fiscal year in which the apportionments are disbursed and every year thereafter, the Controller, or his or her designee, shall cause an audit to be conducted of the books and accounts of the school district, in lieu of the audit required by Section 41020. At the Controller's discretion, the audit may be conducted by the Controller, his or her designee, or an auditor selected by the school district

and approved by the Controller. The costs of these audits shall be borne by the school district. These audits shall be required until the Controller determines, in consultation with the Superintendent, that the school district is financially solvent, but in no event earlier than one year following the implementation of the plan or later than the time the apportionment made is repaid, including interest. In addition, the Controller shall conduct quality control reviews pursuant to subdivision (c) of Section 14504.2.

(e) For purposes of errors and omissions liability insurance policies, the trustee appointed pursuant to this section is an employee of the local educational agency to which he or she is assigned. For purposes of workers' compensation benefits, the trustee is an employee of the local educational agency to which he or she is assigned, except that a trustee appointed pursuant to paragraph (7) of subdivision (a) is an employee of the department for that purpose.

(f) Except for an individual appointed by the Superintendent as trustee pursuant to paragraph (7) of subdivision (a), the state-appointed trustee is a member of the State Teachers' Retirement System, if qualified, for the period of service as trustee, unless the trustee elects in writing not to become a member. A person who is a member or retirant of the State Teachers' Retirement System at the time of appointment shall continue to be a member or retirant of the system for the duration of the appointment. If the trustee chooses to become a member or is already a member, the trustee shall be placed on the payroll of the school district for purposes of providing appropriate contributions to the system. The Superintendent may also require that an individual appointed as trustee pursuant to paragraph (7) of subdivision (a) be placed on the payroll of the school district for purposes of remuneration, other benefits, and payroll deductions. For purposes of workers' compensation benefits, the state-appointed trustee is deemed an employee of the local educational agency to which he or she is assigned, except that a trustee who is appointed pursuant to paragraph (7) of subdivision (a) is an employee of the department for that purpose.

Added Stats 1987 ch 990 § 4. Amended Stats 1988 ch 1461 § 13, ch 1462 § 1.14; Stats 1989 ch 1256 § 5, effective October 1, 1989; Stats 1991 ch 1213 § 9 (AB 1200); Stats 1992 ch 962 § 3 (SB 1996), effective September 26, 1992; Stats 1993 ch 589 § 40 (AB 2211); Stats 1994 ch 1002 § 5 (AB 3627); Stats 2004 ch 52 § 4 (AB 2756), effective June 21, 2004; Stats 2011 ch 296 § 64 (AB 1023), effective January 1, 2012; Stats 2012 ch 429 § 1 (AB 2279), effective January 1, 2013.

Amendments

1988 Amendment: (1) Substituted "the amount" for "such amount as is" after Section 42238," in subd (c); and **(2)** added subd (e). (As amended by Stats 1988, ch 1462, compared to the section as it read prior to 1988. This section was also amended by an earlier chapter, ch 1461. See Gov C § 9605.)

1989 Amendment: Amended the first paragraph in subd (a) by adding **(1)** "and the district has adequate fiscal systems and controls in place" at the end of the fourth sentence; and **(2)** the fifth through seventh sentences.

1991 Amendment: (1) Amended the first paragraph of subd (a) by **(a)** adding "the" before "Public Instruction" in the first sentence; **(b)** deleting "until the loan called for by this section is repaid and the district has adequate fiscal systems and controls in place" at the end of the fourth sentence; **(c)** adding the fifth sentence; and **(d)** substituting "the" for "it" after "district repays" in the sixth sentence; and **(2)** added the third and last sentence of subd (b).

1992 Amendment: (1) Deleted "the" after "The Superintendent of" in the beginning of subd (a); and **(2)** amended subd (d) by **(a)** substituting "in" for "ii," after "financially solvent, but"; and **(b)** adding the fifth sentence.

1993 Amendment: Routine code maintenance.

1994 Amendment: (1) Substituted "and may employ, on a short–term basis, any staff necessary to assist the trustee, including, but not limited to, certified public accountants, as follows:" for ", and who shall be bonded." after "management and finance" in the introductory clause of subd (a); **(2)** added subdivision designations (a)(1)–(a)(5); **(3)** substituted "any necessary staff" for "the costs of the bonding" after "by the trustee and" in subd (a)(1); **(4)** added ", and any necessary staff," after "The trustee" in subd (a)(3); **(5)** added subds (a)(6) and (a)(7); **(6)** deleted ", the costs of the trustee's bonding," after "by the trustee" in subd (c); **(7)** amended subd (e)

by adding **(a)** "policies" after "insurance" in the first sentence; and **(b)** the second sentence; and **(8)** added subd (f).

2004 Amendment: (1) Substituted "Superintendent" for "superintendent" throughout the section; **(2)** substituted "Superintendent" for "Superintendent of Public Instruction" throughout the section; **(3)** substituted "department" for "State Department of Education" throughout the section; **(4)** substituted "pursuant to Section 41320 constitutes the agreement" for "pursuant to Section 41320 shall constitute agreement" in the introductory clause; **(5)** amended subd (a)(3) by **(a)** substituting "until the loan authorized by this section is repaid" for "until the loan called for by this section is repaid" in the first sentence; and **(b)** adding the last sentence; **(6)** amended subd (a)(5) by **(a)** deleting "provision of" before "law"; and **(b)** substituting "trustee are public records" for "trustee shall be public records"; **(7)** amended subd (a)(7) by **(a)** deleting "provisions of" before "law" in the first sentence; and **(b)** substituting "the employee is an employee" for "the employee shall be deemed an employee" in the third sentence; **(8)** amended subd (e) by substituting **(a)** "pursuant to this section is an employee" for "pursuant to this section shall be deemed to be an employee" in the first sentence; **(b)** "the trustee is an employee" for "the trustee shall be deemed an employee"; and **(c)** "pursuant to paragraph (7) of subdivision (a) is an employee" for "pursuant to paragraph (7) of subdivision (a) shall be deemed an employee" in the last sentence; and **(9)** amended subd (f) by **(a)** substituting "the state–appointed trustee is a member" for "the state–appointed trustee shall be a member" in the first sentence; and **(b)** deleting "deemed" after "pursuant to paragraph (7) of subdivision (a) is" in the last sentence.

2011 Amendment: (1) Substituted "Division 2 of the Public Contract Code" for "the Public Contracts Code" in subd (a)(6); **(2)** substituted "this part" for "Part 24 (commencing with Section 41000)" in the fifth sentence of (b); and **(3)** amended subd (c) by **(a)** substituting "an" for "any" after "department, from"; and **(b)** deleting "any" after "the trustee and".

2012 Amendment: (1) Added "school" wherever it appears in the introductory clause, in subds (a)(1), (a)(4), (c), and (d), and in the second sentence of subd (b)(4); **(2)** amended the introductory clause of subd (a) by deleting **(a)** "of Public Instruction" after "Superintendent"; and **(b)** "any" after "short-term basis,"; **(3)** deleted "any" after "trustee and" in subd (a)(1) and in the first sentence of subd (a)(3); **(4)** amended the first sentence of subd (a)(3) by **(a)** substituting "school" for "loan authorized by this section is repaid, the" after "serve until the"; **(b)** deleting "and" after "controls in place,"; **(c)** adding "school" after "determined that the" and after "approved for the"; and **(d)** adding ", and the Superintendent decides to terminate the trustee's appointment, but in no event, for less than three years"; **(5)** substituted "before" for "prior to" in the second sentence of subd (a)(3); **(6)** amended subd (a)(6) by deleting **(a)** "any" after "the employment of"; and **(b)** "the" before "purposes of"; **(7)** amended the second sentence of subd (b)(1) by **(a)** substituting "governing board of the school district" for "local district governing board"; and **(b)** adding "school" after "condition of the"; **(8)** added subds (b)(2) and (b)(3); **(9)** redesignated former subd (b)(2) to be subd (b)(4); **(10)** amended the third sentence of subd (b)(4) by substituting **(a)** "an apportionment to the school district" for "any apportionment to the district"; and **(b)** "a failure" for "any failure"; **(11)** added "school" after "necessary, and the" in the last sentence of subd (b)(4); **(12)** substituted "every year" for "each year" in the first sentence of subd (d); **(13)** deleted "all" before "purposes of errors" in the first sentence of subd (e); **(14)** substituted "educational" for "education" in the first and second sentences of subd (e) and in the last sentence of subd (f); **(15)** substituted "purposes" for "the purpose" in the second sentence of subd (e) and in the last sentence of subd (f); and **(16)** amended subd (f) by **(a)** deleting "the" after "school district for" in the third sentence; and **(b)** substituting "an individual" for "any individual" in the fourth sentence.

§ 42122. Contents of budget

Effective July 1, 1988, each budget shall show a complete plan and itemized statement of all proposed expenditures of the school district and of all estimated revenues for the ensuing fiscal year, together with a comparison of revenues and expenditures for the existing fiscal year. The budget shall also include the appropriations limit and the total annual appropriations subject to limitation as determined pursuant to Division 9 (commencing with Section 7900) of Title 1 of the Government Code. The county superintendent of schools shall from his or her own records supply to the school district any information that the school district may need to make the comparisons required by this section.

Enacted Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended Stats 1987 ch 917 § 16, ch 1025 § 1.5.

Amendments

1987 Amendment: (1) Added "Effective July 1, 1988," at the beginning; **(2)** deleted ", with the actual revenues and expenditures for the last completed fiscal year and the actual and estimated expenditures" after "revenues and expenditures"; **(3)** added the second sentence; and **(4)** added "or her" in the third sentence.

Notes of Decisions

The record did not indicate that a budget filed by a community college district was inadequate where the parties, in mandate proceedings questioning the power of the county board of supervisors to levy tax at a lower rate than requested by a community college district, stipulated that the record on appeal be augmented to include a copy of a document entitled "California Community Colleges Annual Financial and Budget Report," which report met the statutory requirements as a school district's final budget, where the board of supervisors admitted having received a copy of the report, and where it was stipulated at trial that the community college district's budget was prepared and filed within the time and in the manner prescribed by law. San Francisco Community College Dist. v. City and County of San Francisco (1976, Cal App 1st Dist) 58 Cal App 3d 387, 129 Cal Rptr 918, 1976 Cal App LEXIS 1524.

§ 42123. Itemization of revenues and expenditures

Each budget shall be itemized to set forth the necessary revenues and expenditures in each fund to operate the public schools of the district as authorized by law and on forms prescribed by the Superintendent of Public Instruction.

Enacted Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended Stats 1980 ch 1354 § 37.9, effective September 30, 1980; Stats 1986 ch 1150 § 11.

Amendments

1980 Amendment: Added the second paragraph.

1986 Amendment: Deleted **(1)** ", by program," after "expenditures" in the first paragraph; and **(2)** the former second paragraph which read: "In the case of continuation education schools and classes conducted pursuant to Article 3 (commencing with Section 48430) of Chapter 3 of Part 27, the estimated revenue shall include any allowances authorized pursuant to subdivision (a) of Section 41711 and adjustments pursuant to Section 42241.3 which were ultimately subsumed in the districtwide revenue limit. The information shall be separately identified for any public hearing on the school district budget required by Section 42103."

§ 42124. General reserve

The budget may also contain an amount to be known as the general reserve in such sum as the governing board may deem sufficient, for the next succeeding fiscal year, to meet the cash requirements to which the district's credit may be legally extended for that portion of said next succeeding fiscal year until adequate proceeds of the taxes levied for, or apportionment of state funds made to, the district during such succeeding fiscal year are available to the district.

Enacted Stats 1976 ch 1010 § 2, operative April 30, 1977.

§ 42125. Designated fund balance

The budget may contain amounts to be known as the designated fund balance, which may be designated for any specific purpose as determined by the governing board of the school district, and the unappropriated fund balance. These funds shall be available for appropriation by a majority vote of the members of the governing board, to cover expenditures that have not been provided for or that may have been insufficiently provided for, or for unforeseen requirements as they may arise.

Enacted Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended Stats 1987 ch 917 § 17.

Amendments

1987 Amendment: Substituted **(1)** the first sentence for the former first sentence which read "The budget may also contain an amount to be known as the undistributed reserve."; and **(2)** "These funds shall be available for appropriation by a majority" for "The funds in the undistributed reserve shall be available for appropriation by a two–thirds" in the second sentence.

Notes of Decisions

In an action by a school district and its superintendent for declaratory and injunctive relief, the record contained substantial evidence to support the trial court's finding that an item in the school district's budget called an "appropriation for contingencies" was an "appropriation" and not a "reserve" within the meaning of § 5 of the "bailout bill" (Stats. 1978, ch. 332, § 3), which provides state aid to school districts in the aftermath of Proposition 13, providing also for reduction in such aid if the district's general fund and special reserve fund ending balances exceed 5 percent of the district's general fund total revenue, and defining general fund and special reserves as not including "reserves established by law or a governing board policy" adopted prior to passage of Proposition 13. Although there was a conflict in the opinion testimony concerning whether under proper accounting principles funds not designated for a specific purpose in a subsequent year may be held as a reserve, that conflict was resolved in favor of the state's position that such funds may not be held as a reserve. The testimony of one of the state's witnesses alone was sufficient to establish that the funds designated as an appropriation for contingencies were not restricted for a specific purpose in a subsequent fiscal year but were held as an expenditure account for the existing budget year—the balance of which lost its identity at the end of the fiscal year at issue. Edison School Dist. v. Ross (1982, Cal App 3d Dist) 131 Cal App 3d 362, 182 Cal Rptr 312, 1982 Cal App LEXIS 1564.

"Reserve" is not defined in the "bailout bill." (Stats. 1978, ch. 292 as amended, ch. 332.) However, the bill, enacted as an urgency measure in the immediate aftermath of the passage of Proposition 13, was designed to alleviate the harsh fiscal stringencies imposed upon school districts and local governmental entities by the newly enacted constitutional amendment. The "bailout bill" addressed the immediate fiscal needs of school districts and undertook fairly to apportion available state funds on the basis of the disparate needs of the respective districts in the 1978-1979 fiscal year. To that end the reduction formula of § 5 (Stats. 1978, ch. 332, § 3) was devised to take account of carryover funds available to districts in fiscal year 1978–1979 in the form of unexpended, unallocated appropriations from the preceding year; funds restricted for specific purposes were not counted among those so available for the fiscal year if they were reserved by law or by board policy prior to the passage of Proposition 13. Thus funding for current operations would be state supplemented on the basis of relative need determined without disrupting long-term fiscal planning undertaken in good faith. In light of the evident purposes of the "bailout bill," the "reserve" excepted by § 5 from the reduction formula consists of restricted year-end balances unavailable for appropriation to other budgetary accounts in a succeeding fiscal year. Edison School Dist. v. Ross (1982, Cal App 3d Dist) 131 Cal App 3d 362, 182 Cal Rptr 312, 1982 Cal App LEXIS 1564.

§ 42126. Form of budget

Effective July 1, 1988, each budget shall be made on the number of forms and upon the blanks or in the format prescribed by the Superintendent of Public Instruction. It shall be the duty of the Superintendent of Public Instruction to prepare standard forms or a format necessary to show the budgeting items and comparisons required by this article. The required forms or format shall be furnished to the school districts by the county superintendent of schools.

Enacted Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended Stats 1987 ch 917 § 18.

Amendments

1987 Amendment: Substituted **(1)** the first sentence for the former first sentence which read: "Each budget shall be made in quintuplicate in the form and upon the blanks prescribed by the superintendent of Public Instruction."; **(2)** "or a format" for "and blanks" in the second sentence; and **(3)** "The required forms or format" for "Blanks" in the third sentence.

§ 42127. Procedure for formulation and adoption of budget; Computation of tax rates; Public review

(a) On or before July 1 of each year, the governing board of each school district shall accomplish the following:

(1) Hold a public hearing on the budget to be adopted for the subsequent fiscal year. The budget to be adopted shall be prepared in accordance with Section 42126. The agenda for that hearing shall be posted at least 72 hours before the public hearing and shall include the location where the budget will be available for public inspection.

(A) For the 2011–12 fiscal year, notwithstanding any of the standards and criteria adopted by the state board pursuant to Section 33127, each school district budget shall project the same level of revenue per unit of average daily attendance as it received in the 2010–11 fiscal year and shall maintain staffing and program levels commensurate with that level.

(B) For the 2011–12 fiscal year, the school district shall not be required to demonstrate that it is able to meet its financial obligations for the two subsequent fiscal years.

(2) Adopt a budget. Not later than five days after that adoption or by July 1, whichever occurs first, the governing board of the school district shall file that budget with the county superintendent of schools. That budget and supporting data shall be maintained and made available for public review. If the governing board of the school district does not want all or a portion of the property tax requirement levied for the purpose of making payments for the interest and redemption charges on indebtedness as described in paragraph (1) or (2) of subdivision (b) of Section 1 of Article XIII A of the California Constitution, the budget shall include a statement of the amount or portion for which a levy shall not be made.

(b) The county superintendent of schools may accept changes in any statement included in the budget, pursuant to subdivision (a), of the amount or portion for which a property tax levy shall not be made. The county superintendent of schools or the county auditor shall compute the actual amounts to be levied on the property tax rolls of the school district for purposes that exceed apportionments to the school district pursuant to Chapter 6 (commencing with Section 95) of Part 0.5 of Division 1 of the Revenue and Taxation Code. Each school district shall provide all data needed by the county superintendent of schools or the county auditor to compute the amounts. On or before August 15, the county superintendent of schools shall transmit the amounts computed to the county auditor who shall compute the tax rates necessary to produce the amounts. On or before September 1, the county auditor shall submit the rate computed to the board of supervisors for adoption.

(c) The county superintendent of schools shall do all of the following:

(1) Examine the adopted budget to determine whether it complies with the standards and criteria adopted by the state board pursuant to Section 33127 for application to final local educational agency budgets. The county superintendent of schools shall identify, if necessary, technical corrections that are required to be made to bring the budget into compliance with those standards and criteria.

(2) Determine whether the adopted budget will allow the school district to meet its financial obligations during the fiscal year and is consistent with a financial plan that will enable the school district to satisfy its multiyear financial commitments. In addition to his or her own analysis of the budget of each school district, the county superintendent of schools shall review and consider studies, reports, evaluations, or audits of the school district that were commissioned by the school district, the county superintendent of schools, the Superintendent, and state control agencies and that contain evidence that the school district is showing fiscal distress under the standards and criteria adopted in Section 33127 or that contain a finding by an external reviewer that more than three of the 15 most common predictors of a school district needing intervention, as determined by the County Office Fiscal Crisis and Management Assistance Team, are present. The county superintendent of schools shall either conditionally approve or disapprove a budget that does not provide adequate assurance that the school district will meet its current and future obligations and resolve any problems identified in studies, reports, evaluations, or audits described in this paragraph.

(d) On or before August 15, the county superintendent of schools shall approve, conditionally approve, or disapprove the adopted budget for each school district. If a school district does not submit a budget to the county superintendent of schools, the county superintendent of schools shalldevelop, at school district expense, a budget for that school district by September 15 and transmit that budget to the governing board of the school district. The budget prepared by the county superintendent of schools shall be deemed adopted, unless the county superintendent of schools approves any modifications made by the governing board of the school district. The approved budget shall be used as a guide for the school district's priorities. The Superintendent shall review and certify the budget approved by the county. If, pursuant to the review conducted pursuant to subdivision (c), the county superintendent of schools determines that the adopted budget for a school district does not satisfy paragraph (1) or (2) of that subdivision, he or she shall conditionally approve or disapprove the budget and, not later than August 15, transmit to the governing board of the school district, in writing, his or her recommendations regarding revision of the budget and the reasons for those recommendations, including, but not limited to, the amounts of any budget adjustments needed before he or she can approve that budget. The county superintendent of schools may assign a fiscal adviser to assist the school district to develop a budget in compliance with those revisions. In addition, the county superintendent of schools may appoint a committee to examine and comment on the superintendent's review and recommendations, subject to the requirement that the committee report its findings to the county superintendent of schools no later than August 20. For the 2011–12 fiscal year, notwithstanding any of the standards and criteria adopted by the state board pursuant to Section 33127, the county superintendent of schools, as a condition on approval of a school district budget, shall not require a school district to project a lower level of revenue per unit of average daily attendance than it received in the 2010–11 fiscal year nor require the school district to demonstrate that it is able to meet its financial obligations for the two subsequent fiscal years.

(e) On or before September 8, the governing board of the school district shall revise the adopted budget to reflect changes in projected income or expenditures subsequent to July 1, and to include any response to the recommendations of the county superintendent of schools, shall adopt the revised budget, and shall file the revised budget with the county superintendent of schools. Before revising the budget, the governing board of the school district shall hold a public hearing regarding the proposed revisions, to be conducted in accordance with Section 42103. In addition, if the adopted budget is disapproved pursuant to subdivision (d), the governing board of the school district and the county superintendent of schools shall review the disapproval and the recommendations of the county superintendent of schools regarding revision of the budget at the public hearing. The revised budget and supporting data shall be maintained and made available for public review.

(1) For the 2011–12 fiscal year, notwithstanding any of the standards and criteria adopted by the state board pursuant to Section 33127, each school district budget shall project the same level of revenue per unit of average daily attendance as it received in the 2010–11 fiscal year and shall maintain staffing and program levels commensurate with that level.

(2) For the 2011–12 fiscal year, the school district shall not be required to demonstrate that it is able to meet its financial obligations for the two subsequent fiscal years.

(f) On or before September 22, the county superintendent of schools shall provide a list to the Superintendent identifying all school districts for which budgets may be disapproved.

(g) The county superintendent of schools shall examine the revised budget to determine whether it (1) complies with the standards and criteria adopted by the state board pursuant to Section 33127 for application to final local educational agency budgets, (2) allows the school district to meet its financial obligations during the fiscal year, (3) satisfies all conditions established by the county superintendent of schools in the case of a conditionally approved budget, and (4) is consistent with a financial plan that will enable the school district to satisfy its multiyear financial commitments, and, not later than October 8, shall approve or disapprove the revised budget. If the county superintendent of schools disapproves the budget, he or she shall call for the formation of a budget review committee pursuant to Section 42127.1, unless the governing board of the school district and the county superintendent of

schools agree to waive the requirement that a budget review committee be formed and the department approves the waiver after determining that a budget review committee is not necessary. Upon the grant of a waiver, the county superintendent of schools immediately has the authority and responsibility provided in Section 42127.3. Upon approving a waiver of the budget review committee, the department shall ensure that a balanced budget is adopted for the school district by November 30. If no budget is adopted by November 30, the Superintendent may adopt a budget for the school district. The Superintendent shall report to the Legislature and the Director of Finance by December 10 if any school district, including a school district that has received a waiver of the budget review committee process, does not have an adopted budget by November 30. This report shall include the reasons why a budget has not been adopted by the deadline, the steps being taken to finalize budget adoption, the date the adopted budget is anticipated, and whether the Superintendent has or will exercise his or her authority to adopt a budget for the school district. For the 2011–12 fiscal year, notwithstanding any of the standards and criteria adopted by the state board pursuant to Section 33127, the county superintendent of schools, as a condition on approval of a school district budget, shall not require a school district to project a lower level of revenue per unit of average daily attendance than it received in the 2010–11 fiscal year nor require the school district to demonstrate that it is able to meet its financial obligations for the two subsequent fiscal years.

(h) Not later than October 8, the county superintendent of schools shall submit a report to the Superintendent identifying all school districts for which budgets have been disapproved or budget review committees waived. The report shall include a copy of the written response transmitted to each of those school districts pursuant to subdivision (d).

(i) Notwithstanding any other provision of this section, the budget review for a school district shall be governed by paragraphs (1), (2), and (3), rather than by subdivisions (e) and (g), if the governing board of the school district so elects and notifies the county superintendent of schools in writing of that decision, not later than October 31 of the immediately preceding calendar year. On or before July 1, the governing board of a school district for which the budget review is governed by this subdivision, rather than by subdivisions (e) and (g), shall conduct a public hearing regarding its proposed budget in accordance with Section 42103.

(1) If the adopted budget of a school district is disapproved pursuant to subdivision (d), on or before September 8, the governing board of the school district, in conjunction with the county superintendent of schools, shall review the superintendent's recommendations at a regular meeting of the governing board of the school district and respond to those recommendations. The response shall include any revisions to the adopted budget and other proposed actions to be taken, if any, as a result of those recommendations.

(2) On or before September 22, the county superintendent of schools shall provide a list to the Superintendent identifying all school districts for which a budget may be tentatively disapproved.

(3) Not later than October 8, after receiving the response required under paragraph (1), the county superintendent of schools shall review that response and either approve or disapprove the budget. If the county superintendent of schools disapproves the budget, he or she shall call for the formation of a budget review committee pursuant to Section 42127.1, unless the governing board of the school district and the county superintendent of schools agree to waive the requirement that a budget review committee be formed and the department approves the waiver after determining that a budget review committee is not necessary. Upon the grant of a waiver, the county superintendent has the authority and responsibility provided to a budget review committee in Section 42127.3. Upon approving a waiver of the budget review committee, the department shall ensure that a balanced budget is adopted for the school district by November 30. The Superintendent shall report to the Legislature and the Director of Finance by December 10 if any school district, including a school district that has received a waiver of the budget review committee process, does not have an adopted budget by November 30. This report shall include the reasons why a budget has not been adopted by the deadline, the steps being taken to finalize budget adoption, and the date the adopted budget is anticipated. For the 2011–12 fiscal year, notwithstanding any of the standards and criteria adopted by the state board pursuant to Section

33127, the county superintendent of schools, as a condition on approval of a school district budget, shall not require a school district to project a lower level of revenue per unit of average daily attendance than it received in the 2010–11 fiscal year nor require the school district to demonstrate that it is able to meet its financial obligations for the two subsequent fiscal years.

(4) Not later than 45 days after the Governor signs the annual Budget Act, the school district shall make available for public review any revisions in revenues and expenditures that it has made to its budget to reflect the funding made available by that Budget Act.

(j) Any school district for which the county board of education serves as the governing board of the school district is not subject to subdivisions (c) to (h), inclusive, but is governed instead by the budget procedures set forth in Section 1622.

Added Stats 1981 ch 100 § 6.9. Amended Stats 1985 ch 185 § 1; Stats 1986 ch 1150 § 12; Stats 1987 ch 917 § 19; Stats 1988 ch 1462 § 1.17, operative July 1, 1989; Stats 1991 ch 1213 § 15 (AB 1200); Stats 1992 ch 323 § 6 (AB 2506); Stats 1993 ch 923 § 4 (AB 2185); Stats 2002 ch 1168 § 22 (AB 1818), effective September 30, 2002; Stats 2003 ch 62 § 46 (SB 600); Stats 2004 ch 52 § 12 (AB 2756), effective June 21, 2004; Stats 2005 ch 677 § 19 (SB 512), effective October 7, 2005; Stats 2006 ch 730 § 11 (AB 1967), effective January 1, 2007; Stats 2011 ch 43 § 17 (AB 114), effective June 30, 2011; Stats 2012 ch 589 § 6 (AB 2662), effective January 1, 2013.

Former Sections: Former § 42127, similar to the present section, was enacted Stats 1976 ch 1010 § 2, operative April 30, 1977, and repealed Stats 1981 ch 100 § 6.8.

Amendments

1985 Amendment: In addition to making technical changes, substituted "auditor of his or her county" for "board of supervisors, one copy with the auditor of his county, and" in subd (e).

1986 Amendment: (1) Deleted former subd (a)(3) which read: "(3) For the 1981–82 fiscal year only, the information specified in paragraphs (1) and (2) may be filed separately, but no later than August 1, 1981."; **(2)** added "recommended" near the end of subd (b)(2); **(3)** substituted "September 15" for "the seventh day of September" in subd (d); **(4)** substituted subd (e) for former subd (e) which read: "(e) On or before the 15th day of September, the county superintendent shall approve the adopted budget for each school district as officially adopted and submitted by its governing board, and shall file one copy of the adopted budget for each school district with the auditor of his or her county and one copy with the Superintendent of Public Instruction."; and **(5)** added subds (f)–(g).

1987 Amendment: (1) Added "technical" before "corrections" in subds (b)(1) and (e)(2); **(2)** added "final" after "the adopted" in the introductory clause of subd (e); and **(3)** substituted "regularly scheduled meeting" for "public hearing" in subd (g)(1).

1988 Amendment: (1) Amended subd (b) by **(a)** adding "based on standards and criteria for fiscal stability established pursuant to Section 33127," in the introductory clause; **(b)** substituting "district's budget complies with Section 33127" for "proposed expenditures do not exceed the anticipated revenues and that the anticipated revenues are realistic" in subd (b)(2); and **(c)** deleting "as to anticipated revenues" after "recommendations" in subd (b)(3); **(2)** substituted "that" for "which" after "district for purposes" in the first sentence of subd (c); **(3)** amended subd (e) by **(a)** adding "or disapproves" in the introductory clause; **(b)** substituting subd (e)(1) for former subd (e)(1) which read: "(1) Examining the adopted final budget to determine that the proposed expenditures do not exceed the anticipated revenues, including prior year ending balances, and that the anticipated revenues are realistic."; **(c)** deleting "Examining the adopted final budget and" at the beginning of subd (e)(2); and **(d)** substituting "the standards and criteria established pursuant to Section 33127" for "school financial and budget reporting requirements as prescribed in the California School Accounting Manual" in subd (e)(2); **(4)** substituted "it does not comply with the standards and criteria established pursuant to Section 33127" for "proposed expenditures will exceed anticipated revenues, including prior year ending balances, as described in paragraph (1) of subdivision (e), or that specific technical corrections as described in paragraph (2) of subdivision (e) should be made" in subd (f); **(5)** substituted subd (h) for former subd (h) which read: "(h) On or before November 30, the county superintendent of schools shall transmit a copy of each district's adopted final budget to the county auditor. Further, he or she shall transmit to the Superintendent of Public Instruction a copy of each district's adopted final budget, if he or she provided the district governing board recommendations deemed to be

significant and the governing board did not take actions he or she deemed appropriate. Accompanying these budgets shall be a copy of the county superintendent's recommendations and the school district's response to those recommendations as prescribed by paragraph (2) of subdivision (g)."; and **(6)** added subd (j).

1991 Amendment: Amended the section to read as at present, except for the following amendments.

1992 Amendment: (1) Added "accomplish the following:" at the end of the introductory clause of subd (a); **(2)** added subd (a)(1); **(3)** added subdivision designations (a)(2); **(4)** substituted "Not" for "No" in subds (a)(2) and (e); **(5)** amended subd (g) by adding **(a)** "(1)"; and **(b)** ", (2) allows the district to meet its financial obligations during the fiscal year, and (3) is consistent with a financial plan that will enable the district to satisfy its multiyear financial commitments,"; **(6)** substituted "county superintendent" for "the Superintendent of Public Instruction" after "elects, and notifies" in the first subd (h); and **(7)** redesignated former second subd (h) to be subd (i).

1993 Amendment: (1) Redesignated former subds (e), (f), (h), (h)(2), (h)(3), and (i) to be subds (h), (e), (i), (i)(3), (i)(4), and (j); **(2)** added subds (f) and (i)(2); **(3)** substituted "September 8" for "September 1" in subd (e) and (i)(1); **(4)** substituted "October 8" for "September 15" in subd (g), for "August 20" in subd (h), and for "five working days" in subd (i)(3); and **(5)** substituted "(h) for "(g)" after "subdivisions (c) to" in subd (j).

2002 Amendment: (1) Added the second sentence of subd (a)(1); **(2)** added "unless the governing board of the school district and the county superintendent of schools agree to waive the requirement that a budget review committee be formed, and the State Department of Education approves the waiver after determining that a budget review committee is not necessary" in subds (g) and (i)(3); **(3)** added the last sentence of subds (g) and (i)(3); **(4)** substituted "or budget review committees waived. The report shall include" for ", including" in subd (h); and **(5)** amended subd (i)(1) by **(a)** substituting "If" for "In the event of the disapproval of" at the beginning; and **(b)** adding "is disapproved" in the first sentence.

2003 Amendment: (1) Substituted "and supporting data" for ", and supporting data," in the second sentence of subd (a)(2) and the last sentence of subd (e); **(2)** amended subd (b) by **(a)** substituting "Chapter 6 (commencing with Section 95) of Part 0.5 of Division 1" for "Sections 95 to 100, inclusive," in the second sentence; and **(b)** deleting "so" before "computed" in the third and fourth sentences; **(3)** substituted "are required to" for "must" in the second sentence of subd (c)(1); **(4)** substituted "the county superintendent of schools" for "the superintendent" in the second sentence of subd (d); **(5)** amended the second sentences of subds (g) and (i)(3) by **(a)** adding the comma after "Section 42127.1"; and **(b)** deleting the comma after "committee be formed"; and **(6)** deleted the comma after "district so elects" in the first sentence of subd (i).

2004 Amendment: (1) Amended subd (c) by adding **(a)** "county" before "superintendent shall identify" in the last sentence of subd (c)(1); and **(b)** the last two sentences in subd (c)(2); **(2)** added ", conditionally approve," in the first sentence of subd (d); **(3)** added the second–fifth sentences of subd (d); **(4)** amended the sixth sentence of subd (d) by adding **(a)** "conditionally approve or"; and **(b)** ", including, but not limited to, the amounts of any budget adjustments needed before he or she can conditionally approve that budget" at the end.; **(5)** amended the first sentence of subd (g) by **(a)** adding subd (g)(3); and **(b)** redesignating former subd (g)(3) to be subd (g)(4); **(6)** substituted "department" for "State Department of Education" after "formed and the" in the second sentence of subd (g), and in the second sentence of subd (i)(3); **(7)** substituted the third sentence of subd (g) for the former third sentence which read: "Based on the waiver, the county superintendent immediately has the authority and responsibility provided in Section 42127.3."; **(8)** added the last four sentences of subd (g); and **(9)** amended subd (i)(3) by **(a)** substituting the third sentence for the former third sentence which read: "Based on the waiver, the county superintendent immediately has the authority and responsibility provided in Section 42127.3."; and **(b)** adding the last three sentences.

2005 Amendment: (1) Added the third sentence in subd (e); and **(2)** deleted "of Public Instruction" after "Superintendent" in subds (f), (h), and (i)(2).

2006 Amendment (1) Substituted "state board" for "State Board of Education" after "adopted by the" in subd (c)(1); and **(2)** amended subd (g) by **(a)** substituting "state board" for "State Board of Education" after "adopted by the"; **(b)** adding "immediately" after "the county superintendent"; and **(c)** deleting "to a budget review committee" after "and responsibility provided".

2011 Amendment: (1) Added subds (a)(1)(A) and (a)(1)(B); **(2)** substituted "Article XIII A" for "Article XIIIA" in the last sentence of subd (a)(2); **(3)** added the last sentence of subds (d), (g), and (i)(3); and **(4)** added subds (e)(1) and (e)(2).

2012 Amendment: (1) Substituted "before" for "prior to" in the last sentence of the first paragraph of subd (a)(1); **(2)** added "of the school district" in the second sentence of subd (a)(2), in the second and third sentences of the first paragraph of subd (e), and in subd (j); **(3)** added "of schools" after "county superintendent" in the

second through fourth sentences of subd (b), in the second sentence of subd (c)(1), in the last sentence of subd (d), in the third and last sentences of subd (g), in the first sentence of the first paragraph of subd (i), and in the last sentence of subd (i)(3); **(4)** added "school" wherever it appears in the last sentence of subd (a)(2), in the second sentence of subd (b), in the first and last sentences of subd (c)(2), in the fourth and seventh sentences of subd (d), in the first and sixth sentences of subd (g), in the second sentence of subd (h), and in the fifth sentence of subd (i)(3); **(5)** deleted "any" after "if necessary" in the second sentence of subd (c)(1); **(6)** amended the second sentence of subd (c)(2) by adding **(a)** "school" after "commissioned by the"; and **(b)** "of schools" before "the Superintendent"; **(7)** amended the second sentence of subd (d) by **(a)** adding "develop" after "schools shall"; **(b)** adding "school" before "district expense"; and **(c)** deleting "develop" before "a budget for"; **(8)** deleted "conditionally" before "approve that" in the sixth sentence of subd (d); **(9)** amended the eighth sentence of subd (d) by adding **(a)** "county" after "findings to the"; and **(b)** "of schools" before "no later than"; (**10)** Substituted "Before" for "Prior to" in the second sentence of the first paragraph of subd (e); **(11)** deleted "of this subdivision" after "paragraphs (1), (2), and (3)" in the first sentence of the first paragraph of subd (i); **(12)** added "of the school district" before "and respond to" in the first sentence of subd (i)(1); and **(13)** substituted "shall provide" for "will provide" in subd (i)(2).

§ 42127.1. Formation of budget review committee on disapproval of budget; Regional review committee

(a) Pursuant to subdivision (g) or (i) of Section 42127, upon the disapproval of a school district budget by the county superintendent, the county superintendent shall call for the formation of a budget review committee unless the governing board of the school district and the county superintendent of schools agree to waive the requirement that a budget review committee be formed, and the department approves the waiver after determining that a budget review committee is not necessary. Upon the grant of a waiver, the county superintendent has the authority and responsibility provided to a budget review committee in Section 42127.3. Upon approving a waiver of the budget review committee, the department shall ensure that a balanced budget is adopted for the school district by November 30. The Superintendent shall report to the Legislature and the Director of Finance by December 10 if any district, including a district that has received a waiver of the budget review committee process, does not have an adopted budget by November 30. This report shall include the reasons why a budget has not been adopted by the deadline, the steps being taken to finalize budget adoption, and the date the adopted budget is anticipated.

(b) The budget review committee shall be composed of three persons selected by the governing board of the school district from a list of candidates provided to the governing board by the Superintendent of Public Instruction. The list of candidates shall be composed of persons who have expertise in the management of a school district or county office of education. Their experience shall include, but not be limited to, the fiscal and educational aspects of local educational agency management.

(c) Notwithstanding subdivision (b) or any other provision of this article, with the approval of the Superintendent and the governing board of the school district, the county superintendent of schools may select and convene a regional review committee, consisting of persons having the expertise described in that subdivision. The regional review committee shall operate in place of the budget review committee, in accordance with the provisions of this article governing budget review committees.

(d) Members of the committee shall be reimbursed by the department for their services and associated expenses while on official business at rates established by the State Board of Education.

Added Stats 1988 ch 1462 § 1.171. Amended Stats 1991 ch 1213 § 16 (AB 1200); Stats 2002 ch 1168 § 23 (AB 1818), effective September 30, 2002; Stats 2004 ch 52 § 13 (AB 2756), effective June 21, 2004.

Amendments

1991 Amendment: (1) Substituted "subdivision (f)" for "subdivision (h)" in subd (a); **(2)** amended subd (b) by **(a)** adding "to the governing board" in the first sentence; and **(b)** substituting "who" for "that" in the second sentence; **(3)** added subd (c); and **(4)** redesignated former subd (c) to be subd (d).

2002 Amendment: Amended subd (a) by **(1)** substituting "subdivision (g) or (i)" for "subdivision (f)"; **(2)** adding "unless the governing board of the school district and the county superintendent of schools agree to waive the requirement that a budget review committee be formed, and the State Department of Education approves the waiver after determining that a budget review committee is not necessary"; and **(3)** adding the last sentence.

2004 Amendment: (1) Substituted "the department" for "the State Department of Education" in the first sentence of subd (a), and in subd (d); **(2)** substituted the second sentence of subd (a) for the former second sentence which read: "Based on the waiver, the county superintendent immediately has the authority and responsibility provided in Section 42127.3."; **(3)** added the last three sentences of subd (a); and **(4)** deleted "of Public Instruction" after "Superintendent" in the first sentence of subd (c).

§ 42127.2. Selection of review committee; Review of proposed budget and recommendations

(a) The governing board of a school district shall, no later than five working days after the receipt of a candidate list from the Superintendent of Public Instruction pursuant to Section 42127.1, select a budget review committee, and the Superintendent of Public Instruction shall convene the committee no later than five working days following that selection. If the governing board fails to select a committee within the period of time permitted by this subdivision, the Superintendent of Public Instruction instead shall select and convene the budget review committee no later than 10 working days after the district's receipt of the candidate list.

(b) No later than October 31, the budget review committee shall review the proposed budget of the district and the underlying fiscal policies of the district and transmit to the Superintendent of Public Instruction, the county superintendent of schools, and the governing board of the school district either of the following:

(1) The recommendation that the school district budget be approved.

(2) A report disapproving the school district budget and setting forth recommendations for revisions to the school district budget that would enable the district to meet its financial obligations both in the current fiscal year and with regard to the district's multiyear financial commitments.

(c) The Superintendent of Public Instruction may extend the deadline set forth in subdivision (b) for a period of not more than 15 working days.

(d) The Superintendent of Public Instruction shall establish criteria and procedures governing the performance by budget review committees of their duties under this section.

(e) Upon request of the county superintendent of schools, the Controller's office may conduct an audit or review of the fiscal condition of the school district in order to assist a budget review committee or regional review committee for the purposes of this section.

Added Stats 1988 ch 1462 § 1.172. Amended Stats 1991 ch 1213 § 17 (AB 1200); Stats 1995 ch 525 § 5 (AB 438).

Amendments

1991 Amendment: Substituted the section for the former section which read: "(a) The district governing board shall, no later than 15 working days after the receipt of a candidate list from the Superintendent of Public Instruction pursuant to Section 42127.1, select and convene a review committee."(b) The review committee shall, within 15 working days of being convened, review the proposed budget of the district and the underlying fiscal policies of the district and recommend to the Superintendent of Public Instruction, the county superintendent of schools, and the district governing board either of the following:"(c) In the event the committee is unable to respond within 15 working days, the committee shall state the reasons why it was unable to respond within that time frame and establish a time definite and certain, to be approved by the Superintendent of Public Instruction, as to when their recommendations shall be forthcoming."

1995 Amendment: (1) Substituted "governing board of a school district" for "district governing board" near the beginning of subd (a); **(2)** substituted "governing board of the school district" for "district governing board" in the introductory clause of subd (b); and **(3)** deleted "Upon request of the budget review committee," at the beginning of subd (c).

§ 42127.3. Acceptance of recommendation of approval; Proposed alternative budget; Actions by Superintendent

(a) If the budget review committee established pursuant to Sections 42127.1 and 42127.2 recommends approval of the school district budget, the county superintendent of schools shall accept the recommendation of the budget review committee and approve the budget.

(b) If the budget review committee established pursuant to Sections 42127.1 and 42127.2 disapproves the school district budget, the school district governing board, not later than five working days after receipt of the report described in paragraph (2) of subdivision (b) of Section 42127.2, may submit a response to the Superintendent, including any revisions to the adopted final budget and any other proposed actions to be taken as a result of the recommendations of the budget review committee. Based upon the recommendations of the budget review committee and any response to those recommendations provided by the governing board of the school district, the Superintendent shall either approve or disapprove the budget. If the Superintendent disapproves the budget, he or she shall notify the governing board of the school district in writing of the reasons for that disapproval and, until the county superintendent certifies the district's first interim report pursuant to Section 42131, the county superintendent of schools shall do the following as necessary:

(1) Not later than November 30, develop and adopt, in consultation with the Superintendent and the governing board of the school district, a fiscal plan and budget that will govern the district and will allow the district to meet its financial obligations, both in the current fiscal year and with regard to the district's multiyear financial commitments. The Superintendent may extend the date by which the county superintendent of schools is required to develop and adopt a fiscal plan and budget. The governing board of the school district shall govern the operation of the district for the current fiscal year in accordance with that adopted budget.

(2) Cancel purchase orders, prohibit the issuance of nonsalary warrants, and otherwise stay or rescind any action that is inconsistent with the budget adopted pursuant to paragraph (1). The county superintendent of schools shall inform the governing board of the school district in writing of his or her justification for any exercise of authority under this paragraph.

(3) Monitor and review the operation of the school district.

(4) Determine the need for additional staff and may employ, subject to approval by the Superintendent, short-term analytical assistance or expertise to validate financial information if the district staff does not have the expertise or staff.

(5) Require the school district to encumber all contracts and other obligations, to prepare appropriate cashflow analyses and monthly or quarterly budget revisions, and to appropriately record all receivables and payables.

(6) Determine whether there are any financial problem areas and may employ, subject to approval by the Superintendent, a certified public accounting firm to investigate financial problem areas.

(7) Withhold compensation of the members of the governing board and the district superintendent for failure to provide requested financial information. A forfeiture may be appealed to the Superintendent pursuant to subdivision (b) of Section 42127.6.

(c) If, during the selection of the budget review committee or during the committee's review of the budget, an agreement is reached between the governing board of the school district and the county superintendent of schools, and the school district revises its budget to comply with this agreement, the county superintendent of schools shall approve the district budget and the budget review committee selection, or its review of the budget, shall be canceled.

(d) The school district shall pay 75 percent and the county office of education shall pay 25 percent of the actual administrative expenses incurred pursuant to subdivision (b), or costs associated with improving the district's financial management practices. The Superintendent shall develop, and distribute to affected school districts and county offices of education, advisory guidelines regarding the appropriate amount of any fees charged pursuant to this subdivision.

(e) This section shall not be construed to authorize the county superintendent of schools to abrogate any provision of a collective bargaining agreement that was entered into by a school district prior to the date upon which the county superintendent of schools disapproved the budget of the school district pursuant to subdivision (b).

Added Stats 1988 ch 1462 § 1.173. Amended Stats 1991 ch 1213 § 18 (AB 1200); Stats 1992 ch 323 § 7 (AB 2506); Stats 1993 ch 923 § 5 (AB 2185), ch 924 § 9 (AB 1708); 1994 ch 1002 § 9 (AB 3627); Stats 1995 ch 525 § 6 (AB 438); Stats 2006 ch 730 § 12 (AB 1967), effective January 1, 2007.

Amendments

1991 Amendment: Substituted the section for the former section which read: "(a) If the review committee established pursuant to Section 42127.1 recommends approval of the school district budget, the Superintendent of Public Instruction shall accept the recommendation of the review committee and approve the budget."(b) If the review committee established pursuant to Section 42127.1 proposes an alternative budget that includes specific detailed recommendations for actions on, or changes to, fiscal policy necessary to achieve long–term fiscal stability, as defined by Section 33127, the review committee shall transmit to the district governing board, in writing, the reasons for their recommendations. The district governing board shall have 10 working days from the receipt of the recommendations to either adopt or appeal the review committee's recommendations at a public meeting."“(1) If the distrist governing board chooses to adopt the committee's recommendations, or if the board adopts alternative recommendations that would achieve the same fiscal results and that are accepted by the review committee, the Superintendent of Public Instruction shall accept the budget proposed by the review committee and approve the budget."(c) No later than 15 working days after receiving the written appeal described in subdivision (b), the Superintendent of Public Instruction shall either:"(1) Approve the school district budget."(2) Prepare an alternative budget that includes specific detailed recommendations for actions on, or changes to, fiscal policy necessary to achieve long–term fiscal stability, as defined by Section 33127. This alternative budget shall be jointly agreed to by the county office of education and the review committee."

1992 Amendment: (1) Substituted "not" for "no" in subds (b) and (b)(1); and **(2)** deleted former subd (e) which read: "(e) As necessary for the purposes of subdivision (b), the county superintendent of schools may request funding or other assistance from the Superintendent of Public Instruction as necessary to obtain additional information regarding the district's budget or operations through a financial or management review of the district, a cash–flow projection for the district, or other appropriate means. Any contract entered into by a county superintendent of schools for the purposes of this subdivision is subject to the approval of the Superintendent of Public Instruction."

1993 Amendment: (1) Added subds (b)(4)–(b)(7) and (c); **(2)** redesignated former subds (c) and (d) to be subds (d) and (e); and **(3)** amended subd (d) by **(a)** substituting "75 percent and the county office of education shall pay 25 percent of the" for "reasonable fees charged by the county superintendent of schools for"; and **(b)** adding ", or costs associated with improving the district's financial management practices" after "subdivision (b)". (As amended Stats 1993 ch 924, compared to the section as it read prior to 1993. This section was also amended by an earlier chapter, ch 923. See Gov C § 9605.)

1994 Amendment: Substituted "the following as necessary" for "all of the following" at the end of the introductory clause of subd (b).

1995 Amendment: (1) Substituted "governing board of the school district" for "school district governing board" wherever it appears in subd (b); **(2)** added the second sentence of subd (b)(1); and **(3)** added "school" in the last sentence of subd (b)(1) and in subds (b)(3) and (b)(5).

2006 Amendment (1) Amended subd (b) by **(a)** deleting "of Public Instruction" wherever it appears; **(b)** substituting "until the county superintendent certifies " for "for the remainder of" after "that disapproval and,"; and **(c)** substituting "district's first interim report pursuant to Section 42131" for "current fiscal year" after "superintendent certifies the"; **(2)** deleted "of Public Instruction" both times it appears in subd (b)(1); **(3)** deleted "of Public Instruction" after "approval by the Superintendent" in subd (b)(4); **(4)** deleted "of Public Instruction" after "approval by the Superintendent" in subds (b)(6) and (b)(7); and **(5)** deleted "of Public Instruction" after "practices. The Superintendent" in subd (d).

§ 42127.4. Continued operation under last adopted budget

Until a school district receives approval of its budget under this article, the school district shall continue to operate on the basis of whichever of the following budgets contains a lower total spending authority:

(a) The last budget adopted or revised by the governing board of the school district for the prior fiscal year.

(b) The unapproved budget for the current fiscal year, as adopted and revised by the governing board of the school district.

Added Stats 1988 ch 1462 § 1.174. Amended Stats 1991 ch 1213 § 19 (AB 1200).

Amendments

1991 Amendment: Substituted the section for the former section which read: "Until a school district receives approval of its final budget, the school district shall continue to operate on the basis of the last budget shall be jointly agreed to by the county office of education and the review committee."

§ 42127.5. Statement concerning negative unrestricted fund balance or negative cash balance

The governing board of any school district that reported a negative unrestricted fund balance or a negative cash balance in the annual report required by Section 42127 or in the audited annual financial statements required by Section 41020 shall include with the budget submitted in accordance with Section 42127 and the certifications required by Section 35015 a statement that identifies the reasons for the negative unrestricted fund balance or negative cash balance and the steps that have been taken to ensure that the negative balance will not occur at the end of the current fiscal year.

Added Stats 1986 ch 1150 § 13.

Editor's Notes—Ed C § 35015, referred to in this section, relating to certification of district's ability to meet financial obligations was repealed Stats 1991 ch 1213 § 5 (AB 1200).

Former Sections: Former § 42127.5, relating to submission of tentative budget, was added Stats 1979 ch 221 § 5, effective July 6, 1979, and repealed, operative June 30, 1981, by its own terms.

§ 42127.6. Determination and notice of fiscal distress of district; Report and proposed remedial actions; Appeal; Reorganized school districts; Authority of Superintendent

(a) (1) A school district shall provide the county superintendent of schools with a copy of a study, report, evaluation, or audit that was commissioned by the district, the county superintendent, the Superintendent of Public Instruction, and state control agencies and that contains evidence that the school district is showing fiscal distress under the standards and criteria adopted in Section 33127, or a report on the school district by the County Office Fiscal Crisis and Management Assistance Team or any regional team created pursuant to subdivision (i) of Section 42127.8. The county superintendent shall review and consider studies, reports, evaluations, or audits of the school district that contain evidence that the school district is demonstrating fiscal distress under the standards and criteria adopted in Section 33127 or that contain a finding by an external reviewer that more than three of the 15 most common predictors of a school district needing intervention, as determined by the County Office Fiscal Crisis and Management Assistance Team, are present. If these findings are made, the county superintendent shall investigate the financial condition of the school district and determine if the school district may be unable to meet its financial obligations for the current or two subsequent fiscal years, or should receive a qualified or negative interim financial certification pursuant to Section 42131. If at any time during the fiscal year the county superintendent of schools determines that a school district may be unable to meet its financial obligations for the current or two subsequent fiscal years or if a

school district has a qualified or negative certification pursuant to Section 42131, he or she shall notify the governing board of the school district and the Superintendent of Public Instruction in writing of that determination and the basis for the determination. The notification shall include the assumptions used in making the determination and shall be available to the public. The county superintendent of schools shall report to the Superintendent of Public Instruction on the financial condition of the school district and his or her proposed remedial actions and shall do at least one of the following and all actions that are necessary to ensure that the district meets its financial obligations:

(A) Assign a fiscal expert, paid for by the county superintendent, to advise the district on its financial problems.

(B) Conduct a study of the financial and budgetary conditions of the district that includes, but is not limited to, a review of internal controls. If, in the course of this review, the county superintendent determines that his or her office requires analytical assistance or expertise that is not available through the district, he or she may employ, on a short–term basis, with the approval of the Superintendent of Public Instruction, staff, including certified public accountants, to provide the assistance and expertise. The school district shall pay 75 percent and the county office of education shall pay 25 percent of these staff costs.

(C) Direct the school district to submit a financial projection of all fund and cash balances of the district as of June 30 of the current year and subsequent fiscal years as he or she requires.

(D) Require the district to encumber all contracts and other obligations, to prepare appropriate cash-flow analyses and monthly or quarterly budget revisions, and to appropriately record all receivables and payables.

(E) Direct the district to submit a proposal for addressing the fiscal conditions that resulted in the determination that the district may not be able to meet its financial obligations.

(F) Withhold compensation of the members of the governing board and the district superintendent for failure to provide requested financial information. This action may be appealed to the Superintendent of Public Instruction pursuant to subdivision (b).

(G) Assign the Fiscal Crisis and Management Assistance Team to review teacher hiring practices, teacher retention rate, percentage of provision of highly qualified teachers, and the extent of teacher misassignment in the school district and provide the district with recommendations to streamline and improve the teacher hiring process, teacher retention rate, extent of teacher misassignment, and provision of highly qualified teachers. If a review team is assigned to a school district, the district shall follow the recommendations of the team, unless the district shows good cause for failure to do so. The Fiscal Crisis and Management Assistance Team may not recommend an action that would abrogate a contract that governs employment.

(2) Any contract entered into by a county superintendent of schools for the purposes of this subdivision is subject to the approval of the Superintendent of Public Instruction.

(3) An employee of a school district who provides information regarding improper governmental activity, as defined in Section 44112, is entitled to the protection provided pursuant to Article 5 (commencing with Section 44110) of Chapter 1 of Part 25.

(b) Within five days of the county superintendent making the determination specified in subdivision (a), a school district may appeal the basis of the determination and any of the proposed actions that the county superintendent has indicated that he or she will take to further examine the financial condition of the district. The Superintendent of Public Instruction shall sustain or deny any or all parts of the appeal within 10 days.

(c) If, after taking the actions identified in subdivision (a), the county superintendent determines that a district will be unable to meet its financial obligations for the current or subsequent fiscal year, he or she shall notify the school district governing board and the Superintendent of Public Instruction in writing of that determination and the basis for that determination. The notification shall include the assumptions used in making the determination and shall be provided to the superintendent of the school district and parent and teacher organization of the district.

(d) Within five days of the county superintendent making the determination specified in subdivision (c), a school district may appeal that determination to the Superintendent of Public Instruction. The Superintendent shall sustain or deny the appeal within 10 days. If the governing board of the school district appeals the determination, the county superintendent of schools may stay any action of the governing board that he or she determines is inconsistent with the ability of the district to meet its financial obligations for the current or subsequent fiscal year until resolution of the appeal by the Superintendent of Public Instruction.

(e) If the appeal described in subdivision (d) is denied or not filed, or if the district has a negative certification pursuant to Section 42131, the county superintendent, in consultation with the Superintendent of Public Instruction, shall take at least one of the actions described in paragraphs (1) to (5), inclusive, and all actions that are necessary to ensure that the district meets its financial obligations and shall make a report to the Superintendent about the financial condition of the district and remedial actions proposed by the county superintendent.

(1) Develop and impose, in consultation with the Superintendent of Public Instruction and the school district governing board, a budget revision that will enable the district to meet its financial obligations in the current fiscal year.

(2) Stay or rescind any action that is determined to be inconsistent with the ability of the school district to meet its obligations for the current or subsequent fiscal year. This includes any actions up to the point that the subsequent year's budget is approved by the county superintendent of schools. The county superintendent of schools shall inform the school district governing board in writing of his or her justification for any exercise of authority under this paragraph.

(3) Assist in developing, in consultation with the governing board of the school district, a financial plan that will enable the district to meet its future obligations.

(4) Assist in developing, in consultation with the governing board of the school district, a budget for the subsequent fiscal year. If necessary, the county superintendent of schools shall continue to work with the governing board of the school district until the budget for the subsequent year is adopted.

(5) As necessary, appoint a fiscal adviser to perform any or all of the duties prescribed by this section on his or her behalf.

(f) Any action taken by the county superintendent of schools pursuant to paragraph (1) or (2) of subdivision (e) shall be accompanied by a notification that shall include the actions to be taken, the reasons for the actions, and the assumptions used to support the necessity for these actions.

(g) This section does not authorize the county superintendent to abrogate any provision of a collective bargaining agreement that was entered into by a school district prior to the date upon which the county superintendent of schools assumed authority pursuant to subdivision (e).

(h) The school district shall pay 75 percent and the county office of education shall pay 25 percent of the administrative expenses incurred pursuant to subdivision (e) or costs associated with improving the district's financial management practices. The Superintendent of Public Instruction shall develop and distribute to affected school districts and county offices of education advisory guidelines regarding the appropriate amount of administrative expenses charged pursuant to this subdivision.

(i) Notwithstanding Section 42647 or 42650 or any other law, a county treasurer shall not honor any warrant if, pursuant to Sections 42127 to 42127.5, inclusive, or pursuant to this section, the county superintendent or the Superintendent of Public Instruction, as appropriate, has disapproved that warrant or the order on school district funds for which a warrant was prepared.

(j) Effective upon the certification of the election results for a newly organized school district pursuant to Section 35763, the county superintendent of schools may exercise any of the powers and duties of this section regarding the reorganized school district and the other affected school districts until the reorganized school district becomes effective for all purposes in accordance with Article 4 (commencing with Section 35530) of Chapter 3 of Part 21.

(k) The Superintendent of Public Instruction shall monitor the efforts of a county office of education in exercising its authority under this section and may exercise any of that authority if he or she finds that the actions of the county superintendent of schools are not effective in resolving the finan-

cial problems of the school district. Upon a decision to exercise the powers of the county superintendent of schools, the county superintendent of schools is relieved of those powers assumed by the Superintendent. In addition to the actions taken by the county superintendent, the Superintendent of Public Instruction shall take further actions to ensure the long–term fiscal stability of the district. The county office of education shall reimburse the Superintendent of Public Instruction for all of his or her costs in exercising his or her authority under this subdivision. The Superintendent of Public Instruction shall promptly notify the county superintendent of schools, the county board of education, the superintendent of the school district, the governing board of the school district, the appropriate policy and fiscal committees of each house of the Legislature, and the Department of Finance of his or her decision to exercise the authority of the county superintendent of schools.

Added Stats 1993 ch 924 § 11 (AB 1708). Amended Stats 1994 ch 1002 § 10 (AB 3627); Stats 1995 ch 525 § 7 (AB 438); Stats 1998 ch 906 § 4 (AB 2328); Stats 2001 ch 620 § 3 (AB 139); Stats 2004 ch 52 § 14 (AB 2756), effective June 21, 2004, ch 896 § 34 (AB 2525), effective September 29, 2004, ch 902 § 1 (AB 3001), effective September 29, 2004.

Former Sections: Former § 42127.6, similar to the present section, was added Stats 1991 ch 1213 § 20, amended Stats 1992 ch 323 § 8, and repealed Stats 1993 ch 924 § 10 (AB 1708).

Amendments

1994 Amendment: Added **(1)** "any or all of" after "and shall do" near the end of the introductory clause of subd (a); and **(2)** ", not filed," after "subdivision (d) is denied," near the beginning of the introductory clause of subd (e).

1995 Amendment: (1) Deleted "or negative" after "has a qualified" in the first sentence of subd (a); **(2)** substituted "governing board of the school district" for "school district governing board" in subds (a) and (e)(3); **(3)** substituted "and" for a comma after "of that determination" in the first sentence of subd (a); **(4)** substituted the period for ", and shall do any or all of the following, as necessary, to ensure that the district meets its financial obligations:" at the end of the first sentence of subd (a); **(5)** added the second sentence and introductory clause of subd (a); **(6)** added the second sentence of subd (c); **(7)** added the third sentence of subd (d); **(8)** substituted "or not filed, or if" for ", not filed, or" and "any or all" for "one or more" in the introductory clause of subd (e); **(9)** substituted "a budget revision that will enable the district to meet its financial obligations in the current fiscal year" for "revisions to the school district budget that will enable the district to meet its financial obligations" in subd (e)(1); **(10)** substituted the first and second sentences of subd (e)(2) for the former first sentence which read: "Stay or rescind any action that is inconsistent with any revision adopted pursuant to paragraph (1):"; **(11)** added subds (e)(4) and (e)(5); **(12)** added subd (f); **(13)** redesignated former subds (f)—(h) to be subds (g)—(i); and **(14)** amended subd (i) by **(a)** deleting "of schools" after "county superintendent"; and **(b)** substituting "or" for ", or has disapproved" after "that warrant" in subd (i).

1998 Amendment: (1) Substituted "Sections 42127 to 42127.5, inclusive, or pursuant to this section," for "Sections 42127 to 42127.6, inclusive," in subd (i); and **(2)** added subd (j).

2001 Amendment: Added "that shall include, but not be limited to, a review of internal controls" in the first sentence of subd (a)(2).

2004 Amendment (ch 52): (1) Designated former subd (a) to be subd (a)(1) and the former last paragraph of former subd (a) to be subd (a)(2); **(2)** added the first three sentences of subd (a)(1); **(3)** amended the fourth sentence of subd (a)(4) by **(a)** adding "or negative" after "has a qualified"; and **(b)** substituting "Superintendent" for "Superintendent of Public Instruction" after "district and the"; **(4)** substituted the introductory clause of subd (a)(1) for the former introductory clause which read: "The county superintendent of schools shall do any or all of the following, as necessary, to ensure that the district meets its financial obligations:"; **(5)** redesignated former subds (a)(1)–(a)(6) to be subds (a)(1)(A)–(a)(1)(F); **(6)** amended subd (a)(1)(B) by substituting **(a)** "includes, but it not" for "shall include, but not be" after "the district that" in the first sentence; and **(b)** "Superintendent" for "Superintendent of Public Instruction" after "approval of the" in the second sentence; **(7)** substituted "cashflow" for "cash–flow" after "to prepare appropriate" in subd (a)(1)(D); **(8)** substituted "Superintendent" for "Superintendent of Public Instruction" after "approval of the" in subd (a)(2), in the last sentence of subd (b), after "board and the" in the first sentence of subd (c), and wherever it appears in subds (d), (e)(1), (h), and (i); **(9)** added subd (a)(3); **(10)** substituted "provided to the superintendent of the school district and parent and teacher organization

of the district" for "available to the public" in the last sentence of subd (c); **(11)** substituted "Superintendent, shall take at least one of the actions described in paragraphs (1) to (5), inclusive, and all actions that are necessary to ensure that the district meets its financial obligations and shall make a report to the Superintendent about the financial condition of the district and remedial actions proposed by the county superintendent" for "Superintendent of Public Instruction, shall, as necessary to enable the district to meet its' financial obligation, so any of the following:" in the first paragraph of subd (e); **(12)** amended subd (i) by **(a)** deleting "provision of" after "or any other"; and **(b)** substituting "when" for "if" after "honor any warrant"; and **(13)** added subd (k).

2004 Amendment (ch 896): (1) Amended subd (a)(1) by substituting **(a)** "superintendent of schools" for "superintendent" after "district, the county,"; and **(b)** "superintendent of schools" for "superintendent" in the second and third sentences; **(2)** substituted "superintendent of schools" for "superintendent" in subds (a)(1)(A), (a)(1)(B). (e) and (i); **(3)** substituted "superintendent of schools" for "superintendent" both times it appears in subd (b); **(4)** substituted "superintendent of schools" for "superintendent" in the first sentence of subd (d); **(5)** substituted "superintendent of schools" for "superintendent" after "authorize the county" in subd (g); and **(6)** amended subd (k) by substituting **(a)** "Superintendent determines that the county superintendent of schools failed to effectively carry out his or her responsibilities for fiscal oversight as required by this code in resolving" for "Superintendent finds that the actions of the county superintendent of schools are not effective in resolving"; and **(b)** substituting "superintendent of schools" for "superintendent" in the third sentence.

2004 Amendment (ch 902): (1) Substituted "Superintendent of Public Instruction" for "Superintendent" wherever it appears in the first paragraph of subd (a)(1), in the second sentence of subd (a)(B), in subd (a)(2), in the last sentence of subd (a)(3), in subd (c), in the first and last sentences of subd (d), after "consultation with the" in the first sentence of subd (e), wherever it appears in subds (e)(1), (h), and (i); **(2)** substituted "actions and shall do at least one of the following and all actions that are necessary" for "actions, and shall do at least one of the following, and all actions that are necessary," in the introductory clause of subd (a)(1); **(3)** added subd (a)(1)(G); **(4)** deleted the comma after "of the determination" in the first sentence of subd (b); **(5)** substituted "ability of the district" for "district's ability" after "inconsistent with the" in the last sentence of subd (d); **(6)** substituted "ability of the school district" for "school district's ability" after "inconsistent with the" in subd (e)(2); **(7)** amended the last sentence of subd (h) by deleting the comma **(a)** before "and distribute to"; and **(b)** before "advisory guidelines regarding"; and **(8)** deleted the comma after "Section 42650" in subd (i). (As amended Stats 2004 ch 902, compared to the section as it read Stats 2004 ch 52 § 14. This section was also amended by an earlier chapter, ch 896. See Gov C § 9605.)

Notes of Decisions

Ed C § 42127.6(j) permits a county superintendent of schools to exercise his or her fiscal watchdog powers to protect the fiscal solvency of a reorganized district without making fiscal distress findings or going through the investigative and reporting requirements found elsewhere in § 42127.6. Hence, the superintendent has authority to utilize any of the powers set forth in § 42127.6(e), including the power to rescind any action that might jeopardize the solvency of the new district. Polster v. Sacramento County Office of Education (2009, 3d Dist) 180 Cal App 4th 649, 103 Cal Rptr 3d 291, 2009 Cal App LEXIS 2048, review denied Polster (Joan) v. Sacramento County Office of Education (Twin Rivers Unified School District) (2010, Cal.) 2010 Cal. LEXIS 2718.

Because Ed C § 42127.6(j) gives a county superintendent of schools the express authority to rescind any action by the board that he or she deems harmful to the fiscal integrity of a newly formed district, it circumscribes the residual authority granted to an outgoing board under Ed C § 35533. Polster v. Sacramento County Office of Education (2009, 3d Dist) 180 Cal App 4th 649, 103 Cal Rptr 3d 291, 2009 Cal App LEXIS 2048, review denied Polster (Joan) v. Sacramento County Office of Education (Twin Rivers Unified School District) (2010, Cal.) 2010 Cal. LEXIS 2718.

Trial court erred in granting a writ of mandate commanding a county superintendent of schools to process payroll requests pursuant to a transition plan adopted by the outgoing board of a high school district, a plan that awarded severance buyout packages to several high school district administrative employees, where it could not be said that the superintendent's refusal to process the payroll requests was arbitrary, capricious, or entirely without evidentiary support, and plaintiffs thus did not show that the superintendent had a clear, present, and ministerial duty to approve the payroll requests. Letters written by responsible education administrators of the reorganized unified school district itself provided an unimpeachable basis for the superintendent's decision to halt implementation of the buyout packages on the ground that the "golden parachute" deals were inconsistent with the ability of the school district to meet its financial obligations. Polster v. Sacramento County Office of Education (2009, 3d Dist) 180 Cal App 4th 649, 103 Cal Rptr 3d 291, 2009 Cal App LEXIS 2048, review denied

Polster (Joan) v. Sacramento County Office of Education (Twin Rivers Unified School District) (2010, Cal.) 2010 Cal. LEXIS 2718.

§ 42127.8. Establishment of County Office Fiscal Crisis and Management Assistance Team; Members; Governing board; Functions; Assessments; Reimbursement to department; Regional teams of education finance experts

(a) The governing board provided for in subdivision (b) shall establish a unit to be known as the County Office Fiscal Crisis and Management Assistance Team. The team shall consist of persons having extensive experience in school district budgeting, accounting, data processing, telecommunications, risk management, food services, pupil transportation, purchasing and warehousing, facilities maintenance and operation, and personnel administration, organization, and staffing. The Superintendent may appoint one employee of the department to serve on the unit. The unit shall be operated under the immediate direction of an appropriate county office of education selected jointly, in response to an application process, by the Superintendent and the president of the state board or his or her designee.

(b) The unit established under subdivision (a) shall be selected and governed by a 25-member governing board consisting of one representative chosen by the California County Superintendents Educational Services Association from each of the 11 county service regions designated by the association, 11 superintendents of school districts chosen by the Association of California School Administrators from each of the 11 county service regions, one representative from the department chosen by the Superintendent, the Chancellor of the California Community Colleges or his or her designee, and one member of a community college district governing board chosen by the chancellor. The governing board of the County Office Fiscal Crisis and Management Assistance Team shall select a county superintendent of schools to chair the unit.

(c) (1) The Superintendent may request the unit to provide the assistance described in subdivision (b) of Section 1624, Section 1630, subdivision (b) of Section 42127.3, subdivision (c) of Section 42127.6, Section 42127.9, and subdivision (a) of Section 42238.2, and to review the fiscal and administrative condition of any county office of education, school district, or charter school.

(2) A county superintendent of schools may request the unit to review the fiscal or administrative condition of a school district or charter school under his or her jurisdiction.

(3) The Board of Governors of the California Community Colleges may request the unit to provide the assistance described in Section 84041.

(d) In addition to the functions described in subdivision (c), the unit shall do all of the following:

(1) Provide fiscal management assistance, at the request of any school district, charter school, or county office of education, or, pursuant to subdivision (g) of Section 84041, at the request of any community college district. Each school district, charter school, or county office of education receiving that assistance shall be required to pay the onsite personnel costs and travel costs incurred by the unit for that purpose, pursuant to rates determined by the governing board established under subdivision (b). The governing board annually shall distribute rate information to each school district, charter school, and county office of education.

(2) Facilitate training for members of the governing board of the school district, district and county superintendents, chief financial officers within the district, and schoolsite personnel whose primary responsibility is to address fiscal issues. Training services shall emphasize efforts to improve fiscal accountability and expand the fiscal competency of local agencies. The unit shall use state professional associations, private organizations, and public agencies to provide guidance, support, and the delivery of any training services.

(3) Facilitate fiscal management training through the 11 county service regions to county office of education staff to ensure that they develop the technical skills necessary to perform their fiduciary duties. The governing board established pursuant to subdivision (b) shall determine the extent of the training that is necessary to comply with this paragraph.

(4) Produce a training calendar, to be disseminated semiannually to each county service region, that publicizes all of the fiscal training services that are being offered at the local, regional, and state levels.

(e) The governing board shall reserve not less than 25 percent, nor more than 50 percent, of its revenues each year for expenditure for the costs of contracts and professional services as management assistance to school districts or county superintendents of schools in which the board determines that a fiscal emergency exists.

(f) The governing board established under subdivision (b) may levy an annual assessment against each county office of education that elects to participate under this section in an amount not to exceed twenty cents ($0.20) per unit of total average daily attendance for all school districts within the county. The revenues collected pursuant to that assessment shall be applied to the expenses of the unit.

(g) The governing board established under subdivision (b) may pay to the department, from any available funds, a reasonable amount to reimburse the department for actual administrative expenses incurred in the review of the budgets and fiscal conditions of school districts, charter schools, and county superintendents of schools.

(h) When employed as a fiscal adviser by the department pursuant to Section 1630, employees of the unit established pursuant to subdivision (a) shall be considered employees of the department for purposes of errors and omissions liability insurance.

(i) (1) The unit shall request and review applications to establish regional teams of education finance experts throughout the state.

(2) To the extent that funding is provided for purposes of this subdivision in the annual Budget Act or through another appropriation, regional teams selected by the Superintendent, in consultation with the unit, shall provide training and technical expertise to school districts, charter schools, and county offices of education facing fiscal difficulties.

(3) The regional teams shall follow the standards and guidelines of and remain under the general supervision of the governing board established under subdivision (b).

(4) It is the intent of the Legislature that, to the extent possible, the regional teams be distributed geographically throughout the various regions of the state in order to provide timely, cost-effective expertise to school districts, charter schools, county offices of education, and community college districts throughout the state.

Added Stats 1991 ch 1213 § 21 (AB 1200). Amended Stats 1992 ch 323 § 9 (AB 2506); Stats 1993 ch 924 § 12 (AB 1708); Stats 1994 ch 650 § 6 (AB 3141), ch 840 § 13 (AB 3562 (ch 650 prevails); Stats 1995 ch 651 § 2 (SB 793); Stats 1996 ch 1158 § 8 (AB 2964), effective September 30, 1996; Stats 2000 ch 584 § 1 (SB 1331); Stats 2004 ch 52 § 15 (AB 2756), effective June 21, 2004; Stats 2005 ch 357 §§ 2, (SB 430), effective January 1, 2006, ch 360 § 1.5 (AB 1366), effective January 1, 2006; Stats 2011 ch 347 § 19 (SB 942), effective January 1, 2012.

Amendments

1992 Amendment: The amendment made no changes.

1993 Amendment: Added subd (h).

1994 Amendment: (1) Added "telecommunications," before "risk management" in the second sentence of subd (a); **(2)** substituted "California County Superintendents Educational Services Association" for "California Association of County Superintendents of Schools" in subd (b); **(3)** substituted subd (d) for former subd (d) which read: "(d) In addition to the functions described in subd (c), the unit shall provide management assistance at the request of any school district or county office of education. Each district or county office of education receiving that assistance shall be required to pay the onsite personnel costs and travel costs incurred by the unit for that purpose, pursuant to rates determined by the governing board established under subdivision (b). The governing board shall distribute rate information to each school district and county office of education."; **(4)** substituted "superintendents of schools" for "offices of education" wherever it appears in subds (e) and (g); **(5)** substituted "that a fiscal emergency exists" for "a fiscal emergency to exist" at the end of subd of subd (e); and **(6)** deleted "state" before "department for" in subd (h).

1995 Amendment: Added "and subdivision (a) of Section 42238.2," in subd (c).

1996 Amendment: (1) Added "and" before "personnel administration" in subd (a); and **(2)** amended subd (b) by **(a)** substituting "a 23–member" for "an eleven–member" before "governing board"; **(b)** substituting "11" for "10" before "county service regions"; **(c)** adding "11 superintendents of school districts chosen by the Association of California School Administrators from each of the 11 county service regions," before "and one representative"; and **(d)** adding the last sentence.

2000 Amendment: (1) Substituted "Secretary for Education" for "Secretary of Child Development and Education" at the end of subd (a); and **(2)** added "the" before "County Office" in the last sentence of subd (b).

2004 Amendment: (1) Deleted "of Public Instruction" after "Superintendent" wherever it appears in subds (a) and (c); **(2)** substituted "department" for "State Department of Education" in subd (a), and the first time it appears in subds (g) and (h); **(3)** added ", school district, or charter school" to the end of subd (c); and **(4)** added subd (i).

2005 Amendment: (1) Amended subd (b) by **(a)** substituting "25-member" for "23-member"; **(b)** deleting "and" after "regions,"; and **(c)** substituting "Instruction, the Chancellor of the California Community Colleges or his or her designee, and one member of a community college district governing board chosen by the chancellor." for "Instruction."; **(2)** in subd (c), **(a)** added subdivision designation (1); and **(b)** added subd (2); **(3)** amended subd (d)(1) by **(a)** substituting "district, charter school," for "district" in two places; and **(b)** substituting "education, or, pursuant to subdivision (g) of Section 84041, at the request of any community college district." for "education."; **(4)** amended subd (d)(3) by substituting "11 country service regions" for "10 county service regions" and "duties." for "duty."; **(5)** amended subd (g) by substituting "districts, charter schools," for "districts"; and **(6)** amended subd (i) by **(a)** substituting "districts, charter schools," for "districts" in two places; and **(b)** substituting "education, and community college districts" for "education" in subd (i)(4). (As amended Stats 2005 ch 360, compared to the section as it read prior to 2005. This section was also amended by an earlier chapter, ch 357. See Gov C §9605.)

2011 Amendment: (1) Substituted "president of the state board or his or her designee" for "Secretary for Education" in the last sentence of subd (a); **(2)** amended the first sentence of subd (b) by **(a)** substituting "department" for "State Department of Education"; and **(b)** deleting "of Public Instruction" after "the Superintendent"; and **(3)** deleted "Section 33132," after "Section 1630," in subd (c)(1).

§ 42127.9. Appeal of changes in district's budget

(a) No later than five days after a school district receives notice of any change or changes adopted by the county superintendent of schools in the district's budget pursuant to subdivision (b) of Section 42127.3, subdivision (e) of Section 42127.6, or subdivision (b) of Section 42131, the governing board of the district may submit an appeal to the Superintendent of Public Instruction, based upon the contention that the change or changes would do one or more of the following:

(1) Exceed the financial or program changes necessary to allow the district to meet its financial obligations in the current fiscal year and with regard to its multiyear financial commitments. It is the intent of the Legislature that any change or changes adopted by the county superintendent of schools in a school district's budget minimize, to the extent possible, any impact upon the educational program of the district.

(2) Require reductions that are unnecessary in view of other reductions that are proposed by the governing board of the district and that reasonably can be expected to be realized.

(3) Make one or more changes in the district's operations that are inconsistent with any provision of state or federal law.

(b) No later than five days after receiving that appeal, the Superintendent of Public Instruction shall deny or uphold the appeal. If the appeal is denied, the district shall implement the change or changes adopted by the county superintendent of schools. If the appeal is upheld, the Superintendent of Public Instruction may revise the change or changes adopted by the county superintendent of schools or issue guidelines governing the manner in which the governing board of the district or the county superintendent of schools shall be required to change the district budget.

Added Stats 1991 ch 1213 § 22 (AB 1200). Amended Stats 1993 ch 924 § 13 (AB 1708).

Amendments

1993 Amendment: Substituted "subdivision (e)" for "subdivision (c)" in subd (a).

§ 42128. Effect of neglect or refusal to make a budget

If the governing board of any school district neglects or refuses to make a school district budget as prescribed by this article, or neglects to file interim reports pursuant to Section 42130, the county superintendent of schools shall not make any apportionment of state or county school money for the particular school district for the current school year, and the county superintendent shall notify the appropriate county official that he or she shall not approve any warrants issued by the school district.

Enacted Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended Stats 1993 ch 924 § 14 (AB 1708); Stats 1995 ch 525 § 8 (AB 438).

Amendments

1993 Amendment: Added ", and the county superintendent shall notify the appropriate county official that he or she shall not approve any warrants issued by the school district" at the end.

1995 Amendment: Added "or neglects to file interim reports pursuant to Section 42130,".

§ 42129. Submission of required reports; Delinquent reports

School districts and county offices of education shall transmit to the department, on a timely basis, all budget reports, prior year expenditure reports, qualified and negative financial status reports, program cost accounting reports, certifications, and audit reports as prescribed by subdivision (l) of Section 1240, subdivision (g) of Section 35035, Sections 1621, 1623, 41020, 42127, 42131, and Chapter 7.2 (commencing with Section 56836) of Part 30, and those reports used to calculate the first, second, and annual principal apportionments and special purpose apportionments for school districts and county offices of education. If the reports are not submitted to the Superintendent of Public Instruction within 14 days after the submission date prescribed in the statute or specified by the Superintendent of Public Instruction, the Superintendent of Public Instruction may direct the county auditor to withhold payment of any stipend, expenses, or salaries to the district superintendent, county superintendent, or members of the governing boards, as appropriate. The payments shall be withheld until the delinquent reports have been submitted to the department. If the county superintendent performs the functions of the county auditor, the Superintendent of Public Instruction may direct the county superintendent to withhold the payments specified in this section.

Added Stats 1986 ch 1150 § 14. Amended Stats 1988 ch 1462 § 1.19; Stats 1998 ch 89 § 13 (AB 598), effective June 30, 1998, operative July 1, 1998; Stats 2002 ch 1168 § 24 (AB 1818), effective September 30, 2002; Stats 2004 ch 896 § 36 (AB 2525), effective September 29, 2004.

Amendments

1988 Amendment: (1) Substituted "reports, prior year expenditure reports, qualified and negative financial status reports, program cost accounting reports, certifications, and audit reports as prescribed by subdivision (j) of Section 1240, 35014, 41020, 42127, and 56730.5, and" for "and audit reports as prescribed by Sections 1623, 41020, and 42127 of the Education Code and,"; and **(2)** added the last sentence.

1998 Amendment: Substituted "Chapter 7.2 (commencing with Section 56836) of Part 30" for "57730.5" in the first sentence.

2002 Amendment: (1) Deleted "35014," after "1623,"; **(2)** added "42131,"; and **(3)** substituted "If" for "In the event that" at the beginning of the second sentence.

2004 Amendment: Substituted **(1)** "department" for "State Department of Education" in the first and third sentences; **(2)** "subdivision (*l*) of Section 1240" for "subdivision (j) of Section 1240" in the first sentence; and **(3)** "payments shall be withheld" for "withholding shall continue only" in the third sentence.

§ 44041. Deductions in salary payment as requested by employee

(a)(1) The governing board of each school district when drawing an order for the salary payment due to employees of the district shall, without charge, reduce the order by the amount which it has been requested in a revocable written authorization by the employee to deduct for any or all of the following purposes:

(A) Paying premiums on any policy or certificate of group life insurance for the benefit of the employee or for group disability insurance, or legal expense insurance, or any of them, for the benefit of the employee or his or her dependents issued by an admitted insurer on a form of policy or certificate approved by the Insurance Commissioner.

(B) Paying rates, dues, fees, or other periodic charges on any hospital service contract for the benefit of the employee, or his or her dependents, issued by a nonprofit hospital service corporation on a form approved by the Insurance Commissioner pursuant to the former provisions of Chapter 11A (commencing with Section 11491) of Part 2 of Division 2 of the Insurance Code.

(C) Paying periodic charges on any medical and hospital service agreement or contract for the benefit of the employee, or his or her dependents, issued by a nonprofit corporation subject to Part 2 (commencing with Section 5110) of, Part 3 (commencing with Section 7110) of, or Part 11 (commencing with Section 10810) of, Division 2 of Title 1 of the Corporations Code.

(D) Paying periodic charges on any legal services contract for the benefit of the employee, or his or her dependents issued by a nonprofit corporation subject to Part 3 (commencing with Section 7110) of, or Part 11 (commencing with Section 10810) of, Division 2 of Title 1 of the Corporations Code.

(2) The requirements of this subdivision shall not apply to subdivision (b).

(b) For purposes of a deferred compensation plan authorized by Section 403(b) or 457 of the Internal Revenue Code or an annuity program authorized by Section 403(b) of the Internal Revenue Code that is offered by the school district which provides for investments in corporate stocks, bonds, securities, mutual funds, or annuities, except as prohibited by the California Constitution, the governing board of each school district when drawing an order for the salary payment due to an employee of the district shall, with or without charge, reduce the order by the amount which it has been requested in a revocable written authorization by the employee to deduct for participating in a deferred compensation plan or annuity program offered by the school district. The governing board shall determine the cost of performing the requested deduction and may collect that cost from the organization, entity, or employee requesting or authorizing the deduction. For purposes of this subdivision, the governing board of a school district is entitled to include in the amounts reducing the order the costs of any compliance or administrative services that are required to perform the requested deduction in compliance with federal or state law, and may collect these costs from the participating employee, the employee's participant account, or the organization or entity authorizing the deduction.

(c) The governing board of the district shall, beginning with the month designated by the employee and each month thereafter until authorization for the deduction is revoked, draw its order upon the funds of the district in favor of the insurer which has issued the policies or certificates or in favor of the nonprofit hospital service corporation which has issued hospital service contracts, or in favor of the nonprofit corporation which has issued medical and hospital service or legal service agreements or contracts, for an amount equal to the total of the respective deductions therefor made during the month. The governing board may require that the employee submit his or her authorization for the deduction up to one month in advance of the effective date of coverage.

(d) "Group insurance" as used in this section shall mean only a bona fide group program of life or disability or life and disability insurance where a master contract is held by the school district or an employee organization but it shall, nevertheless, include annuity programs authorized by Section 403(b) of the Internal Revenue Code when approved by the governing board.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended by Stats 1978 ch 1305 § 24, operative January 1, 1980. Amended by Stats 2006 ch 780 § 6, effective January 1, 2007; Stats 2007

ch. 130 § 69 (AB 299), effective January 1, 2008, ch 323 § 19 (ch. 323 prevails) (AB 757), effective January 1, 2008.

Editor's Notes—Ins C § 11491, referred to in this section, was repealed in 1996.

Amendments

1978 Amendment: Amended the first sentence by **(1)** adding "(commencing with Section 11491)"; **(2)** substituting "nonprofit corporation subject to Part 2 (commencing with Section 5110) of, Part 3 (commencing with Section 7110) of, or Part 11 (commencing with Section 10810) of, Division 2 of Title 1 of the Corporations Code" for "nonprofit membership corporation lawfully operating under Section 9200 or 9201 of the Corporations Code"; and **(3)** substituting "nonprofit corporation subject to Part 3 (commencing with Section 7110) of, or Part 11 (commencing with Section 10810) of, Division 2 of Title 1 of the Corporations Code" for "nonprofit membership corporation lawfully operating under Section 9200 or 9201.2 of the Corporations Code" at the end of the sentence.

2006 Amendment: (1) Added subdivision designations (a)–(a)(1)(D); **(2)** deleted "participating in a deferred compensation program offered by the school district which provides for investments in corporate stocks, bonds, securities, mutual funds, or annuities, except as prohibited by the Constitution, or" at the end of subd (a)(1); **(3)** substituted the period for ", or" at the end of subds (a)(1)(A)–(a)(1)(C); **(4)** added "or her" after "or his" wherever it appears in the section; **(5)** added subd (a)(2); and **(6)** added subd (b).

2007 Amendment: (1) Added "former" after "pursuant to the" in subd (a)(1)(B); and **(2)** substituted "employee" for "employees" after "due to an" in subd (b).

§ 44041.5. Contract with a third-party administrator regarding annuity contract and custodial account or deferred compensation plan

(a) For purposes of this section, the following definitions shall apply:

(1) "Annuity contract" means an annuity contract described in Section 403(b) of the Internal Revenue Code that is available to employees as described in Section 770.3 of the Insurance Code.

(2) "Custodial account" means a custodial account described in Section 403(b)(7) of the Internal Revenue Code.

(3) "Deferred compensation plan" means a plan described in Section 457 of the Internal Revenue Code.

(4) "Employer" means a school district or county office of education.

(5) "Third-party administrator" means a person or entity that provides administrative or compliance services to an employer as described in subdivision (b).

(b) An employer may enter into a written contract with a third-party administrator for services regarding an annuity contract and custodial account or a deferred compensation plan provided by the employer. That contract may include any of the following:

(1) Services to ensure compliance with either Section 403(b) of the Internal Revenue Code regarding the annuity contract and custodial account or Section 457 of the Internal Revenue Code regarding a deferred compensation plan, including, but not limited to, any of the following:

(A) Administer and maintain written plan documents governing the employer's plan.

(B) Review and authorize hardship withdrawal requests under Section 403(b) of the Internal Revenue Code, transfer requests, loan requests, unforeseeable emergency withdrawals under Section 457 of the Internal Revenue Code and other disbursements permitted under either Section 403(b) or 457 of the Internal Revenue Code.

(C) Review and determine domestic relations orders as qualified domestic relations orders as described in Section 414(p) of the Internal Revenue Code.

(D) Provide notice to eligible employees that is consistent with Title 26 of the Code of Federal Regulations that those employees may participate in an annuity contract and custodial account.

(E) Administer and maintain specimen salary reduction agreements for the employer and employees of that employer to initiate payroll deferrals.

(F) Monitor, from information provided either directly from the employee, as part of the common remitting services provided pursuant to paragraph (2), through information provided by the employer, or through information provided by vendors authorized by the employer to provide investment products, the maximum contributions allowed by employees participating in either the annuity contract and custodial account as described in Sections 402(g), 414(v), and 415 of the Internal Revenue Code or the deferred compensation plan as described in Section 414(v) or 457 of the Internal Revenue Code.

(G) Calculate and maintain vesting information for contributions made by the employer to the annuity contract and custodial account or deferred compensation plan.

(H) Identify and notify employees that are required to take a minimum distribution of the funds in that employee's annuity contract and custodial account or deferred compensation plan as described in Section 401(a)(9) of the Internal Revenue Code.

(I) Coordinate responses to the Internal Revenue Service if there is an Internal Revenue Service audit of the annuity contract and custodial account or deferred compensation plan.

(2) Services to administer the annuity contract and custodial account or a deferred compensation plan that includes, but is not limited to, all of the following:

(A) Common remitting services.

(B) General educational information to employees about the annuity contract and custodial account or the deferred compensation plan that includes, but is not limited to, the enrollment process, program eligibility, and investment options.

(C) Internal reports for the employer to ensure compliance with either Section 403(b) or 457 of the Internal Revenue Code and compliance with Title 26 of the Code of Federal Regulations.

(D) Consulting services related to the design, operation, and administration of the plan.

(E) Internal audits, on behalf of an employer, of a provider's plan compliance procedures with respect to the provider's annuity contract or custodial account offered under the employer's plan. These audits shall not be conducted more than once per year for any provider's plan unless documented evidence indicates a problem in complying with either Section 403(b) or 457 of the Internal Revenue Code.

(c)(1) If an employer elects to contract with a third-party administrator for the administrative or compliance services to employers described in subdivision (b), the employer shall do all of the following:

(A) Require the third-party administrator to provide proof of liability insurance and a fidelity bond in an amount determined by the employer to be sufficient to protect the assets of participants and beneficiaries in the annuity contract and custodial account or deferred compensation plan.

(B) Require the third-party administrator to provide evidence of a safe chain-of-custody of assets process for ensuring fulfillment of fiduciary responsibilities and timely placement of participant investments.

(C) Require evidence, if the third-party administrator is related to or affiliated with a provider of investment products pursuant to Section 403(b) or 457 of the Internal Revenue Code, that data generated from the services provided by the third-party administrator are maintained in a manner that prevents the provider of investment products from accessing that data unless access to the data is required to provide the services in accordance with the contract entered into with the employer pursuant to subdivision (b).

(2) This subdivision shall apply to any administrative or compliance services provided pursuant to a contract for services between an employer and the State Teachers' Retirement System if the system does not contract with a third-party administrator to provide those administrative and compliance services on behalf of the system.

(d) A third-party administrator shall disclose to any employer seeking his or her services any fees, commissions, cost offsets, reimbursements, or marketing or promotional items received by the administrator, a related entity, or a representative or agent of the administrator or related entity from any plan provider selected as a vendor of a annuity contract, custodial account, or deferred compensation plan by the employer. A third-party administrator that is affiliated with or has a contractual relationship

with a provider of annuity contracts, custodial accounts, or deferred compensation plans shall disclose the existence of the relationship to each employer and each individual participant in the annuity contract, custodial account or deferred compensation plan.

(e) Any personal information obtained by the third-party administrator in providing services pursuant to this section shall be used by the third-party administrator only to provide those services for the employer in accordance with the contract entered into with the employer pursuant to subdivision (b).

(f) Nothing in this section shall be construed to interfere with either of the following:

(1) The rights of employees or beneficiaries as described in Section 770.3 of the Insurance Code.

(2) The ability of the employer to establish nonarbitrary requirements upon providers of an annuity contract that, in the employer's discretion, aid in the administration of its benefit programs and do not unreasonably discriminate against any provider of an annuity contract or interfere with the rights of employees or beneficiaries as described in Section 770.3 of the Insurance Code.

(g) This section shall not apply to any services provided by a third-party administrator pursuant to a contract for services between an employer and the State Teachers' Retirement System. Any services provided by a third-party administrator pursuant to a contract for services between an employer and the State Teachers' Retirement System shall be subject to either Section 24953, in the case of an annuity contract or custodial account, or Section 24977, in the case of a deferred compensation plan.

Added by Stats 2006 ch 780 § 7 (AB 2462), effective January 1, 2007. Amended by Stats 2007 ch. 130 § 70 (AB 299), effective January 1, 2008.

Amendments

2007 Amendment: (1) Added "For" at the beginning of subd (a); **(2)** amended subd (b)(1)(F) by substituting **(a)** "paragraph (2)" for "subparagraph (2)"; and **(b)** "Section 414(v) or 457" for "Sections 414(v) or 457"; and **(3)** added "of the following" at the end of the introductory clause in subd (f).

§ 44043. Temporary disability

Any school employee of a school district who is absent because of injury or illness which arose out of and in the course of the person's employment, and for which the person is receiving temporary disability benefits under the workers' compensation laws of this state, shall not be entitled to receive wages or salary from the district which, when added to the temporary disability benefits, will exceed a full day's wages or salary.

During such periods of temporary disability so long as the employee has available for the employee's use sick leave, vacation, compensating time off or other paid leave of absence, the district shall require that temporary disability checks be endorsed payable to the district. The district shall then cause the employee to receive the person's normal wage or salary less appropriate deductions including but not limited to employee retirement contributions.

When sick leave, vacation, compensating time off or other available paid leave is used in conjunction with temporary disability benefits derived from workers' compensation, as provided in this section, it shall be reduced only in that amount necessary to provide a full day's wage or salary when added to the temporary disability benefits.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977.

Notes of Decisions

1. Generally

Given that Ed C § 44043 payments are in part temporary disability benefits under workers' compensation laws, temporary disability payments commence when a school district pays an injured employee his or her normal wages under § 44043; accordingly, where a school district sought to terminate further liability for an em-

ployee's temporary disability indemnity based on Lab C § 4656(c)(1), the employee had received exactly what she was entitled to under Ed C § 44043, and although the district admitted that it did not precisely follow the procedure outlined in § 44043, or the alternate procedure set forth in Ed C § 44044, the legislature would likely not have been concerned with a slight administrative deviation that was mutually beneficial to the parties and achieved the same end result. Mt. Diablo Unified School Dist. v. Workers' Comp. Appeals Bd. (2008, 1st Dist) 165 Cal App 4th 1154, 2008 Cal App LEXIS 1222.

Ed C § 44043 provides a different and inferior benefit than Lab C § 4850. Mt. Diablo Unified School Dist. v. Workers' Comp. Appeals Bd. (2008, 1st Dist) 165 Cal App 4th 1154, 2008 Cal App LEXIS 1222.

§ 44044. Retention of temporary disability checks

Notwithstanding the provisions of Sections 44043, 44984 and 45192, a school district may waive the requirement that temporary disability checks be endorsed payable to the district, and may in lieu thereof, permit the employee to retain his temporary disability check, providing that notice be given to the district that such check has been delivered to the employee. In such cases, the district shall then cause the employee to receive his normal wage or salary less appropriate deductions, including, but not limited to, employee retirement contributions, and an amount equivalent to the face amount of the temporary disability check, which the employee has been permitted to retain. In all cases, employee benefits are to be computed on the basis of the employee's regular wage or salary prior to the deduction of any amounts for temporary disability payments.

Nothing contained herein shall be deemed to in any way diminish those rights and benefits which are granted to a school employee pursuant to the provisions of Sections 44043, 44984 and 45192.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977.

Notes of Decisions

1. Generally

Given that Ed C § 44043 payments are in part temporary disability benefits under workers' compensation laws, temporary disability payments commence when a school district pays an injured employee his or her normal wages under § 44043; accordingly, where a school district sought to terminate further liability for an employee's temporary disability indemnity based on Lab C § 4656(c)(1), the employee had received exactly what she was entitled to under Ed C § 44043, and although the district admitted that it did not precisely follow the procedure outlined in § 44043, or the alternate procedure set forth in Ed C § 44044, the legislature would likely not have been concerned with a slight administrative deviation that was mutually beneficial to the parties and achieved the same end result. Mt. Diablo Unified School Dist. v. Workers' Comp. Appeals Bd. (2008, 1st Dist) 165 Cal App 4th 1154, 2008 Cal App LEXIS 1222.

§ 44252.5. Administering state basic skills assessment test; Agreements with other states; Proficiency

(a) The commission shall administer the state basic skills proficiency test pursuant to Sections 44227, 44252, and 44830 in accordance with rules and regulations adopted by the commission. A fee shall be charged to individuals being tested to cover the costs of the test, including the costs of developing, administering, and grading the test. The amount of the fee shall be established by the commission to recover the cost of examination administration and development pursuant to Section 44235.3.

(b) The commission may enter into agreements with other states permitting the use of the state basic skills proficiency test as a requirement for the issuance of credentials or for teacher preparation program admission in those other states, provided that the use would advance the interests of the State of California and that the other states reimburse the Teacher Credentials Fund for a proportionate share of costs of the development and administration of the test.

(c) An individual who passes the state basic skills proficiency test, as adopted by the Superintendent, shall be considered proficient in the skills of reading, writing, and mathematics, and shall not be

required to be retested by this test for purposes of meeting the proficiency requirements of Sections 44227, 44252, and 44830.

(d) An individual who passes one or more components of the state basic skills proficiency test in the subjects of basic reading, writing, or mathematics shall be deemed to have demonstrated his or her proficiency in these subject areas and shall not be required to be retested in these subjects during subsequent test administrations.

Added Stats 1981 ch 1136 § 2. Amended Stats 1982 ch 206 § 2, effective May 18, 1982; Stats 1983 ch 536 § 2, effective July 28, 1983; Stats 1986 ch 989 § 2; Stats 1999 ch 704 § 1 (AB 1282); Stats 2006 ch 517 § 5 (SB 1209), effective January 1, 2007; Stats 2008 ch 518 § 3 (SB 1186), effective January 1, 2009.

Amendments

1982 Amendment: (1) Amended subd (a) by **(a)** substituting "in accordance with rules and regulations adopted" for "at existing centers administered" in the first sentence; **(b)** adding the second sentence; **(c)** adding "in the 1982–83 fiscal year, thirty–five dollars ($35) in the 1983–84 fiscal year, and forty dollars ($40) in subsequent fiscal years" in the fifth sentence; and **(d)** substituting "receive" for "collect" after "commission shall" in the last sentence; and **(2)** deleted the former second sentence of subd (b) which read: "An individual who passes a proficiency test in basic skills in another state shall be considered to meet the proficiency requirements of this section only if the commission determines that the test covers the same skills as the state assessment instrument and that the test is equivalent to the state instrument in difficulty."

1983 Amendment: (1) Substituted "test", "proficiency test", and "basic skills proficiency test" for references to "assessment instrument", "assessment", and "assessment instrument to measure proficiency in basic reading, writing, and mathematics skills" in subds (a) and (b); **(2)** substituted "44227, 44252," for "44252" in the first sentence of subd (a) and near the end of subd (b); **(3)** deleted the former last sentence of subd (a) which read: "The commission shall receive the fee from the individuals being assessed, and reimburse the State Department of Education for any costs the department incurs in the process of adopting the assessment instrument and overseeing the implementation of these provisions."; **(4)** added the comma after "Public Instruction" in subd (b); and **(5)** added subd (c).

1986 Amendment: (1) Added subd (b); and **(2)** redesignated former subds (b) and (c) to be subds (c) and (d).

1999 Amendment: Amended subd (a) by **(1)** substituting "for the 1984–85 fiscal year to January 1, 2002" for "in subsequent fiscal years" in the fifth sentence; and **(2)** adding the last sentence.

2006 Amendment: (1) Amended subd (a) by **(a)** deleting the former second sentence which read: "The adopted rules and regulations shall be promulgated by the commission before January 1, 1983, and shall be exempt from the requirements of Section 44232."; and **(b)** deleting "commission shall establish the amount of this fee. However, the fee shall not exceed thirty dollars ($30) in the 1982 fiscal year, thirty five dollars ($35) in the 1983-84 fiscal year, and forty dollars ($40) for the 1984-85 fiscal year to January 1, 2002. Subsequent to January 1, 2002, the" after "grading the test. The"; **(2)** deleted "of Public Instruction" after "by the Superintendent" in subd (c); and **(3)** added subd (e).

2008 Amendment: (1) Substituted "An individual" for "Any individual" at the beginning of subds (c) and (d); **(2)** deleted the comma after "writing, or mathematics" in subd (d); and **(3)** deleted former subd (e) which read: "(e) Any individual who achieves a passing score, as determined by the Superintendent, on any of the tests specified in subdivision (d) of Section 44252 shall be considered proficient in the skills of reading, writing, and mathematics, and shall not be required to pass the state basic skills proficiency test or be retested for purposes of meeting the proficiency requirements of Sections 44227, 44252, and 44830."

§ 44830. Employment of certificated persons; Basic skills proficiency test; Emergency substitute teachers; Exemptions

(a) The governing board of a school district shall employ for positions requiring certification qualifications, only persons who possess the qualifications for those positions prescribed by law. It is contrary to the public policy of this state for a person or persons charged, by the governing boards, with the responsibility of recommending persons for employment by the boards to refuse or to fail to do so for reasons of race, color, religious creed, sex, or national origin of the applicants for that employment.

(b) The governing board of a school district shall not initially hire on a permanent, temporary, or substitute basis a certificated person seeking employment in the capacity designated in his or her credential unless that person has demonstrated basic skills proficiency as provided in Section 44252.5 or is exempted from the requirement by subdivision (c), (d), (e), (f), (g), (h), (i), (j), or (k).

(1) The governing board of a school district, with the authorization of the Commission on Teacher Credentialing, may administer the state basic skills proficiency test required under Sections 44252 and 44252.5.

(2) The Superintendent, in conjunction with the commission and local governing boards, shall take steps necessary to ensure the effective implementation of this subdivision.

It is the intent of the Legislature that in effectively implementing this subdivision, the governing boards of school districts shall direct superintendents of schools to prepare for emergencies by developing a pool of qualified emergency substitute teachers. This preparation shall include public notice of the test requirements and of the dates and locations of administrations of the tests. The governing board of a school district shall make special efforts to encourage individuals who are known to be qualified in other respects as substitutes to take the state basic skills proficiency test at its earliest administration.

(3) Demonstration of proficiency in reading, writing, and mathematics by a person pursuant to Section 44252 satisfies the requirements of this subdivision.

(c) A certificated person is not required to take the state basic skills proficiency examination if he or she has taken and passed it at least once, achieved a passing score on any of the tests specified in subdivision (b) of Section 44252, or possessed a credential before the enactment of the statute that made the test a requirement.

(d) This section does not require a person employed solely for purposes of teaching adults in an apprenticeship program, approved by the Apprenticeship Standards Division of the Department of Industrial Relations, to pass the state proficiency assessment instrument as a condition of employment.

(e) This section does not require the holder of a child care permit or a permit authorizing service in a development center for the handicapped to take the state basic skills proficiency test, so long as the holder of the permit is not required to have a baccalaureate degree.

(f) This section does not require the holder of a credential issued by the commission who seeks an additional credential or authorization to teach, to take the state basic skills proficiency test.

(g) This section does not require the holder of a credential to provide service in the health profession to take the state basic skills proficiency test if that person does not teach in the public schools.

(h) This section does not require the holder of a designated subjects special subjects credential to pass the state basic skills proficiency test as a condition of employment unless the requirements for the specific credential require the possession of a baccalaureate degree. The governing board of each school district, or each governing board of a consortium of school districts, or each governing board involved in a joint powers agreement, which employs the holder of a designated subjects special subjects credential shall establish its own basic skills proficiency for these credentials and shall arrange for those individuals to be assessed. The basic skills proficiency criteria established by the governing board shall be at least equivalent to the test required by the district, or in the case of a consortium or a joint powers agreement, by any of the participating districts, for graduation from high school. The governing board or boards may charge a fee to individuals being tested to cover the costs of the test, including the costs of developing, administering, and grading the test.

(i) This section does not require the holder of a preliminary or clear designated subjects career technical education teaching credential to pass the state basic skills proficiency test.

(j) This section does not require certificated personnel employed under a foreign exchange program to take the state basic skills proficiency test. The maximum period of exemption under this subdivision shall be one year.

(k) Notwithstanding any other law, a school district or county office of education may hire certificated personnel who have not taken the state basic skills proficiency test if that person has not yet been

afforded the opportunity to take the test. The person shall take the test at the earliest opportunity and may remain employed by the school district pending the receipt of his or her test results.

Enacted Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended Stats 1981 ch 1136 § 13; Stats 1982 ch 206 § 6, effective May 18, 1982, ch 1388 § 5, effective September 24, 1982; Stats 1983 ch 536 § 3, effective July 28, 1983, ch 1038 § 2; Stats 1985 ch 747 § 1; Stats 1986 ch 989 § 5; Stats 1996 ch 948 § 2 (AB 1068), effective September 26, 1996, operative February 11, 1997; Stats 1998 ch 547 § 6 (AB 1620), effective September 18, 1998; Stats 2004 ch 113 § 1 (SB 1208); Stats 2007 ch 191 § 2 (SB 112), effective January 1, 2008; Stats 2008 ch 518 § 8 (SB 1186), effective January 1, 2009.

Amendments

1981 Amendment: (1) Designated the former section to be subd (a); **(2)** substituted "the" for "said" wherever it appears in the second sentence of subd (a); and **(3)** added subds (b) and (c).

1982 Amendment: (1) Substituted the first paragraph of subd (b) for the former first paragraph which read: "(b) Commencing on March 1, 1982, no certificated person shall be hired initially to serve in any school district on a permanent, temporary, or substitute basis, unless the person has demonstrated proficiency in basic reading, writing, and mathematics skills in the English language."; **(2)** added subd (b)(1); **(3)** redesignated former subd (b)(1) to be subd (b)(2); **(4)** added the second paragraph of subd (b)(2); **(5)** substituted subd (b)(3) for former subd (b)(3) which read: "(3) If a certificated person does not pass a proficiency assessment in basic skills pursuant to this section, he or she shall be given one year to master these basic skills, and then shall be given one additional opportunity to be reassessed. Failure to pass an assessment in basic skills on the second opportunity shall be grounds for dismissal under procedures established in Article 3 (commencing with Section 44930) of Chapter 4."; **(6)** added subd (c); **(7)** redesignated former subd (c) to be subd (d); and **(8)** added subds (e)–(h). (As amended by Stats 1982, ch 1388, compared to the section as it read prior to 1982. This section was also amended by an earlier chapter, ch 206. See Gov C § 9605.)

1983 Amendment: (1) Amended subd (a) by substituting **(a)** "A governing board of a school district" for "Governing boards of school districts"; and **(b)** "is" for "shall be" after "It" at the beginning of the second sentence; **(2)** amended subd (b) by substituting **(a)** "(g), (h), (i), (j), (k), (l), (m), and (n)" for "and (g)"; **(b)** "Commission on Teacher Credentialing" for "Commission on Teacher Preparation and Licensing" in subd (b)(1); and **(c)** "ensure" for "insure" in subd (b)(2); **(3)** substituted "any" for "another" after "certification in" in subd (c); **(4)** added subds (e)–(g); **(5)** redesignated former subds (e) and (f) to be subds (h) and (i); **(6)** added subd (j); **(7)** redesignated former subd (g) to be subd (k); **(8)** added subd (l); **(9)** redesignated former subd (h) to be subd (m); and **(10)** added subds (n) and (o). (As amended by Stats 1983, ch 1038, compared to the section as it read prior to 1983. This section was also amended by an earlier chapter, ch 536. See Gov C § 9605.)

1985 Amendment: (1) Amended the second sentence of subd (a) by **(a)** deleting "such" after "recommending"; and **(b)** substituting "that" for "such" after "applicants for"; and **(2)** added the second sentence of subd (c).

1986 Amendment: Deleted former subd (o) which read: "(o) The commission shall require that each applicant for a credential issued by the commission, unless exempted by the provisions of Section 44252, take the state basic skills proficiency test for diagnostic purposes. Each applicant shall take the test no later than the deadline for the submission of his or her application for entrance to the credential program. Test results shall be forwarded to each California postsecondary institution to which the applicant has applied."

1996 Amendment: (1) Deleted "the provisions of" after "required under" in subd (b)(1); **(2)** added subdivision designation (c)(1); and **(3)** added subd (c)(2).

1998 Amendment: (1) Substituted "or (m)" for "(m), and (n)" at the end of subd (b); **(2)** deleted former subd (m) which read: "(m) A school district may hire a teacher credentialed in another state who has not taken the state basic skills test if, at a public meeting, the school district governing board certifies that no person who meets the credentialing requirements and who has satisfied the basic skills requirement specified in Section 44261.5 is available to fill a position deemed necessary to the normal operation of the school curriculum. The board shall include in the certification a statement of the need to fill the position and the reasons for the need, proof of its attempts to recruit qualified teachers in California, and a statement attesting to the failure of those attempts. Such certification shall be submitted to the commission with the name of the teacher the board intends to employ pursuant to this section. The commission shall issue an emergency credential pursuant to paragraph 3 of subdivision (b) of Section 44252, upon receipt of this documentation."; and **(3)** redesignated former subd (n) to be subd (m).

2004 Amendment: (1) Amended subd (b) by substituting **(a)** "A school district governing board shall not initially" for "Commencing on February 1, 1983, no school district governing board shall initially" at the beginning of the section; **(b)** "his or her credential," for "his or her credential"; and **(c)** "Section 44252.5 or is exempted from the requirement by subdivision (c)," for "Section 44252.5 or unless the person is exempted from the requirement by subdivision (c)," at the end of the section; **(2)** added "state" after "may administer the" in subd (b)(1); **(3)** deleted "the provisions of" after "effectively implementing" in the second sentence of subd (b)(2); **(4)** substituted "Section 44252 satisfies the" for "Section 44252 shall satisfy the" in subd (b)(3); **(5)** amended subd (c)(1) by **(a)** substituting "person is not required" for "person shall not be required" at the beginning of the section; **(b)** adding "district or if he or she is a retired Certificated employee who meets all of the following requirements:" after "to employment with the" at the end of the section; and **(c)** adding subds (c)(1)(A)–(c)(1)(C); **(6)** added subd (c)(2); **(7)** substituted "that has been developed" for "which has been developed" in subd (c)(2); **(8)** redesignated former subd (c)(2) to be subd (c)(3); **(9)** substituted "of Part 28 is not required" for "of Part 28 shall not be required" in the first sentence of subd (c)(3); **(10)** substituted "This section does not require" for "Nothing in this section shall require" in subds (d)–(g); **(11)** substituted "if that person" for "so long as that person" in subd (g); **(12)** added "state" before "basic skills proficiency" twice in subd (h); **(13)** substituted "Section 44930)." for "Section 44930) of Chapter 4." in subd (i); **(14)** substituting "This section does not require the holder" for "Nothin in this section shall be construed as requiring the holder" in subds (j) and (k); **(15)** substituted "This section does not require" for "Nothing in this section shall be construed to require" in subd (l); and **(16)** amended subd (m) by deleting **(a)** "provision of" after "Notwithstanding any other" in the first sentence; and **(b)** "then" after "The person shall" in the second sentence.

2007 Amendment: (1) Substituted "Superintendent" for "superintendent" in subd (b)(2); **(2)** amended subd (c)(1) by **(a)** substituting "examination" for "test"; and **(b)** substituting "taken and passed it at least once, achieved a passing score on any of the tests specified in subdivision (d) of Section 44252, or possessed a credential before the enactment of the statute that made the test a requirement." for "been employed in a position requiring certification in any school district within 39 months prior to employment with the district or if he or she is a retired certificated employee who meets all of the following requirements:"; **(3)** deleted former subds (c)(1)(A)–(c)(3) which read:

"(A) He or she has taught 15 years or more in a California public school.

"(B) He or she has been employed at least five of those 15 years in the same school district that desires to reemploy that person and has been employed as a full-time classroom teacher within the last five years or concurrently enrolls in a teacher refresher course that meets all of the following requirements:

"(i) The course is developed and administered by the employing school district.

"(ii) The course is aligned with the state content and performance standards for pupils, adopted pursuant to subdivision (a) of Section 60605.

"(iii) The course is approved by the local governing board.

"(C) He or she has been employed as a classroom teacher or administrator within the last 10 years.

"(2) A person holding a valid California credential who has not been employed in a position requiring certification in any school district within 39 months prior to employment and who has not taken the state basic skills proficiency test, but who has passed a basic skills proficiency examination that has been developed and administered by the school district offering that person employment, may be employed by the governing board of that school district on a temporary basis on the condition that he or she will take the state basic skills proficiency test within one year of the date of his or her employment.

"(3) A certificated person who is employed for purposes of the class size reduction program set forth in Chapter 6.10 (commencing with Section 52120) of Part 28 is not required to take the state basic skills proficiency test if he or she has been employed in a position requiring certification in any school district within 39 months prior to employment with the district. A person holding a valid California credential who has not been employed in a position requiring certification in any school district within 39 months prior to employment for purposes of the class size reduction program and who has not taken the state basic skills proficiency test may be employed by the governing board of that school district on a temporary basis on the condition that he or she will take the state basic skills proficiency test within one calendar year of the date of his or her employment.";

and **(4)** substituted "employed by the school district" for "employed by the district" in subd (m).

2008 Amendment: (1) Amended subd (a) by substituting **(a)** "qualifications for those positions" for "qualifications therefor" in the first sentence; and **(b)** "state for a person" for "state for any person" in the last sentence; **(2)** amended subd (b) by **(a)** substituting "The governing board of a school district" for "A school district governing board"; **(b)** deleting the comma after "his or her credential"; and **(c)** substituting "subdivision (c), (d),

(e), (f), (g), (h), (i), (j), or (k)" for "subdivision (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), or (m)"; **(3)** added the first paragraph of subd (b)(2); **(4)** redesignated former subd (b)(2) to be the second paragraph of subd (b)(2); **(5)** amended the last paragraph of subd (b)(2) by substituting **(a)** "the governing boards of school districts" for "school district governing boards" in the first sentence; and **(b)** "The governing board of a school district" for "District governing boards" in the last sentence; **(6)** substituted "a person" for "any person" in subd (b)(3); **(7)** substituted "subdivision (b)" for "subdivision (d)" in subd (c); **(8)** deleted the comma after "skills proficiency test" in subd (g); **(9)** deleted former subds (h) and (i) which read:

"(h) If the state basic skills proficiency test is not administered at the time of hiring, the holder of a vocational designated subject credential who has not already taken and passed the state basic skills proficiency test may be hired on the condition that he or she will take the test at its next local administration.

"(i) If the holder of a vocational designated subject credential does not pass a proficiency assessment in basic skills pursuant to this section, he or she shall be given one year in which to retake and pass the proficiency assessment in basic skills. If at the expiration of the one-year period he or she has not passed the proficiency assessment in basic skills, he or she shall be subject to dismissal under procedures established in Article 3 (commencing with Section 44930).";

(10) redesignated former subds (j)-(m) to be subds (h)-(k); **(11)** amended subd (h) by **(a)** substituting "designated subjects special subjects" for "vocational designated subject" both times it appears; and **(b)** adding "unless the requirements for the specific credential require the possession of a baccalaureate degree" in the first sentence; **(12)** substituted subd (i) for former subd (i) which read:

"(i) This section does not require the holder of an adult education designated subject credential for other than academic subjects, who is employed in an instructional setting for 20 hours or less per week, to pass the state proficiency assessment as a condition of employment.";

and **(13)** substituted "or county office of education may hire certificated personnel who have not taken" for "may hire a certificated teacher who has not taken" in the first sentence of subd (k).

Notes of Decisions

Teacher does not hold public office, but serves as employee of school district under employment contract. Main v. Claremont Unified School Dist. (1958, Cal App 2d Dist) 161 Cal App 2d 189, 326 P2d 573, 1958 Cal App LEXIS 1718, overruled Barthuli v. Board of Trustees (1977) 19 Cal 3d 717, 139 Cal Rptr 627, 566 P2d 261, 1977 Cal LEXIS 159.

Provisions restricting employment by local boards of education to teachers holding credentials from State Board of Education do not automatically deprive teachers of tenure or of status as permanent employees, but implement statewide system of certification by requirement that only teachers so qualified shall be eligible for employment by local boards; such provisions do not condition tenure rights or status on certification. Mass v. Board of Education (1964) 61 Cal 2d 612, 39 Cal Rptr 739, 394 P2d 579, 1964 Cal LEXIS 241.

If a teacher meets the Educational Code provisions for permanent status, the attainment of such status is automatic, and requires no application by the teacher or affirmative action on the part of the school board. Vittal v. Long Beach Unified Sch. Dist. (1970, Cal App 2d Dist) 8 Cal App 3d 112, 87 Cal Rptr 319, 1970 Cal App LEXIS 2026.

Narrow exceptions in Ed C § 44911 for sister-state teachers, specifically Ed C §§ 44252(b), 44830(m), did not permit a teacher credentialed out of state without demonstrated competence to teach, as such a teacher must have passed equivalent examinations, and had a one year window in which to pass the California Basic Educational Skills Test; thus, such a case would involve a teacher with a foreign credential serving under an emergency credential only until the teacher either obtained a California credential or ran out of time to do so. Smith v. Governing Bd. of Elk Grove Unified School Dist. (2004, Cal App 3d Dist) 120 Cal App 4th 563, 16 Cal Rptr 3d 1, 2004 Cal App LEXIS 1095, review denied (2004, Cal) 2004 Cal LEXIS 9471.

§ 44830.3. Employment of district interns; Requirements; Assistance and guidance; Professional development plan; Compensation; Credentialing of district interns

(a) The governing board of any school district that maintains prekindergarten, kindergarten, or any of grades 1 to 12, inclusive, classes in bilingual education, or special education programs, may, in consultation with an accredited institution of higher education offering an approved program of pedagogical teacher preparation, employ persons authorized by the Commission on Teacher Credentialing to

provide service as district interns to provide instruction to pupils in those grades or classes as a classroom teacher. The governing board shall require that each district intern be assisted and guided by a certificated employee selected through a competitive process adopted by the governing board after consultation with the exclusive teacher representative unit or by personnel employed by institutions of higher education to supervise student teachers. These certificated employees shall possess valid certification at the same level, or of the same type of credential, as the district interns they serve.

(b) The governing board of each school district employing district interns shall develop and implement a professional development plan for district interns in consultation with an accredited institution of higher education offering an approved program of pedagogical preparation. The professional development plan shall include all of the following:

(1) Provisions for an annual evaluation of the district intern.

(2) As the governing board determines necessary, a description of courses to be completed by the district intern, if any, and a plan for the completion of preservice or other clinical training, if any, including student teaching.

(3) Mandatory preservice training for district interns tailored to the grade level or class to be taught, through either of the following options:

(A) One hundred twenty clock hours of preservice training and orientation in the aspects of child development, classroom organization and management, pedagogy, and methods of teaching the subject field or fields in which the district intern will be assigned, which training and orientation period shall be under the direct supervision of an experienced permanent teacher. In addition, persons holding district intern certificates issued by the commission pursuant to Section 44325 shall receive orientation in methods of teaching pupils with disabilities. At the conclusion of the preservice training period, the permanent teacher shall provide the district with information regarding the area that should be emphasized in the future training of the district intern.

(B) The successful completion, prior to service by the intern in any classroom, of six semester units of coursework from a regionally accredited college or university, designed in cooperation with the school district to provide instruction and orientation in the aspects of child development and the methods of teaching the subject matter or matters in which the district intern will be assigned.

(4) Instruction in child development and the methods of teaching during the first semester of service for district interns teaching in prekindergarten, kindergarten, or any of grades 1 to 6, inclusive, including bilingual education classes and special education programs.

(5) Instruction in the culture and methods of teaching bilingual pupils during the first year of service for district interns teaching pupils in bilingual classes and, for persons holding district intern certificates issued by the commission pursuant to Section 44325, instruction in the etiology and methods of teaching pupils with disabilities.

(6) Any other criteria that may be required by the governing board.

(7) In addition to the requirements set forth in paragraphs (1) to (6), inclusive, the professional development plan for district interns teaching in special education programs shall also include 120 clock hours of mandatory training and supervised fieldwork that shall include, but not be limited to, instructional practices, and the procedures and pedagogy of both general education programs and special education programs that teach pupils with disabilities.

(8) In addition to the requirements set forth in paragraphs (1) to (6), inclusive, the professional development plan for district interns teaching bilingual classes shall also include 120 clock hours of mandatory training and orientation, which shall include, but not be limited to, instruction in subject matter relating to bilingual-crosscultural language and academic development.

(9) The professional development plan for district interns teaching in special education programs shall be based on the standards adopted by the commission as provided in subdivision (a) of Section 44327.

(c) Each district intern and each district teacher assigned to supervise the district intern during the preservice period shall be compensated for the preservice period required pursuant to subparagraph

(A) or (B) of paragraph (3) of subdivision (b). The compensation shall be that which is normally provided by each district for staff development or in-service activity.

(d) Upon completion of service sufficient to meet program standards and performance assessments, the governing board may recommend to the Commission on Teacher Credentialing that the district intern be credentialed in the manner prescribed by Section 44328.

Added Stats 1983 ch 498 § 45, effective July 28, 1983. Amended Stats 1984 ch 482 § 10.5, effective July 17, 1984; Stats 1987 ch 1468 § 8; Stats 1994 ch 673 § 8 (SB 1657); Stats 1996 ch 303 § 1 (AB 1432), ch 948 § 3 (AB 1068), effective September 26, 1996, operative February 11, 1997; Stats 2002 ch 1087 § 5 (SB 2029); Stats 2003 ch 62 § 53 (SB 600), ch 461 § 6 (SB 187) (ch 461 prevails); Stats 2004 ch 183 § 67 (AB 3082); Stats 2005 ch 22 § 39 (SB 1108), effective January 1, 2006; Stats 2007 ch 323 § 20 (AB 757), effective January 1, 2008; Stats 2009 ch 316 § 9 (AB 239), effective January 1, 2010.

Editor's Notes—Stats 1996 ch 948 § 7 provided that ch 948 would not become operative unless AB 2460 of the 1995–96 Regular Session was chaptered and became operative effective January 1, 1997; AB 2460 was not chaptered in 1996, and so ch 948 did not become operative. However, Stats 1997 ch 1 § 1 repealed Stats 1996 ch 948 § 7, effective February 11, 1997; and § 2 of Stats 1997 ch 1 provided that it is the intent of the Legislature in enacting this act to immediately facilitate the reduction of class size in California and to cause Chapter 948 of the Statutes of 1996 to become operative.

Amendments

1984 Amendment: Substituted "6 to 8, inclusive, in a departmentalized program" for "7 and 8 in a departmentalized junior high school" in subd (a).

1987 Amendment: (1) Changed all references to teacher trainees to refer to district interns in subds (a), (b)(1), (b)(2), and (d); **(2)** amended subd (a) by **(a)** substituting "that maintains kindergarten or grades 1 to 12, inclusive, or that maintains classes in bilingual education" for "maintaining grades 9 to 12, inclusive, or maintaining grades 6 to 8, inclusive, in a departmentalized program," in the first sentence; **(b)** adding "on the appropriate statement of need document provided by the commission" in the second sentence; and **(c)** adding "or by certificated employees selected through a competitive process adopted by the governing board after consultation with the exclusive teacher representative unit or by personnel employed by institutions of higher education to supervise student teachers" in the third sentence; **(3)** amended the first paragraph of subd (b) by **(a)** substituting "district interns" for "certificated teacher trainees" after "employing" in the first sentence; **(b)** substituting "district interns" for "each teacher trainee" after "plan for" in the first sentence; and **(c)** adding "all of the following" in the clause at the end; **(4)** added subds (b)(3)–(b)(5); **(5)** redesignated former subd (b)(3) to be subd (b)(6); **(6)** added subd (c); **(7)** redesignated former subd (c) to be subd (d); and **(8)** added "or three years of service for those teaching in bilingual classes" in subd (d).

1994 Amendment: (1) Amended subd (a) by **(a)** adding "classes in bilingual education, or in the case of special education programs for pupils with mild and moderate disabilities, the Los Angeles Unified School District,"; **(b)** adding "or classes" before "as a classroom" near the end of the first sentence; **(c)** substituting "an insufficient number of" for "insufficient" after "commission that" in the second sentence; **(d)** deleting "the provisions of" before "Article 4"; and **(e)** adding the last sentence; **(2)** amended subd (b)(3) by **(a)** deleting "teaching in kindergarten or grades 1 to 12, inclusive," after "district interns"; and **(b)** adding "or class" before "to be taught"; **(3)** amended subd (b)(3)(B) by **(a)** adding "successful" after "The"; and **(b)** substituting "coursework from a regionally accredited college or university," for "college or university coursework" before "designed in"; **(4)** added subds (b)(7)–(b)(9); and **(5)** substituted subd (d) for former subd (d) which read: "(d) Upon completion of two years of service or three years of service for those teaching in bilingual classes, the governing board may recommend to the Commission on Teacher Credentialing that the district intern be credentialed in the mannter prescribed by Section 44328."

1996 Amendment: (1) Amended the first sentence of subd (a) by adding **(a)** "or that maintains" after "grades 1 to 12, inclusive,"; and **(b)** ", in consultation with an accredited public institution of higher education offering an approved program of pedagogical teacher preparation,"; **(2)** deleted the former second sentence of subd (a) which read: "Prior to employing any person as a district intern, the governing board shall certify to the commission on the appropriate statement of need document provided by the commission that an insufficient number of

fully credentialed teachers are available."; **(3)** added the comma after "training and orientation" in subd (b)(8); and **(4)** deleted "of the Education Code" at the end of subd (b)(9).

2002 Amendment: (1) Amended the first sentence of subd (a) by **(a)** substituting "or" for ", or in the case of" after "bilingual education"; **(b)** substituting "may" for "the Los Angeles Unified School District, may," after "moderate disabilities,"; and **(c)** deleting the comma after "pedagogical teacher preparation"; **(2)** amended subd (b)(3)(A) by **(a)** substituting ", classroom organization and management, pedagogy, and" for "and the" in the first sentence; and **(b)** adding the second sentence; **(3)** added "and, for person holding district intern certificates issued by the commission pursuant to Section 44325, special education programs for pupils with mild and moderate disabilities" in subd (b)(4); **(4)** added "and, for persons holding district intern certificates issued by the commission pursuant to Section 44325, instruction in the etiology and methods of teaching children with mild and moderate disabilities" in subd (b)(5); and **(5)** amended subd (b)(7) by substituting **(a)** "training and supervised fieldwork that" for "preservice training and orientation, which"; and **(b)** "instructional practices, and the procedures and pedagogy of both general education programs and special education programs that teach pupils with disabilities" for "instruction in the development of exceptional children and the methods of teaching exceptional children".

2003 Amendment: (1) Amended subd (a) by **(a)** deleting "of the school district who has been designated by the governing board as a mentor teacher pursuant to Article 4 (commencing with Section 44490) of Chapter 3 or by certificated employees" after "by a certificated employee" in the second sentence; and **(b)** substituting "These" for "Mentor teachers or other" at the beginning of the last sentence; **(2)** amended subd (b)(3)(B) by **(a)** deleting the comma after "school district"; and **(b)** substituting "matter or matters" for "field or fields"; **(3)** amended subd (b)(4) by **(a)** adding "education" after "bilingual"; and **(b)** substituting "persons" for "person"; **(4)** substituted "children" for "pupils" wherever it appears in subd (b)(5); **(5)** amended the first sentence of subd (c) by adding **(a)** "required"; and **(b)** "of subdivision (b)"; and **(6)** substituted "service sufficient to meet program standards and performance assessments" for "two years of service, or three years of service for interns participating in a program that leads to the attainment of a specialist credential to teach pupils with mild and moderate disabilities, or four years if the intern is participating in a program that leads to the attainment of both a multiple subject or single subject teaching credential and a specialist credential to teach pupils with mild and moderate disabilities" in subd (d).

2004 Amendment: (1) Amended subd (a) by deleting **(a)** "or that maintains" after "kindergarten or grades 1 to 12, inclusive,"; and **(b)** the comma after "mild and moderate disabilities" in the first sentence; and **(2)** added "of" before both occurrences of "and methods of teaching" in subd (b)(5).

2005 Amendment: (1) Deleted the comma after "of the same type" in the last sentence of subd (a); and **(2)** substituted "pupils" for "children" wherever it appears in subd (b)(5).

2007 Amendment: (1) Substituted "maintains prekindergarten, kindergarten," for "maintains kindergarten" in subd (a); **(2)** substituted "in prekindergarten, kindergarten," for "in kindergarten" in subd (b)(4); **(3)** amended subd (b)(5) by deleting **(a)** "of" after "in the culture"; and **(b)** "of" after "in the etiology"; and **(4)** substituted "disabilities shall also" for "disabilities also shall" in subd (b)(7).

2009 Amendment: (1) Substituted "any of grades" for "grades" in the first sentence of subd (a) and in subd (b)(4); **(2)** deleted "for pupils with mild and moderate disabilities" after "education programs" in the first sentence of subd (a) and in subd (b)(9); **(3)** substituted "disabilities" for "mild and moderate disabilities" in the second sentence of subd (b)(3)(A) and in subd (b)(5); **(4)** substituted "special education programs" for ", for persons holding district intern certificates issued by the commission pursuant to Section 44325, special education programs for pupils with mild and moderate disabilities at those levels" in subd (b)(4); and **(5)** deleted "for pupils with mild and moderate disabilities" before "shall also include" in subd (b)(7).

Notes of Decisions

A school district was precluded from asserting that a teacher was an "intern" not entitled to probationary status, rather than a "district intern" under Ed C § 44830.3 who was entitled to 30 days' prior written notice of dismissal, where the district had accepted funds on the condition that the teacher was a "district intern." Nor was probationary status defeated by Ed C § 44885.5, since a district intern was not required to satisfy all three of the criteria set forth in subdivision (a); rather, it contemplated two categories of district interns. In addition, Ed C § 44920 specified that temporary employees were only to be hired if there were long-term vacancies due to a teacher's leave of absence. Welch v. Oakland Unified School Dist. (2001, Cal App 1st Dist) 91 Cal App 4th 1421, 111 Cal Rptr 2d 374, 2001 Cal App LEXIS 700.

§ 44856. "Sojourn certificated employees"

The governing board of a school district, for the purposes of providing bilingual instruction, foreign language instruction, or cultural enrichment, in the schools of the district, subject to the rules and regulations of the state board, may conclude arrangements with the proper authorities of a foreign country, or of a state, territory, or possession of the United States, for the hiring of bilingual teachers employed in public or private schools of a foreign country, state, territory, or possession. To be eligible for employment, the teacher must speak English fluently. Any persons employed pursuant to this section shall be known as a "sojourn certificated employee."

A person shall not be hired as a sojourn certificated employee by a school district unless he or she holds the necessary valid credential or credentials issued by the Commission on Teacher Credentialing authorizing the person to serve in a position requiring certification qualifications in the school district proposing to employ him or her. The person may be employed for a period not to exceed two years, except that thereafter the period of employment may be extended from year to year for a total period of not more than five years upon verification by the employing district that termination of the employment would adversely affect an existing bilingual or foreign language program or program of cultural enrichment, and that attempts to secure the employment of a certificated California teacher qualified to fill the position have been unsuccessful. The commission shall establish minimum standards for the credentials for sojourn certificated employees.

Enacted Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended Stats 2009 ch 53 § 12 (SB 512), effective January 1, 2010; Stats 2010 ch 328 § 42 (SB 1330), effective January 1, 2011.

Amendments

2009 Amendment: (1) Amended the first paragraph by **(a)** deleting "may" after "school district"; **(b)** substituting "the state board, may conclude" for "the State Board of Education conclude"; **(c)** substituting "a foreign country, or of a state" for "any foreign country, or of any state"; **(d)** adding the comma after "To be eligible for employment"; and **(e)** deleting "so" after "Any persons"; and **(2)** amended the second paragraph by **(a)** generally eliminating "such"; **(b)** substituting "A person shall not" for "No person may" at the beginning; **(c)** adding "or she" before "holds the necessary"; **(d)** substituting "Commission on Teacher Credentialing authorizing the person" for "Commission for Teacher Preparation and Licensing authorizing him"; **(e)** adding "or her" at the end of the first sentence; **(f)** deleting "only" after "person may be employed" at the beginning of the second sentence; and **(g)** adding the comma after "cultural enrichment".

2010 Amendment: Substituted "certificated employee" for "certificate employee" in the first sentence of the second paragraph.

§ 44907. Effect of retirement

The retirement of any employee of a school district under the provisions of any retirement law, except for employees retiring for disability under the Teachers' Retirement Law, shall automatically effect the dismissal of the employee from the employ of the district at the end of the current school year.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended by Stats 1992 ch 1165 § 8 (SB 1884), effective September 29, 1992.

Amendments

1992 Amendment: Added ", except for employees retiring for disability under the Teachers' Retirement Law,".

§ 44917. Classification of substitute employees; Temporary employment deemed probationary employment

Except as provided in Sections 44888 and 44920, governing boards of school districts shall classify as substitute employees those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service.

After September 1 of any school year, the governing board of any school district may employ, for the remainder of the school year, in substitute status any otherwise qualified person who consents to be employed in a position for which no regular employee is available, including persons retired for service under the State Teachers' Retirement System. Inability to acquire the services of a qualified regular employee shall be demonstrated to the satisfaction of the Commission on Teacher Credentialing.

Any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a position requiring certification qualifications, be classified by the governing board as a probationary employee and the previous year's employment as a temporary employee shall be deemed one year's employment as a probationary employee for purposes of acquiring permanent status.

Enacted Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended Stats 2009 ch 53 § 13 (SB 512), effective January 1, 2010.

Editor's Notes—The reference to Ed C § 44888 in this section appears as enacted.

Amendments

2009 Amendment (1) Deleted "so" after "person who consents to be"; and **(2)** substituting "Commission on Teacher Credentialing" for "Commission on Teacher Preparation and Licensing".

Notes of Decisions

Substitute teacher is employed from day to day to serve at option of school district in absence of regular teacher. Wood v. Los Angeles City School Dist. (1935, Cal App) 6 Cal App 2d 400, 44 P2d 644, 1935 Cal App LEXIS 915.

Teaching as substitute does not qualify one to become permanent teacher. Wood v. Los Angeles City School Dist. (1935, Cal App) 6 Cal App 2d 400, 44 P2d 644, 1935 Cal App LEXIS 915.

Substitute teachers may be dismissed at the pleasure of the board. Hogsett v. Beverly Hills School Dist. (1936, Cal App) 11 Cal App 2d 328, 53 P2d 1009, 1936 Cal App LEXIS 345.

No statute requires classification of substitute teacher as probationary. Matthews v. Board of Education (1962, Cal App 4th Dist) 198 Cal App 2d 748, 18 Cal Rptr 101, 1962 Cal App LEXIS 1463.

The status of a teacher employed as a substitute, who was assigned to classes formerly taught by a resigned permanently-certificated teacher, was determined by her employment contract classifying her as a substitute teacher. The statute relating to classification of substitute employees, is completely silent with regard to the status of those who replace permanently-certificated employees. Rutley v. Belmont Elementary Sch. Dist. (1973, Cal App 1st Dist) 31 Cal App 3d 702, 107 Cal Rptr 671, 1973 Cal App LEXIS 1102.

The employment of temporary teachers for two consecutive years did not compel their classification as probationary teachers by virtue of former Ed. Code, § 13336, where conflicting and inconsistent sections of the Education Code bearing on the same subject matter were enacted later by the Legislature and thus abrogated any contrary language in the earlier statute compelling automatic probationary status for a rehired temporary teacher. Santa Barbara Federation of Teachers v. Santa Barbara High Sch. Dist. (1977, Cal App 2d Dist) 76 Cal App 3d 223, 142 Cal Rptr 749, 1977 Cal App LEXIS 2103.

Under former Ed. Code, § 13336, (now § 44917), permitting treatment of those persons employed to fill positions of regular employees absent from service as substitute employees, employees absent from service include employees who have been removed from the position they normally hold in order to temporarily fill another school district position as well as employees on leave of absence from the district. Thus, a school district properly classified a teacher as a substitute teacher, rather than as a probationary employee, where she was assigned as

a teacher for four months in place of a teacher who had been designated as acting dean. Levy v. San Francisco Unified School Dist. (1978, Cal App 1st Dist) 79 Cal App 3d 953, 145 Cal Rptr 292, 1978 Cal App LEXIS 1385.

Employee was not entitled to classification as a temporary employee, and its attendant ramifications, because there was no evidence suggesting that she was ever employed to teach temporary classes or because another teacher was on leave or experiencing long term illness. Fine v. Los Angeles Unified School Dist. (2004, Cal App 2d Dist) 116 Cal App 4th 1070, 10 Cal Rptr 3d 876, 2004 Cal App LEXIS 330, rehearing denied (2004, Cal App 2d Dist) 2004 Cal App LEXIS 594.

School district's policy for classifying teachers and counselors as temporary employees, insofar as it was based on the fact they held something less than a preliminary or professional (clear) credential, such as preintern certificates, university internship credentials, emergency teaching permits, and credential waivers, was invalid because the district could classify as temporary employees only those persons who, by virtue of the position they occupied or the manner of service they performed, were defined or described as temporary employees in the California Education Code. All certificated employees who were not so classified as temporary employees, and who were not properly classified under the Code as permanent or substitute employees, had to be classified as probationary employees and had to be accorded the rights of probationary employees as provided in the Code, including the right to accrue seniority and the rights to notice and a hearing in the event of a workforce reduction. Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist. (2006, Cal App 5th Dist) 145 Cal App 4th 1260, 52 Cal Rptr 3d 486, 2006 Cal App LEXIS 1994, rehearing denied (2007, Cal App 5th Dist) 2007 Cal App LEXIS 70, review denied (2007, Cal) 2007 Cal LEXIS 3622.

Although Ed C § 44915 does not mention temporary employees, other provisions of the California Education Code, including Ed C §§ 44917, 44919, 44920, authorize that classification in certain narrowly defined situations, and Ed C § 44915 therefore establishes probationary status as the default classification for teachers whom the Education Code does not require to be classified otherwise. California Teachers Assn. v. Vallejo City Unified School Dist. (2007, Cal App 1st Dist) 149 Cal App 4th 135, 56 Cal Rptr 3d 712, 2007 Cal App LEXIS 469.

Although the legislature intended Ed C § 45030 to authorize school districts to hire substitute teachers as defined in Ed C § 44917, as the district deems necessary, it does not mean a district may classify any teacher as a substitute no matter what duties the teacher has performed. Vasquez v. Happy Valley Union School Dist. (2008, 3d Dist) 2008 Cal App LEXIS 166.

§ 44922. Regulations allowing reduction of workload to part–time duties

Notwithstanding any other provision, the governing board of a school district or a county superintendent of schools may establish regulations which allow their certificated employees to reduce their workload from full-time to part-time duties.

The regulations shall include, but shall not be limited to, the following, if the employees wish to reduce their workload and maintain retirement benefits pursuant to Section 22713 of this code or Section 20815 of the Government Code:

(a) The employee shall have reached the age of 55 prior to reduction in workload.

(b) The employee shall have been employed full time in a position requiring certification for at least 10 years of which the immediately preceding five years were full-time employment.

(c) During the period immediately preceding a request for a reduction in workload, the employee shall have been employed full time in a position requiring certification for a total of at least five years without a break in service. For purposes of this subdivision, sabbaticals and other approved leaves of absence shall not constitute a break in service.

(d) The option of part-time employment shall be exercised at the request of the employee and can be revoked only with the mutual consent of the employer and the employee.

(e)(1) The employee shall be paid a salary that is the pro rata share of the salary he or she would be earning had he or she not elected to exercise the option of part-time employment but shall retain all other rights and benefits for which he or she makes the payments that would be required if he or she remained in full-time employment.

(2) The employee shall receive health benefits as provided in Section 53201 of the Government Code in the same manner as a full-time employee.

(f) The minimum part-time employment shall be the equivalent of one-half of the number of days of service required by the employee's contract of employment during his or her final year of service in a full-time position.

(g) This option is limited in prekindergarten through grade 12 to certificated employees who do not hold positions with salaries above that of a school principal.

(h) The period of this part-time employment shall include a period of time, as specified in the regulations, which shall be up to and include five years for employees subject to Section 20815 of the Government Code or 10 years for employees subject to Section 22713 of this code.

(i) The period of part-time employment of employees subject to Section 20815 of the Government Code shall not extend beyond the end of the school year during which the employee reaches his or her 70th birthday. This subdivision shall not apply to any employee subject to Section 22713 of this code.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended by Stats 1979 ch 630 § 2; Stats 1981 ch 1023 § 2; Stats 1982 ch 1428 § 6; Stats 1987 ch 330 § 21; Stats 2000 ch 1025 § 39 (AB 816); Stats 2006 ch 655 § 84 (SB 1466), effective January 1, 2007.

Amendments

1979 Amendment: (1) Added subd (c); **(2)** redesignated former subds (c)–(f) to be subds (d)–(g); **(3)** added subds (h) and (i); and **(4)** added the last paragraph.

1981 Amendment: (1) Added the commas after "include" and after "limited to" in the introductory clause of the second paragraph; **(2)** substituted "shall" for "must" in subds (a), (b), the first sentence of (c), and (d); **(3)** generally added feminine pronouns; **(4)** substituted "70th" for "65th" in subd (i); and **(5)** deleted the former third paragraph which read: "This section shall remain in effect only until June 30, 1983, and as of such date is repealed, unless a later enacted statute, which becomes effective before that date, deletes or extends such date. However, any member who commences part–time employment pursuant to this section prior to June 30, 1983, may continue such part–time employment and receive such retirement benefits and health benefits until the member has completed five years of such part–time employment."

1982 Amendment: (1) Added "or a county superintendent of schools" in the first paragraph; and **(2)** amended the introductory clause of the second paragraph by substituting **(a)** "The" for "Such" at the beginning; and **(b)** "following, if the" for "following if such".

1987 Amendment: (1) Amended subd (h) by **(a)** substituting "this" for "such" after "The period"; and **(b)** adding "for employees subject to Section 20815 of the Government Code or 10 years for employees subject to Section 22724 of this code"; **(2)** amended the first sentence of subd (i) by **(a)** deleting "such" after "period of"; and **(b)** adding "of employees subject to Section 20815 of the Government Code; and "**(3)** added the second sentence of subd (i).

2000 Amendment: (1) Deleted the former last sentence of subd (c) which read: "Time spent on a sabbatical or other approved leave of absence shall not be used in computing the five–year full–time service requirement prescribed by this subdivision."; and **(2)** substituted "include a period of time, as specified in the regulations, which shall be up to and include" for "not exceed" for subd (h).

2006 Amendment: (1) Substituted "Section 22713" for "Section 22724" after "benefits pursuant to" in the introductory paragraph; **(2)** added subd designations (e)(1) and (e)(2); **(3)** substituted "that" for "which" after "paid a salary" in subd (e)(1); **(4)** substituted "Section 22713" for "Section 22724" after "employees subject to" in subd (h); and **(5)** substituted "Section 22713" for "Section 22724" after "employee subject to" in subd (i).

Notes of Decisions

The trial court erred in denying a teachers' union's petition for a writ of mandate to compel the city's unified school district and district officials to grant part-time status to eligible employees pursuant to regulations adopted by respondents and incorporated into the parties' collective bargaining agreement. Even though the agreement failed to comply with Ed. Code, §§ 22724 and 44922, concerning mandatory regulation of part-time employment, once the parties had agreed to have a program for part-time employees, the mandatory statutory provisions were incorporated by operation of law into the agreement, and those provisions prevailed over any noncomplying terms in the agreement. Accordingly, pursuant to Ed. Code, § 44922, respondents had a clear and present duty to grant requests from eligible employees who desired to participate in the part-time leave program, and the

writ should have issued. United Teachers-L.A. v. Los Angeles Unified School Dist. (1994, Cal App 2d Dist) 24 Cal App 4th 1510, 29 Cal Rptr 2d 897, 1994 Cal App LEXIS 461, review denied (1994, Cal) 1994 Cal LEXIS 4362.

A teachers' union did not waive the more favorable statutory provisions concerning part-time employment by agreeing to less favorable terms in a collective bargaining agreement with a school district. Ed. Code, § 44922, mandates that part-time status may continue for a period of up to 10 years, and the contract provided for a period of 5 years. Although a part-time employment program is discretionary, once the district had agreed to a such a program, it was bound by the statutory provisions. Ed. Code, § 44924, does not permit waiver of the benefits conferred by Ed. Code, § 44922. United Teachers-L.A. v. Los Angeles Unified School Dist. (1994, Cal App 2d Dist) 24 Cal App 4th 1510, 29 Cal Rptr 2d 897, 1994 Cal App LEXIS 461, review denied (1994, Cal) 1994 Cal LEXIS 4362.

Under Ed C § 44922, which allows school districts to establish part-time schedules for certain certificated employees, such employees, while paid the prorated share of their full-time salaries, retain the insurance benefits accorded to full-time employees, as long as they make the benefit payments that would be required if they remained in full-time employment. Gov C § 53201's relevance in the § 44922 scheme is simply that if a particular school district chooses to offer its employees health benefits, the § 44922 part-time employees will receive health benefits in the same manner as full-time employees, as long as the part-time employees make the health benefit payments that would be required had they remained full-time employees. If no such payments would be required as a full-time employee, no such payments are required as a § 44922 part-time employee. In this way, § 44922 part-time employees receive health benefits in the same manner as full-time employees. Praiser v. Biggs Unified School Dist. (2001, Cal App 3d Dist) 87 Cal App 4th 398, 104 Cal Rptr 2d 551, 2001 Cal App LEXIS 134, review denied (2001, Cal) 2001 Cal LEXIS 3567.

In an employee's action against a school district and associated individuals for wrongful discharge in violation of public policy, the trial court properly granted judgment on the pleadings in favor of the district and the individuals. The district's inability to offer a part-time administrative position as allowed by Ed C § 44922 did not constitute a violation of fundamental policy; although § 44922 enabled the district to bestow a valuable right on a select segment of their employees, § 44922 did not embody the kind of universal and important right recognized as fundamental to the public good. Sinatra v. Chico Unified School Dist. (2004, Cal App 3d Dist) 119 Cal App 4th 701, 14 Cal Rptr 3d 661, 2004 Cal App LEXIS 943, review denied (2004, Cal) 2004 Cal LEXIS 8387.

§ 44929. Credit for additional years to encourage retirement of certificated employees

Whenever the governing board of a school district or a county office of education, by formal action, determines that because of impending curtailment of or changes in the manner of performing services, the best interests of the district or county office of education would be served by encouraging the retirement of certificated employees and that the retirement will result in a net savings to the district or county office of education, an additional two years of service shall be credited under the Defined Benefit Program of the State Teachers' Retirement Plan to a certificated employee pursuant to Section 22714 if all of the conditions set forth in that section are satisfied.

Added by Stats 1994 ch 20 § 3 (SB 858), effective March 16, 1994. Amended by Stats 1998 ch 965 § 320 (AB 2765); Stats 2003 ch 313 § 14 (AB 1207).

Former Sections: Former § 44929, similar to the present section, was added Stats 1984 ch 361 § 2, amended Stats 1987 ch 601 § 2, Stats 1990 ch 996 § 2, and repealed, operative January 1, 1994, by its own terms.

Amendments

1998 Amendment: (1) Substituted "State Teacher's Retirement Defined Benefit Program" for "State Teachers' Retirement System" in subds (a), (a)(1), and (g); **(2)** deleted the former last sentence of subd (a)(1) which read: "For the 1993–94 fiscal year, the retirement period shall begin on the date of the formal action and shall end on June 30, 1994."; **(3)** substituted "is" for "are" after "four years, that" in the third sentence of subd (a)(2); **(4)** added "shall" after "paragraph (1)" the second time it appears in subd (b)(2); and **(5)** deleted "into the State Teachers' Retirement System" after "reinstates" in subd (f).

2003 Amendment: (1) Deleted subdivision designation (a) at the beginning; **(2)** deleted "taken prior to January 1, 1999" after "formal action"; **(3)** deleted "either:" after "retirement will"; **(4)** deleted "; result in a reduction of the number of certificated employees as a result of declining enrollment; or result in the retention of certificated employees who are credentialed to teach in teacher shortage disciplines, including, but not limited to, mathematics and science" after "county office of education"; **(5)** deleted "State Teachers' Retirement" after "credited under the"; **(6)** added "of the State Teachers' Retirement Plan"; **(7)** substituted "conditions set forth in that section are satisfied." for "following conditions exist:"; and **(8)** deleted former subds (a)(1)–(a)(4) and subds (b)–(g) which read:

"(a)(1) The employee is credited with five or more years of service under the State Teachers' Retirement Defined Benefit Program and retires during a period of not more than 120 days or less than 60 days, commencing no sooner than the effective date of the formal action of the district or county superintendent of schools that shall specify the period.

"(2) The district or county office of education transmits to the retirement fund an amount determined by the Teachers' Retirement Board that equals the actuarial equivalent of the difference between the allowance the member receives after the receipt of service credit under this section and Section 22714 and the amount the member would have received without the service credit and an amount determined by the Teachers' Retirement Board that equals the actuarial equivalent of the difference between the purchasing power protection supplemental payment the member receives after receipt of additional service credit pursuant to this section and the amount the member would have received without the additional service credit. The payment for purchasing power shall be deposited in the Supplemental Benefit Maintenance Account established by Section 22400 and shall be subject to Sections 24414 and 24415. The transfer to the retirement fund shall be made in a manner, and time period that shall not exceed four years, that is acceptable to the Teachers' Retirement Board. The school district or county office of education shall make the payment with respect to all eligible employees who retired pursuant to this section and Section 22714.

"(3) The district or county office of education transmits to the retirement fund the administrative costs incurred by the State Teachers' Retirement System in implementing this section, as determined by the Teachers' Retirement Board." "(4) The governing board of the school district or the county office of education has considered the availability of teachers to fill the positions that would be vacated pursuant to this section.

"(b)(1) The school district shall demonstrate and certify to the county superintendent that the formal action taken would result in either: (A) a net savings to the district; (B) a reduction of the number of certificated employees as a result of declining enrollment, as computed pursuant to Section 42238.5; or (C) the retention of certificated employees who are credentialed to teach in teacher shortage disciplines.

"(2) The county superintendent shall certify to the Teachers' Retirement Board that a result specified in paragraph (1) can be demonstrated. The certification shall include, but not be limited to, the information specified in subdivision (b) of Section 14502. A district that qualifies under clause (B) of paragraph (1) shall also certify that it qualifies as a declining enrollment district as computed pursuant to Section 42238.5.

"(3) The school district shall reimburse the county superintendent for all the costs of the county superintendent that result from the certification.

"(c)(1) The county office of education shall demonstrate and certify to the Superintendent of Public Instruction that the formal action taken would result in either:

"(A) a net savings to the county office of education;

"(B) a reduction of the number of certificated employees as a result of declining enrollment; or

"(C) the retention of certificated employees who are credentialed to teach in teacher shortage disciplines.

"(2) The Superintendent of Public Instruction shall certify to the Teachers' Retirement Board that a result specified in paragraph (1) can be demonstrated. The certification shall include, but not be limited to, the information specified in subdivision (b) of Section 14502.

"(3) The Superintendent of Public Instruction may request reimbursement from the county office of education for all administrative costs that result from the certification. (d) The service credit made available pursuant to this section shall be available to all members employed by the school district or county office of education who meet the conditions set forth in this section.

"(e) The amount of service credit shall be two years.

"(f) Any employee who retires with service credit granted under this section and Section 22714 and who subsequently reinstates, shall forfeit the service credit granted under this section and Section 22714.

"(g) This section shall not be applicable to any employee otherwise eligible if the employee receives any unemployment insurance payments arising out of employment with an employer subject to Part 13 (commencing

with Section 22000) during a period extending one year beyond the effective date of the formal action, or if the employee is not otherwise eligible to retire for service under the State Teachers' Retirement Defined Benefit Program."

§ 44929.1. [Section repealed 2005.]

Added by Stats 2003 ch 313 § 15 (AB 1207), operative January 3, 2004. Repealed, January 1, 2005, by its own terms. The repealed section related to additional service and age credit.

Former Sections: Former § 44929.1, relating to legislative findings and declarations, was added Stats 1986 ch 148 § 1 and repealed, operative June 30, 1990, by the terms of former Ed C § 44929.16.

§ 44957. Rights of probationary employee terminated due to reduction in employees

Any probationary employee whose services have been terminated as provided in Section 44955 shall have the following rights:

(a) For the period of 24 months from the date of such termination, any employee who in the meantime has not attained the age of 65 years shall have the preferred right to reappointment, subject to the prior rights to reappointment by all permanent employees as set forth in Section 44956, in the order of original employment as determined by the governing board in accordance with the provisions of Sections 44831 to 44855, inclusive, if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service. Except as otherwise provided, no probationary or temporary employee with less seniority shall be employed to render a service which such employee is certificated and competent to render and provided that such an employee shall be given a priority over employees whose right to a position is derived pursuant to Section 44918. However, prior to reappointing any employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(b) Notwithstanding subdivision (a), a school district may deviate from reappointing a probationary employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the employee has special training and experience necessary to teach that course or course of study, or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

(c) As to any such employee who is reappointed, the period of his absence shall be treated as a leave of absence and shall not be considered as a break in the continuity of his service, he shall retain the classification and order of employment he had when his services were terminated, and credit for prior service under any state or district retirement system shall not be affected by such termination; provided, however, that the period of his absence shall not be counted as a part of the service required for attaining permanent status in the district or, except as provided in subdivision (e), for retirement purposes.

(d) During the period of his preferred right to reappointment, any such employee shall, in the order of original employment, and subject to the rights of permanent employees as set forth in Section 44956, be offered prior opportunity for substitute service during the absence of any other employee who has been granted leave of absence or who is temporarily absent from duty; provided, that his services may be terminated upon a return to duty of such other employee, that such substitute service shall not affect the retention of his previous classification and rights, and that such an employee shall

be given a priority over employees whose right to a substitute position is derived pursuant to Section 44918.

(e) At any time prior to the completion of one year after his return to service, an employee reappointed under the provisions of this section may elect to continue or to reinstate his membership and interest in any state or district retirement system and to receive retirement benefits as if no absence from service had occurred. In the event of such election the employee shall pay into the retirement system the amount of his share of contribution and the district's share of contribution attributable to the period of absence and the amount of any contributions withdrawn, plus interest.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended by Stats 1983 ch 498 § 68, effective July 28, 1983, ch 1302 § 15.5, effective September 30, 1983.

Amendments

1983 Amendment: Substituted the section for the former section which read:

"Any probationary employee whose services have been terminated as provided in Section 44955 shall have the following rights:

"(a) For the period of 24 months from the date of such termination, any employee who in the meantime has not attained the age of 65 years shall have the preferred right to reappointment, subject to the prior rights to reappointment by all permanent employees as set forth in Section 44956, in the order of original employment as determined by the governing board in accordance with the provisions of Sections 44831 to 44855, inclusive, if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service; provided, that no probationary or temporary employee with less seniority shall be employed to render a service which such employee is certificated and competent to render and provided that such an employee shall be given a priority over employees whose right to a position is derived pursuant to Section 44918.

"(b) As to any such employee who is reappointed, the period of his absence shall be treated as a leave of absence and shall not be considered as a break in the continuity of his service, he shall retain the classification and order of employment he had when his services were terminated, and credit for prior service under any state or district retirement system shall not be affected by such termination; provided, however, that the period of his absence shall not be counted as a part of the service required for attaining permanent status in the district or, except as provided in subdivision (c), for retirement purposes.

"(c) During the period of his preferred right to reappointment, any such employee shall, in the order of original employment, and subject to the rights of permanent employees as set forth in Section 44956, be offered prior opportunity for substitute service during the absence of any other employee who has been granted leave of absence or who is temporarily absent from duty; provided, that his services may be terminated upon a return to duty of such other employee, that such substitute service shall not affect the retention of his previous classification and rights, and that such an employee shall be given a priority over employees whose right to a substitute position is derived pursuant to Section 44918.

"(d) At any time prior to the completion of one year after his return to service, an employee reappointed under the provisions of this section may elect to continue or to reinstate his membership and interest in any state or district retirement system and to receive retirement benefits as if no absence from service has occurred. In the event of such election the employee shall pay into the retirement system the amount of his share of contribution and the district's share of contribution attributable to the period of absence and the amount of any contributions withdrawn, plus interest." (As amended by Stats 1983, ch 1302, compared to the section as it read prior to 1983. This section was also amended by an earlier chapter, ch 498. See Gov C § 9605.)

Notes of Decisions

1. Statutory Construction, Application, and Effect Because the legislature has sharply limited school districts' ability to hire temporary teachers, and there was no evidence that 43 provisionally credentialed teachers who were dismissed by a school district for economic reasons fell within the narrow categories of temporary employment defined in the California Education Code, the teachers fell within the default classification of "probationary" in Ed C § 44915. Because the Education Code gives probationary teachers a number of rights and protections, including certain protections in the event of a layoff under Ed C §§ 44949, 44955, 44957, and the

statutes in question do not distinguish between probationary teachers based on the status of their credentials, the dismissed teachers were denied their statutory rights as probationary employees of the district when the district released them from employment without following the layoff procedures. California Teachers Assn. v. Vallejo City Unified School Dist. (2007, Cal App 1st Dist) 149 Cal App 4th 135, 56 Cal Rptr 3d 712, 2007 Cal App LEXIS 469.

§ 44965. Granting of leaves of absence after pregnancy and childbirth

The governing board of any school district shall provide for leave of absence from duty for any certificated employee of the district who is required to be absent from duties because of pregnancy, miscarriage, childbirth, and recovery therefrom. The length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties, shall be determined by the employee and the employee's physician.

Disabilities caused or contributed to by pregnancy, miscarriage, childbirth, and recovery therefrom are, for all job–related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment by any school district.

Except as provided herein, written and unwritten employment policies and practices of any school district shall be applied to disability due to pregnancy or childbirth on the same terms and conditions applied to other temporary disabilities.

This section shall be construed as requiring the governing board of a school district to grant leave with pay only when it is necessary to do so in order that leaves of absence for disabilities caused or contributed to by pregnancy, miscarriage, or childbirth be treated the same as leaves for illness, injury, or disability.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977.

Notes of Decisions

Where pregnancy is the cause of a teacher's leave of absence, she is not entitled to compensation during the period of her absence. Axelrod v. Board of Education (1940, Cal App) 37 Cal App 2d 367, 99 P2d 571, 1940 Cal App LEXIS 537.

In view of a recent United States Supreme Court decision laying down due process guidelines as to school teacher maternity leave requirements properly imposable, and suggesting that it might be permissible for a district to require that a pregnant teacher go on maternity leave during the last few weeks of pregnancy, a school district rule that a teacher go on maternity leave three months prior to be expected birth of her child, and precluding her from resuming her employment within three months after the birth of the child was unconstitutional, and a further requirement of the same rule that a teacher give advance notice of her pregnant condition was not severable from those invalid requirements; breach of the notice requirement therefore could not constitute a valid basis for the district's refusal to reemploy the teacher for the next school year. Kornblum v. Newark Unified Sch. Dist. (1974, Cal App 1st Dist) 37 Cal App 3d 623, 112 Cal Rptr 457, 1974 Cal App LEXIS 1160.

Ohio administrative rule providing that pregnant teacher must take maternity leave beginning 5 months prior to expected birth of her child, must give notice of pregnancy at least 2 weeks prior to commencement of mandatory leave, and could become eligible for reemployment no earlier than beginning of next school semester after child was 3 months old, provided that a doctor issued certificate attesting to teacher's health, voided as to 5-month and 3-month provisions on due process grounds. Cleveland Bd. of Educ. v. LaFleur (1974) 414 US 632, 39 L Ed 2d 52, 94 S Ct 791, 1974 US LEXIS 44.

§ 44966. Leaves of absence for study and travel

The governing board of any school district may grant any employee of the district employed in a position requiring certification qualifications, a leave of absence for not to exceed one year for the purpose of permitting study or travel by the employee which will benefit the schools and pupils of the district. The governing board may provide that the leave of absence be taken in separate six–month

periods or separate quarters rather than for a continuous one–year period, provided that the leave of absence for both of the separate six–month periods or any or all quarters shall be commenced and completed within a three–year period. Any period of service by the individual intervening between the two separate six–month periods or separate quarters of the leave of absence shall comprise a part of the service required for a subsequent leave of absence.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended by Stats 1994 ch 922 § 96 (AB 2587).

Amendments

1994 Amendment (1) Substituted "the" for "such a" after "may provide that" near the beginning of the second sentence; **(2)** deleted "such" before "leave of absence" near the end; and **(3)** deleted the former second paragraph which read:"If any leave of absence commenced upon within three years prior to November 8, 1967, was taken in one or more separate periods of less than one year, the period of service intervening between such separate periods shall comprise a part of the service required for a subsequent such leave of absence."

Notes of Decisions

The study or travel for which leave may be granted is limited to study or travel "which will benefit the schools and pupils of the district." Standard Elementary School Dist. v. Healy (1938, Cal App) 26 Cal App 2d 172, 79 P2d 123, 1938 Cal App LEXIS 1014.

A leave for the purpose of travel or study could hardly be said to be a leave asked solely for the convenience of the applicant. Standard Elementary School Dist. v. Healy (1938, Cal App) 26 Cal App 2d 172, 79 P2d 123, 1938 Cal App LEXIS 1014.

School teacher who was granted sabbatical leave to obtain advanced academic degree under agreement requiring submission of transcript of record or of study on special problem on completion of leave and who pursued with some diligence and accomplishment purposes for which leave was granted but could produce only transcript indicating attendance at university before leave period and showing that he was not registered there during such period failed to show, in mandamus suit to compel payment of his compensation for leave period, that contract violated public policy and was incapable of performance by him where he did not make any reasonable attempt, during period specified by agreement for furnishing proof of accomplishment, to supply anything relative to his leave activities that might have been accepted by board of education in place of transcript, even though portion of agreement of his own making stated that evidence of progress would be completion of required dissertation and any related projects. Berry v. Coronado Board of Education (1965, Cal App 4th Dist) 238 Cal App 2d 391, 47 Cal Rptr 727, 1965 Cal App LEXIS 1151.

Fact that state legislature, by adopting statutory provisions respecting leaves of absence for travel and study, and officers of school district, by adopting regulations in that regard, have determined that type of travel that teacher undertakes does in fact make him more valuable teacher does not require conclusion, for federal income tax purposes, that expenses for such travel are deductible for federal income tax purposes as ordinary and necessary business expenses. Adelson v. United States (1965, 9th Cir Cal) 342 F2d 332, 1965 US App LEXIS 6884.

A school district's requirement for annual increment of salary of 75 percent attendance upon teaching duties did not deny equal protection of the laws in providing exceptions for employees granted military or sabbatical leave but not for an employee whose absence was caused by illness; strong public policy favors the granting of credit to employees on military leave, and sabbatical leave is distinguishable because it is granted only for the purpose of travel or study which will benefit the schools and pupils of the school district. Hunt v. Alum Rock Union Elementary Sch. Dist. (1970, Cal App 1st Dist) 7 Cal App 3d 612, 86 Cal Rptr 663, 1970 Cal App LEXIS 2196.

§ 44967. Time qualifications for leaves of absence for travel and study

No leave of absence shall be granted to any employee under Section 44966 who has not rendered service to the district for at least seven consecutive years preceding the granting of the leave, and not more than one such leave of absence shall be granted in each seven–year period. The governing board granting the leave of absence may, subject to the rules and regulations of the State Board of Education,

prescribe the standards of service which shall entitle the employee to the leave of absence. No absence from the service of the district under a leave of absence, other than a leave of absence granted pursuant to Section 44966, granted by the governing board of the district shall be deemed a break in the continuity of service required by this section, and the period of such absence shall not be included as service in computing the seven consecutive years of service required by this section. Service under a national recognized fellowship or foundation approved by the State Board of Education, for a period of not more than one year, for research, teaching or lecturing shall not be deemed a break in continuity of service, and the period of such absence shall be included in computing the seven consecutive years of service required by this section.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977.

§ 44968. Service and compensation during leaves of absence for travel and study

Every employee granted a leave of absence pursuant to Section 44966 may be required to perform such services during the leave as the governing board of the district and the employee may agree upon in writing, and the employee shall receive such compensation during the period of the leave as the governing board and the employee may agree upon in writing, which compensation shall be not less than the difference between the salary of the employee on leave and the salary of a substitute employee in the position which the employee held prior to the granting of the leave. However, in lieu of such difference, the board may pay one–half of the salary of the employee on leave or any additional amount up to and including the full salary of the employee on leave.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977.

Notes of Decisions

A leave granted for one year was an unusual privilege and if the grant of such leave was to be accompanied by payment of compensation during the period covered by the leave, it must clearly appear that the leave was asked and granted for the express purpose stated in the statute. Standard Elementary School Dist. v. Healy (1938, Cal App) 26 Cal App 2d 172, 79 P2d 123, 1938 Cal App LEXIS 1014.

§ 44968.5. Agreement not to receive compensation during leave of absence

An employee granted a leave of absence pursuant to Section 44966 or 44967 may agree in writing with the governing board of the school district not to receive compensation during the period of the leave.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977.

§ 44969. Manner of payment for leave of absence time

Every employee, as a condition to being granted a leave of absence pursuant to Section 44966, shall agree in writing to render a period of service in the employ of the governing board of the district following his return from the leave of absence which is equal to twice the period of the leave. Compensation granted by the governing board to the employee on leave for less than one year may be paid during the first year of service rendered in the employ of the governing board following the return of the employee from the leave of absence or, in the event that the leave is for a period of one year, such compensation may be paid in two equal annual installments during the first two years of such service following the return of the employee. The compensation shall be paid the employee while on the leave of absence in the same manner as if the employee were teaching in the district, upon the furnishing by the employee of a suitable bond indemnifying the governing board of the district against loss in the event that the employee fails to render the agreed upon period of service in the employ of the governing board following the return of the employee from the leave of absence. The bond shall be exone-

rated in event the failure of the employee to return and render the agreed upon period of service is caused by the death or physical or mental disability of the employee. If the governing board finds and by resolution declares that the interests of the district will be protected by the written agreement of the employee to return to the service of the district and render the agreed upon period of service therein following his return from the leave, the governing board in its discretion may waive the furnishing of the bond and pay the employee on leave in the same manner as though a bond is furnished.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977.

§ 44970. Pro rata reduction of payment and division of bond proceeds upon partial default

If the employee does not serve for the entire period of service agreed upon under Section 44969, the amount of compensation paid for the leave of absence shall be reduced by an amount which bears the same proportion to the total compensation as the amount of time which was not served bears to the total amount of time agreed upon. If the employee furnished an indemnity bond, upon default, the proceeds of the bond shall be divided between the employee and the school district in the same proportion as the actual amount of time served bears to the amount of time agreed upon.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977.

§ 44984. Required rules for industrial accident and illness leaves of absence

Governing boards of school districts shall provide by rules and regulations for industrial accident and illness leaves of absence for all certificated employees. The governing board of any district which is created or whose boundaries or status is changed by an action to organize or reorganize districts completed after the effective date of this section shall provide by rules and regulations for such leaves of absence on or before the date on which the organization or reorganization of the district becomes effective for all purposes as provided in Section 4064.

Such rules or regulations shall include the following provisions:

a. Allowable leave shall be for not less than 60 days during which the schools of the district are required to be in session or when the employee would otherwise have been performing work for the district in any one fiscal year for the same accident;

b. Allowable leave shall not be accumulated from year to year;

c. Industrial accident or illness leave shall commence on the first day of absence;

d. When a certificated employee is absent from his duties on account of an industrial accident or illness, he shall be paid such portion of the salary due him for any month in which the absence occurs as, when added to his temporary disability indemnity under Division 4 or Division 4.5 of the Labor Code, will result in a payment to him of not more than his full salary;

The phrase "full salary" as utilized in this subdivision shall be computed so that it shall not be less than the employee's "average weekly earnings" as that phrase is utilized in Section 4453 of the Labor Code. For purposes of this section, however, the maximum and minimum average weekly earnings set forth in Section 4453 of the Labor Code shall otherwise not be deemed applicable.

e. Industrial accident or illness leave shall be reduced by one day for each day of authorized absence regardless of a temporary disability indemnity award;

f. When an industrial accident or illness leave overlaps into the next fiscal year, the employee shall be entitled to only the amount of unused leave due him for the same illness or injury.

Upon termination of the industrial accident or illness leave, the employee shall be entitled to the benefits provided in Sections 44977, 44978 and 44983, and for the purposes of each of these sections, his absence shall be deemed to have commenced on the date of termination of the industrial accident or illness leave, provided that if the employee continues to receive temporary disability indemnity, he may elect to take as much of his accumulated sick leave which, when added to his temporary disability indemnity, will result in a payment to him of not more than his full salary.

The governing board may, by rule or regulation, provide for such additional leave of absence for industrial accident or illness as it deems appropriate.

During any paid leave of absence, the employee may endorse to the district the temporary disability indemnity checks received on account of his industrial accident or illness. The district, in turn, shall issue the employee appropriate salary warrants for payment of the employee's salary and shall deduct normal retirement, other authorized contributions, and the temporary disability indemnity, if any, actually paid to and retained by the employee for periods covered by such salary warrants.

Any employee receiving benefits as a result of this section shall, during periods of injury or illness, remain within the State of California unless the governing board authorizes travel outside the state.

In the absence of rules and regulations adopted by the governing board pursuant to this section an employee shall be entitled to industrial accident or illness leave as provided in this section but without limitation as to the number of days of such leave.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977.

Editor's Notes—Ed C § 4064, referred to in this section, was repealed in 1982. See now Ed C § 74251.

Notes of Decisions

In an action against a school district, members of its board, and high school principals by a former probationary teacher who had voluntarily resigned and had been assaulted and injured by a student in his classroom three days before his resignation became effective, the trial court erred in granting defendants' motion for summary judgment as to a cause of action for special disability pay pursuant to Ed C § 44984, and school board rules implementing the statute. Such disability pay constitutes an "allowance" within the meaning of Gov C § 905 subd (c), which excepts from the claim presentation requirements, "claims by public employees for fees, salaries, wages, mileage or other expenses and allowances." Furthermore, receipt of a workers' compensation award did not prevent payment of plaintiff's full salary (made up in part of workers' compensation benefits) for a limited period pursuant to the statute and the board rules. A board rule adopted pursuant to Gov C § 935, subd. (a), which authorizes a public entity to impose a claims procedure in such cases, was inapplicable since it was adopted almost three months after plaintiff's cause of action accrued and contained no retroactivity provision. Adler v. Los Angeles Unified School Dist. (1979, Cal App 2d Dist) 98 Cal App 3d 280, 159 Cal Rptr 528, 1979 Cal App LEXIS 2272.

§ 44987. Leave of absence for service as elected officer of public employee organization

(a) The governing board of a school district shall grant to any employee, upon request, a leave of absence without loss of compensation for the purpose of enabling the employee to serve as an elected officer of any local school district public employee organization, or any statewide or national public employee organization with which the local organization is affiliated.

The leave shall include, but is not limited to, absence for purposes of attendance by the employee at periodic, stated, special, or regular meetings of the body of the organization on which the employee serves as an officer. Compensation during the leave shall include retirement fund contributions required of the school district as employer. The required employer contribution rate shall be the rate adopted by the Teachers' Retirement Board as a plan amendment with respect to the Defined Benefit Program as provided in Section 22711. The employee shall earn full service credit during the leave of absence and shall pay member contributions as prescribed by Section 22711. The maximum amount of the service credit earned may not exceed twelve calendar years. Any employee who serves as a full–time officer of a public employee organization is not eligible for disability benefits under the State Teachers' Retirement Plan while on the leave of absence.

Following the school district's payment of the employee for the leave of absence, the school district shall be reimbursed by the employee organization of which the employee is an elected officer for all compensation paid the employee on account of the leave. Reimbursement by the employee organization shall be made within 10 days after its receipt of the school district's certification of payment of compensation to the employee.

The leave of absence without loss of compensation provided for by this section is in addition to the released time without loss of compensation granted to representatives of an exclusive representative by subdivision (c) of Section 3543.1 of the Government Code.

For purposes of this section, "school district" also means "county superintendent of schools."

(b) An employee who after August 31, 1978, was absent on account of elected–officer service, shall receive full service credit in the State Teachers' Retirement Plan; provided that, not later than April 30, 1981: (1) the employee makes a written request to the employer for a leave of absence for the period of the elected–officer service, and (2) the employee organization of which the employee is an elected officer pays to the employee's school district an amount equal to the required State Teachers' Retirement Plan member and employer retirement contributions, as prescribed by this section.

The school district, following this written request and payment, shall transmit the amount received to the State Teachers' Retirement System, informing it of the period of the employee's leave of absence. The State Teachers' Retirement System shall credit the employee with all service credit earned for the period of the elected–officer leave of absence.

If the employee has been compensated by the school district for the period of the service, then, as a condition to the employee's entitlement to service credit for this period, the school district shall be reimbursed by the employee organization for the amount of the compensation.

The provisions of this subdivision shall apply retroactively to all service as an elective officer in a public employee organization occurring after August 31, 1978.

Added by Stats 1978 ch 1169 § 3. Amended by Stats 1980 ch 1272 § 2; Stats 1982 ch 279 § 9; Stats 1987 ch 623 § 1; Stats 1988 ch 688 § 1; Stats 2004 ch 912 § 33 (AB 2233).

Amendments

1980 Amendment: (1) Designated the former section to be subd (a); **(2)** amended the first paragraph of subd (a) by **(a)** deleting "or" after "employee organization,"; and **(b)** substituting "local school district public employee organization which is affiliated with such state and national organizations" for "of any local organization or organizations of a school district having at least 50,000 employees which is affiliated with both a statewide and national organization"; **(3)** amended the second paragraph of subd (a) by **(a)** adding the comma after "special" in the first sentence; and **(b)** substituting "the State Teachers' Retirement System while on such a leave of absence" for "any public employee retirement system in California for injuries incurred on the job while on such a leave of absence" at the end of the paragraph; and **(4)** added subd (b).

1982 Amendment: Substituted the third sentence of the second paragraph of subd (a) for the former third sentence which read: "Required retirement contributions shall include the amount necessary to pay any unfunded liability cost for such retirement plan."

1987 Amendment: (1) Generally eliminated "such"; and **(2)** amended subd (a) by **(a)** substituting "local school district public employee organization, or any statewide or national public employee organization with which the local organization is affiliated" for "statewide public employee organization, national organization with which such statewide organization is affiliated, or local school district public employee organization which is affiliated with such state and national organizations" at the end of the first paragraph; and **(b)** deleting "a" before "leave of absence" at the end of the second paragraph.

1988 Amendment: Substituted "twelve" for "eight" in the fifth sentence of the second paragraph of subd (a).

2004 Amendment: Substituted **(1)** "State Teachers' Retirement Plan" for "State Teachers' Retirement System" in the second paragraph of subd (a), the introductory clause of subd (b), and in subd (b)(1); **(2)** Amended the second paragraph in subd (a) by substituting **(a)** "rate adopted by the Teachers' Retirement Board as a plan amendment with respect to the Defined Benefit Program as provided in Section 22711" for "contribution rate for additional service credit less the member contribution rate prescribed by Section 22804" at the end of the third sentence; **(b)** "Section 22711" for "Section 22804" at the end of the fourth sentence; **(c)** "may not" for "shall not" in the fifth sentence; and **(d)** "is not" for "shall not be" in the sixth sentence; and **(3)** "If" for "In the event that" at the beginning of the third paragraph in subd (b).

Notes of Decisions

If an employee organization determined its purposes required its elected officer to take a leave of absence 50 percent of the work week, Ed C § 44987(a) required the school district employer to grant the leave request, so long as the employee organization reimbursed the school district for all compensation paid to the employee during the leave of absence. The Legislature intended to allow an elected officer of a local school district employee organization to take a leave of absence for any period of time for which the organization was willing to reimburse the school district. The phrase "leave of absence" could not reasonably be interpreted to refer solely to an extended period of absence. Tracy Educators Assn. v. Superior Court (2002, Cal App 3d Dist) 96 Cal App 4th 530, 116 Cal Rptr 2d 916, 2002 Cal App LEXIS 2016.

§ 44987.3. Leave of absence to serve on certain boards or committees

(a) The governing board of a school district shall grant to any employee, upon request, a leave of absence without loss of any compensation for the purpose of enabling the employee to serve on any of the following boards, commissions, committees, or groups, so long as the requirements of subdivision (b) are satisfied:

(1) Advisory Commission on Special Education, as provided for by Section 33590.

(2) Advisory committee for child care and development services, as provided in Section 8286.

(3) Curriculum Development and Supplemental Materials Commission, as provided for by Section 33530.

(4) Educational Innovation and Planning Commission, as provided for by Section 33502.

(5) Educational Management and Evaluation Commission, as provided for by Section 33550.

(6) Any other group, commission, or board authorized by statute; or commission or board, any of whose members are appointed by the Governor or the state board; whose purposes and activities are to further public education, exclusive of the Commission on Teacher Credentialing.

(b) A leave of absence shall not be granted unless all the following requirements are satisfied:

(1) Service is performed in the State of California.

(2) The board, commission, committee, or group, in writing, informs the employee's district of the service.

(3) The board, commission, committee, or group agrees, prior to service, to reimburse the school district pursuant to subdivision (d).

(c) The leave of absence shall be limited to 20 schooldays per school year.

(d) Following the school district's payment of the employee for the leave of absence, the school district shall be reimbursed by the board, commission, committee, or group that the employee serves for the compensation paid to the employee's substitute and for actual administrative costs related to the leave of absence granted to the employee under this section, upon written request for reimbursement by the school district. Reimbursement by the board, commission, committee, or group shall be made within 10 days after its receipt of the school district's certification of payment of compensation to the employee and of payment of compensation to the employee's substitute.

(e) The leave of absence without loss of compensation provided for by this section is in addition to the release time without loss of compensation granted to representatives of an exclusive representative by subdivision (c) of Section 3543.1 of the Government Code and the leave of absence granted employees by Section 44987.

(f) As used in this section, "school district" also means a county superintendent of schools.

Added Stats 1980 ch 1121 § 1. Amended Stats 2009 ch 53 § 15 (SB 512), effective January 1, 2010.

Amendments

2009 Amendment: In addition to making technical changes, **(1)** substituted "the" for "such" after "purpose of enabling" in the introductory clause of subd (a); **(2)** substituted subd (a)(2) for former subd (a)(2) which read: "(2) Advisory Committee for Child Care, as provided for by Chapter 2 (commencing with Section 8200) of Part

6."; **(3)** deleted former subds (a)(3) and (a)(4) which read: "(3) California Advisory Council on Vocational Education, as provided for by Section 8000."(4) California Commission on Crime Control and Violence Prevention, as provided for by Section 14101 of the Penal Code."; **(4)** redesignated former subds (a)(5)–(a)(7) to be subds (a)(3)–(a)(5); **(5)** deleted former subds (a)(8)–(a)(10) which read: "(8) Equal Educational Opportunities Commission, as provided for by Section 33570."(9) Instructional Television Advisory Commission, as provided for by Sections 51872 and 51873."(10) State Council of Educational Planning and Coordination, as provided for by Section 21000."; **(6)** redesignated former subd (a)(11) to be subd (a)(6); and **(7)** amended subd (a)(6) by substituting (a) "state board" for "State Board of Education"; and (b) "on Teacher Credentialing" for "for Teacher Preparation and Licensing".

Notes of Decisions

The trial court erred in denying a teacher's petition for writ of mandate to compel a school district to grant a paid leave of absence to enable the teacher to serve on an advisory panel created by the state Commission on Teaching Credentialing. The panel was to develop standards for future teachers and to develop methods for evaluating prospective teachers. Educ. Code, § 44987.3, subd. (a)(11), provides that school districts shall grant a leave of absence for teachers serving on "any other group, commission, or board authorized by statute"; and Educ. Code, § 44288, provides that the commission shall create subject matter advisory panels, such as the one to which the teacher was selected. This serves the legislative purpose of facilitating active teachers' participation in statutorily authorized groups that act to further public education. Thus, the advisory panel fell under the broad ambit of § 44987.3, subd. (a)(11), and the teacher was entitled to a paid leave of absence to serve on the panel. Wiman v. Vallejo City Unified School Dist. (1990, Cal App 1st Dist) 221 Cal App 3d 1486, 271 Cal Rptr 142, 1990 Cal App LEXIS 730.

§ 45025. Part–time employees

Any person employed by a district in a position requiring certification qualifications who serves less than the minimum schoolday as defined in Sections 46112 to 46116, inclusive, or 46141 may specifically contract to serve as a part–time employee. In fixing the compensation of part–time employees, governing boards shall provide an amount which bears the same ratio to the amount provided full–time employees as the time actually served by such part–time employees bears to the time actually served by full–time employees of the same grade or assignment. This section shall not apply to any person classified as a temporary employee under Sections 44919 and 44888, or any person employed as a part–time employee above and beyond his employment as a full–time employee in the same school district.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977.

Editor's Notes—Ed C § 46116, referred to in this section, was repealed in 1987. Ed C § 44888, referred to in this section, was reserved.

Notes of Decisions

Temporary community college teachers hired pursuant to the provisions of former Ed C § 13337.5 (see now Ed C § 44929.25), providing for the temporary classification of teachers of community college or adult classes who teach not more than 60 percent of full time, were not entitled to the benefits of former Ed C § 13503.1, providing for compensation for part-time work proportionate to the amounts paid full-time employees. Former Ed C § 13503.1, contains an express exclusion of "any person classified as a temporary employee under former Ed C §§ 13337 and 13337.5 (see now Ed C §§ 44919 and 44929.25)" Peralta Federation of Teachers, etc. v Peralta Federation of Teachers, etc. v. Peralta Community College Dist. (1979) 24 Cal 3d 369, 155 Cal Rptr 679, 595 P2d 113, 1979 Cal LEXIS 263, cert den (1979) 444 US 966, 62 L Ed 2d 379, 100 S Ct 455, 1979 US LEXIS 3844.

The phrase "time actually served" as used in former Ed C § 13503.1, which provides that in fixing the compensation of persons employed by a school district as part-time employees the governing board shall provide an amount which bears the same ratio to the amount provided full-time employees as the time actually served by such part-time employee bears to the time actually served by full-time employees, means the time actually spent

on the job both inside and outside the classroom, and requires consideration of the total amount of time spent by part- and full-time teachers in connection with their teaching. However, the phrase did not mean that the required number of hours for full-time instructors set by the district could be used as the measure, as that was the very measure that was deleted from the statute when it was amended to include the "time actually served" language. California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal 3d 692, 170 Cal Rptr 817, 621 P2d 856, 1981 Cal LEXIS 110.

Part-time teachers hired by a community college district prior to November 8, 1967 (the date former Ed C § 13337.5, see now Ed C § 44929.25, which authorized temporary status for part-timers, became effective), and classified by the district as temporary employees, were entitled to reclassification as part-time regular employees pursuant to former Ed C § 13346.25, and to receive additional prorated back pay, pursuant to former Ed C § 13503.1, insofar as their causes of action were not barred by the applicable three-year statute of limitations, or by failure to present a claim if required by any applicable district regulation in effect at the time of accrual of the causes of action, such additional back pay to be apportioned according to the time actually spent on the job both inside and outside of the classroom. California Teachers Assn. v. Los Angeles Community College Dist. (1981, Cal App 2d Dist) 123 Cal App 3d 947, 177 Cal Rptr 168, 1981 Cal App LEXIS 2176.

Ed C § 45025, which is a recodification of former Ed C § 13503.1, and provides that part-time employees are to be paid in the same ratio as full-time employees, applies only to instructors in grades one through eight and high school. This conclusion is compelled by the language of § 45025, if not by its singular placement, i.e., as part of title 2, division 3, of the Education Code, which applies to elementary and secondary education. Although former § 13503.1 used terms which applied to employees of both community college districts and elementary and high school districts, and referred to sections which embraced community college instructors, § 45025, while reenacting the equal pay provisions, changed these references to limit its application to elementary and high school instructors. Furthermore, Ed C § 3, which states: "[t]he provisions of this Code, insofar as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations, not as new enactments," does not change this result, since § 45025 is not "substantially the same" as former Ed C § 13503.1 on the crucial point of its applicability to community college instructors. Ferris v. Los Rios Community College Dist. (1983, Cal App 3d Dist) 146 Cal App 3d 1, 194 Cal Rptr 16, 1983 Cal App LEXIS 2045.

§ 45028. Teachers; Technical assistance and planning grant funding

(a)(1) Effective July 1, 1970, each person employed by a school district in a position requiring certification qualifications, except a person employed in a position requiring administrative or supervisory credentials, shall be classified on the salary schedule on the basis of uniform allowance for years of training and years of experience, except if a public school employer and the exclusive representative negotiate and mutually agree to a salary schedule based on criteria other than a uniform allowance for years of training and years of experience pursuant to Chapter 10.7 (commencing with Section 3540) of the Government Code. Employees shall not be placed in different classifications on the schedule, nor paid different salaries, solely on the basis of the respective grade levels in which such employees serve.

(2) In no case shall the governing board of a school district draw orders for the salary of any teacher in violation of this section, nor shall any superintendent draw any requisition for the salary of any teacher in violation thereof.

(3) This section shall not apply to teachers of special day and evening classes in elementary schools, teachers of special classes for elementary pupils, teachers of special day and evening high school classes and substitute teachers.

(b)(1) It is not a violation of the uniformity requirement of this section for a school district, with the agreement of the exclusive representative of certificated employees, if any, to grant any employee hired after a locally specified date differential credit for prior years of experience or prior units of credit for purposes of initial placement on the salary schedule of the district.

(2) This subdivision is declaratory of existing law.

(c) A public school employer and the exclusive representative of credentialed teachers may jointly apply to the Superintendent for technical assistance and planning grant funding to facilitate the planning of a salary schedule for teachers based on criteria in addition to years of training and years of ex-

perience, as described in subdivision (a). The Superintendent may make planning grants from funds appropriated for this purpose in the annual Budget Act or other legislation.

(d) To be eligible for grant funding pursuant to subdivision (c), the public school employer and the exclusive representative of credentialed teachers should consider a salary schedule designed to compensate teachers for the additional responsibilities, time, and effort required to serve in challenging school settings, and reward teachers for professional growth tied to their particular assignments.

(e) Public school employers and exclusive representatives of credentialed teachers are encouraged to recognize teacher contributions to improving pupil achievement, provide incentives to teachers to accept teaching assignments in areas of highest need, and recognize relevant professional experience on the salary schedule in lieu of units and degrees or in lieu of teaching experience.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended by Stats 1988 ch 1461 § 19.7; Stats 1996 ch 959 § 1 (SB 98); Stats 2006 ch 517 § 29 (SB 1209), effective January 1, 2007.

Amendments

1988 Amendment: (1) Designated the former section to be subd (a); **(2)** added the comma after "qualifications" in the first sentence of the first paragraph of subd (a); and **(3)** added subd (b).

1996 Amendment: Amended subd (a) by adding **(1)** "school" after "employed by a"; and **(2)** ", except if a public school employer and the exclusive representative negotiate and mutually agree to a salary schedule based on criteria other than a uniform allowance for years of training and years of experience pursuant to Chapter 10.7 (commencing with Section 3540) of the Government Code".

2006 Amendment: (1) Added subd designations (a)(1)-(a)(3) in subd (a); **(2)** added subd designations (b)(1) and (b)(3) in subd (b); and **(3)** added subds (c)-(e).

Notes of Decisions

The contract of a teacher is contained in the statutes, the rules and regulations of the board, and it cannot be contended that the board can fix the status of a teacher by its rules and regulations, and by resolution, and then by a letter from an employee improperly interpreting the resolutions, claim that the status is different from that fixed by the rules and regulations and by the resolution. Fry v. Board of Education (1941) 17 Cal 2d 753, 112 P2d 229, 1941 Cal LEXIS 310.

Uniformity is required by the statute, but the uniformity which the law contemplates is not violated by a "reasonable" classification. Rible v. Hughes (1944) 24 Cal 2d 437, 150 P2d 455, 1944 Cal LEXIS 247, 154 ALR 137.

A board of education may not decide that its previous teacher experience ratings had departed from the rule of uniformity and reduce them, notwithstanding the contracts resulting from the original ratings had become executed, where its action in so doing results in attempting retroactively to make new contracts. Aebli v. Board of Education (1944, Cal App) 62 Cal App 2d 706, 145 P2d 601, 1944 Cal App LEXIS 869.

Classification of teachers for salary purposes based on training is not arbitrary, discriminatory, or unreasonable, may form basis for differences in salary payments to permanent teachers performing same duties, does not violate uniformity required in schedule making allowances for years of training and service, and may be used in composing acceptable salary schedule. San Diego Federation of Teachers v. Board of Education (1963, Cal App 4th Dist) 216 Cal App 2d 758, 31 Cal Rptr 146, 1963 Cal App LEXIS 2078.

It is within the province of the governing board of a school district to determine the extent to which salary credit is to be given for teaching experience outside the district and a court is not free to interfere with such determination if the policy is reasonable in nature and is applied fairly and without discrimination. Lawe v. El Monte School Dist. (1968, Cal App 2d Dist) 267 Cal App 2d 20, 72 Cal Rptr 554, 1968 Cal App LEXIS 1355, superseded by statute as stated in California Teachers' Assn. v. Livingston Union School Dist. (1990, Cal App 5th Dist) 219 Cal App 3d 1503, 269 Cal Rptr 160, 1990 Cal App LEXIS 428.

In fixing compensation of teachers, a school board is empowered to adopt a salary schedule provided it is not arbitrary, discriminatory, or unreasonable, and provided further than any allowance for years of training and experience is uniform and based on reasonable classifications. Shoban v. Board of Trustees (1969, Cal App 4th Dist) 276 Cal App 2d 534, 81 Cal Rptr 112, 1969 Cal App LEXIS 1837.

There was a rational basis for classifying intermediate teachers differently than primary or secondary teachers, and the salary schedule thus violated neither the provisions prohibiting salary differences solely on the basis of respective grade levels, nor the principle of uniformity of treatment limiting a school's discretionary control over the salary of teachers. Lompoc Federation of Teachers v. Lompoc Unified Sch. Dist. (1976, Cal App 2d Dist) 58 Cal App 3d 701, 130 Cal Rptr 70, 1976 Cal App LEXIS 1579, overruled Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist. (1978) 21 Cal 3d 650, 147 Cal Rptr 359, 580 P2d 1155, 1978 Cal LEXIS 254.

The prohibition against salary discrimination cannot be circumvented by the establishment of artificially low normal assignments for preferred grade levels, with extra compensation for additional service. Lompoc Federation of Teachers v. Lompoc Unified Sch. Dist. (1976, Cal App 2d Dist) 58 Cal App 3d 701, 130 Cal Rptr 70, 1976 Cal App LEXIS 1579, overruled Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist. (1978) 21 Cal 3d 650, 147 Cal Rptr 359, 580 P2d 1155, 1978 Cal LEXIS 254.

One of the Legislature's aims in enacting Ed. Code, § 45028, formerly § 13506, providing that each teacher shall be classified on the salary schedule on the basis of uniform allowance for years of training and experience and that teachers shall not be placed in different salary classifications solely on the basis of the grade levels which they taught, was to break away from the past reliance on judicial assessments of reasonableness in the salary classification of teachers and establish a more certain standard of its own. Thus the new statute has the twofold purpose of requiring that teachers be classified for salary purposes and that such classification proceed wholly on a uniform basis of years of training and experience. One effect of this action is to eliminate the possibility of instances in which a district, while granting a given maximum of credit for outside teaching experience, makes such credit available on a less than uniform basis to all teachers. Also, it was not the sole legislative purpose in amending the statute to remove the previous practice of classifying teachers for salary purposes according to grade level taught. (Disapproving, to the extent they are inconsistent herewith, Lompoc Federation of Teachers v. Lompoc Unified Sch. Dist. (1976) 58 Cal App 3d 701, 130 Cal Rptr 70, 1976 Cal App LEXIS 1579 and California Sch. Employees Assn. v. Coachella Valley Unified Sch. Dist. (1977) 65 Cal App 3d 913, 135 Cal Rptr 630, 1977 Cal App LEXIS 1100.) Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist. (1978) 21 Cal 3d 650, 147 Cal Rptr 359, 580 P2d 1155, 1978 Cal LEXIS 254.

Ed. Code, § 45028, formerly § 13506, providing that each teacher shall be classified on the salary schedule on the basis of uniform allowance for years of training and years of experience, would not forbid a rule providing for credit for outside teaching experience up to five years, although such a rule may have the effect of depriving a teacher with six years of outside experience of a year of credit. Such a rule would constitute a uniform allowance for years of experience within the meaning of the statute, since under it teachers would receive credit for prior experience up to the stated maximum. Similarly, the statute would not preclude a school district from making reasonable determinations as to the level and quality of training or experience which is necessary to qualify for a particular level of credit within its boundaries. Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist. (1978) 21 Cal 3d 650, 147 Cal Rptr 359, 580 P2d 1155, 1978 Cal LEXIS 254.

Under Ed. Code, § 45028 (former § 13506), providing that each teacher shall be classified on the salary schedule on the basis of a uniform allowance for years of training and years of experience, a school district is free to define "experience" for purposes of its salary schedule provided that what is so defined applies uniformly to all teachers employed by the district. Accordingly, a provision in a collective bargaining agreement providing that a teacher shall be advanced to the next step on the salary schedule provided he or she has received a satisfactory performance rating, and defining a year of experience within the district's employment as one for which the teacher has received a satisfactory evaluation, applicable to all teachers alike, did not violate Ed. Code, § 45028. Thus, teachers who challenged the incentive provision after being denied an advancement on the basis of unsatisfactory performance were not entitled to relief, where, on the record and in terms of the issue posed by the petition, it must be accepted as true that the teachers' unsatisfactory ratings were justified on the basis of their own behavior, and where there was nothing in the record to demonstrate that there was or was not a probability of abuse inherent in the subjective evaluation process. Mayer v. Board of Trustees (1980, Cal App 4th Dist) 106 Cal App 3d 476, 165 Cal Rptr 655, 1980 Cal App LEXIS 1893.

A school district rule governing salary advancement of certificated teachers violated Ed. Code, § 45028, which provides, in pertinent part, that "… each person employed by a district in a position requiring certification qualifications … shall be classified on the salary schedule on the basis of uniform allowance for years of training and years of experience," where the salary rule limited a teacher who advanced on the salary schedule from one column to the next, upon attainment of a higher educational level, to a one-step increase for experience, even though the teacher had additional years of experience and the new column had steps for those additional years of

experience. The rule precluded teachers from receiving credit for experience solely due to their seniority within the system. California Teachers Assn. v. Board of Education (1982, Cal App 2d Dist) 129 Cal App 3d 826, 181 Cal Rptr 432, 1982 Cal App LEXIS 1374.

A school district's professional growth program, which required that certified personnel receiving salary step advancement for experience complete a specified number of professional growth units for each four years, violated Ed. Code, § 45028. On its face, the policy denied credit for years of experience as a teacher based on the teacher's failure to obtain professional growth units that had little or nothing to do with the teacher's experience in performing teaching duties; and, because it did not treat years of training and years of experience uniformly, the policy did not qualify as a legitimate pay incentive program. The policy was unlawful as applied because it permanently deprived teachers in a deficient status under the professional growth policy credit for years of experience. Wygant v. Victor Valley Joint Union High School Dist. (1985, Cal App 4th Dist) 168 Cal App 3d 319, 214 Cal Rptr 205, 1985 Cal App LEXIS 2097.

For the purposes of Ed. Code, § 45028, which requires that certified teachers be "classified on the salary schedule on the basis of uniform allowance for years of training and years of experience," "experience," given its normal and ordinary import and construed in context, means the performance of a teacher's duties, which normally include lesson preparation, classroom instruction, grading, parental counseling, and supervision of extracurricular activities of students. Wygant v. Victor Valley Joint Union High School Dist. (1985, Cal App 4th Dist) 168 Cal App 3d 319, 214 Cal Rptr 205, 1985 Cal App LEXIS 2097.

In a mandamus proceeding challenging a school district's salary placement policy for teachers that was in effect during a collective bargaining agreement, the trial court erred in holding that Gov. Code, § 3543.2, subd. (d) (requirement of collective bargaining regarding payment of additional compensation of teachers based upon criteria other than years of training and years of experience), superseded Ed. Code, § 45028 (teacher shall be classified on salary schedule on basis of uniform allowance for years of training and experience). The policy, which provided that a teacher could advance to the next column in the schedule upon acquiring additional educational credits and attaining specified step levels in the preceding column, satisfied neither the "additional compensation" nor the "other criteria" prong of § 3543.2, subd. (d), and thus was governed by § 45028. San Francisco Classroom Teachers Assn. v. San Francisco Unified School Dist. (1987, Cal App 1st Dist) 196 Cal App 3d 627, 242 Cal Rptr 352, 1987 Cal App LEXIS 2358.

A school district's placement policy of advancing certified teachers to the next column of its salary schedule based on the teacher's acquisition of additional educational credits and the reaching of designated steps of a prior column violated Ed. Code, § 45028 (certified teachers must be classified on salary schedule on the basis of uniform allowance for years of training and experience). Under the policy, a teacher's failure to take the additional credits by the time the teacher reached a certain level of seniority within the system resulted in a denial of credit for experience to which the teacher otherwise would have been entitled, and it was not logical to define "experience" under the statute in terms of experience in a certain column of a salary schedule, since a teacher's duties did not vary in accordance with placement on the schedule. San Francisco Classroom Teachers Assn. v. San Francisco Unified School Dist. (1987, Cal App 1st Dist) 196 Cal App 3d 627, 242 Cal Rptr 352, 1987 Cal App LEXIS 2358.

In a proceeding by state and local teachers' associations for a writ of mandate against a school district governing board and the district superintendent, alleging that the district teachers were not being paid on a uniform basis for their years of training and experience as required by Ed. Code, § 45028, the trial court erred in denying the petition on the ground that the school district could "grandfather" certain teachers by using a classification system under which certain teachers were paid differently from others because they were hired and their salaries fixed before the statute was enacted. Ed. Code, § 45028, applies to all certificated teachers employed within a school district, and exceptions cannot be made for employees hired before its effective date. California Teachers Assn. v. Governing Bd. (1991, Cal App 2d Dist) 229 Cal App 3d 695, 280 Cal Rptr 286, 1991 Cal App LEXIS 379, review denied (1991, Cal) 1991 Cal LEXIS 3250.

A school district salary structure that punishes teachers who do not take advanced course work by denying them advancement for their additional years of teaching experience violates Ed. Code, § 45028, which requires formulation of a salary schedule based on a uniform allowance for years of training and experience. The appropriate method for a school district to encourage its teachers to take advanced course work is to create a special salary category as an extra reward for those teachers who do undertake advanced training, rather than having a policy of denying advancement to teachers that do not do any additional work. California Teachers Assn. v. Governing Bd. (1991, Cal App 2d Dist) 229 Cal App 3d 695, 280 Cal Rptr 286, 1991 Cal App LEXIS 379, review denied (1991, Cal) 1991 Cal LEXIS 3250.

A school district policy that precludes teachers from advancing more than a single classification on the salary scale in any one year, regardless of the amount of additional training they obtain, violates Ed. Code, § 45028, which requires formulation of a salary schedule based on a uniform allowance for years of training and experience. Although a school district is entitled to make reasonable determinations as to the level and quality of the training and experience necessary for advancement to a higher classification, it may not discriminate against teachers who have met the criteria for advancement by denying them full credit for their work. California Teachers Assn. v. Governing Bd. (1991, Cal App 2d Dist) 229 Cal App 3d 695, 280 Cal Rptr 286, 1991 Cal App LEXIS 379, review denied (1991, Cal) 1991 Cal LEXIS 3250.

Although Ed. Code, § 45028, which requires a school district to formulate a salary schedule based on a uniform allowance for years of training and experience for teachers, is qualified by Gov. Code, § 3543.2, subd. (d), which permits a public school employer and the exclusive representative of employees to negotiate regarding additional compensation based upon criteria other than years of training and experience, the Government Code section cannot be applied to permit a deviation from the uniformity requirements of Ed. Code, § 45028, on the ground that the deviations were agreed to in collective bargaining. The Education Code does not permit contractual waivers of benefits guaranteed by Ed. Code, § 45028 (Ed. Code, § 44924), and the chapter of the Government Code that contains Gov. Code, § 3543.2, and establishes a system of collective bargaining for school district employees, provides that it shall not supersede other provisions of the Education Code (Gov. Code, § 3540). Thus, Ed. Code, § 45028, prevails over the collective bargaining provisions in the Government Code, and may not be waived. California Teachers Assn. v. Governing Bd. (1991, Cal App 2d Dist) 229 Cal App 3d 695, 280 Cal Rptr 286, 1991 Cal App LEXIS 379, review denied (1991, Cal) 1991 Cal LEXIS 3250.

A one-time payment to teachers did not violate the uniform pay provisions of Ed C § 45028 or the legislative purposes underlying it where at least one criterion upon which the payment was based was neither years of training nor years of experience. Thus, the conditions imposed on an additional one-time payment of three percent of base salary satisfied the requirement for "criteria other than years of training and years of experience," within the meaning of Gov C § 3543.2(d), where the disparity in pay between teachers of equal training and experience was based upon whether or not they returned to work for the 1998-1999 school year or retired after the 1997-1998 school year. Since the conditions imposed upon the one-time payment satisfied the "other criteria" prong of § 3543.2(d), § 45028 was not violated. California Teachers Assn. v. Governing Bd. of Hilmar Unified School Dist. (2002, Cal App 5th Dist) 95 Cal App 4th 183, 115 Cal Rptr 2d 323, 2002 Cal App LEXIS 181.

School district's implementation of a compressed salary schedule in a collective bargaining agreement violated the uniformity requirement of Ed C § 45028 because the implementation resulted in less experienced teachers moving up the salary ladder at a rate of one step per year, while more experienced teachers were regressed to step levels below their number of years of experience; new system did not fall within the "other criteria" exception of Gov C § 3543.2 because the system was governed solely by length of experience and level of training, and the goal of encouraging teacher recruitment and retention was not a "criterion." Adair v. Stockton Unified School Dist. (2008, 3d Dist) 162 Cal App 4th 1436, 2008 Cal App LEXIS 747.

Trial court properly severed from the valid part of a collective agreement a provision that violated a statutory uniformity requirement, in that it resulted in a slower climb up the salary ladder for teachers with more than 17 years of experience than for their less-experienced counterparts; Ed C § 44924 renders void any portion of a collective bargaining agreement purporting to waive the benefits of the uniformity provisions of Ed C § 45028. Adair v. Stockton Unified School Dist. (2008, 3d Dist) 162 Cal App 4th 1436, 2008 Cal App LEXIS 747.

§ 45134. Age limits; Employment of persons receiving retirement allowance

(a) Notwithstanding any other provisions of law, no minimum or maximum age limits shall be established for the employment or continuance in employment of persons as part of the classified service.

(b) Any person possessing all of the minimum qualifications for any employment shall be eligible for appointment to that employment, and no rule or policy, either written or unwritten, heretofore or hereafter adopted, shall prohibit the employment or continued employment, solely because of the age of any person in any school employment who is otherwise qualified.

(c) No person shall be employed in school employment while he or she is receiving a retirement allowance under any retirement system by reason of prior school employment, except that a person may be hired:

(1) Pursuant to Article 8 (commencing with Section 21220) of Chapter 12 of Part 3 of Division 5 of Title 2 of the Government Code.

(2) As an aide in one of the following circumstances:

(A) An aide is needed in a class with a high pupil–teacher ratio.

(B) An aide is needed to provide one–on–one instruction in remedial classes or for underprivileged students.

A person working as an aide pursuant to this subdivision shall not receive service credits for purposes of the State Teachers' Retirement System.

(d) The provisions of subdivision (c) shall be inapplicable to persons who were employed in the classified service of any school district as of September 18, 1959, and who are still in the employ of the same district on the effective date of this subdivision, and the rights of those persons shall be fixed and determined as of September 18, 1959, and no such person shall be deprived of any right to any retirement allowance or eligibility for any such allowance to which he or she would have been entitled as of that date. Any such person who, by reason of any provision of law to the contrary, has been deprived of any right to retirement allowance or eligibility for such an allowance, shall, upon the filing of application therefore, be reinstated to such rights as he or she would have had had this subdivision been in effect on September 18, 1959.

(e) This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 6 (commencing with Section 45240) of this chapter.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended by Stats 1983 ch 666 § 3; Stats 1986 ch 371 § 1; Stats 1990 ch 903 § 2 (AB 4048); Stats 2005 ch 351 § 40 (AB 224), effective January 1, 2006.

Amendments

1983 Amendment: Substituted **(1)** subd (c) for former subd (c) which read: "(c) This section does not authorize the employment of any person in particular school employment who has reached the retirement age for that particular employment prescribed by any retirement system applicable thereto, whether or not the person is a member of the retirement system, or entitled to a retirement salary thereunder, nor shall any person be employed in such employment while he is receiving a retirement allowance under any retirement system by reason of prior school employment."; and **(2)** subd (e) for former subd (e) which read: "(e) This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 6 (commencing with Section 45240) of this chapter, except that in a school district or districts, governed by the same governing board, in which the combined average daily attendance of all districts is in excess of 400,000, the permanent classification of any employee who is classified as a permanent employee under the provisions of Article 6 (commencing with Section 45240) of this chapter shall cease at the close of the fiscal year in which the employee reaches the age of 65 years. In such district or districts the employment, or continued employment of any employee beyond the close of the fiscal year in which he reaches the age of 65 years shall be at the discretion of the governing board of the district, which may, at its pleasure, terminate the services of such employee at any time. Employment beyond age 65 in such districts shall be in accordance with rules and regulations governing such employment approved by the personnel commission, and adopted by the governing board of the district."

1986 Amendment: Amended subd (c) by adding **(1)** "or she" after "employment while he" in the introductory clause; **(2)** ", except that a person may hired as an aide in one of the following circumstances:"(1) An aide is needed in a class with a high pupil–teacher ratio."(2) An aide is need to provide one–on–one instruction in remedial classes or for underprivileged students."; and **(3)** the second paragraph.

1990 Amendment: In addition to making technical changes, **(1)** substituted "as" for "a" after "persons" in subd (a); **(2)** deleted "as an aide in one of the following circumstances" at the end of the introductory clause in subd (c); **(3)** added subd (c)(1); **(4)** added the introductory clause in subd (c)(2); and **(5)** redesignated former subds (c)(1) and (c)(2) to be subds (c)(2)(A) and (c)(2)(B).

2005 Amendment: (1) Deleted "such" before "person" in subd (b); **(2)** deleted "therefore" after "qualified" in subd (b); **(3)** substituted "Article 8 (commencing with Section 21220) of Chapter 12" for "Article 5 (commencing with Section 21150) of Chapter 8" in subd (c)(1); and **(4)** substituted "therefore," for "herefor," in the last sentence of subd (d).

§ 47605. Petition to establish school; Public hearing; Grounds for grant or denial; Requirements for school; Oversight by local education agency; Teacher qualifications; Audit report (Charter schools)

(a) (1) Except as set forth in paragraph (2), a petition for the establishment of a charter school within a school district may be circulated by one or more persons seeking to establish the charter school. A petition for the establishment of a charter school shall identify a single charter school that will operate within the geographic boundaries of that school district. A charter school may propose to operate at multiple sites within the school district, as long as each location is identified in the charter school petition. The petition may be submitted to the governing board of the school district for review after either of the following conditions is met:

(A) The petition is signed by a number of parents or legal guardians of pupils that is equivalent to at least one-half of the number of pupils that the charter school estimates will enroll in the school for its first year of operation.

(B) The petition is signed by a number of teachers that is equivalent to at least one-half of the number of teachers that the charter school estimates will be employed at the school during its first year of operation.

(2) A petition that proposes to convert an existing public school to a charter school that would not be eligible for a loan pursuant to subdivision (b) of Section 41365 may be circulated by one or more persons seeking to establish the charter school. The petition may be submitted to the governing board of the school district for review after the petition is signed by not less than 50 percent of the permanent status teachers currently employed at the public school to be converted.

(3) A petition shall include a prominent statement that a signature on the petition means that the parent or legal guardian is meaningfully interested in having his or her child or ward attend the charter school, or in the case of a teacher's signature, means that the teacher is meaningfully interested in teaching at the charter school. The proposed charter shall be attached to the petition.

(4) After receiving approval of its petition, a charter school that proposes to establish operations at one or more additional sites shall request a material revision to its charter and shall notify the authority that granted its charter of those additional locations. The authority that granted its charter shall consider whether to approve those additional locations at an open, public meeting. If the additional locations are approved, they shall be a material revision to the charter school's charter.

(5) A charter school that is unable to locate within the jurisdiction of the chartering school district may establish one site outside the boundaries of the school district, but within the county in which that school district is located, if the school district within the jurisdiction of which the charter school proposes to operate is notified in advance of the charter petition approval, the county superintendent of schools and the Superintendent are notified of the location of the charter school before it commences operations, and either of the following circumstances exists:

(A) The school has attempted to locate a single site or facility to house the entire program, but a site or facility is unavailable in the area in which the school chooses to locate.

(B) The site is needed for temporary use during a construction or expansion project.

(6) Commencing January 1, 2003, a petition to establish a charter school may not be approved to serve pupils in a grade level that is not served by the school district of the governing board considering the petition, unless the petition proposes to serve pupils in all of the grade levels served by that school district.

(b) No later than 30 days after receiving a petition, in accordance with subdivision (a), the governing board of the school district shall hold a public hearing on the provisions of the charter, at which time the governing board of the school district shall consider the level of support for the petition by teachers employed by the district, other employees of the district, and parents. Following review of the petition and the public hearing, the governing board of the school district shall either grant or deny the charter within 60 days of receipt of the petition, provided, however, that the date may be extended by an additional 30 days if both parties agree to the extension. In reviewing petitions for the establish-

ment of charter schools pursuant to this section, the chartering authority shall be guided by the intent of the Legislature that charter schools are and should become an integral part of the California educational system and that establishment of charter schools should be encouraged. The governing board of the school district shall grant a charter for the operation of a school under this part if it is satisfied that granting the charter is consistent with sound educational practice. The governing board of the school district shall not deny a petition for the establishment of a charter school unless it makes written factual findings, specific to the particular petition, setting forth specific facts to support one or more of the following findings:

(1) The charter school presents an unsound educational program for the pupils to be enrolled in the charter school.

(2) The petitioners are demonstrably unlikely to successfully implement the program set forth in the petition.

(3) The petition does not contain the number of signatures required by subdivision (a).

(4) The petition does not contain an affirmation of each of the conditions described in subdivision (d).

(5) The petition does not contain reasonably comprehensive descriptions of all of the following:

(A) (i) A description of the educational program of the school, designed, among other things, to identify those whom the school is attempting to educate, what it means to be an "educated person" in the 21st century, and how learning best occurs. The goals identified in that program shall include the objective of enabling pupils to become self-motivated, competent, and lifelong learners.

(ii) If the proposed school will serve high school pupils, a description of the manner in which the charter school will inform parents about the transferability of courses to other public high schools and the eligibility of courses to meet college entrance requirements. Courses offered by the charter school that are accredited by the Western Association of Schools and Colleges may be considered transferable and courses approved by the University of California or the California State University as creditable under the "A" to "G" admissions criteria may be considered to meet college entrance requirements.

(B) The measurable pupil outcomes identified for use by the charter school. "Pupil outcomes," for purposes of this part, means the extent to which all pupils of the school demonstrate that they have attained the skills, knowledge, and attitudes specified as goals in the school's educational program. Pupil outcomes shall include outcomes that address increases in pupil academic achievement both schoolwide and for all groups of pupils served by the charter school, as that term is defined in subparagraph (B) of paragraph (3) of subdivision (a) of Section 47607.

(C) The method by which pupil progress in meeting those pupil outcomes is to be measured.

(D) The governance structure of the school, including, but not limited to, the process to be followed by the school to ensure parental involvement.

(E) The qualifications to be met by individuals to be employed by the school.

(F) The procedures that the school will follow to ensure the health and safety of pupils and staff. These procedures shall include the requirement that each employee of the school furnish the school with a criminal record summary as described in Section 44237.

(G) The means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted.

(H) Admission requirements, if applicable.

(I) The manner in which annual, independent financial audits shall be conducted, which shall employ generally accepted accounting principles, and the manner in which audit exceptions and deficiencies shall be resolved to the satisfaction of the chartering authority.

(J) The procedures by which pupils can be suspended or expelled.

(K) The manner by which staff members of the charter schools will be covered by the State Teachers' Retirement System, the Public Employees' Retirement System, or federal social security.

(L) The public school attendance alternatives for pupils residing within the school district who choose not to attend charter schools.

(M) A description of the rights of any employee of the school district upon leaving the employment of the school district to work in a charter school, and of any rights of return to the school district after employment at a charter school.

(N) The procedures to be followed by the charter school and the entity granting the charter to resolve disputes relating to provisions of the charter.

(O) A declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for purposes of Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code.

(P) A description of the procedures to be used if the charter school closes. The procedures shall ensure a final audit of the school to determine the disposition of all assets and liabilities of the charter school, including plans for disposing of any net assets and for the maintenance and transfer of pupil records.

(c) (1) Charter schools shall meet all statewide standards and conduct the pupil assessments required pursuant to Sections 60605 and 60851 and any other statewide standards authorized in statute or pupil assessments applicable to pupils in noncharter public schools.

(2) Charter schools shall, on a regular basis, consult with their parents, legal guardians, and teachers regarding the school's educational programs.

(d) (1) In addition to any other requirement imposed under this part, a charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations, shall not charge tuition, and shall not discriminate against any pupil on the basis of the characteristics listed in Section 220. Except as provided in paragraph (2), admission to a charter school shall not be determined according to the place of residence of the pupil, or of his or her parent or legal guardian, within this state, except that an existing public school converting partially or entirely to a charter school under this part shall adopt and maintain a policy giving admission preference to pupils who reside within the former attendance area of that public school.

(2) (A) A charter school shall admit all pupils who wish to attend the school.

(B) If the number of pupils who wish to attend the charter school exceeds the school's capacity, attendance, except for existing pupils of the charter school, shall be determined by a public random drawing. Preference shall be extended to pupils currently attending the charter school and pupils who reside in the district except as provided for in Section 47614.5. Other preferences may be permitted by the chartering authority on an individual school basis and only if consistent with the law.

(C) In the event of a drawing, the chartering authority shall make reasonable efforts to accommodate the growth of the charter school and in no event shall take any action to impede the charter school from expanding enrollment to meet pupil demand.

(3) If a pupil is expelled or leaves the charter school without graduating or completing the school year for any reason, the charter school shall notify the superintendent of the school district of the pupil's last known address within 30 days, and shall, upon request, provide that school district with a copy of the cumulative record of the pupil, including a transcript of grades or report card, and health information. This paragraph applies only to pupils subject to compulsory full-time education pursuant to Section 48200.

(e) The governing board of a school district shall not require any employee of the school district to be employed in a charter school.

(f) The governing board of a school district shall not require any pupil enrolled in the school district to attend a charter school.

(g) The governing board of a school district shall require that the petitioner or petitioners provide information regarding the proposed operation and potential effects of the school, including, but not limited to, the facilities to be used by the school, the manner in which administrative services of the school are to be provided, and potential civil liability effects, if any, upon the school and upon the school district. The description of the facilities to be used by the charter school shall specify where the school intends to locate. The petitioner or petitioners shall also be required to provide financial state-

ments that include a proposed first-year operational budget, including startup costs, and cashflow and financial projections for the first three years of operation.

(h) In reviewing petitions for the establishment of charter schools within the school district, the governing board of the school district shall give preference to petitions that demonstrate the capability to provide comprehensive learning experiences to pupils identified by the petitioner or petitioners as academically low achieving pursuant to the standards established by the department under Section 54032, as it read before July 19, 2006.

(i) Upon the approval of the petition by the governing board of the school district, the petitioner or petitioners shall provide written notice of that approval, including a copy of the petition, to the applicable county superintendent of schools, the department, and the state board.

(j) (1) If the governing board of a school district denies a petition, the petitioner may elect to submit the petition for the establishment of a charter school to the county board of education. The county board of education shall review the petition pursuant to subdivision (b). If the petitioner elects to submit a petition for establishment of a charter school to the county board of education and the county board of education denies the petition, the petitioner may file a petition for establishment of a charter school with the state board, and the state board may approve the petition, in accordance with subdivision (b). A charter school that receives approval of its petition from a county board of education or from the state board on appeal shall be subject to the same requirements concerning geographic location to which it would otherwise be subject if it received approval from the entity to which it originally submitted its petition. A charter petition that is submitted to either a county board of education or to the state board shall meet all otherwise applicable petition requirements, including the identification of the proposed site or sites where the charter school will operate.

(2) In assuming its role as a chartering agency, the state board shall develop criteria to be used for the review and approval of charter school petitions presented to the state board. The criteria shall address all elements required for charter approval, as identified in subdivision (b) and shall define "reasonably comprehensive" as used in paragraph (5) of subdivision (b) in a way that is consistent with the intent of this part. Upon satisfactory completion of the criteria, the state board shall adopt the criteria on or before June 30, 2001.

(3) A charter school for which a charter is granted by either the county board of education or the state board based on an appeal pursuant to this subdivision shall qualify fully as a charter school for all funding and other purposes of this part.

(4) If either the county board of education or the state board fails to act on a petition within 120 days of receipt, the decision of the governing board of the school district to deny a petition shall, thereafter, be subject to judicial review.

(5) The state board shall adopt regulations implementing this subdivision.

(6) Upon the approval of the petition by the county board of education, the petitioner or petitioners shall provide written notice of that approval, including a copy of the petition to the department and the state board.

(k) (1) The state board may, by mutual agreement, designate its supervisorial and oversight responsibilities for a charter school approved by the state board to any local educational agency in the county in which the charter school is located or to the governing board of the school district that first denied the petition.

(2) The designated local educational agency shall have all monitoring and supervising authority of a chartering agency, including, but not limited to, powers and duties set forth in Section 47607, except the power of revocation, which shall remain with the state board.

(3) A charter school that is granted its charter through an appeal to the state board and elects to seek renewal of its charter shall, before expiration of the charter, submit its petition for renewal to the governing board of the school district that initially denied the charter. If the governing board of the school district denies the school's petition for renewal, the school may petition the state board for renewal of its charter.

(l) Teachers in charter schools shall hold a Commission on Teacher Credentialing certificate, permit, or other document equivalent to that which a teacher in other public schools would be required to hold. These documents shall be maintained on file at the charter school and are subject to periodic inspection by the chartering authority. It is the intent of the Legislature that charter schools be given flexibility with regard to noncore, noncollege preparatory courses.

(m) A charter school shall transmit a copy of its annual, independent financial audit report for the preceding fiscal year, as described in subparagraph (I) of paragraph (5) of subdivision (b), to its chartering entity, the Controller, the county superintendent of schools of the county in which the charter school is sited, unless the county board of education of the county in which the charter school is sited is the chartering entity, and the department by December 15 of each year. This subdivision does not apply if the audit of the charter school is encompassed in the audit of the chartering entity pursuant to Section 41020.

Added Stats 1992 ch 781 § 1 (SB 1448). Amended Stats 1993 ch 589 § 45 (AB 2211); Stats 1996 ch 786 § 3 (AB 3384); Stats 1998 ch 34 § 6 (AB 544), ch 673 § 2 (AB 2417); Stats 1999 ch 828 § 1 (AB 631); Stats 2000 ch 580 § 4 (AB 2659); Stats 2001 ch 344 § 1 (SB 675), ch 892 § 1.5 (SB 740); Stats 2002 ch 209 § 1 (SB 1709), ch 1058 § 6 (AB 1994); Stats 2005 ch 543 § 2 (AB 1610), effective January 1, 2006; Stats 2007 ch 569 § 27 (SB 777), effective January 1, 2008; Stats 2008 ch 179 § 46 (SB 1498), effective January 1, 2009; Stats 2012 ch 576 § 1 (SB 1290), effective January 1, 2013.

Amendments

1993 Amendment: Routine code maintenance.

1996 Amendment: (1) Added subd (b)(14); and **(2)** substituted "Section 60605" for "Section 60602.5" in subd (c).

1998 Amendment: (1) Substituted subd (a) for former subd (a) which read: "(a) A petition for the establishment of a charter school within any school district may be circulated by any one or more persons seeking to establish the charter school. After the petition has been signed by not less than 10 percent of the teachers currently employed by the school district, or by not less than 50 percent of the teachers currently employed at one school of the district, it may be submitted to the governing board of the school district for review."; **(2)** amended subd (b) by **(a)** substituting "governing board of the school district shall consider the level of support for the petition by teachers employed by the district, other employees of the district, and parents" for "board shall consider the level of employee and parental support for the petition" at the end of the first sentence; **(b)** adding the third sentence; **(c)** substituting the fourth sentence and introductory clause for the former introductory clause which read: "A school district governing board may grant a charter for the operation of a school under this part if it determines that the petition contains the number of signatures required by subdivision (a), a statement of each of the conditions described in subdivision (d), and descriptions of all of the following:"; **(d)** adding subds (b)(1)–(b)(4) and the introductory clause of subd (b)(5); **(e)** redesignating former subds (b)(1)–(b)(14) to be subds (b)(5)(A)–(b)(5)(N); and **(f)** substituting subd (b)(5)(I) for the former subdivision which read: "The manner in which an annual audit of the financial and programmatic operations of the school is to be conducted."; **(3)** substituted subd (c) for former subd (c) which read: "Charter schools shall meet the statewide performance standards and conduct the pupil assessments required pursuant to Section 60605."; **(4)** redesignated former subd (d) to be subd (d)(1); **(5)** added "Except as provided in paragraph (2)," at the beginning of the second sentence of subd (d)(1); **(6)** added subd (d)(2); **(7)** amended the first sentence of subd (g) by **(a)** substituting "of a school district shall" for "may"; and **(b)** adding ", if any," after "civil liability effects"; **(8)** added the second sentence of subd (g); and **(9)** substituted subds (j)–(l) for former subd (j) which read:

"(j)(1) If the governing board of the school district denies a charter, the county superintendent of schools, at the request of the petitioner or petitioners, shall select and convene a review panel to review the action of the governing board. The review panel shall consist of three governing board members from other school districts in the county and three teachers from other school districts in the county unless only one school district is located in the county, in which case the panel members shall be selected from school districts in adjoining counties.

"(2) If the review panel determines that the governing board failed to appropriately consider the charter request, or acted in an arbitrary manner in denying the request, the review panel shall request the governing board to reconsider the charter request. In the case of a tie vote of the panel, the county superintendent of schools shall

vote to break the tie."(3) If, upon reconsideration, the governing board denies a charter, the county board of education, at the request of the petitioner or petitioners, shall hold a public hearing in the manner described in subdivision (b) and, accordingly, may grant a charter. A charter school for which a charter is granted by a county board of education pursuant to this paragraph shall qualify fully as a charter school for all funding and other purposes of this part." (As amended Stats 1998 ch 673, compared to the section as it read prior to 1998. This section was also amended by an earlier chapter, ch 34. See Gov C § 9605.)

1999 Amendment: Added subd (b)(5)(O).

2000 Amendment: (1) amended subd (b) by substituting **(a)** "one or more" for "one, or more," near the end of the introductory clause of subd (b); and **(b)** "Code)" for "Code" at the end of subd (b)(5)(O); and **(2)** amended subd (j) by **(a)** adding subd (j)(2); **(b)** redesignating former subds (j)(2)–(j)(5) to be subds (j)(3)–(j)(6); and **(c)** adding the comma after "school district" in subd (j)(4).

2001 Amendment: Added **(1)** "except as provided for in Section 47614.5" at the end of the first sentence of subd (d)(2)(B); and **(2)** subd (m).

2002 Amendment: (1) Added the second and third sentences of subd (a)(1); **(2)** added subds (a)(4)–(a)(6); **(3)** amended subd (b)(5) by adding **(a)** subdivision designation (b)(5)(A)(i); **(b)** subd (b)(5)(A)(ii); and **(c)** subd (b)(5)(P); **(4)** substituted ", on a regular basis," for "on a regular basis" in subd (c)(2); **(5)** added the second sentence of subd (g); **(6)** added "applicable county superintendent of schools, the State Department of Education, and the" in subd (i); **(7)** amended subd (j)(1) by **(a)** substituting "the county board of education" for "either the county board of education or directly to the State Board of Education" in the first sentence; **(b)** deleting "or the State Board of Education, as the case may be," after "education" in the second sentence; **(c)** adding ", and the state board may approve the petition, in accordance with subdivision (b)" at the end of the third sentence; and **(d)** adding the fourth and fifth sentence; **(8)** added "based on an appeal" in subd (j)(3); **(9)** added "State Department of Education and the" in subd (j)(6); **(10)** substituted "through an appeal to" for "by" in the first sentence of subd (k)(3); and **(11)** added ", the Controller, the county superintendent of schools of the county in which the charter school is sited, unless the county board of education of the county in which the charter school is sited is the chartering entity," in subd (m). (As amended Stats 2002 ch 1058, compared to the section as it read prior to 2002. This section was also amended by an earlier chapter, ch 209. See Gov C § 9605.)

2005 Amendment: (1) Amended subd (a)(2) by **(a)** substituting "A petition that proposes to convert an existing public school to" for "In the case of a petition for the establishment of"; **(b)** deleting "through the conversion of an existing public school," after "a charter school"; **(c)** deleting ", the petition" after "Section 41365"; and **(d)** deleting "converted" after "seeking to establish the"; **(2)** amended subd (a)(4) by **(a)** deleting "within the jurisdictional boundaries of the school district" after "one or more additional sites"; **(b)** substituted "authority that granted its charter" for "governing board of the school district" in two places; and **(c)** substituted "approved," for "approved by the governing board of the school district,"; **(3)** amended subd (a)(5) by **(a)** substituting "within whose jurisdiction" for "where"; **(b)** deleting "of Public Instruction" after "the Superintendent"; **(c)** adding a comma after "operations"; **(d)** in subd (a)(5)(A), substituting "program, but a site" for "program but such a"; and **(e)** deleting "or site" after "facility" in subd (a)(5)(A); **(4)** substituted "the manner in which" for "how" in subd (b)(1)(A)(ii); **(5)** amended subd (c) by **(a)** substituting "Sections 60605 and 60851" for "Section 60605" in subd (c)(1); and **(b)** adding "guardians," in subd (c)(2); **(6)** added subd (d)(3); **(7)** amended subd (e) and (f) by **(a)** substituting "The" for "No"; and **(b)** adding "not" after "school district shall"; **(8)** in subd (h) and (i), substituted "department" for "State Department of Education"; **(9)** amended subd (j) by **(a)** deleting "of Section 47605" after "in subdivision (b)" in subd (j)(2); **(b)** deleting "of Section 47605" after "of subdivision (b)" in subd (j)(2); **(c)** substituting "this part." for "the Charter Schools Act of 1992." in subd (j)(2); and **(d)** substituting "department" for "State Department of Education" in subd (j)(6); **(10)** amended subd (l) by **(a)** deleting "be required to" after "charter schools shall"; and **(b)** substituting "are" for "shall be"; and **(11)** amended subd (m) by **(a)** substituting "department" for "State Department of Education"; and **(b)** substituting "does" for "shall".

2007 Amendment: (1) Added "legal" after "parents or" in subd (a)(1)(A); **(2)** amended subd (a)(3) by **(a)** adding "legal" after "the parent or"; and **(b)** substituting "child or ward" for "child, or ward,"; **(3)** substituted "The governing board of the school district shall" for "A school district governing board shall" in the introductory paragraph of subd (b); **(4)** Added ", legal guardians," in subd (c)(2); **(5)** amended subd (d)(1) by **(a)** substituting "on the basis of the characteristics listed in Section 220" for "on the basis of ethnicity, national origin, gender, or disability" in the first sentence; and **(b)** added "legal" after "her parent or" in the second sentence; **(6)** substituted "the governing board of the school district shall" for "the school district governing board shall" in subd (h); and **(7)** substituted "state board" for "State Board of Education" each time it appears in subds (i)–(k).

2008 Amendment: (1) Amended the first sentence of the introductory paragraph of subd (a)(1) by **(a)** substituting "a school district" for "any school district"; and **(b)** deleting "any" after "circulated by"; **(2)** deleted "any" after "circulated by" in the first sentence of subd (a)(2); **(3)** amended the introductory clause of subd (a)(5) by **(a)** deleting "Notwithstanding subdivision (a)," before "A charter school" at the beginning; **(b)** substituting "in" for "within" after "within the county"; and **(c)** substituting "the jurisdiction of which the charter school proposes" for "whose jurisdiction the charter school proposes"; **(4)** deleted the comma after "annual, independent" in subd (b)(5)(I); **(5)** substituted "Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code" for "the Educational Employment Relations Act (Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code)" in subd (b)(5)(O); **(6)** substituted "an existing public school" for "any existing public school" in the last sentence of subd (d)(1); **(7)** deleted the commas around "in no event" in subd (d)(2)(C); **(8)** added "as it read prior to July 19, 2006" at the end of subd (h); **(9)** amended the fourth sentence of subd (j)(1) by substituting **(a)** "A charter" for "Any charter" at the beginning; **(b)** "to which" for "that" after "geographic location"; **(c)** "subject if it received approval" for "subject to if it receives approval"; and **(d)** "which it originally submitted" for "whom it originally submits" near the end; **(10)** deleted the comma after "school district" in subd (j)(4); **(11)** substituted "local educational agency" for "local education agency" in subds (k)(1) and (k)(2); and **(12)** deleted the comma after "annual, independent" near the beginning of subd (m).

2012 Amendment: (1) Substituted "is met" for "are met" in the last sentence of the introductory paragraph of subd (a)(1); **(2)** substituted "is signed" for "has been signed" in subds (a)(1)(A) and (a)(1)(B) and in the second sentence of subd (a)(2); **(3)** substituted "exists" for "exist" in the introductory clause of subd (a)(5); **(4)** added the last sentence of subd (b)(5)(B); **(5)** deleted "the" after "charter school for" in subd (b)(5)(O); **(6)** deleted "However," at the beginning of the first sentence of subd (d)(2)(B); **(7)** substituted "used" for "utilized" in the first sentence of subd (g); **(8)** substituted ", as it read before" for " as it read prior to" in subd (h); and **(9)** amended the first sentence of subd (k)(3) by substituting **(a)** "is granted" for "has been granted"; and **(b)** "before" for "prior to".

Notes of Decisions

Cal. Educ. Code § 47605(a)(6), which provided that a school district could not approve a petition to establish a charter school serving pupils in a grade level not served by that district unless the petition proposed to serve all grade levels served by that district, did not relieve a non–sponsoring public school district of its obligation under Cal. Educ. Code § 47614 to provide facilities for in–district charter school students whom the subject district would have been required to accommodate if such students did not attend the charter school operating in that district. Sequoia Union High School Dist. v. Aurora Charter High School (2003, Cal App 1st Dist) 112 Cal App 4th 185, 5 Cal Rptr 3d 86, 2003 Cal App LEXIS 1477.

As a subdivision of the Los Angeles, California, Unified School District (LAUSD), the Palisades, California, Charter High School (PCHS) is not a public agency within the meaning of Gov C § 53050, separately required to register with the California Secretary of State and the county clerk for the Roster of Public Agencies, and PCHS's incorporation as a nonprofit public benefit corporation, assuming that were the case, would not change this relationship. While PCHS and LAUSD are independent legal entities, PCHS is a subdivision of its chartering authority because its existence, funding, and charter depend on LAUSD. Knapp v. Palisades Charter High School (2006, Cal App 2d Dist) 141 Cal App 4th 780, 46 Cal Rptr 3d 295, 2006 Cal App LEXIS 1136, rehearing granted, depublished (2006, Cal App 2d Dist) 2006 Cal App LEXIS 1369.

When a district school converts to a charter school, it has a defined attendance area as a district school, and students within that former attendance area are entitled to an ongoing admission preference at the charter school if they wish to attend, but students may not be forced to attend the charter school. From the point in time when the district school converts to a charter school and on, the school district and the charter school are in a vigorous competition for the students residing within the former attendance area of the charter school. California School Bds. Assn. v. State Bd. of Education (2010, 3d Dist) 191 Cal App 4th 530, 119 Cal Rptr 3d 596, 2010 Cal App LEXIS 2170, review denied California School Boards Association v. State Board of Education/(California Charter Schools Association) (2011, Cal.) 2011 Cal. LEXIS 3899.

Under the Education Code, an arbitrator has no authority to deny or revoke a school charter. United Teachers of Los Angeles v. Los Angeles Unified School Dist. (2012, Cal) 2012 Cal LEXIS 6164.

Collective bargaining provision does not conflict with the Education Code if its enforcement would neither control the approval or denial of a charter school petition nor delay or obstruct the charter petition approval process. United Teachers of Los Angeles v. Los Angeles Unified School Dist. (2012, Cal) 2012 Cal LEXIS 6164.

Ed C § 47605 establishes a comprehensive process for approval of charter school petitions, spelling out precisely what is expected of a charter applicant. Any collective bargaining provision that delays the timelines set forth in § 47605 or adds to an applicant's statutory obligations for securing approval of a charter conflicts with § 47605 and may not be enforced. United Teachers of Los Angeles v. Los Angeles Unified School Dist. (2012, Cal) 2012 Cal LEXIS 6164.

§ 47611. Participation in State Teachers' Retirement Plan

(a) If a charter school chooses to make the State Teacher's Retirement Plan available, all employees of the charter school who perform creditable service shall be entitled to have that service covered under the plan's Defined Benefit Program or Cash Balance Benefit Program, and all provisions of Part 13 (commencing with Section 22000) and Part 14 (commencing with Section 26000) shall apply in the same manner as the provisions apply to other public schools in the school district that granted the charter.

(b)(1) If a charter school offers its employees coverage by the State Teachers' Retirement System or the Public Employees' Retirement System, or both, the charter school shall inform all applicants for positions within that charter school of the retirement system options for employees of the charter school.

(2) The information shall specifically include whether the charter school makes available to employees coverage under the State Teachers' Retirement System, the Public Employees' Retirement System, or both systems, and that accepting employment in the charter school may exclude the applicant from further coverage in the applicant's current retirement system, depending on the retirement options offered by the charter of the charter school.

Added by Stats 1992 ch 781 § 1 (SB 1448). Amended by Stats 1996 ch 608 § 57 (AB 2673), effective September 19, 1996, operative July 1, 1996; Stats 1999 ch 939 § 89 (SB 1074); Stats 2000 ch 1025 § 40 (AB 816).

Amendments

1996 Amendment: Added "and Part 14 (commencing with Section 26000)".

1999 Amendment: Substituted the section for the former section which read: "If a charter school chooses to participate in the State Teacher's Retirement System, all employees of the charter school who qualify for membership in the system shall be covered under the system, and all provisions of Part 13 (commencing with Section 22000) and Part 14 (commencing with Section 26000) shall apply in the same manner as if the charter school were a public school in the school district that granted the charter."

2000 Amendment: (1) Designated the former section to be subd (a); and **(2)** added subd (b).

§ 47611.3. Creation of reports required by retirement systems by school district or county office of education; Condition

(a) At the request of a charter school, a school district or county office of education that is the chartering authority of a charter school shall create any reports required by the State Teachers' Retirement System and the Public Employees' Retirement System. The county superintendent of schools, employing agency, or school district that reports to those systems pursuant to Section 23004 of this code or Section 20221 of the Government Code shall submit the required reports on behalf of the charter school. The school district or county office of education may charge the charter school for the actual costs of the reporting services.

(b) As a condition of creating and submitting reports for the State Teachers' Retirement System and the Public Employees Retirement System, the school district or county office of education shall not require a charter school to purchase payroll processing services from the chartering authority. Information submitted on behalf of the charter school to the State Teachers' Retirement System, the Public

Employees' Retirement System, or both, shall be in a format conforming to the requirements of those systems.

Added by Stats 2000 ch 466 § 1 (SB 2105).

§ 48927. Application of chapter to "state special schools"

(a) This chapter shall also apply to pupils attending the California School for the Blind and the two California Schools for the Deaf, which shall be referred to as the "state special schools."

(b) Because the state special schools have a governance structure different from that of school districts, for the purposes of this section the following definitions shall apply:

(1) "Superintendent" means the appropriate principal of the state special school in which the pupil is enrolled, or the principal's designee, for purposes of Sections 48900, 48900.2, 48900.3, 48900.4, 48900.5, 48900.7, and 48911, and subdivisions (a) and (j) of Section 48918.

(2) "Governing board of each school district," "governing board of any school district," or "each governing board of a school district" means the Superintendent of Public Instruction or his or her designee for purposes of subdivision (a) of Section 48900.1, subdivision (b) of Section 48901, subdivision (b) of Section 48901.5, Section 48907, Section 48910, the first paragraph of Section 48918, and the first paragraph of Section 48918.5.

(3) "Governing board" means the Superintendent of the State Special School in which the pupil is enrolled for purposes of Section 48912, subdivision (d) of Section 48915, Section 48915.5, Section 48916, Section 48917, subdivisions (a), (c), (d), (f), (h), (i), (j), and (k) of Section 48918, and Sections 48921, 48922, 48923, and 48924.

(4) "Governing board" means the governing board of the district of residence of the expelled pupil for purposes of subdivision (f) of Section 48915 and Section 48916.1. In the case of an adult pupil expelled from a state special school, "governing board" means the governing board of the school district that referred the pupil to the state special school for purposes of the code section cited in this paragraph.

(5) "Superintendent of schools or the governing board" means the appropriate principal of the state special school in which the pupil is enrolled, or the principal's designee, for the purposes of Section 48900.6.

(6) "School district" or "district" means the state special school in which the pupil is enrolled for purposes of Section 48900.8, subdivision (b) of Section 48903, Section 48905, Section 48909, Section 48914, paragraph (1) of subdivision (e) of Section 48916.1, subdivision (c) of Section 48918.5, Section 48919, Section 48920, and Section 48921.

(7) "County board of education" or "county board" means the Superintendent of Public Instruction or his or her designee for purposes of Sections 48920, 48921, 48922, 48923, and 48924.

(8) "Local educational agency" includes a state special school for purposes of Section 48902 and Section 48915.5.

(9) "A change in placement" for purposes of paragraph (2) of subdivision (a) of Section 48915.5 means a referral by the state special school to the pupil's school district of residence for placement in an appropriate interim alternative educational setting.

(10) "Individualized education program team" means the individualized education program team of the pupil's school district of residence with appropriate representation from the state special school in which the pupil is enrolled for purposes of subdivision (a) of Section 48915.5.2.

(11) "Individualized education program team" means the individualized education program team of the state special school in which the pupil is enrolled with appropriate representation from the pupil's school district of residence for purposes of subdivisions (b), (c), and (d) of Section 48915.5.3.

(c) Subdivision (b) of this section shall be deemed to provide the same due process procedural protections to pupils in the state special schools as afforded to pupils in the public school districts of the state.

Added by Stats 2002 ch 492 § 7 (AB 1859). Amended by Stats 2003 ch 62 § 56.5 (SB 600).

Amendments

2003 Amendment: (1) Added "and" before "48911" in subd (b)(1); **(2)** substituted "means" for "shall mean" in the second sentence of subd (b)(4) and in subds (b)(6) and (b)(7); **(3)** substituted "code section" for "statute" in the second sentence of subd (b)(4); and **(4)** substituted "state special school" for "State Special School" in subd (b)(9).

§ 52055.57. Identification of program improvement local educational agencies; Notification; Self-assessment; Sanctions; Federal improvement funding; Funds available for agencies not identified as program improvement local educational agency

(a) (1) Provisions that are applicable to local educational agencies under this section are for the purpose of implementing federal requirements under the federal No Child Left Behind Act of 2001 (20 U.S.C. Sec. 6301 et seq.). The satisfaction of these criteria by local educational agencies that choose to participate under this article shall be a condition of receiving funds pursuant to this section.

(2) The department shall identify local educational agencies that are in danger of being identified within two years as program improvement local educational agencies under the federal No Child Left Behind Act of 2001, and shall notify those local educational agencies, in writing, of this status and provide those local educational agencies with research-based criteria to conduct a voluntary self-assessment.

(3) The self-assessment shall identify deficiencies within the operations of the local educational agency, and the programs and services of the local educational agency.

(4) A local educational agency identified pursuant to paragraph (2) is encouraged to revise its local educational agency plan based on the results of the self-assessment.

(5) The program described in this subdivision shall be referred to as the "Early Warning Program."

(b) (1) A local educational agency identified as a program improvement local educational agency under the federal No Child Left Behind Act of 2001 shall do all of the following:

(A) Conduct a self-assessment using materials and criteria based on current research and provided by the department.

(B) No later than 90 days after a local educational agency is identified for program improvement, contract with a county office of education or another external entity after working with the county superintendent of schools, for both of the following purposes:

(i) Verifying the fundamental teaching and learning needs in the schools of that local educational agency as determined by the local educational agency self-analysis, and identifying the specific academic problems of low-achieving pupils, including a determination of why the prior plan of the local educational agency failed to bring about increased pupil academic achievement.

(ii) Ensuring that the local educational agency receives intensive support and expertise to implement local educational agency reform initiatives in the revised local educational agency plan as required by the federal No Child Left Behind Act of 2001.

(C) Revise and expeditiously implement the local educational agency plan to reflect the findings of the verified self-assessment.

(D) After working with the county superintendent of schools or an external verifier, contract with an external provider to provide support and implement recommendations to assist the local educational agency in resolving shortcomings identified in the verified self-assessment.

(2) (A) Subject to the availability of funds in the annual Budget Act for this purpose, a local educational agency described in paragraph (1) annually may receive fifty thousand dollars ($50,000), plus ten thousand dollars ($10,000) for each school that is supported by federal funds pursuant to Title I of the federal No Child Left Behind Act of 2001 within the local educational agency, for the purpose of fulfilling the requirements of this subdivision. If funding is not provided in the annual Budget Act or

other statute, local educational agencies shall not be subject to the requirements of subparagraphs (B) and (D) of paragraph (1).

(B) Subject to the availability of funds appropriated in the annual Budget Act for this purpose, a local educational agency identified as a program improvement local educational agency during the 2005-06 fiscal year, shall receive priority for funding based upon the performance of the socioeconomically disadvantaged subgroup of the local educational agency on the Academic Performance Index. Priority for funding shall be provided to the lowest performing local educational agencies that are identified as program improvement local educational agencies. It is the intent of the Legislature that funds apportioned pursuant to this paragraph be used to support activities identified in paragraph (1).

(C) It is the intent of the Legislature that a local educational agency identified as a program improvement local educational agency receive no more than two years of funding pursuant to this paragraph.

(c) A local educational agency that has been identified for corrective action under the federal No Child Left Behind Act of 2001 shall be subject to one or more of the following sanctions as recommended by the Superintendent and approved by the state board:

(1) Replacing local educational agency personnel who are relevant to the failure to make adequate yearly progress.

(2) Removing schools from the jurisdiction of the local educational agency and establishing alternative arrangements for the governance and supervision of those schools.

(3) Appointing, by the state board, a receiver or trustee, to administer the affairs of the local educational agency in place of the county superintendent of schools and the governing board.

(4) Abolishing or restructuring the local educational agency.

(5) Authorizing pupils to transfer from a school operated by the local educational agency to a higher performing school operated by another local educational agency, and providing those pupils with transportation to those schools, in conjunction with carrying out not less than one additional action described under this paragraph.

(6) Instituting and fully implementing a new curriculum that is based on state academic content and achievement standards, including providing appropriate professional development based on scientifically based research for all relevant staff, that offers substantial promise of improving educational achievement for high-priority pupils.

(7) Deferring programmatic funds or reducing administrative funds.

(d) (1) The department shall develop, and the state board shall approve at a public meeting, objective criteria by which a local educational agency identified for corrective action and subject to a sanction listed under subdivision (c) shall be evaluated to determine the pervasiveness and severity of its performance problems and the sanction to be imposed.

(2) A local educational agency identified for corrective action and subject to a sanction listed under subdivision (c) may apply for a one-year, nonrenewable grant of federal improvement funding to assist in its improvement process and may expend that grant funding over the time period allowable under federal law. It is the intent of the Legislature to integrate federal funding that is available for this purpose, including, but not limited to, funding for program improvement and school improvement grants pursuant to Section 6303 of Title 20 of the United States Code.

(3) The amount of a grant for a local educational agency with extensive and severe performance problems shall be one hundred fifty thousand dollars ($150,000) per school identified for program improvement pursuant to federal law. The amount of a grant for a local educational agency with moderate performance problems shall be one hundred thousand dollars ($100,000) per school identified for program improvement pursuant to federal law. The amount of a grant for a local educational agency with minor or isolated performance problems shall be fifty thousand dollars ($50,000) per school identified for program improvement pursuant to federal law.

(4) A local educational agency that receives funding under this subdivision shall use the funds in accordance with Section 6316(b) and (c) of Title 20 of the United States Code. Pursuant to the technical assistance requirements under the federal No Child Left Behind Act of 2001 outlined in Section

6312(b) and (c) and Section 6317 of Title 20 of the United States Code, the Superintendent may recommend, and the state board may approve, that a local educational agency contract with a district assistance and intervention team or other technical assistance provider to receive guidance, support, and technical assistance. A district intervention and assistance team or other technical provider with which a local educational agency is required to contract shall perform the duties specified in subdivision (e) of Section 52059.

(5) Notwithstanding any other law, a local educational agency that receives funding under this subdivision or that receives other federal funds for school improvement shall not use those funds to compensate a receiver or trustee assigned by the state board pursuant to paragraph (3) of subdivision (c).

(e) A local educational agency that has received a sanction under subdivision (c) and has not exited program improvement under the federal No Child Left Behind Act of 2001 shall appear before the state board within three years to review the progress of the local educational agency. Upon hearing testimony and reviewing written data from the local educational agency, the district assistance and intervention team, or county superintendent of schools, the Superintendent shall recommend, and the state board may approve, an alternative sanction under subdivision (c), or may take any appropriate action.

(f) Subject to the availability of funds in the annual Budget Act for this purpose, a local educational agency that is not identified as a program improvement local educational agency under the federal No Child Left Behind Act of 2001 may annually receive up to fifteen thousand dollars ($15,000) per school identified as a program improvement school for the purposes of supporting schools identified as program improvement schools in the local educational agency and determining barriers to improved pupil academic achievement. That local educational agency shall receive no less than forty thousand dollars ($40,000) and no more than one million five hundred thousand dollars ($1,500,000) for those purposes. The Superintendent shall compile a list that ranks each local educational agency based on the number of, and percentage of, schools identified as program improvement schools and shall provide this funding to local educational agencies equally from each list until all funds appropriated for this purpose are depleted. These funds shall be provided for no more than three years.

(g) For purposes of this article, "local educational agency" means a school district, county office of education, or charter school that elects to receive its funding directly pursuant to Section 47651, and that provides public educational services to pupils in kindergarten or any of grades 1 to 12, inclusive.

Added Stats 2004 ch 579 § 1 (AB 2066), effective September 18, 2004. Amended Stats 2005 ch 513 § 3 (AB 953), effective October 4, 2005; Stats 2006 ch 538 § 119 (SB 1852), effective January 1, 2007; Stats 2008 ch 757 § 6 (AB 519), effective September 30, 2008.

Amendments

2005 Amendment: (1) Added "of 2001" after "No Child Left Behind Act" in subd (a)(1); **(2)** substituted "two" for "three to four" in subd (a)(2); **(3)** substituted "(2)" for "(1)" after "paragraph" in subd (a)(4); **(4)** deleted former subd (b) which read:

"If a local educational agency is at risk of being identified for program improvement within two years, the department shall invite that local educational agency to participate in the Prevention of Local Educational Agency Intervention Program, which is hereby created. A local educational agency that elects to participate in this program shall do all of the following:

"(A) Conduct a self-assessment using materials and criteria based on current research and provided by the department.

"(B) No later than 30 days after a local educational agency elects to participate in the Prevention of Local Educational Agency Intervention Program, contract with a county office of education or another external entity after working with the county superintendent of schools, for all of the following purposes:

"(i) Verifying the fundamental teaching and learning needs in the schools of that local educational agency as determined by a self-assessment, and identifying the specific academic problems of low-achieving pupils, including a determination of why the prior plan of the local educational agency failed to bring about increased pupil academic achievement.

"(ii) Ensuring that the local educational agency receives intensive support and expertise to implement local educational agency reform initiatives in the revised local educational agency plan as required by the federal No Child Left Behind Act of 2001 (20 U.S.C. Sec. 6301 et seq.).

"(C) Revise and expeditiously implement the local educational agency plan of the local educational agency to reflect the findings of the verified self-assessment.

"(2) Subject to the availability of funds in the annual Budget Act for this purpose, a participating local educational agency may annually receive funds based on the following schedule, for no more than three years, for the purpose of fulfilling the requirements of subparagraph (B) of paragraph (1):

"(A) A local educational agency consisting of less than 20,000 pupils may annually receive fifty thousand dollars ($50,000).

"(B) A local education agency consisting of greater than or equal to 20,000 pupils but less than 50,000 pupils may annually receive one hundred thousand dollars ($100,000).

"(C) A local educational agency consisting of greater than 50,000 pupils may annually receive two hundred thousand dollars ($200,000).

"(3) If a local educational agency does not elect to participate in the Prevention of Local Educational Agency Intervention Program, the governing board of the local educational agency shall hold a public hearing at a regularly scheduled meeting to discuss the reasons and rationale for not participating, and to explain the manner in which the local educational agency intends to address the needs of the district.";

(5) redesignated former subds (c)–(j) to be subd (b)–(i); **(6)** deleted former subd (c)(1)(E) which read: "(E) If the local educational agency elects to participate in the Prevention of Local Educational Agency Intervention Program pursuant to subdivision (b), the activities performed pursuant to subdivision (b) may serve as the foundation for the requirements of subparagraphs (A), (B), and (C)."; **(7)** substituted the present subd (b)(2)(A) for the former (c)(2) which read: "(2) Subject to the availability of funds in the annual Budget Act for this purpose, a local educational agency participating in this program may annually receive fifty thousand dollars ($15,000) and ten thousand dollars ($10,000) for each school within the local educational agency, for no more than two years, for the purpose of fulfilling the requirements of this subdivision."; **(8)** substituted the present subd (b)(2)(B) for the former subd (c)(3)(A) and (c)(3)(B) which read: "(3)(A) Subject to the availability of funds in the annual Budget Act for this purpose, if the governing board of a local educational agency participating in this program determines that it needs a grant to implement the recommendations of the county superintendent of schools or another external entity, the governing board may apply to the department for a supplemental grant not to exceed two million dollars ($2,000,000). The application shall demonstrate the need for additional funding, beyond that currently available to the local educational agency. The department shall submit the request to the State Board of Education with a recommendation of approval or denial. (B) The State Board of Education shall notify the requesting local educational agency of the decision. If the State Board of Education approves a grant of an amount less than that applied for, the local educational agency may accept or reject the grant."; **(9)** added subd (b)(2)(C); **(10)** deleted "and did not accept a supplemental grant pursuant to paragraph (3) of subdivision (c)," before "shall be subject" in subd (c)(1); **(11)** deleted "of Public Instruction" after "Superintendent" in subd (c)(1); **(12)** substituted "state board:'' for "State Board of Education:" in subd (c)(1); **(13)** substituted "state board," for "State Board of Education,'' in subd (c)(1)(C); **(14)** substituted "higher performing" for "higher-performing" in subd (c)(1)(E); **(15)** substituted "scientifically based" for "scientifically-based" in subd (c)(1)(F); **(16)** substituted the present subds (c)(2) and (c)(3) for the former subds (d)(2)–(d)(4) which read:

"(2) A local educational agency that has been identified for corrective action under the federal No Child Left Behind Act of 2001 (20 U.S.C. Sec. 6301 et seq.) and accepted a supplemental grant pursuant to paragraph (3) of subdivision (c), shall be subject to one or more of the following sanctions as recommended by the Superintendent of Public Instruction and approved by the State Board of Education:

"(A) Replacing local educational agency personnel who are relevant to the failure to make adequate yearly progress.

"(B) Removing schools from the jurisdiction of the local educational agency and establishing alternative arrangements for public governance and supervision of those schools.

"(C) Appointing, by the State Board of Education, a receiver or trustee to administer the affairs of the local educational agency in place of the county superintendent of schools and the governing board.

"(D) Abolishing or restructuring the local educational agency.

"(E) Authorizing pupils to transfer from a school operated by the local educational agency to a higherperforming school operated by another local educational agency, and providing those pupils with transportation to

those schools, in conjunction with carrying out not less than one additional action described under this paragraph.

"(3) In addition to the sanctions prescribed by paragraphs (1) and (2), the Superintendent of Public Instruction may recommend, and the State Board of Education may approve, the requirement that a local educational agency contract with a district assistance and intervention team to aid a local educational agency.

"(4) Subject to the availability of funds in the annual Budget Act for this purpose, if the State Board of Education requires a local educational agency to contract with a school assistance and intervention team pursuant to paragraph (3), the local educational agency may annually receive fifty thousand dollars ($50,000), plus ten thousand dollars ($10,000) for each school within the local educational agency, for no more than two years, for the purpose of contracting with and implementing the recommendations of the school assistance and intervention team.";

(17) substituted "January 31, 2006," for "July 31, 2005," in subd (c)(4); **(18)** deleted "of Public Instruction" after "Superintendent" in subd (c)(4); **(19)** substituted "district" for "school" in subd (c)(4); **(20)** substituted "(c)" for "(d)" after "subdivision" in the first sentence of subd (d); **(21)** substituted "state board" for "State Board of Education" both times it appears in subd (d); **(22)** deleted "the" before "schools" in subd (d); **(23)** deleted "of Public Instruction" after "Superintendent" in subd (d); **(24)** substituted "(c)," for "(d)," after "subdivision" in the last sentence of subd (d); **(25)** substituted "seq.)" for "seq.), that is not eligible to participate in the Prevention of Local Educational Agency Intervention Program, and that has ten or more schools in program improvement, or in which 55 percent or more of the schools are in program improvement," in subd (e); **(26)** deleted "so" before "identified" in subd (e); **(27)** added "as a program improvement school" before "for the purposes" in subd (e); **(28)** substituted "Superintendent" for "superintendent" in subd (e); **(29)** substituted "and (e)" for "(d), and (f)" in subd (f); **(30)** substituted "Superintendent" for "superintendent" in subd (f); **(31)** substituted "(b)." for "(c)." after "subdivision" in subd (f); **(32)** added "and" before "that provides" in subd (g); and **(33)** substituted "(e) if it is" for "(d) if they are" in subd (i).

2006 Amendment: (1) Substituted "both" for "all" after "of schools, for" in subd (b)(1)(B); **(2)** substituted "plus" for "and" after "fifty thousand dollars ($50,000)," in subd (b)(2)(A); **(3)** substituted "state board" for "State Board of Education" after "for this purpose, if the" in subd (c)(3); and **(4)** substituted "state board" for "State Board of Education" after "shall develop and the" in subd (c)(4).

2008 Amendment: (1) Deleted "Any" before "Provisions that" in the first sentence of subd (a)(1); **(2)** deleted "(20 U.S.C. Sec. 6301 et seq.)" after "federal No Child Left Behind Act of 2001" in subds (a)(2), the introductory clause of subd (b)(1), (b)(1)(B)(ii), and (b)(2)(A); **(3)** substituted "is identified" for "becomes identified" after "educational agency" in the introductory clause of subd (b)(1)(B); **(4)** deleted "of the local educational agency" after "educational agency plan" in subd (b)(1)(C); **(5)** amended subd (b)(2)(A) by **(a)** substituting "annually may receive" for "may annually receive" after "paragraph (1)" in the first sentence; and **(b)** adding the last sentence; **(6)** redesignated former subds (c)(1) and (c)(1)(A)-(c)(1)(G) to be the introductory clause of subd (c) and subds (c)(1)-(c)(7); **(7)** deleted "(20 U.S.C. Sec. 6301 et seq.)," after "federal No Child Left Behind Act of 2001" in the introductory clause of subd (c); **(8)** deleted former subds (c)(2)-(c)(4) which read:

"(2) In addition to the sanctions prescribed by paragraph (1), the Superintendent may recommend, and the state board may approve, the requirement that a local educational agency contract with a district assistance and intervention team to aid a local educational agency.

"(3) Subject to the availability of funds in the annual Budget Act for this purpose, if the state board requires a local educational agency to contract with a district assistance and intervention team pursuant to paragraph (2), the local educational agency may annually receive fifty thousand dollars ($50,000), plus ten thousand dollars ($10,000) for each school that is supported by federal funds pursuant to Title I of the federal No Child Left Behind Act of 2001 (20 U.S.C. Sec. 6301 et seq.) within the local educational agency, for no more than two years, for the purpose of contracting with and implementing the recommendations of the district assistance and intervention team.

"(4) Not later than January 31, 2006, the Superintendent shall develop and the state board shall approve, standards and criteria to be applied by a district assistance and intervention team in carrying out their duties. The standards and criteria shall include all of the following areas:

"(A) Governance.

"(B) Alignment of curriculum, instruction, and assessments to state standards.

"(C) Fiscal operations.

"(D) Parent and community involvement.

"(E) Human resources.

"(F) Data systems and achievement monitoring.

"(G) Professional development.";

(9) added subd (d); **(10)** redesignated former subds (d) and (e) to be subds (e) and (f); **(11)** deleted "(20 U.S.C. Sec. 6301 et seq.)" after "federal No Child Left Behind Act of 2001" in the first sentence of subds (e) and (f); **(12)** amended the last sentence of subd (e) by **(a)** substituting the comma for "and" after "local educational agency"; and **(b)** adding the comma after "intervention team"; **(13)** deleted former subd (f) which read: "(f) If there are more local educational agencies that qualify to receive funds under subdivisions (b), (c), and (e) than the amount appropriated for these purposes, the Superintendent may redirect funding for the purposes of subdivision (b)."; and **(14)** deleted former subds (h) and (i) which read:

"(h) For purposes of this section, a 'stakeholder' is, but is not necessarily limited to, any of the following:

"(1) A parent of a child attending a school within the jurisdiction of the local educational agency.

"(2) A community partner of the local educational agency.

"(3) An employee of the local educational agency, as selected by the bargaining unit.

"(i) A local educational agency shall not receive funds pursuant to subdivision (b), (c), or (e) if it is initially identified for program improvement or prevention after July 1, 2009."

§ 52055.58. Transmission of final evaluation of pilot project involving district assistance and intervention teams

By April 1, 2010, the department shall transmit to the appropriate fiscal and policy committees of the Legislature, the Legislative Analyst's Office, and the Department of Finance a copy of the final evaluation of the pilot project involving district assistance and intervention teams conducted by the department and a consortium of county offices of education.

Added Stats 2007 ch 174 § 8 (SB 80), effective August 24, 2007.

§ 52055.59. Evaluation of corrective actions taken by local educational agencies identified for corrective action

(a) Subject to an appropriation in the annual Budget Act or other statute, the Superintendent shall contract with an independent evaluator to complete a comprehensive three-year evaluation of the program established pursuant to subdivision (d) of Section 52055.57. It is the intent of the Legislature that a total of one million dollars ($1,000,000) be provided for the independent evaluation, with three hundred thirty-four thousand dollars ($334,000) provided for the 2008-09 fiscal year, three hundred thirty-three thousand dollars ($333,000) provided for the 2009-10 fiscal year, and three hundred thirty-three thousand dollars ($333,000) provided for the 2010-11 fiscal year. The evaluation shall focus on local educational agencies that are identified for corrective action beginning with the 2007-08 fiscal year, and in the 2008-09, 2009-10, and 2010-11 fiscal years, and shall include data compiled for those local educational agencies for those years.

(b) The evaluation shall examine the implementation, impact, costs, and effectiveness of the corrective actions and reform strategies undertaken by local educational agencies that are identified for corrective action, as specified in subdivision (a). The evaluation also shall determine the effectiveness of the technical assistance provided by the district assistance and intervention teams and other technical assistance providers pursuant to Section 52059.

(c) The Superintendent shall ensure that the evaluation includes, at a minimum, all of the following factors:

(1) Program implementation data, including, but not limited to, a review of startup activities, the quality of the academic program, local governance and leadership, the allocation of fiscal resources, the allocation of personnel, management practices, community support, parental participation, the use of pupil data to inform instructional practice, and staff development.

(2) Pupil performance data, including, but not limited to, results of assessments used to determine whether local educational agencies have made significant progress towards meeting their state and federal academic growth targets and data for each of the following subgroups:

(A) English learners.

(B) Pupils with exceptional needs.

(C) Pupils who are eligible for funds under Title I of the federal No Child Left Behind Act of 2001 (20 U.S.C. Sec. 6301 et seq.).

(3) Data on the percentage of fully credentialed teachers, the percentage of teachers who hold emergency credentials, the percentage of teachers assigned outside their subject area of competence, the accreditation status of the school if appropriate, average class size per grade level, and the number of pupils in multitrack, year-round schools. These data shall be compiled for the 2008-09, 2009-10, and 2010-11 school years.

(d) The evaluation shall include a rigorous qualitative and quantitative assessment of how program implementation affected pupil achievement and teacher quality using the information required pursuant to subdivision (c).

(e) The Superintendent shall submit two interim reports and a final report to the Governor, the Department of Finance, the Legislature, and the Legislative Analyst's Office. The reports shall be submitted to these agencies no later than November 1, 2009, November 1, 2010, and November 1, 2011, respectively.

Added Stats 2008 ch 757 § 7 (AB 519), effective September 30, 2008.

§ 52055.60. Certain schools, county offices of education, or charter schools identified for program improvement or corrective action allowed to utilize certain categorical program flexibility provisions (Inoperative July 1, 2013; Repealed January 1, 2014)

(a) Notwithstanding any other law, for the 2008-09 to the 2012-13 fiscal years, inclusive, the department and the state board shall not prohibit a school, school district, county office of education, or charter school identified for program improvement pursuant to the federal No Child Left Behind Act of 2001, or a school district or county office of education that has received a federal corrective action sanction by the state board pursuant to subdivision (b) of Section 52055.57, from utilizing the flexibility provisions established in Section 42605. The department and the state board shall not identify the funds with which sanctions or corrective actions are to be implemented.

(b) This section does not prohibit a school, county office of education, or charter school that has been identified for program improvement pursuant to the federal No Child Left Behind Act of 2001, or a school district or county office of education sanctioned pursuant to subdivision (c) of Section 52055.57, from implementing sanctions imposed pursuant to paragraph (6) of subdivision (c) of Section 52055.57.

(c) This section shall become inoperative on July 1, 2013, and, as of January 1, 2014, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2014, deletes or extends the dates on which it becomes inoperative and is repealed.

Added Stats 2009–2010 4th Ex Sess ch 2 § 25 (AB 2XXXX), effective July 28, 2009, inoperative July 1, 2013, repealed January 1, 2014.

§ 84040. Strengthening fiscal accountability; Requirement for annual audit

(a) It is the intent of the Legislature to encourage sound fiscal management practices among community college districts for the most efficient and effective use of public funds for the education of community college students by strengthening fiscal accountability at the district and state levels.

(b) The governing board of each community college district shall provide for an annual audit of all funds, books, and accounts of the district in accordance with regulations of the board of governors. The audit shall be made by certified public accountants licensed by the California Board of Accountancy. In the event the governing board of a community college district fails to provide for an audit,

the board of governors shall provide for an audit, and if the board of governors fails or is unable to make satisfactory arrangements for such an audit, the Department of Finance shall make arrangements for the audit. The cost of any audit described above shall be paid from district funds.

(c) The board of governors shall adopt criteria and standards for periodic assessment of the fiscal condition of community college districts, and these regulations regarding the review and improvement of district fiscal conditions as necessary to encourage sound fiscal management practices. In so doing:

(1) The governing board of a community college district, as required by regulations of the board of governors, shall periodically report information to the board of governors regarding the fiscal condition of the district.

(2) The board of governors, by regulation, shall develop standards for district maintenance of sound fiscal conditions. The regulations shall authorize a board comprehensive management review of any community college district which, after assessing itself or being assessed in accordance with board criteria and standards, is shown to be experiencing fiscal difficulty. On the basis of the findings of the management review, the board of governors may recommend appropriate changes in a district's management practices.

(3) The board of governors, by regulation, shall develop appropriate procedures and actions for districts that fail to achieve fiscal stability or that fail to comply with the board of governors' recommendations. The procedures and remedies may include the appointment of a special trustee to manage the district. The board of governors shall be authorized to reduce or withhold apportionment to districts to pay for the cost of the special trustee, management review, or other extraordinary costs resulting from the district's fiscal difficulties and to ensure the stabilization of the district's financial condition.

(4) The board of governors shall report to the chairs of the educational policy and fiscal committees of both houses of the Legislature, the Director of Finance, and the Governor any corrective action taken by the district and any action taken against the district pursuant to paragraph (3).

Added Stats 1990 ch 1372 § 638 (SB 1854). Amended Stats 2000 ch 1055 § 15 (AB 2889), effective September 30, 2000.

Former Sections: Former § 84040, similar to the present section, was enacted Stats 1976 ch 1010 § 2, operative April 30, 1977, amended Stats 1977 ch 36 § 334.5, effective April 29, 1977, operative April 30, 1977, ch 936 § 5, Stats 1978 ch 207 § 5, and repealed Stats 1990 ch 1372 § 637.

Amendments

2000 Amendment: In addition to making technical changes, amended subd (b) by substituting **(1)** "California Board of Accountancy" for "State Board of Accountancy" in the second sentence; and **(2)** "an audit" for "such audit" in the third sentence.

§ 84040.5. Statements and information in audit reports; Development of audit procedures; Costs

(a) The board of governors, in cooperation with, and upon approval by, the Department of Finance, shall prescribe the statements and other information to be included in the audit reports filed with the state and shall develop audit procedures for carrying out the purposes of this section. The Department of Finance may make audits, surveys, and reports which, in the judgment of the department will serve the best interest of the state.

(b) A review of existing audit procedures, statements, and other information required to be included in the audit reports shall be conducted periodically by the board of governors, in cooperation with the Department of Finance. Standards shall be updated periodically.

(c) For the audit of community colleges electing to take formal action pursuant to Sections 22714, 22714.5, 87488, and 87488.1, the audit standards shall require any information as is prescribed by the chancellor, including, but not limited to, the following:

(1) The number and type of positions being vacated.

(2) The age and service credit of the retirees receiving the additional service credit provided by Sections 22714 and 87488.

(3) A comparison of the salary and benefits of each retiree receiving the additional service credit with the salary and benefits of the replacement employee, if any.

(4) The resulting retirement costs, including interest, if any, and postretirement healthcare benefits costs, incurred by the employer.

(d) The chancellor shall annually prepare a cost analysis, based upon the information included in the audit reports for the prior fiscal year, to determine the net savings or costs resulting from formal actions taken by community college districts pursuant to Sections 22714, 22714.5, 87488, and 87488.1, and shall report the results of the cost analysis to the Governor and the Legislature by April 1 of each year.

(e) All costs incurred by the board of governors to implement subdivision (c) shall be absorbed by the board of governors.

(f) At the request of the Department of Finance, each community college district that elects to take formal action pursuant to Sections 22714, 22714.5, 87488, and 87488.1 shall reimburse the Department of Finance for any related administrative costs incurred by the Department of Finance.

Added by Stats 1977 ch 936 § 6. Amended by Stats 1988 ch 1331 § 6; Stats 1994 ch 20 § 4 (SB 858), effective March 16, 1994; Stats 2004 ch 935 § 5 (AB 1852).

Amendments

1988 Amendment: Amended the second paragraph by substituting **(1)** "conducted periodically by the board of governors, in cooperation with the Department of Finance" for "commenced on January 1, 1978, by the Department of Finance, in cooperation with the Auditor General and the board of governors" in the first sentence; and **(2)** the second sentence for the former second sentence which read: "Updated standards shall be completed by August 1, 1978, and shall periodically be updated no less than every two years thereafter."

1994 Amendment: Added **(1)** subdivision designations (a) and (b); and **(2)** subds (c)–(f).

2004 Amendment: Substituted **(1)** "Sections 22714, 22714.5, 87488, and 87488.1," for "Sections 22714 and 87488," in the introductory clause of subd (c) and in subds (d) and (f); and **(2)** "any" for "such" in the introductory clause of subd (c).

§ 87002. "Administrator"; "Educational administrator"; "Classified administrator"

(a) "Administrator" means any person employed by the governing board of a community college district in a supervisory or management position as defined in Article 5 (commencing with Section 3540) of Chapter 10.7 of Division 4 of Title 1 of the Government Code.

(b) "Educational administrator" means an administrator who is employed in an academic position designated by the governing board of the district as having direct responsibility for supervising the operation of or formulating policy regarding the instructional or student services program of the college or district. Educational administrators include, but are not limited to, chancellors, presidents, and other supervisory or management employees designated by the governing board as educational administrators.

(c) "Classified administrator" means an administrator who is not employed as an educational administrator.

Added by Stats 1990 ch 1302 § 6 (SB 2298), effective September 24, 1990.

Former Sections: Former § 87002, defining "credential", was enacted Stats 1976 ch 1010 § 2, operative April 30, 1977, and repealed Stats 1990 ch 1302 § 5, effective September 24, 1990.

Editor's Notes—Article 5 of Chapter 10.7 of Division 4 of Title 1 of the Government Code, referred to in subd (a) of this section, commences with Gov.C § 3544.

§ 87040. Deduction in salary payment as requested by employee

(a)(1) The governing board of each community college district when drawing an order for the salary payment due to employees of the district shall, without charge, reduce the order by the amount which it has been requested in a revocable written authorization by the employee to deduct for any or all of the following purposes:

(A) Paying premiums on any policy or certificate of group life insurance for the benefit of the employee or for group disability insurance, or legal expense insurance, or any of them, for the benefit of the employee or his or her dependents issued by an admitted insurer on a form of policy or certificate approved by the Insurance Commissioner.

(B) Paying rates, dues, fees, or other periodic charges on any hospital service contract for the benefit of the employee, or his or her dependents, issued by a nonprofit hospital service corporation on a form approved by the Insurance Commissioner pursuant to the provisions of Chapter 11A (commencing with Section 11491) of Part 2 of Division 2 of the Insurance Code.

(C) Paying periodic charges on any medical and hospital service agreement or contract for the benefit of the employee, or his or her dependents, issued by a nonprofit corporation subject to Part 2 (commencing with Section 5110) of, Part 3 (commencing with Section 7110) of, or Part 11 (commencing with Section 10810) of, Division 2 of Title 1 of the Corporations Code.

(D) Paying periodic charges on any legal services contract for the benefit of the employee, or his or her dependents issued by a nonprofit corporation subject to Part 3 (commencing with Section 7110) of, or Part 11 (commencing with Section 10810) of, Division 2 of Title 1 of the Corporations Code.

(2) This subdivision shall not apply to subdivision (b).

(b) For purposes of a deferred compensation plan authorized by Section 403(b) or 457 of the Internal Revenue Code or an annuity program authorized by Section 403(b) of the Internal Revenue Code that is offered by the community college district which provides for investments in corporate stocks, bonds, securities, mutual funds, or annuities, except as prohibited by the California Constitution, the governing board of each community college district when drawing an order for the salary payment due to an employee of the district shall, with or without charge, reduce the order by the amount which it has been requested in a revocable written authorization by the employee to deduct for participating in a deferred compensation plan or annuity program offered by the community college district. The governing board shall determine the cost of performing the requested deduction and may collect that cost from the organization, entity, or employee requesting or authorizing the deduction. For purposes of this subdivision, the governing board of a community college district is entitled to include in the amounts reducing the order the costs of any compliance or administrative services that are required to perform the requested deduction in compliance with federal or state law, and may collect these costs from the participating employee, the employee's participant account, or the organization or entity authorizing the deduction.

(c) The governing board of the district shall, beginning with the month designated by the employee and each month thereafter until authorization for the deduction is revoked, draw its order upon the funds of the district in favor of the insurer which has issued the policies or certificates or in favor of the nonprofit hospital service corporation which has issued hospital service contracts, or in favor of the nonprofit corporation which has issued medical and hospital service or legal service agreements or contracts, for an amount equal to the total of the respective deductions therefor made during the month. The governing board may require that the employee submit his or her authorization for the deduction up to one month in advance of the effective date of coverage.

(d) "Group insurance" as used in this section shall mean only a bona fide group program of life or disability or life and disability insurance where a master contract is held by the community college district or an employee organization but it shall, nevertheless, include annuity programs authorized by Section 403(b) of the Internal Revenue Code when approved by the governing board.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended by Stats 1978 ch 1305 § 27, operative January 1, 1980; Stats 2006 ch 780 § 8 (AB 2462), effective January 1, 2007; Stats 2007 ch 130 § 81 (AB 299), effective January 1, 2008.

Editor's Notes—Ins C § 11491, referred to in this section and relating to nonprofit hospital plans in relation to profit corporations, was repealed by Stats 1996 ch 484 § 1 (SB 1866).

Amendments

1978 Amendment: (1) Amended the first sentence by substituting **(a)** "nonprofit corporation subject to Part 2 (commencing with Section 5110) of, Part 3 (commencing with Section 7110) of, or Part 11 (commencing with Section 10810) of, Division 2 of Title 1 of the Corporations Code" for "nonprofit membership corporation lawfully operating under Section 9200 or 9201 of the Corporations Code"; and **(b)** "nonprofit corporation subject to Part 3 (commencing with Section 7110) of, or Part 11 (commencing with Section 10810) of, Division 2 of Title 1 of the Corporations Code" for "nonprofit membership corporation lawfully operating under Section 9200 or 9201.5 of the Corporations Code" at the end of the sentence; and **(2)** substituted "nonprofit corporation" for "nonprofit membership corporation" before "which has issued medical" in the second sentence.

2006 Amendment: (1) Added and redesignated subdivision designations; **(2)** deleted "participating in a deferred compensation program offered by the district which provides for investments in corporate stocks, bonds, securities, mutual funds, or annuities, except as prohibited by the Constituted, or" at the end of subd (a)(1); **(3)** substituted a period for ", or" at the end of subds (a)(1)(A)–(a)(1)(C); and **(4)** added subds (a)(2) and (b).

2007 Amendment: (1) Added "or her" wherever it appears; **(2)** substituted "Chapter 11A" for "Chapter 11a" in subd (a)(1)(B)"; **(3)** deleted "The requirements of" at the beginning of subd (a)(2); and **(4)** substituted "employee" for "employees" after "payment due to an" in subd (b).

§ 87040.5. Contract with a third-party administrator regarding annuity contract and custodial account or deferred compensation plan

(a) For purposes of this section, the following definitions shall apply:

(1) "Annuity contract" means an annuity contract described in Section 403(b) of the Internal Revenue Code that is available to employees as described in Section 770.3 of the Insurance Code.

(2) "Custodial account" means a custodial account described in Section 403(b)(7) of the Internal Revenue Code.

(3) "Deferred compensation plan" means a plan described in Section 457 of the Internal Revenue Code.

(4) "Third-party administrator" means a person or entity that provides administrative or compliance services to a community college district as described in subdivision (b).

(b) A community college district may enter into a written contract with a third-party administrator for services regarding an annuity contract and custodial account or a deferred compensation plan provided by the community college district. That contract may include any of the following:

(1) Services to ensure compliance with either Section 403(b) of the Internal Revenue Code regarding the annuity contract and custodial account or Section 457 of the Internal Revenue Code regarding a deferred compensation plan, including, but not limited to, any of the following:

(A) Administer and maintain written plan documents governing the community college district's plan.

(B) Review and authorize hardship withdrawal requests under Section 403(b) of the Internal Revenue Code, transfer requests, loan requests, unforeseeable emergency withdrawals under Section 457 of the Internal Revenue Code and other disbursements permitted under either Section 403(b) or 457 of the Internal Revenue Code.

(C) Review and determine domestic relations orders as qualified domestic relations orders as described in Section 414(p) of the Internal Revenue Code.

(D) Provide notice to eligible employees that is consistent with Title 26 of the Code of Federal Regulations that those employees may participate in an annuity contract and custodial account.

(E) Administer and maintain specimen salary reduction agreements for the community college district and employees of that community college district to initiate payroll deferrals.

(F) Monitor, from information provided either directly from the employee, as part of the common remitting services provided pursuant to paragraph (2), through information provided by the community college district, or through information provided by vendors authorized by the community college district to provide investment products, the maximum contributions allowed by employees participating in either the annuity contract and custodial account as described in Sections 402(g), 414(v), and 415 of the Internal Revenue Code or the deferred compensation plan as described in Section 414(v) or 457 of the Internal Revenue Code.

(G) Calculate and maintain vesting information for contributions made by the community college district to the annuity contract and custodial account or deferred compensation plan.

(H) Identify and notify employees that are required to take a minimum distribution of the funds in that employee's annuity contract and custodial account or deferred compensation plan as described in Section 401(a)(9) of the Internal Revenue Code.

(I) Coordinate responses to the Internal Revenue Service if there is an Internal Revenue Service audit of the annuity contract and custodial account or deferred compensation plan.

(2) Services to administer the annuity contract and custodial account or a deferred compensation plan that includes, but is not limited to, all of the following:

(A) Common remitting services.

(B) General educational information to employees about the annuity contract and custodial account or the deferred compensation plan that includes, but is not limited to, the enrollment process, program eligibility, and investment options.

(C) Internal reports for the community college district to ensure compliance with either Section 403(b) or 457 of the Internal Revenue Code and compliance with Title 26 of the Code of Federal Regulations.

(D) Consulting services related to the design, operation, and administration of the plan.

(E) Internal audits, on behalf of a community college district, of a provider's plan compliance procedures with respect to the provider's annuity contract or custodial account offered under the community college district's plan. These audits shall not be conducted more than once per year for any provider's plan unless documented evidence indicates a problem in complying with either Section 403(b) or 457 of the Internal Revenue Code.

(c)(1) If a community college district elects to contract with a third-party administrator for the administrative or compliance services to community college districts described in subdivision (b), the community college district shall do all of the following:

(A) Require the third-party administrator to provide proof of liability insurance and a fidelity bond in an amount determined by the community college district to be sufficient to protect the assets of participants and beneficiaries in the annuity contract and custodial account or deferred compensation plan.

(B) Require the third-party administrator to provide evidence of a safe chain-of-custody of assets process for ensuring fulfillment of fiduciary responsibilities and timely placement of participant investments.

(C) Require evidence, if the third-party administrator is related to or affiliated with a provider of investment products pursuant to Section 403(b) or 457 of the Internal Revenue Code, that data generated from the services provided by the third-party administrator are maintained in a manner that prevents the provider of investment products from accessing that data unless access to the data is required to provide the services in accordance with the contract entered into with the community college district pursuant to subdivision (b).

(2) This subdivision shall apply to any administrative or compliance services provided pursuant to a contract for services between a community college district and the State Teachers' Retirement System if the system does not contract with a third-party administrator to provide those administrative and compliance services on behalf of the system.

(d) A third-party administrator shall disclose to any community college district seeking his or her services any fees, commissions, cost offsets, reimbursements, or marketing or promotional items received by the administrator, a related entity, or a representative or agent of the administrator or related entity from any plan provider selected as a vendor of an annuity contract, custodial account, or deferred compensation plan by the community college district. A third-party administrator that is affiliated with or has a contractual relationship with a provider of annuity contracts, custodial accounts, or deferred compensation plans shall disclose the existence of the relationship to each community college district and each individual participant in the annuity contract, custodial account or deferred compensation plan.

(e) Any personal information obtained by the third-party administrator in providing services pursuant to this section shall be used by the third-party administrator only to provide those services for the community college district in accordance with the contract entered into with the community college district pursuant to subdivision (b).

(f) Nothing in this section shall be construed to interfere with either of the following:

(1) The rights of employees or beneficiaries as described in Section 770.3 of the Insurance Code.

(2) The ability of the community college district to establish nonarbitrary requirements upon providers of an annuity contract that, in the community college district's discretion, aid in the administration of its benefit programs and do not unreasonably discriminate against any provider of an annuity contract or interfere with the rights of employees or beneficiaries as described in Section 770.3 of the Insurance Code.

(g) This section shall not apply to any services provided by a third-party administrator pursuant to a contract for services between a community college district and the State Teachers' Retirement System. Any services provided by a third-party administrator pursuant to a contract for services between a community college district and the State Teachers' Retirement System shall be subject to either Section 24953, in the case of an annuity contract or custodial account, or Section 24977, in the case of a deferred compensation plan.

Added by Stats 2006 ch 780 § 9 (AB 2462), effective January 1, 2007. Amended by Stats 2007 ch 130 § 82 (AB 299), effective January 1, 2008.

Amendments

2007 Amendment: (1) Amended subd (b)(1)(F) by substituting **(a)** "paragraph (2)" for "subparagraph (2)"; and **(b)** "Section 414(v) or 457" for "Sections 414(v) or 457"; and **(2)** added "of the following" at the end of the introductory clause of subd (f).

§ 87482.5. Classification of certain instructors as temporary employees; Effect of service as substitute; Service in professional ancillary activities

(a) Notwithstanding any other law, a person who is employed to teach adult or community college classes for not more than 67 percent of the hours per week considered a full-time assignment for regular employees having comparable duties shall be classified as a temporary employee, and shall not become a contract employee under Section 87604. If the provisions of this section are in conflict with the terms of a collective bargaining agreement in effect on or before January 1, 2009, the provisions of this section shall govern the employees subject to that agreement upon the expiration of the agreement.

(b) Service as a substitute on a day-to-day basis by persons employed under this section shall not be used for purposes of calculating eligibility for contract or regular status.

(c)(1) Service in professional ancillary activities by persons employed under this section, including, but not necessarily limited to, governance, staff development, grant writing, and advising student organizations, shall not be used for purposes of calculating eligibility for contract or regular status unless otherwise provided for in a collective bargaining agreement applicable to a person employed under this section.

(2) This subdivision may not be construed to affect the requirements of subdivision (d) of Section 84362.

Added Stats 1985 ch 132 § 2. Amended Stats 2003 ch 25 § 1 (SB 955); Stats 2008 ch 84 § 1 (AB 591), effective January 1, 2009.

Amendments

2003 Amendment: Added subd (c).

2008 Amendment: Amended subd (a) by **(1)** substituting "other law, a person" for "other provision of law, any person"; **(2)** substituting "67 percent" for "60 percent"; and **(3)** adding the last sentence.

Notes of Decisions

Community college districts have the authority to employ two types of academic employees designated as temporary: those hired for a limited time to meet certain specified needs, Ed C §§ 87478, 87480, 87481, 87482, and those hired on a part-time basis of 60 percent or less of a full-time workload. Balasubramanian v. San Diego Community College Dist. (2000, Cal App 4th Dist) 80 Cal App 4th 977, 95 Cal Rptr 2d 837, 2000 Cal App LEXIS 385.

Temporary employees hired under Ed C § 87482.5 may continue to teach year after year, without becoming contract employees, provided each year they teach not more than 60 percent of a full-time assignment exclusive of day-to-day substitution assignments. Balasubramanian v. San Diego Community College Dist. (2000, Cal App 4th Dist) 80 Cal App 4th 977, 95 Cal Rptr 2d 837, 2000 Cal App LEXIS 385.

In contrast to those provisions mandating contract status upon reemployment or continuation of particular duties, Ed C § 87482.5, pertaining to employees of a school district as 60 percent full-time equivalent employees, provides no such consequence; section 87482.5 does not compel reclassification. Balasubramanian v. San Diego Community College Dist. (2000, Cal App 4th Dist) 80 Cal App 4th 977, 95 Cal Rptr 2d 837, 2000 Cal App LEXIS 385.

Ed C § 87482.5(b) prohibits reclassification of a temporary employee as a contract employee by virtue of teaching more than 60 percent full-time equivalent, where the service as a substitute teacher is on a day-to-day basis. Balasubramanian v. San Diego Community College Dist. (2000, Cal App 4th Dist) 80 Cal App 4th 977, 95 Cal Rptr 2d 837, 2000 Cal App LEXIS 385.

Temporary employee statutes should be strictly construed. An employee should not be classified as temporary unless that classification is specifically authorized; otherwise, the catchall provision in Ed C § 87477 controls. Stryker v. Antelope Valley Community College Dist. (2002, Cal App 2d Dist) 100 Cal App 4th 324, 122 Cal Rptr 2d 489, 2002 Cal App LEXIS 4409.

Proper measure in determining whether the 60 percent limit is exceeded is the number of hours the person seeking tenure spends teaching classes compared to the number of hours per week a regular fully assigned employee spends on comparable duties. Stryker v. Antelope Valley Community College Dist. (2002, Cal App 2d Dist) 100 Cal App 4th 324, 122 Cal Rptr 2d 489, 2002 Cal App LEXIS 4409.

§ 87483. Regulations allowing reduction of workload to part–time duties

Notwithstanding any other provision, the governing board of a community college district may establish regulations that allow academic employees to reduce their workload from full–time to part–time duties. The regulations shall include, but shall not be limited to, the following if the employees wish to reduce their workload and maintain retirement benefits pursuant to Section 22713 of this code or Section 20815 of the Government Code:

(a) The employee shall have reached the age of 55 prior to reduction in workload.

(b) The employee shall have been employed full time in an academic position or a position requiring certification qualifications, or both, for at least 10 years of which the immediately preceding five years were full–time employment.

(c) During the period immediately preceding a request for a reduction in workload, the employee shall have been employed full time in an academic position or a position requiring certification qualifications, or both, for a total of at least five years without a break in service. For purposes of this sub-

division, sabbaticals and other approved leaves of absence shall not constitute a break in service. Time spent on a sabbatical or other approved leave of absence shall not be used in computing the five–year full–time service requirement prescribed by this subdivision.

(d) The option of part–time employment shall be exercised at the request of the employee and can be revoked only with the mutual consent of the employer and the employee.

(e) The employee shall be paid a salary which is the pro rata share of the salary he or she would be earning had he or she not elected to exercise the option of part–time employment but shall retain all other rights and benefits for which he or she makes the payments that would be required if he or she remained in full–time employment.

The employee shall receive health benefits as provided in Section 53201 of the Government Code in the same manner as a full–time employee.

(f) The minimum part–time employment shall be the equivalent of one–half of the number of days of service required by the employee's contract of employment during his or her final year of service in a full–time position.

(g) The period of this part–time employment shall not exceed five years for employees subject to Section 20815 of the Government Code or 10 years for employees subject to Section 22713 of this code.

(h) The period of part–time employment of employees subject to Section 20815 of the Government Code shall not extend beyond the end of the college year during which the employee reaches his or her 70th birthday. This subdivision shall not apply to any employee subject to Section 22713 of this code.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended by Stats 1978 ch 558 § 1; Stats 1979 ch 218 § 1, effective July 6, 1979, ch 630 § 3, ch 1110 § 1, effective September 28, 1979, ch 1110 § 1.5, effective September 28, 1979, operative January 1, 1980; Stats 1981 ch 1023 § 3; Stats 1987 ch 330 § 22; Stats 1990 ch 1302 § 84 (SB 2298), effective September 24, 1990; Stats 1995 ch 758 § 154 (AB 446).

Amendments

1978 Amendment: (1) Added subd (f); and **(2)** deleted former subd (g) which read: "(g) This section shall not be applicable to persons who are administrators in community colleges."

1979 Amendment (ch 218): (1) Added subd (c); **(2)** redesignated former subds (c)–(f) to be subds (d)–(g); **(3)** added "of this code" after "Section 22724" in the second paragraph; and **(4)** substituted "Section 22724 of this code" for "Section 22724 of the Government Code" in subd (g).

1979 Amendment (ch 1110 § 1): (1) Substituted "and with respect to members of the State Teachers' Retirement System" for "of this code" in the introductory clause of subd (g); and **(2)** added subd (h).

1979 Amendment (ch 1110 § 1.5): (1) Substituted subd (g) for former subd (g) which read:

"(g) Notwithstanding the provisions of Section 22724 of this code, the following contributions, shall be made to the Teachers' Retirement Fund:

"(1) The member shall contribute the amount that would have been contributed if the member was employed full time.

"(2) The employer shall contribute 13 percent of the salary that would have been paid the member had the member been employed full time.";

(2) substituted subd (h) for former subd (h) which read:

"(h) With respect to members of the Public Employees' Retirement System, the following contributions shall be made to the Public Employees' Retirement Fund:

"(1) The member shall contribute the amount that would have been contributed if the member was employed full time.

"(2) Contributions based on full salary in accordance with Chapter 6 (commencing with Section 20740) of Part 3 of Division 5 of the Government Code.";

and **(3)** added the last paragraph.

1981 Amendment: (1) Added the commas after "include" and after "limited to" in the introductory clause of the second paragraph; **(2)** substituted "shall" for "must" in subds (a), (b), the first sentence of (c), and (d); **(3)** generally added feminine pronouns; **(4)** substituted "70th" for "65th" in subd (h); and **(5)** deleted the former third

paragraph which read: "This section shall remain in effect only until June 30, 1983, and as of such date is repealed, unless a later enacted statute, which becomes operative before that date, deletes or extends such date. However, any member who commences part–time employment pursuant to this section prior to June 30, 1983, may continue such part–time employment and receive such retirement benefits and health benefits until the member has completed five years of such part–time employment."

1987 Amendment: (1) Amended subd (g) by **(a)** substituting "this" for "such" after "The period"; and **(b)** adding "for employees subject to Section 22724 of this code"; **(2)** amended the first sentence of subd (h) by **(a)** deleting "such" after "period of"; and **(b)** adding "of employees subject to Section 20815 of the Government Code"; and **(3)** added the second sentence of subd (h).

1990 Amendment: Substituted **(1)** "academic" for "their certificated" in the first sentence; **(2)** "The" for "Such" before "regulations" and before "employees wish" in the introductory clause; and **(3)** "an academic position or a position requiring certification qualifications, or both," for "a position requiring certification" in subds (b) and (c).

1995 Amendment: Substituted **(1)** "that" for "which" after "may establish regulations" in the first sentence; **(2)** "Section 22713" for "Section 22724" wherever it appears; and **(3)** "college" for "school" after "beyond the end of the" in subd (h).

§ 87488. Credit of additional years to encourage retirement of academic employees; Conditions

Whenever the governing board of a community college district, by formal action, determines that because of impending curtailment of or changes in the manner of performing services, the best interests of the district would be served by encouraging the retirement of academic employees and that the retirement will result in a net savings to the district, an additional two years of service shall be credited under the Defined Benefit Program of the State Teachers' Retirement Plan to an academic employee pursuant to Section 22714 if all of the conditions set forth in that section are satisfied.

Added by Stats 1994 ch 20 § 5 (SB 858), effective March 16, 1994. Amended by Stats 1998 ch 965 § 321 (AB 2765); Stats 2003 ch 313 § 16 (AB 1207).

Former Sections: Former § 87488, similar to the present section, was added Stats 1984 ch 361 § 3, amended Stats 1985 ch 293 § 7, effective July 29, 1985, Stats 1987 ch 601 § 3, Stats 1990 ch 996 § 3, ch 1302 § 88.5, effective September 14, 1990, operative until January 1, 1994, and repealed, operative January 1, 1994, by its own terms.

Amendments

1998 Amendment: (1) Substituted "State Teachers' Retirement Defined Benefit Program" for "State Teachers' Retirement System" in subds (a), (a)(1), and (f); **(2)** deleted the former last sentence of subd (a)(1) which read: "For the 1993–94 fiscal year, the retirement period shall begin on the date of the formal action and shall end on June 30, 1994."; **(3)** substituted "in a time period that shall not exceed four years, that is" for "time period that shall not exceed four years, that are" in the third sentence of subd (a)(2); and **(4)** deleted "into the State Teachers' Retirement System" after "reinstates" in subd (e).

2003 Amendment: (1) Deleted former subdivision designation (a) at the beginning of the section; **(2)** deleted "taken prior to January 1, 1999" after "formal action"; **(3)** deleted "either:" after "retirement will"; **(4)** deleted "; result in a reduction of the number of academic employees as a result of declining enrollment; or result in the retention of faculty who are qualified to teach in areas of teacher shortage, including, but not limited to, mathematics and science" after "to the district"; **(5)** substituted "Defined Benefit Program of the State Teachers' Retirement Plan" for "State Teachers' Retirement Defined Benefit Program"; **(6)** substituted "conditions set forth in that section are satisfied." for "following conditions exist:"; and **(7)** deleted former subds (a)(1)–(a)(4) and subds (b)–(f) which read:

"(1) The employee is credited with five or more years of service under the State Teachers' Retirement Defined Benefit Program and retires during a period not more than 120 days or less than 60 days, commencing no sooner than the effective date of the formal action of the district that shall specify the period.

"(2) The governing board transmits to the retirement fund an amount determined by the Teachers' Retirement Board that equals the actuarial equivalent of the difference between the allowance the member receives after the receipt of service credit under this section and Section 22714 and the amount the member would have received without the service credit and an amount determined by the Teachers' Retirement Board that equals the actuarial equivalent of the difference between the purchasing power protection supplemental payment the member receives after receipt of additional service credit pursuant to this section and the amount the member would have received without the additional service credit. The payment for purchasing power shall be deposited in the Supplemental Benefit Maintenance Account established by Section 22400 and shall be subject to Sections 24414 and 24415. The transfer to the retirement fund shall be made in a manner and in a time period that shall not exceed four years, that is acceptable to the Teachers' Retirement Board. The community college district shall make the payment with respect to all eligible employees who retired pursuant to this section and Section 22714.

"(3) The governing board transmits to the retirement fund the administrative costs incurred by the State Teachers' Retirement System in implementing this section, as determined by the Teachers' Retirement Board.

"(4) The governing board of the community college district has considered the availability of academic employees to fill the positions that would be vacated pursuant to this section.

"(b)(1) The community college district shall demonstrate and certify to the chancellor's office that the formal action taken would result in either: (A) a net savings to the district; (B) a reduction in the number of academic employees as a result of declining enrollment, as computed pursuant to subdivision (c) of Section 84701; or (C) the retention of faculty who are qualified to teach in teacher shortage disciplines.

"(2) The chancellor shall certify to the Teachers' Retirement Board that the results specified in paragraph (1) can be demonstrated. The certification shall include, but not be limited to, the information specified in subdivision (c) of Section 84040.5. A community college district that qualifies under clause (B) of paragraph (1) shall also certify that it qualifies as a declining enrollment district as computed pursuant to subdivision (c) of Section 84701.

"(3) The chancellor may request reimbursement from the community college district for all administrative costs that result from the certification.

"(c) The service credit made available pursuant to this section shall be available to all members employed by the community college district who meet the conditions set forth in this section.

"(d) The amount of service credit shall be two years.

"(e) Any employee who retires with service credit granted under this section and Section 22714 and subsequently reinstates, shall forfeit the service credit granted under this section and Section 22714.

"(f) This section shall not be applicable to any employee otherwise eligible if the employee receives any unemployment insurance payments arising out of employment with an employer subject to Part 13 (commencing with Section 22000) during a period extending one year beyond the effective date of the formal action, or if the employee is not otherwise eligible to retire for service under the State Teachers' Retirement Defined Benefit Program."

§ 87488.1. [Section repealed 2005.]

Added by Stats 2003 ch 313 § 17 (AB 1207), operative January 3, 2004. Repealed, January 1, 2005, by its own terms. The repealed section related to additional service and age credit.

§ 88001. Definitions

As used in this chapter the following terms mean:

(a) "Classification" means that each position in the classified service shall have a designated title, a regular minimum number of assigned hours per day, days per week, and months per year, a specific statement of the duties required to be performed by the employees in each such position, and the regular monthly salary ranges for each such position.

(b) "Permanent," as used in the phrase "permanent employee," includes tenure in the classification in which the employee passed the required probationary period and includes all of the incidents of that classification.

(c) "Regular," as used in the phrase "regular classified employee," or any similar phrase, refers to a classified employee who has probationary or permanent status.

(d) "Demotion" means assignment to an inferior position or status without the employee's written voluntary consent.

(e) "Disciplinary action" includes any action whereby an employee is deprived of any classification or any incident of any classification in which he or she has permanence, including dismissal, suspension, demotion, or any reassignment, without his or her voluntary consent, except a layoff for lack of work or lack of funds.

(f) "Reclassification" means the upgrading of a position to a higher classification as a result of the gradual increase of the duties being performed by the incumbent in that position.

(g) "Layoff for lack of funds or layoff for lack of work" includes any reduction in hours of employment or assignment to a class or grade lower than that in which the employee has permanence, voluntarily consented to by the employee, in order to avoid interruption of employment by layoff.

(h) "Cause," relating to disciplinary actions against classified employees, means those grounds for discipline or offenses enumerated in the law or the written rules of a community college employer. No disciplinary action may be maintained for any "cause" other than as defined herein.

This section shall not apply to districts to which Article 3 (commencing with Section 88060) is applicable.

This section shall not apply to any district which, during the 1973–74 college year, had an average daily attendance of 100,000 or more.

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended by Stats 1995 ch 758 § 186 (AB 446).

Amendments

1995 Amendment: (1) In addition to making technical changes, amended the introductory clause of the first paragraph by **(a)** deleting "Definitions" at the beginning; and **(b)** adding "the following terms mean"; **(2)** added "or she" and "or her" in subd (e); **(3)** substituted "community college" for "public school" in the first sentence of subd (h); **(4)** amended the second paragraph by deleting "the provisions of" **(a)** at the beginning; and **(b)** after "to which"; and **(5)** amended the last paragraph by **(a)** deleting "the provisions of" at the beginning; and **(b)** substituting "college year" for "school year".

§ 88033. Age limits

(a) Notwithstanding any other provisions of law, no minimum or maximum age limits shall be established for the employment or continuance in employment of persons as part of the classified service.

(b) Any person possessing all of the minimum qualifications for any employment shall be eligible for appointment to that employment, and no rule or policy, either written or unwritten, heretofore or hereafter adopted, shall prohibit the employment or continued employment, solely because of the age of any such person in any community college employment who is otherwise qualified therefor.

(c) No person shall be employed in community college employment while he or she is receiving a retirement allowance under any retirement system by reason of prior school or community college employment, except as provided in Article 5 (commencing with Section 21150) of Chapter 8 of Part 3 of Division 5 of Title 2 of the Government Code.

(d) Subdivision (c) shall be inapplicable to persons who were employed in the classified service of any community college district as of September 18, 1959, and who are still employed by the same district on September 15, 1961, and the rights of those persons shall be fixed and determined as of September 18, 1959, and none of these persons shall be deprived of any right to any retirement allowance or eligibility for any such allowance to which he or she would have been entitled as of that date. Any such person who, by reason of any provision of law to the contrary, has been deprived of any right to retirement allowance or eligibility for such an allowance, shall, upon the filing of application therefor, be reinstated to those rights as he or she would have had, had this subdivision been in effect on September 18, 1959.

(e) This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 3 (commencing with Section 88060).

Enacted by Stats 1976 ch 1010 § 2, operative April 30, 1977. Amended by Stats 1983 ch 666 § 5; Stats 1990 ch 903 § 3 (AB 4048); Stats 1995 ch 758 § 199 (AB 446); Stats 2004 ch 183 § 83 (AB 3082).

Editor's Notes—Article 5 of Chapter 8 of Part 3 of Division 5 of Title 2 of the Government Code, referred to in subd (c) of this section, commences with § 20750.

Amendments

1983 Amendment: Substituted **(1)** subd (c) for former subd (c) which read: "This section does not authorize the employment of any person in particular school employment who has reached the retirement age for that particular employment prescribed by any retirement system applicable thereto, whether or not the person is a member of the retirement system, or entitled to a retirement salary thereunder, nor shall any person be employed in such employment while he is receiving a retirement allowance under any retirement system by reason of prior school employment"; and **(2)** subd (e) for former subd (e) which read: "This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 3 (commencing with Section 88060) of this chapter, except that in a community college district governed by the same governing board, in which the combined average daily attendance of all districts is in excess of 400,000, the permanent classification of any employee who is classified as a permanent employee under the provisions of Article 3 (commencing with Section 88060) of this chapter shall cease at the close of the fiscal year in which the employee reaches the age of 65 years. In such district or districts the employment, or continued employment of any employee beyond the close of the fiscal year in which he reaches the age of 65 years shall be at the discretion of the governing board of the district, which may, at its pleasure, terminate the services of such employee at any time. Employment beyond age 65 in such districts shall be in accordance with rules and regulations governing such employment approved by the personnel commission, and adopted by the governing board of the district."

1990 Amendment: (1) Substituted "as" for "a" after "persons" in subd (a); **(2)** amended subd (c) by adding **(a)** "or she" after "he"; and **(b)** ", except as provided in Article 5 (commencing with Section 21150) of Chapter 8 of Part 3 of Division 5 of Title 2 of the Government Code"; **(3)** substituted the comma for a semicolon after "September 18, 1959" the second time it appears in the first sentence of subd (d); and **(4)** added "or she" after "he" in the second sentence in subd (d).

1995 Amendment: (1) Added "or community college" in subd (c); **(2)** deleted "The provisions of" at the beginning of subd (d); **(3)** amended the first sentence of subd (d) by **(a)** substituting "September 15, 1961" for "the effective date of this subdivision"; **(b)** substituting "none of these persons" for "no such person"; and **(c)** adding "or she" after "allowance to which he"; and **(4)** deleted "of this chapter" at the end of subd (e).

2004 Amendment: Substituted "who are still employed by the same district" for "who are still in the employ of the same district" in the first sentence of subd (d).

EXTRACTS FROM THE GOVERNMENT CODE

§ 1243. Effects of conviction for crimes arising out of official duties as public official [Section renumbered Gov C § 7522.70 effective January 1, 2013]

Added by Stats 2005 ch 322 § 1 (AB 1044), effective January 1, 2006. Amended and renumbered Gov C § 7522.70 by Stats 2012 ch 296 § 9 (AB 340), effective January 1, 2013.

§ 3540.1. Definitions

As used in this chapter:

(a) "Board" means the Public Employment Relations Board created pursuant to Section 3541.

(b) "Certified organization" or "certified employee organization" means an organization that has been certified by the board as the exclusive representative of the public school employees in an appropriate unit after a proceeding under Article 5 (commencing with Section 3544).

(c) "Confidential employee" means an employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information that is used to contribute significantly to the development of management positions.

(d) "Employee organization" means an organization that includes employees of a public school employer and that has as one of its primary purposes representing those employees in their relations with that public school employer. "Employee organization" shall also include any person of the organization authorized to act on its behalf.

(e) "Exclusive representative" means the employee organization recognized or certified as the exclusive negotiating representative of public school employees, as "public school employee" is defined in subdivision (j), in an appropriate unit of a public school employer.

(f) "Impasse" means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile.

(g) "Management employee" means an employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Public Employment Relations Board.

(h) "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, is not subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

(i) "Organizational security" is within the scope of representation, and means either of the following:

(1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement. However, an arrangement shall not deprive the employee of the right to terminate his or her obligation to the employee organization within a period of 30 days following the expiration of a written agreement.

(2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organi-

zation for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first.

(j) "Public school employee" or "employee" means a person employed by a public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

(k) "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, a county superintendent of schools, a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code, an auxiliary organization established pursuant to Article 6 (commencing with Section 72670) of Chapter 6 of Part 45 of Division 7 of Title 3 of the Education Code, except an auxiliary organization solely formed as or operating a student body association or student union, or a joint powers agency, except a joint powers agency established solely to provide services pursuant to Section 990.8, if all the following apply to the joint powers agency.

(1) It is created as an agency or entity that is separate from the parties to the joint powers agreement pursuant to Section 6503.5.

(2) It has its own employees separate from employees of the parties to the joint powers agreement.

(3) Any of the following are true:

(A) It provides educational services primarily performed by a school district, county board of education, or county superintendent of schools.

(B) A school district, county board of education, or county superintendent of schools is designated in the joint powers agreement pursuant to Section 6509.

(C) It is comprised solely of educational agencies.

(*l*) "Recognized organization" or "recognized employee organization" means an employee organization that has been recognized by an employer as the exclusive representative pursuant to Article 5 (commencing with Section 3544).

(m) "Supervisory employee" means an employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend that action, if, in connection with the foregoing functions, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Added Stats 1975 ch 961 § 2, operative July 1, 1976. Amended Stats 1977 ch 1159 § 6, operative July 1, 1978; Stats 1985 ch 661 § 2; Stats 1999 ch 828 § 5 (AB 631); Stats 2000 ch 135 § 63 (AB 2539), ch 893 § 1 (SB 1960) (ch 893 prevails); Stats 2003 ch 190 § 1 (SB 253); Stats 2011 ch 674 § 1 (AB 501), effective January 1, 2012; Stats 2012 ch 162 § 54 (SB 1171), effective January 1, 2013.

Historical Derivation: Former Ed C § 13081, as added Stats 1965 ch 2041 § 2, amended Stats 1970 ch 1412 § 3, ch 1413 § 2.

Amendments

1977 Amendment: Substituted "Public Employment Relations Board" for "Educational Employment Relations Board" in subd (a).

1985 Amendment: The amendment made technical changes.

1999 Amendment: Amended subd (k) by **(1)** deleting "or" after "board of education,"; and **(2)** adding ", or a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code".

2000 Amendment: Added "is within the scope of representation, and" in the introductory clause of subd (i).

2003 Amendment: Substituted **(1)** subd (c) for former subd (c) which read: "(c) 'Confidential employee' means any employee who, in the regular course of his or her duties, has access to, or possesses information relating to, his or her employer's employer–employee relations."; **(2)** "of the organization authorized" for "such an organization authorizes" in the second sentence of subd (d); **(3)** "is not" for "shall not be" after "Section 3543.7,"

in subd (h); **(4)** "an arrangement may not" for "no such arrangement shall" in the second sentence of subd (i)(1); and **(5)** "that" for "such" after "or effectively recommend" in subd (m).

2011 Amendment: (1) Substituted "that" for "which" in subds (b) and (l) and the first sentence of subd (d); **(2)** substituted "an" for "any" after "means" in subds (c) and (m) and the first sentence of subd (g); **(3)** substituted "an organization that" for "any organization which" in the first sentence of subd (d); **(4)** substituted "public school employees, as 'public school employee' is defined in subdivision (j)," for "certificated or classified employees" in subd (e); **(5)** substituted "may" for "shall" in the second sentence of subd (i)(1); **(6)** substituted "a" for "any" after "means" and after "employed by" in subd (j); **(7)** amended the first paragraph of subd (k) by (a) deleting "or" after "superintendent of schools,"; and (b) adding ", an auxiliary organization established pursuant to Article 6 (commencing with Section 72670) of Chapter 6 of Part 45 of Division 7 of Title 3 of the Education Code, except an auxiliary organization solely formed as or operating a student body association or student union, or a joint powers agency, except a joint powers agency established solely to provide services pursuant to Section 990.8, if all the following apply to the joint powers agency"; **(8)** added subds (k)(1)-(k)(3); and **(9)** substituted "layoff" for "lay off" in subd (m).

2012 Amendment: Substituted "lay off" for "layoff" in subd (m).

Notes of Decisions

1. "Employee Organization"

An employee organization did not constitute a "group of employees" within the meaning of Cal. Admin. Code, tit. 8, § 34020, which prescribes, after the establishment of an organizational security agreement, a procedure pursuant to which a "group of employees in an appropriate unit" may petition to rescind that agreement, and thus, had no standing to petition the Public Employment Relations Board to rescind an organizational security agreement in which employees of a unified school district had voted in favor of an organizational security agreement requiring them to pay an agency fee to another employee organization that had been designated the exclusive representative of the employees of the district. The Educational Employment Relations Act (Gov C § 3540 et seq.) applies the principle of exclusivity to the employee organization chosen as the exclusive representative of the employees for all dealings with the employer. If the Public Employment Relations Board, created to administer the act, had intended to permit any labor unit, rival, or representative to take the action, it could have expressly said so when the regulation was adopted. Moreover, the fact that some employees of the school district belonged to the employee organization did not transform that labor unit into a "group of employees" as defined and specified in § 34020. Bissell v. Public Employment Relations Bd. (1980, Cal App 3d Dist) 109 Cal App 3d 878, 167 Cal Rptr 498, 1980 Cal App LEXIS 2209.

Gov C § 3540.1, subd. (d), by expanding the definition of employee organizations to include persons authorized to act on the organization's behalf, was intended to permit a local union to act through an affiliate in discharging the union's representational obligations under the Educational Employment Relations Act (Gov C § 3540 et seq.). Thus, for purposes of determining nonmembers' rights to object to uses of their service fees under an organizational security arrangement, service fee funds spent by an authorized affiliate in support of the union's representational obligations must be treated as if spent by the union itself. Cumero v. Public Employment Relations Bd. (1989) 49 Cal 3d 575, 262 Cal Rptr 46, 778 P2d 174, 1989 Cal LEXIS 1603.

2. Union or Service Fees

In consolidated actions by a teachers' union against teachers who had refused to either join the union or pay it a service fee as required by an "organizational security" provision in the collective bargaining agreement entered into by the employer-school district and the union, which was the teachers' exclusive bargaining representative, the trial court properly granted money judgments in favor of the union. Under the labor relations system established for public education employees by the Educational Employment Relations Act (Gov C § 3540 et seq.), a collective bargaining agreement executed by an exclusive bargaining representative binds all the members of the unit as to all terms within the organization's scope of representation. Gov C § 3540.1, subd. (i)(2), which defines organizational security as an arrangement requiring an employee, as a condition of continued employment, either to join a union or to pay a service fee, permits but does not require the remedy of termination of noncomplying employees' employment; civil suit is also an appropriate remedy. San Lorenzo Education Ass'n v. Wilson (1982) 32 Cal 3d 841, 187 Cal Rptr 432, 654 P2d 202, 1982 Cal LEXIS 250.

Public school employees who were not union members, but who, pursuant to collective bargaining agreements between certain teachers' unions and the school districts that employed them, were required to pay a "ser-

vice fee" not to exceed the amount of union dues, as authorized by Gov C § 3540.1, subd. (i)(2), were required to bring their dispute over the fee to the Public Employment Relations Board before they could challenge the constitutionality of the fee requirement in court. The constitutional violations raised by the public school employees were within the jurisdiction of the board, despite the claim that these constitutional violations did not constitute "unfair practices" as defined by Gov C §§ 3541.5, 3543.5 and 3543.6. The board is not limited to investigating charges defined as "unlawful" under §§ 3543.5 and 3543.6. Under Gov C § 3541.3, subd. (i), the board has the power to not only investigate unfair practices but also to investigate alleged violations of the Education Employment Regulations Act (Gov C § 3540 et seq.), and to take such action and make such determinations as the board deems necessary to effectuate the policies of the act. Looking beyond the constitutional label given to the public school employees' grievances, the substance of the conduct complained of may also constitute unfair practices, which arguably could be resolved by a board ruling. Link v. Antioch Unified School Dist. (1983, Cal App 1st Dist) 142 Cal App 3d 765, 191 Cal Rptr 264, 1983 Cal App LEXIS 1684.

Union regulations providing that written notice concerning the amount and purpose of, and procedures for appealing, agency fees assessed against nonunion public school teachers pursuant to Gov C § 3540.1, subd. (i)(2), could be given concurrently with collection of the fees (Cal. Code Regs., tit. 8, §§ 32992, subd. (c)(2), 32995, subd. (a)(2)) comported with due process and did not violate the nonmembers' rights under U.S. Const., 1st Amend. The regulations, by requiring that all collected fees be placed in escrow pending identification of objectors, and by also requiring that contested fees be placed in escrow pending resolution of the dispute, prevented the union from having access to the funds for political, ideological, or other nonrepresentational purposes, thus avoiding the evil of requiring nonmembers to subsidize ideological activity which with they disagreed. Jerabek v. Public Employment Relations Bd. (1991, Cal App 3d Dist) 2 Cal App 4th 1298, 4 Cal Rptr 2d 181, 1991 Cal App LEXIS 1521, cert den (1992) 506 US 815, 121 L Ed 2d 25, 113 S Ct 56, 1992 US LEXIS 5576.

3. Management Employees

In a case in which a probationary teacher sued a school district and individual defendants, the trial court erred in finding that three of the individual defendants were management employees under Ed C § 44113. To the extent these employees exercised "official authority" to recommend that the teacher not be reelected to employment, they acted as "supervisory employees," as defined in Gov C § 3540.1, subd. (m), and not as "management employees," as defined in § 3540.1, subd. (g). Conn v. Western Placer Unified School Dist. (2010, 3d Dist) 186 Cal App 4th 1163, 113 Cal Rptr 3d 116, 2010 Cal App LEXIS 1192, modified, rehearing denied (2010, Cal. App. 3d Dist.) 2010 Cal. App. LEXIS 1390.

If a public school employer designates an employee as a management employee, the public school employer's designation is controlling unless the California Public Employment Relations Board reviews the designation and determines the designation is incorrect. Accordingly, a trial court correctly determined that Ed C § 44114(c), did not apply to a former employee of a county office of education where, when the alleged retaliatory acts against him occurred, he was a management employee as a matter of law because the education office had designated him as such, and the record did not show the California Public Employment Relations Board had reviewed and overturned that designation. Hartnett v. Crosier (2012, 4th Dist) 2012 Cal App LEXIS 495.

4. Public School Employer

Because a joint labor/management benefits committee was created as part of, and for the purpose of furthering, the collective bargaining process under the Educational Employment Relations Act, Gov C §§ 3540 et seq., the committee's proceedings were exempt under Gov C § 3549.1, from the Ralph M. Brown Act, Gov C §§ 54950 et seq. The committee was not a legislative body under Gov C § 54952(b), and thus was not required under Gov C § 54953(a), to hold open meetings; rather, it was a public school employer under Gov C § 3540.1(k), entitled under Gov C § 3543.3, to meet and negotiate as defined in § 3540.1(h), through its agents or representatives, with its employees' exclusive representatives. Californians Aware v. Joint Labor/Management Benefits Committee (2011, 2d Dist) 200 Cal App 4th 972, 2011 Cal App LEXIS 1412.

5. Supervisory Employees

Ed C § 44113, makes persons who exercise supervisory authority over personnel actions liable when that authority is used to interfere with a schoolteacher's rights under California's Reporting by School Employees of Improper Governmental Activities Act, Ed C §§ 44110-44114. Accordingly, in a case in which a former employee of a county office of education sued several individual education office employees for allegedly retaliat-

ing against him in violation of § 44113, subd. (a), the trial court erred in granting summary judgment in favor of the individual defendants, because they were also supervisory employees under Gov C § 3540.1(m). Hartnett v. Crosier (2012, 4th Dist) 2012 Cal App LEXIS 495.

§ 6254. Records exempt from disclosure requirements

Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

(d) Contained in or related to any of the following:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.

(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(4) Information received in confidence by any state agency referred to in paragraph (1).

(e) Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.

(f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the California Emergency Management Agency, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. However, state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files that reflects the analysis or conclusions of the investigating officer.

Customer lists provided to a state or local police agency by an alarm or security company at the request of the agency shall be construed to be records subject to this subdivision.

Notwithstanding any other provision of this subdivision, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date

of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

(2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined in any of the sections of the Penal Code set forth in this subdivision may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

(3) Subject to the restrictions of Section 841.5 of the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code. However, the address of the victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph may not be used directly or indirectly, or furnished to another, to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury. Nothing in this paragraph shall be construed to prohibit or limit a scholarly, journalistic, political, or government use of address information obtained pursuant to this paragraph.

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided for in Chapter 3 (commencing with Section 99150) of Part 65 of Division 14 of Title 3 of the Education Code.

(h) The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained. However, the law of eminent domain shall not be affected by this provision.

(i) Information required from any taxpayer in connection with the collection of local taxes that is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying the information.

(j) Library circulation records kept for the purpose of identifying the borrower of items available in libraries, and library and museum materials made or acquired and presented solely for reference or exhibition purposes. The exemption in this subdivision shall not apply to records of fines imposed on the borrowers.

(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

(*l*) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary. However, public records shall not be transferred to the custody of the Governor's Legal Affairs Secretary to evade the disclosure provisions of this chapter.

(m) In the custody of or maintained by the Legislative Counsel, except those records in the public database maintained by the Legislative Counsel that are described in Section 10248.

(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with the licensing agency to establish his or her personal qualification for the license, certificate, or permit applied for.

(o) Financial data contained in applications for financing under Division 27 (commencing with Section 44500) of the Health and Safety Code, where an authorized officer of the California Pollution Control Financing Authority determines that disclosure of the financial data would be competitively injurious to the applicant and the data is required in order to obtain guarantees from the United States Small Business Administration. The California Pollution Control Financing Authority shall adopt rules for review of individual requests for confidentiality under this section and for making available to the public those portions of an application that are subject to disclosure under this chapter.

(p) Records of state agencies related to activities governed by Chapter 10.3 (commencing with Section 3512), Chapter 10.5 (commencing with Section 3525), and Chapter 12 (commencing with Section 3560) of Division 4, that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under these chapters. Nothing in this subdivision shall be construed to limit the disclosure duties of a state agency with respect to any other records relating to the activities governed by the employee relations acts referred to in this subdivision.

(q) (1) Records of state agencies related to activities governed by Article 2.6 (commencing with Section 14081), Article 2.8 (commencing with Section 14087.5), and Article 2.91 (commencing with Section 14089) of Chapter 7 of Part 3 of Division 9 of the Welfare and Institutions Code, that reveal the special negotiator's deliberative processes, discussions, communications, or any other portion of the negotiations with providers of health care services, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy, or that provide instruction, advice, or training to employees.

(2) Except for the portion of a contract containing the rates of payment, contracts for inpatient services entered into pursuant to these articles, on or after April 1, 1984, shall be open to inspection one year after they are fully executed. If a contract for inpatient services that is entered into prior to April 1, 1984, is amended on or after April 1, 1984, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after it is fully executed. If the California Medical Assistance Commission enters into contracts with health care providers for other than inpatient hospital services, those contracts shall be open to inspection one year after they are fully executed.

(3) Three years after a contract or amendment is open to inspection under this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other provision of law, the entire contract or amendment shall be open to inspection by the Joint Legislative Audit Committee and the Legislative Analyst's Office. The committee and that office shall maintain the confidentiality of the contracts and amendments until the time a contract or amendment is fully open to inspection by the public.

(r) Records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency.

(s) A final accreditation report of the Joint Commission on Accreditation of Hospitals that has been transmitted to the State Department of Health Care Services pursuant to subdivision (b) of Section 1282 of the Health and Safety Code.

(t) Records of a local hospital district, formed pursuant to Division 23 (commencing with Section 32000) of the Health and Safety Code, or the records of a municipal hospital, formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Part 2 of Division 3 of Title 4 of this code, that relate to any contract with an insurer or nonprofit hospital service plan for inpatient or outpatient services for alternative rates pursuant to Section 10133 of the Insurance Code. However, the record shall be open to inspection within one year after the contract is fully executed.

(u) (1) Information contained in applications for licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department that indicates when or where the applicant is vulnerable to attack or that concerns the applicant's medical or psychological history or that of members of his or her family.

(2) The home address and telephone number of prosecutors, public defenders, peace officers, judges, court commissioners, and magistrates that are set forth in applications for licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

(3) The home address and telephone number of prosecutors, public defenders, peace officers, judges, court commissioners, and magistrates that are set forth in licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

(v) (1) Records of the Managed Risk Medical Insurance Board related to activities governed by Part 6.3 (commencing with Section 12695), Part 6.5 (commencing with Section 12700), Part 6.6 (commencing with Section 12739.5), and Part 6.7 (commencing with Section 12739.70) of Division 2 of the Insurance Code, and that reveal any of the following:

(A) The deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board, entities with which the board is considering a contract, or entities with which the board is considering or enters into any other arrangement under which the board provides, receives, or arranges services or reimbursement.

(B) The impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) (A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.3 (commencing with Section 12695), Part 6.5 (commencing with Section 12700), Part 6.6 (commencing with Section 12739.5), or Part 6.7 (commencing with Section 12739.70) of Division 2 of the Insurance Code, on or after July 1, 1991, shall be open to inspection one year after their effective dates.

(B) If a contract that is entered into prior to July 1, 1991, is amended on or after July 1, 1991, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after the effective date of the amendment.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contracts or amendments to the contracts are open to inspection pursuant to paragraph (3).

(w) (1) Records of the Managed Risk Medical Insurance Board related to activities governed by Chapter 8 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) Except for the portion of a contract that contains the rates of payment, contracts for health coverage entered into pursuant to Chapter 8 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, on or after January 1, 1993, shall be open to inspection one year after they have been fully executed.

(3) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contracts or amendments to the contracts are open to inspection pursuant to paragraph (2).

(x) Financial data contained in applications for registration, or registration renewal, as a service contractor filed with the Director of Consumer Affairs pursuant to Chapter 20 (commencing with Section 9800) of Division 3 of the Business and Professions Code, for the purpose of establishing the service contractor's net worth, or financial data regarding the funded accounts held in escrow for service contracts held in force in this state by a service contractor.

(y) (1) Records of the Managed Risk Medical Insurance Board related to activities governed by Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code, and that reveal any of the following:

(A) The deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board, entities with which the board is considering a contract, or entities with which the board is considering or enters into any other arrangement under which the board provides, receives, or arranges services or reimbursement.

(B) The impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) (A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code, on or after January 1, 1998, shall be open to inspection one year after their effective dates.

(B) If a contract entered into pursuant to Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the effective date of the amendment.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to paragraph (2) or (3).

(5) The exemption from disclosure provided pursuant to this subdivision for the contracts, deliberative processes, discussions, communications, negotiations, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff shall also apply to the contracts, deliberative processes, discussions, communications, negotiations, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of applicants pursuant to Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code.

(z) Records obtained pursuant to paragraph (2) of subdivision (f) of Section 2891.1 of the Public Utilities Code.

(aa) A document prepared by or for a state or local agency that assesses its vulnerability to terrorist attack or other criminal acts intended to disrupt the public agency's operations and that is for distribution or consideration in a closed session.

(ab) Critical infrastructure information, as defined in Section 131(3) of Title 6 of the United States Code, that is voluntarily submitted to the California Emergency Management Agency for use by that office, including the identity of the person who or entity that voluntarily submitted the information. As used in this subdivision, "voluntarily submitted" means submitted in the absence of the office exercis-

ing any legal authority to compel access to or submission of critical infrastructure information. This subdivision shall not affect the status of information in the possession of any other state or local governmental agency.

(ac) All information provided to the Secretary of State by a person for the purpose of registration in the Advance Health Care Directive Registry, except that those records shall be released at the request of a health care provider, a public guardian, or the registrant's legal representative.

(ad) The following records of the State Compensation Insurance Fund:

(1) Records related to claims pursuant to Chapter 1 (commencing with Section 3200) of Division 4 of the Labor Code, to the extent that confidential medical information or other individually identifiable information would be disclosed.

(2) Records related to the discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the fund, and any related deliberations.

(3) Records related to the impressions, opinions, recommendations, meeting minutes of meetings or sessions that are lawfully closed to the public, research, work product, theories, or strategy of the fund or its staff, on the development of rates, contracting strategy, underwriting, or competitive strategy pursuant to the powers granted to the fund in Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code.

(4) Records obtained to provide workers' compensation insurance under Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code, including, but not limited to, any medical claims information, policyholder information provided that nothing in this paragraph shall be interpreted to prevent an insurance agent or broker from obtaining proprietary information or other information authorized by law to be obtained by the agent or broker, and information on rates, pricing, and claims handling received from brokers.

(5) (A) Records that are trade secrets pursuant to Section 6276.44, or Article 11 (commencing with Section 1060) of Chapter 4 of Division 8 of the Evidence Code, including without limitation, instructions, advice, or training provided by the State Compensation Insurance Fund to its board members, officers, and employees regarding the fund's special investigation unit, internal audit unit, and informational security, marketing, rating, pricing, underwriting, claims handling, audits, and collections.

(B) Notwithstanding subparagraph (A), the portions of records containing trade secrets shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law.

(6) (A) Internal audits containing proprietary information and the following records that are related to an internal audit:

(i) Personal papers and correspondence of any person providing assistance to the fund when that person has requested in writing that his or her papers and correspondence be kept private and confidential. Those papers and correspondence shall become public records if the written request is withdrawn, or upon order of the fund.

(ii) Papers, correspondence, memoranda, or any substantive information pertaining to any audit not completed or an internal audit that contains proprietary information.

(B) Notwithstanding subparagraph (A), the portions of records containing proprietary information, or any information specified in subparagraph (A) shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law.

(7) (A) Except as provided in subparagraph (C), contracts entered into pursuant to Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code shall be open to inspection one year after the contract has been fully executed.

(B) If a contract entered into pursuant to Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the amendment has been fully executed.

(C) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(D) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to this paragraph.

(E) This paragraph is not intended to apply to documents related to contracts with public entities that are not otherwise expressly confidential as to that public entity.

(F) For purposes of this paragraph, "fully executed" means the point in time when all of the necessary parties to the contract have signed the contract.This section shall not prevent any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.This section shall not prevent any health facility from disclosing to a certified bargaining agent relevant financing information pursuant to Section 8 of the National Labor Relations Act (29 U.S.C. Sec. 158).

Added Stats 1981 ch 684 § 1.5, effective September 23, 1981, operative January 1, 1982. Amended Stats 1982 ch 83 § 1, effective March 1, 1982, ch 1492 § 2, ch 1594 § 2, effective September 30, 1982; Stats 1983 ch 200 § 1, effective July 12, 1983, ch 621 § 1, ch 955 § 1, ch 1315 § 1; Stats 1984 ch 1516 § 1, effective September 28, 1984; Stats 1985 ch 103 § 1; ch 1218 § 1; Stats 1986 ch 185 § 2; Stats 1987 ch 634 § 1, effective September 14, 1987, ch 635 § 1; Stats 1988 ch 870 § 1, ch 1371 § 2; Stats 1989 ch 191 § 1; Stats 1990 ch 1106 § 2 (SB 2106); Stats 1991 ch 278 § 1.2 (AB 99), effective July 30, 1991, ch 607 § 4 (SB 98); Stats 1992 ch 3 § 1 (AB 1681), effective February 10, 1992, ch 72 § 2 (AB 1525), effective May 28, 1992, ch 1128 § 2 (AB 1672), operative July 1, 1993; Stats 1993 ch 606 § 1 (AB 166), effective October 1, 1993 (ch 1265 prevails); Stats 1993 ch 610 § 1 (AB 6), effective October 1, 1993; Stats 1993 ch 611 § 1 (SB 60), effective October 1, 1993; Stats 1993 ch 1265 § 14 (SB 798); S tats 1994 ch 82 § 1 (AB 2547), ch 1263 § 1.5 (AB 1328); Stats 1995 ch 438 § 1 (AB 985), ch 777 § 2 (AB 958), ch 778 § 1.5 (SB 1059); Stats 1996 ch 1075 § 11 (SB 1444); Stats 1997 ch 623 § 1 (AB 1126); Stats 1998 ch 13 § 1 (AB 487), ch 110 § 1 (AB 1795) (ch 110 prevails), ch 485 § 83 (AB 2803); Stats 2000 ch 184 § 1 (AB 1349); Stats 2001 ch 159 § 105 (SB 662); Stats 2002 ch 175 § 1 (SB 1643); Stats 2003 ch 230 § 1 (AB 1762), effective August 11, 2003, ch 673 § 12 (SB 2); Stats 2004 ch 8 § 1 (AB 1209), effective January 22, 2004, ch 183 § 134 (AB 3082), ch 228 § 2 (SB 1103), effective August 16, 2004, ch 882 § 1 (AB 2445), ch 937 § 2.5 (AB 1933); Stats 2005 ch 22 § 71 (SB 1108), ch 476 § 1 (AB 1495), effective October 4, 2005, ch 670 § 1.5 (SB 922), effective October 7, 2005; Stats 2006 ch 538 § 232 (SB 1852); Stats 2007 ch 577 § 1 (AB 1750), effective October 13, 2007, ch 578 § 1.5 (SB 449); Stats 2008 ch 344 § 1 (SB 1145), effective September 26, 2008, ch 358 § 2 (AB 2810), ch 372 § 1.3 (AB 38), effective January 1, 2009; Stats 2010 ch 32 § 1 (AB 1887) (ch 32 prevails), effective June 29, 2010, ch 178 § 33 (SB 1115), effective January 1, 2011, operative January 1, 2012; Stats 2011 ch 285 § 7 (AB 1402), effective January 1, 2012. See this section as modified in Governor's Reorganization Plan No. 2 § 85 of 2012. Amended Stats 2012 ch 697 § 1 (AB 2221), effective January 1, 2013.

Editor's Notes—2012 Governor's Reorganization Plan No. 2 was submitted to the Legislature on May 3, 2012, and became effective July 3, 2012, pursuant to Gov C § 12080.5, and substantively operative July 1, 2013. The text as modified by § 85, reads: "Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

"(a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.

"(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.

"(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

"(d) Contained in or related to any of the following:

"(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.

"(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

"(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

"(4) Information received in confidence by any state agency referred to in paragraph (1).

"(e) Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.

"(f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. However, state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files that reflects the analysis or conclusions of the investigating officer.

"Customer lists provided to a state or local police agency by an alarm or security company at the request of the agency shall be construed to be records subject to this subdivision.

"Notwithstanding any other provision of this subdivision, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

"(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

"(2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined in any of the sections of the Penal Code set forth in this subdivision may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

"(3) Subject to the restrictions of Section 841.5 of the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental

purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code. However, the address of the victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph may not be used directly or indirectly, or furnished to another, to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury. Nothing in this paragraph shall be construed to prohibit or limit a scholarly, journalistic, political, or government use of address information obtained pursuant to this paragraph.

"(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided for in Chapter 3 (commencing with Section 99150) of Part 65 of Division 14 of Title 3 of the Education Code.

"(h) The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained. However, the law of eminent domain shall not be affected by this provision.

"(i) Information required from any taxpayer in connection with the collection of local taxes that is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying the information.

"(j) Library circulation records kept for the purpose of identifying the borrower of items available in libraries, and library and museum materials made or acquired and presented solely for reference or exhibition purposes. The exemption in this subdivision shall not apply to records of fines imposed on the borrowers.

"(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

"(*l*) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary. However, public records shall not be transferred to the custody of the Governor's Legal Affairs Secretary to evade the disclosure provisions of this chapter.

"(m) In the custody of or maintained by the Legislative Counsel, except those records in the public database maintained by the Legislative Counsel that are described in Section 10248.

"(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with the licensing agency to establish his or her personal qualification for the license, certificate, or permit applied for.

"(o) Financial data contained in applications for financing under Division 27 (commencing with Section 44500) of the Health and Safety Code, where an authorized officer of the California Pollution Control Financing Authority determines that disclosure of the financial data would be competitively injurious to the applicant and the data is required in order to obtain guarantees from the United States Small Business Administration. The California Pollution Control Financing Authority shall adopt rules for review of individual requests for confidentiality under this section and for making available to the public those portions of an application that are subject to disclosure under this chapter.

"(p) Records of state agencies related to activities governed by Chapter 10.3 (commencing with Section 3512), Chapter 10.5 (commencing with Section 3525), and Chapter 12 (commencing with Section 3560) of Division 4, that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under these chapters. Nothing in this subdivision shall be construed to limit the disclosure duties of a state agency with respect to any other records relating to the activities governed by the employee relations acts referred to in this subdivision.

"(q)(1) Records of state agencies related to activities governed by Article 2.6 (commencing with Section 14081), Article 2.8 (commencing with Section 14087.5), and Article 2.91 (commencing with Section 14089) of Chapter 7 of Part 3 of Division 9 of the Welfare and Institutions Code, that reveal the special negotiator's deliberative processes, discussions, communications, or any other portion of the negotiations with providers of health care services, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy, or that provide instruction, advice, or training to employees.

"(2) Except for the portion of a contract containing the rates of payment, contracts for inpatient services entered into pursuant to these articles, on or after April 1, 1984, shall be open to inspection one year after they are fully executed. If a contract for inpatient services that is entered into prior to April 1, 1984, is amended on or after April 1, 1984, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after it is fully executed. If the California Medical Assistance Commission enters into contracts with health care providers for other than inpatient hospital services, those contracts shall be open to inspection one year after they are fully executed.

"(3) Three years after a contract or amendment is open to inspection under this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

"(4) Notwithstanding any other law, the entire contract or amendment shall be open to inspection by the Joint Legislative Audit Committee and the Legislative Analyst's Office.

"The committee and that office shall maintain the confidentiality of the contracts and amendments until the time a contract or amendment is fully open to inspection by the public.

"(r) Records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency.

"(s) A final accreditation report of the Joint Commission on Accreditation of Hospitals that has been transmitted to the State Department of Health Care Services pursuant to subdivision (b) of Section 1282 of the Health and Safety Code.

"(t) Records of a local hospital district, formed pursuant to Division 23 (commencing with Section 32000) of the Health and Safety Code, or the records of a municipal hospital, formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Part 2 of Division 3 of Title 4 of this code, that relate to any contract with an insurer or nonprofit hospital service plan for inpatient or outpatient services for alternative rates pursuant to Section 10133 of the Insurance Code. However, the record shall be open to inspection within one year after the contract is fully executed.

"(u)(1) Information contained in applications for licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department that indicates when or where the applicant is vulnerable to attack or that concerns the applicant's medical or psychological history or that of members of his or her family.

"(2) The home address and telephone number of peace officers, judges, court commissioners, and magistrates that are set forth in applications for licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

"(3) The home address and telephone number of peace officers, judges, court commissioners, and magistrates that are set forth in licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

"(v)(1) Records of the Managed Risk Medical Insurance Board related to activities governed by Part 6.3 (commencing with Section 12695), Part 6.5 (commencing with Section 12700), Part 6.6 (commencing with Section 12739.5), and Part 6.7 (commencing with Section 12739.70) of Division 2 of the Insurance Code, and that reveal any of the following:

"(A) The deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board, entities with which the board is considering a contract, or entities with which the board is considering or enters into any other arrangement under which the board provides, receives, or arranges services or reimbursement.

"(B) The impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

"(2)(A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.3 (commencing with Section 12695), Part 6.5 (commencing with Section 12700), Part 6.6 (commencing with Section 12739.5), or Part 6.7 (commencing with Section 12739.70) of Division 2 of the Insurance Code, on or after July 1, 1991, shall be open to inspection one year after their effective dates.

"(B) If a contract that is entered into prior to July 1, 1991, is amended on or after July 1, 1991, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after the effective date of the amendment.

"(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

"(4) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contracts or amendments to the contracts are open to inspection pursuant to paragraph (3).

"(w)(1) Records of the Managed Risk Medical Insurance Board related to activities governed by Chapter 8 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

"(2) Except for the portion of a contract that contains the rates of payment, contracts for health coverage entered into pursuant to Chapter 8 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, on or after January 1, 1993, shall be open to inspection one year after they have been fully executed.

"(3) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contracts or amendments to the contracts are open to inspection pursuant to paragraph (2).

"(x) Financial data contained in applications for registration, or registration renewal, as a service contractor filed with the Director of Consumer Affairs pursuant to Chapter 20 (commencing with Section 9800) of Division 3 of the Business and Professions Code, for the purpose of establishing the service contractor's net worth, or financial data regarding the funded accounts held in escrow for service contracts held in force in this state by a service contractor.

"(y)(1) Records of the Managed Risk Medical Insurance Board related to activities governed by Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code, and that reveal any of the following:

"(A) The deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board, entities with which the board is considering a contract, or entities with which the board is considering or enters into any other arrangement under which the board provides, receives, or arranges services or reimbursement.

"(B) The impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

"(2)(A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code, on or after January 1, 1998, shall be open to inspection one year after their effective dates.

"(B) If a contract entered into pursuant to Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the effective date of the amendment.

"(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

"(4) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to paragraph (2) or (3).

"(5) The exemption from disclosure provided pursuant to this subdivision for the contracts, deliberative processes, discussions, communications, negotiations, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff shall also apply to the contracts, deliberative processes, discussions, communications, negotiations, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of applicants pursuant to Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code.

"(z) Records obtained pursuant to paragraph (2) of subdivision (f) of Section 2891.1 of the Public Utilities Code.

"(aa) A document prepared by or for a state or local agency that assesses its vulnerability to terrorist attack or other criminal acts intended to disrupt the public agency's operations and that is for distribution or consideration in a closed session.

"(ab) Critical infrastructure information, as defined in Section 131(3) of Title 6 of the United States Code, that is voluntarily submitted to the Office of Emergency Services for use by that office, including the identity of

the person who or entity that voluntarily submitted the information. As used in this subdivision, 'voluntarily submitted' means submitted in the absence of the office exercising any legal authority to compel access to or submission of critical infrastructure information. This subdivision shall not affect the status of information in the possession of any other state or local governmental agency.

"(ac) All information provided to the Secretary of State by a person for the purpose of registration in the Advance Health Care Directive Registry, except that those records shall be released at the request of a health care provider, a public guardian, or the registrant's legal representative.

"(ad) The following records of the State Compensation Insurance Fund:

"(1) Records related to claims pursuant to Chapter 1 (commencing with Section 3200) of Division 4 of the Labor Code, to the extent that confidential medical information or other individually identifiable information would be disclosed.

"(2) Records related to the discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the fund, and any related deliberations.

"(3) Records related to the impressions, opinions, recommendations, meeting minutes of meetings or sessions that are lawfully closed to the public, research, work product, theories, or strategy of the fund or its staff, on the development of rates, contracting strategy, underwriting, or competitive strategy pursuant to the powers granted to the fund in Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code.

"(4) Records obtained to provide workers' compensation insurance under Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code, including, but not limited to, any medical claims information, policyholder information provided that nothing in this paragraph shall be interpreted to prevent an insurance agent or broker from obtaining proprietary information or other information authorized by law to be obtained by the agent or broker, and information on rates, pricing, and claims handling received from brokers.

"(5)(A) Records that are trade secrets pursuant to Section 6276.44, or Article 11 (commencing with Section 1060) of Chapter 4 of Division 8 of the Evidence Code, including without limitation, instructions, advice, or training provided by the State Compensation Insurance Fund to its board members, officers, and employees regarding the fund's special investigation unit, internal audit unit, and informational security, marketing, rating, pricing, underwriting, claims handling, audits, and collections.

"(B) Notwithstanding subparagraph (A), the portions of records containing trade secrets shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law.

"(6)(A) Internal audits containing proprietary information and the following records that are related to an internal audit:

"(i) Personal papers and correspondence of any person providing assistance to the fund when that person has requested in writing that his or her papers and correspondence be kept private and confidential. Those papers and correspondence shall become public records if the written request is withdrawn, or upon order of the fund.

"(ii) Papers, correspondence, memoranda, or any substantive information pertaining to any audit not completed or an internal audit that contains proprietary information.

"(B) Notwithstanding subparagraph (A), the portions of records containing proprietary information, or any information specified in subparagraph (A) shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law.

"(7)(A) Except as provided in subparagraph (C), contracts entered into pursuant to Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code shall be open to inspection one year after the contract has been fully executed.

"(B) If a contract entered into pursuant to Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the amendment has been fully executed.

"(C) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

"(D) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to this paragraph.

"(E) Nothing in this paragraph is intended to apply to documents related to contracts with public entities that are not otherwise expressly confidential as to that public entity.

"(F) For purposes of this paragraph, 'fully executed' means the point in time when all of the necessary parties to the contract have signed the contract.

"Nothing in this section prevents any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

"Nothing in this section prevents any health facility from disclosing to a certified bargaining agent relevant financing information pursuant to Section 8 of the National Labor Relations Act (29 U.S.C. Sec. 158)."

2012 Amendment: (1) Substituted "Office of Emergency Services" for "California Emergency Management Agency" in the first sentence of subd (f); (2) deleted "provision of" after "Notwithstanding any other" in subd (q)(4) and in the first sentence of subd (v)(4); (3) substituted "Office of Emergency Services" for "California Emergency Management Agency" in the first sentence of subd (ab).

Note—2012 Governor's Reorganization Plan No. 2 provides:

SEC. 329. (a) Except as provided for in subdivision (b), the provisions of this plan shall become operative on July 1, 2013.

(b) A state agency, department, or entity may take actions prior to July 1, 2013, that are necessary to ensure that the provisions of the plan become operative on July 1, 2013, and are implemented in a timely fashion. These actions may include, but are not limited to, reassignment of duties between state agencies, departments, or entities, activities included in Section 12080.3 of the Government Code, actions relating to planning for the changes provided for in the plan, and the expenditure of funds necessary for the transfer of authority and responsibilities accomplished by the plan.

Former Sections: Former § 6254, similar to the present section, was added Stats 1968 ch 1473 § 39, amended Stats 1970 ch 1231 § 1.5, ch 1295 § 1.5, Stats 1975 ch 1231 § 1, ch 1246 § 3, Stats 1976 ch 314 § 1, Stats 1977 ch 650 § 1, effective September 7, 1977, Stats 1978 ch 1217 § 3, ch 1217 § 4, operative July 1, 1979, Stats 1980 ch 519 § 1, Stats 1981 ch 265 § 1, ch 684 § 1, effective September 23, 1981, and repealed, operative January 1, 1982, by its own terms.

Historical Derivation: Former Gov C § 6254, as added Stats 1968 ch 1473 § 39, amended Stats 1970 ch 1231 § 11.5, ch 1295 § 1.5, Stats 1975 ch 1231 § 1, ch 1246 § 3, Stats 1976 ch 314 § 1, Stats 1977 ch 650 § 1, Stats 1978 ch 1217 § 3, ch 1217 § 4, Stats 1980 ch 519 § 1, Stats 1981 ch 265 § 1, ch 684 § 1.

Amendments

1982 Amendment (ch 83): (1) Amended subd (f) by **(a)** substituting "state and local law enforcement agencies" for "local law enforcement agencies and the California Highway Commission" in the first sentence; and **(b)** adding the second paragraph; and **(2)** deleted the former last paragraph which read: "This section shall become operative on January 1, 1982."

1982 Amendment (ch 1594): Added subd (q). (As amended Stats 1982 ch 1594, compared to the section as amended by Stats 1982 ch 83. This section was also amended by an earlier chapter, ch 1492. See Gov C § 9605.)

1983 Amendment (ch 200): Added subd (r).

1983 Amendment (ch 1315): Added subd (s). (As amended Stats 1983 ch 1315, compared to the section as amended by Stats 1983 ch 200. This section was also amended by two earlier chapters, chs 621 and 955. See Gov C § 9605.)

1984 Amendment: In addition to making technical changes, **(1)** substituted subd (q) for former subd (q) which read: "(q) Records of state agencies related to activities governed by Articles 2.6, 2.8, and 2.91 of Chapter 7 (commencing with Section 14000) of Part 3 of Division 9 of the Welfare and Institutions Code, which reveal the special negotiator's deliberative processes, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy, or which provide instruction, advice, or training to employees. All or portions of contracts entered into pursuant to these articles may be exempted from the provisions of this chapter as specified by the terms of each contract."Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law."; and **(2)** added the last two paragraphs.

1985 Amendment: (1) Amended the second paragraph of subd (q) by adding **(a)** "Except for the portion of a contract containing the rates of payment,"; and **(b)** ", except for any portion containing the rates of payment,"; and **(2)** added the third and fourth paragraphs of subd (q). (As amended by Stats 1985, ch 1218, compared to the section as it read prior to 1985. This section was also amended by an earlier chapter, ch 103. See Gov C § 9605.)

1986 Amendment: (1) Deleted "of Title 1 of the Government Code" after "Section 810)" in subd (b); **(2)** substituted "paragraph (1)" for "subdivision (1)" wherever it appears in subd (d); **(3)** substituted "as defined by

subdivision (c)" for "of violence as defined by subdivision (b)" in the first paragraph of subd (f); and **(4)** added subd (t).

1987 Amendment (ch 634): Added the second and third sentences of subd (f)(2).

1987 Amendment (ch 635): Substituted "is to be construed as preventing" for "prevents" in the last two paragraphs.

1988 Amendment: (1) Substituted ". However" for "; provided, however, that" at the end of the first sentence of the first paragraph of subd (f); **(2)** added "273.5," after "273d" in the first sentence of subd (f)(2); and **(3)** substituted ". However" for ", provided, however" at the end of the first sentence of subd (h).

1989 Amendment: Added "273.5," in the first sentence of subd (f)(2).

1990 Amendment: Added subd (v).

1991 Amendment (ch 278): Added subd (w).

1991 Amendment (ch 607): In addition to making technical changes, added "422.6, 422.7, or 422.75" wherever it appears in the second paragraph of subd (f)(2).

1992 Amendment (ch 3): Added "Subject to the restrictions imposed by Section 841.5 of the Penal Code," at the beginning of subd (f)(2).

1992 Amendment (ch 72): Added "or the records of a municipal hospital, formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Division 3 of Title 4 of this code," in the first sentence of subd (t).

1992 Amendment (ch 1128): Added subd (x).

1993 Amendment (ch 611): (1) Added "carjacking" after "larceny, robbery," in the first sentence of subd (f); **(2)** amended subd (p) by **(a)** adding ", Chapter 10.5 (commencing with Section 3525, and Chapter 2 (commencing with Section 3560)"; and **(b)** deleting "Chapter 10.5 (commencing with Section 3525) of Division 4 of Title 1, and Chapter 12 (commencing with Section 3560) of Division 4 of Title 1," after "of Title 1," in subd (p); and **(3)** substituted "firearms issued pursuant to Section 12050 of the Penal Code" for "concealed weapons issued" in subd (u). (As amended Stats 1993 ch 611, compared to the section as it read prior to 1993. This section was also amended by two earlier chapters, chs 606 and 610. See Gov C § 9605.)

1993 Amendment (ch 1265): (1) Deleted "carjacking," after "larceny, robbery," in the first sentence of subd (f); **(2)** substituted "of Division 4 of Title 1, Chapter 10.5 (commencing with Section 3525) of Division 4 of Title 1" in subd (p); **(3)** deleted former subd (v) which read: "(v) Residence addresses contained in licensure applications and registration applications for collection agencies as may be required by the Bureau of Collection and Investigative Services of the Department of Consumer Affairs pursuant to Sections 6876.2, 6877, 6878, and 6894.3 of the Business and Professions Code."; **(4)** redesignated former subds (w) and (x) to be subds (v) and (w); and **(5)** added subd (x).

1994 Amendment: Added **(1)** "carjacking" after "explosion, larceny, robbery," in subd (f); and **(2)** ", except those records in the public data base maintained by the Legislative Counsel that are described in Section 10248" in subd (m). (As amended Stats 1994 ch 1263, compared to the section as it read prior to 1994. This section was also amended by an earlier chapter, ch 82. See Gov C § 9605.)

1995 Amendment: In addition to making technical changes, **(1)** substituted "Sections 6254.7 and 6254.13" for "Section 6254.7" in the introductory clause; **(2)** deleted ", current address," after "The full name" in subd (f)(1); **(3)** amended subd (f)(2) by **(a)** substituting "and age of the victim" for ", age, and current address of the victim, except that the address of the victim of any crime defined by Section 261, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, or 422.75 of the Penal Code shall not be disclosed" in the first sentence; and **(b)** adding "220" and "or 646.9" wherever it appears; and **(4)** added subd (f)(3). (As amended Stats 1994 ch 778, compared to the section as it read prior to 1994. This section was also amended by two earlier chapters, chs 438 and 777. See Gov C § 9605.)

1996 Amendment: (1) Amended subd (f)(2) by substituting **(a)** "Section 220, 261, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9" for "Section 220, 261, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9" in the second sentence; and **(b)** "Section 220, 261, 262, 264, 264.1, 273a, 273d, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9" for "Section 220, 261, 264, 264.1, 273a, 273d, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9" in the third sentence; and **(2)** substituted "Section 220, 261, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9" for "Section 220, 261, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9" in subd (f)(3).

1997 Amendment: Added **(1)** subd (y); and **(2)** the third paragraph of subd (y).

1998 Amendment: (1) Designated former subd (u) to be subd (u)(1); and **(2)** added subds (u)(2), (u)(3) and (z).

2000 Amendment: (1) Added "261.5," after "Section 220, 261," both times it appears in subd (2) and subd (3) of the second paragraph of subd (f); **(2)** amended subd (u) by adding **(a)** subdivision designation (u)(1); and **(b)** subd (u)(2); and **(3)** added subd (z).

2001 Amendment: In addition to making technical changes, **(1)** added "any of the following" in the introductory clause of subd (d); **(2)** substituted "Notwithstanding any other provision of this subdivision" for "Other provisions of this subdivision notwithstanding" in the introductory clause of subd (f); **(3)** amended the first paragraph of subd (q) by substituting **(a)** "Article" for "Articles" after "governed by"; **(b)** "Article 2.8" for "2.8"; and **(c)** "Article 2.9" for "2.9"; and **(4)** substituted "committee" for "Joint Legislative Audit Committee" in the last paragraph of subd (q) and in subds (v)(4), (w)(3), and (y)(4).

2002 Amendment: (1) Added the comma after "Records" in subd (k); and **(2)** added subd (aa).

2003 Amendment (ch 230): (1) Substituted "memorandums" for "memoranda" in subd (a); **(2)** substituted "database" for "data base" in subd (m); **(3)** added "or Part 6.4 (commencing with Section 12699.50)" in subd (y)(1); **(4)** added "or Part 6.4 (commencing with Section 12699.50)" in subd (y)(2)(A); **(5)** added "or Part 6.4 (commencing with Section 12699.50)" in subd (y)(2)(B); and **(6)** added subd (y)(5).

2003 Amendment (ch 673): Added subd (bb).

2004 Amendment (ch 8): (1) Substituted "memoranda" for "memorandums" in subd (a); **(2)** amended subd (f) by **(a)** substituting "subdivision (b) of Section 13951" for "subdivision (c) of Section 13960" in the first paragraph; and **(b)** added the second paragraph; **(3)** substituted "maintained by the Governor's Legal Affairs Secretary," for "maintained by the Governor's legal affairs secretary," in subd (k)(1); **(4)** substituted "or for a state or local agency" for "a local agency" in subd (aa); and **(5)** added subds (bb)(1)–(4).

2004 Amendment (ch 228): (1) Amended subd (f)(3) by **(a)** substituting "may not be used directly or indirectly, or furnished to another, for "shall not be used directly or indirectly"; and **(b)** adding the last sentence; **(2)** amended the last paragraph of subd (q) by substituting **(a)** "Legislative Analyst's Office" for "Legislative Analyst's office" at the end of the first sentence; and **(b)** "that" for "the" in the last sentence; and **(3)** added subd (cc).

2004 Amendment (ch 937): (1) Amended subd (f)(3) by **(a)** substituting "may not" for "shall not" before "be used directly or indirectly"; and **(b)** adding the last sentence; **(2)** amended the last paragraph of subd (q) by substituting **(a)** "Legislative Analyst's Office" for "Legislative Analyst's office" at the end of the first sentence; and **(b)** "that" for "the" in the last sentence; and **(3)** added subd (cc).

2005 Amendment (ch 476): (1) Substituted "Analyst's Office" for "Analyst's Office" in the fifth sentence of subd (q); and **(2)** substituted subd (bb) for the former subd (bb) which read: "(bb)(1) Records of the Managed Risk Medical Insurance Board related to activities governed by Part 8.7 (commencing with Section 2120) of Division 2 of the Labor Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees."(2)(A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 8.7 (commencing with Section 2120) of Division 2 of the Labor Code on or after January 1, 2004, shall be open to inspection one year after they have been fully executed."(B) In the event that a contract entered into pursuant to Part 8.7 (commencing with Section 2120) of Division 2 of the Labor Code is amended, the amendment shall be open to inspection one year after the amendment has been fully executed."(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection."(4) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to paragraph (2) or (3)."

2005 Amendment (ch 670): Amended subd (r) by adding **(1)** "and records of Native American places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code" after "sacred places"; **(2)** ", or in the possession of," after "maintained by"; and **(3)** ", another state agency, or a local agency" after "Native American Heritage Commission".

2006 Amendment: (1) Substituted "if" for "provided that" after "course of business," in subd (a); **(2)** amended subd (f) by **(a)** substituting ". However," for ", except that" after "or licensing purposes"; and **(b)** substituting "reflects" for "reflect" after "investigative files that"; **(3)** substituted "However," for ", except that" after "Business and Professions Code." in subd (f)(3); **(4)** substituted ". However," for ", provided that" after "Legal

Affairs Secretary" in subd (l); **(5)** substituted "products" for "product" after "meeting minutes, research, work" in subd (p); **(6)** substituted "If" for "In the event that" after "are fully executed." in subd (q); **(7)** substituted "If" for "In the event that" at the beginning of subd (v)(2)(B); **(8)** deleted "for agreement" after "and that reveal" in subd (w)(1); **(9)** substituted "is" for "are" after "amendments to a contract" in subd (w)(3); **(10)** added "and" after "of the Insurance Code," in subd (y)(1); **(11)** added subd (bb); **(12)** redesignated former subd (bb) to be subd (cc); and **(13)** added "Act (29 U.S.C. Sec. 158)" after "National Labor Relations" in subd (cc).

2007 Amendment (ch 577): (1) Added "Division 14 of Title 3 of" in subd (g); **(2)** deleted "of Title 1" after "of Division 4" in the first sentence of subd (p); **(3)** substituted "State Department of Health Care Services" for "State Department of Health Services" in subd (s); **(4)** amended the first sentence of subd (t) by (a) adding "Part 2 of" after "of Chapter 5 of"; and (b) deleting "and 11512" after "Section 10133"; **(5)** substituted "Managed Risk Medical Insurance Board" for "Major Risk Medical Insurance Program" in subds (v)(1) and (w)(1); **(6)** substituted "entities contracting or seeking to contract with the board" for "health plans"in subds (v)(1) and (y)(1); **(7)** substituted "their effective dates" for "they have been fully executed" at the end of subds (v)(2)(A) and (y)(2)(A); **(8)** deleted "for health coverage" after "If a contract" in subd (v)(2)(B); **(9)** substituted "Chapter 8" for "Chapter 14" in subds (w)(1) and (w)(2); **(10)** substituted "If" for "In the event of" at the beginning of subd (y)(2)(B); **(11)** deleted "with health plans" after "communications, negotiations" wherever it appears in subd (y)(5); and **(12)** redesignated former subds (bb) and (cc) to be subds (ab) and (ac).

2007 Amendment (ch 578): (1) Amended subd (f)(2) by **(a)** substituting "Section 220, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9 or 647.6" for "Section 220, 261, 261.5, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9"; and **(b)** substituting "in any of the sections of the Penal Code set forth in this subdivision" for "by Section 220, 261, 261.5, 262, 264, 264.1, 273a, 273d, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code"; **(2)** substituted "Section 220, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6" for "Section 220, 261, 261.5, 262, 264, 264.1, 273a, 273d, 273.5,286, 288, 288a,289, 422.6, 422.7, 422.75, or 646.9," in subd (f)(3); **(3)** added "of Division 14 of Title 3" in subd (g); **(4)** deleted "of Title 1" after "of Division 4" in subd (p); **(5)** substituted "State Department of Health Care Services" for "State Department of Health Services" in subd (s); **(6)** amended subd (t) by **(a)** adding "of Part 2" after "of, Chapter 5"; and **(b)** deleting "or 11512" after "Section 10133"; **(7)** amended subd (v)(1) by **(a)** substituting "Managed Risk Medical Insurance Board" for "Major Risk Medical Insurance Program"; and **(b)** substituting "entities contracting or seeking to contract with the board" for "health plans"; **(8)** substituted "their effective dates" for "they have been fully executed" in subd (v)(2)(A); **(9)** deleted "for health coverage" after "If a contract" in subd (v)(2)(B); **(10)** amended subd (w)(1) by **(a)** substituting "Managed Risk Medical Insurance Board" for "Major Risk Medical Insurance Program"; and **(b)** substituting "Chapter 8" for "Chapter 14"; **(11)** substituted "Chapter 8" for "Chapter 14" in subd (w)(2); **(12)** substituted "entities contracting or seeking to contract with the board" for "health plans" in subd (y)(1); **(13)** substituted "their effective dates" for "they have been fully executed" in subd (y)(2)(A); **(14)** substituted "If" for "In the event that" in subd (y)(2)(B); **(15)** deleted "with health plans" after "communications, negotiations" both times it appears in subd (y)(5); and **(16)** redesignated former subds (bb) and (cc) to be subds (ab) and (ac).

2008 Amendment (ch 344): Added subd (ad).

2008 Amendment (ch 372): (1) Amended subd (f) by **(a)** adding "the California Emergency Management Agency," in the first sentence of the first paragraph; and **(b)** added "236.1" to the Section list in subds (f)(2) and (f)(3); **(2)** substituted "contracts or amendments to the contracts are" for "contract or amendments to a contract is" in subds (v)(4) and (w)(3); and **(3)** substituted "Emergency Management Agency" for "Office of Homeland Security" in subd (ab). (As amended Stats 2008 ch 372, compared to ch 344. This section was also amended by an earlier chapter, ch 358. See Gov C § 9605.)

2010 Amendment: (1) Amended subd (v)(1) by **(a)** substituting a comma for "and" after "Section 12695)"; **(b)** adding ", Part 6.6 (commencing with Section 12739.5), and Part 6.7 (commencing with Section 12739.70)"; **(c)** substituting "any of the following:" for "the deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees."; and **(d)** adding subds (v)(1)(A) and

(v)(1)(B); **(2)** amended subd (v)(2)(A) by **(a)** deleting "for health coverage" after "payment, contracts"; **(b)** substituting a comma for "or" after "Section 12695)"; and **(c)** adding ", Part 6.6 (commencing with Section 12739.5), or Part 6.7 (commencing with Section 12739.70)"; **(3)** substituted "effective date of the amendment" for "amendment has been fully executed" in subd (v)(2)(B); **(4)** amended subd (y)(1) by **(a)** substituting "any of the following:" for "the deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees."; and **(b)** adding subds (y)(1)(A) and (y)(1)(B); and **(5)** substituted "effective date of the amendment" for "amendment has been fully executed" in subd (y)(2)(B).

2011 Amendment: (1) Added subdivision designations (q)(1)-(q)(4); **(2)** substituted "Section 26150, 26155, 26170, or 26215" for "Section 12050" in subds (u)(1)-(u)(3); and **(3)** substituted "subdivision (f)" for "subdivision (c)" in subd (z).

2012 Amendment: (1) Added "prosecutors, public defenders," in subds (u)(2) and (u)(3); **(2)** deleted "provision of" after "Notwithstanding any other" in the first sentence of subds (v)(4), (w)(3), (y)(4), and (ad)(7)(D); **(3)** substituted "This paragraph is not" for "Nothing in this paragraph is" in subd (ad)(7)(E); and **(4)** substituted "This section shall not prevent" for "Nothing in this section prevents" in last two paragraphs.

NOTES OF DECISIONS

1. Generally

There are three statutory conditions for exemption from the California Public Records Act, pursuant to Gov C § 6254, subd. (a) (preliminary drafts of agency memoranda not normally retained in the ordinary course of business): the record sought must be a preliminary draft, note, or memorandum; not retained by the public agency in the ordinary course of business; and the public interest in withholding must clearly outweigh the public interest in disclosure. The purpose of the exemption is to provide a measure of agency privacy for written discourse concerning matters pending administrative action. Citizens for a Better Environment v. Department of Food & Agriculture (1985, Cal App 3d Dist) 171 Cal App 3d 704, 217 Cal Rptr 504, 1985 Cal App LEXIS 2446.

With regard to the "memorandum" exemption to the federal Freedom of Information Act (FOIA), an exemption protects the deliberative materials produced in the process of making agency decisions, but not factual materials, and not agency law. The purpose of the exception is to foster robust discussion within the agency of policy questions attending pending administrative decisions. The means to achieve this is an exemption from disclosure of those portions of predecisional writings containing advisory opinions, recommendations, and policy deliberations. However, memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context are not exempt from disclosure. Moreover, the text and context of Gov C § 6254, subd. (a) (exemption from disclosure as to preliminary drafts of agency memoranda not normally retained in ordinary course of business), pursuant to the California Public Records Act, suggest that it has essentially the same purpose as its FOIA cognate. Thus, to the extent permitted by the express statutory language, a reviewing court may properly look to the reasoning of the analogous federal case law in construing Gov C § 6254, subd. (a). Citizens for a Better Environment v. Department of Food & Agriculture (1985, Cal App 3d Dist) 171 Cal App 3d 704, 217 Cal Rptr 504, 1985 Cal App LEXIS 2446.

The Public Records Act (Gov C § 6250 et seq.) contains a number of exemptions from disclosure. Because of the strong public policy in favor of disclosure of public records, such records must be disclosed unless they come within one or more of the categories of documents exempt from compelled disclosure (Gov C § 6254). These exemptions are construed narrowly, and the burden is on the public agency to show that the records should not be disclosed. Rogers v. Superior Court (1993, Cal App 2d Dist) 19 Cal App 4th 469, 23 Cal Rptr 2d 412, 1993 Cal App LEXIS 1028.

2. Legislative Intent

Financial data supplied by a waste disposal company to a city which the city relied on in granting a rate increase to the company pursuant to an exclusive contract between the city and the company for the collection of waste and garbage within the city limits, was not exempt from disclosure under Gov C § 6254, subd. (n), which exempts from disclosure "[s]tatements of personal worth or financial data required by a licensing agency and filed by an applicant with such licensing agency to establish his personal qualifications for the license, certificate, or permit applied for." The term license within the meaning of § 6254, subd. (n), must be construed narrowly to give effect to the legislative intent that favors disclosure over secrecy in government. If the Legislature had

intended a broad exemption to apply to any financial statements then it need not have hinged the exemption to those filing applications for licensing agencies. Although it makes good sense to exempt license applicants, that situation was distinct from the type of contractual relationship that existed between the city and the disposal company. San Gabriel Tribune v. Superior Court (1983, Cal App 2d Dist) 143 Cal App 3d 762, 192 Cal Rptr 415, 1983 Cal App LEXIS 1811.

Cal Const., Art. I, § 1, guarantees all persons the inalienable right to privacy. Nonetheless, the public and the press have a right to review the government's conduct of its business. The Legislature, mindful of the right of individuals to privacy, has deemed the public's right of access to information concerning the conduct of public business a fundamental and necessary interest of citizenship. Consequently, in enacting the Public Records Act (Gov C § 6250 et seq.), the Legislature balanced the individual's privacy interest with the right to know about the conduct of public business. The specific exemptions from this general requirement of disclosure, which are listed in Gov C § 6254, are construed narrowly to insure maximum disclosure of the conduct of governmental operations. New York Times Co. v. Superior Court (1990, Cal App 2d Dist) 218 Cal App 3d 1579, 268 Cal Rptr 21, 1990 Cal App LEXIS 282.

Considering the language of Pen C § 832.8(a) as a whole, the legislature did not intend the words "personal data" to carry their broadest possible meaning, encompassing any and all information related to a particular officer, and had the legislature intended Pen C § 832.7 to change the law with respect to disclosure of public salary information, one would expect to see specific language to that effect in the statute because the legislature easily could have added "salary" to the list of personnel records set forth in Pen C § 832.8. The amount of salary paid to a particular individual provides information concerning the governmental agency in which the public has a legitimate and traditionally recognized interest. International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007, Cal) 42 Cal 4th 319, 64 Cal Rptr 3d 693, 165 P 3d 488, 2007 Cal LEXIS 8918.

3. Construction With Other Law

The doctrine of equal protection did not require release of the records of a sheriff's department investigation of a shooting incident involving several juveniles to the mother of one of the minors for her use in a civil action arising out of the incident without the necessity of her obtaining a juvenile court order for inspection of such records as required by Welf. & Inst. Code, § 827. The promotion of the rehabilitative purposes of the juvenile law provides more than a valid reason to require the confidentiality of juvenile records under the statute, which provides a simple procedure (petition for a court order) under which the mother could obtain the report but yet protect the other minors involved. Wescott v. County of Yuba (1980, Cal App 3d Dist) 104 Cal App 3d 103, 163 Cal Rptr 385, 1980 Cal App LEXIS 1657.

Gov C § 6254, subd. (b) is not redundant of subdivision (k), through which CCP § 2018 (repealed) applies and protects attorney work product, but rather subdivision (b) confers upon public agencies a broader exemption from disclosure by protecting the "work product" generated by a public agency in anticipation of litigation. Nor is it redundant of the attorney-client privilege codified in Ev C § 950 et seq. and made applicable to the CPRA through subdivision (k) of Gov C § 6254. Gov C § 6254, subd. (b), refers to litigation records generally, while subdivision (k) specifically refers to matters of privilege, including the attorney-client privilege. Fairley v. Superior Court (1998, Cal App 2d Dist) 66 Cal App 4th 1414, 78 Cal Rptr 2d 648, 1998 Cal App LEXIS 823, rehearing denied (1998, Cal App 2d Dist) 67 Cal App 4th 730a, 1998 Cal App LEXIS 873.

Gov C § 6254, subd. (b) is not redundant of subdivision (k), through which CCP § 2018 (repealed) applies and protects attorney work product, but rather subdivision (b) confers upon public agencies a broader exemption from disclosure by protecting the "work product" generated by a public agency in anticipation of litigation. Nor is it redundant of the attorney-client privilege codified in Ev C § 950 et seq. and made applicable to the CPRA through subdivision (k) of Gov C § 6254. Gov C § 6254, subd. (b), refers to litigation records generally, while subdivision (k) specifically refers to matters of privilege, including the attorney-client privilege. Fairley v. Superior Court (1998, Cal App 2d Dist) 66 Cal App 4th 1414, 78 Cal Rptr 2d 648, 1998 Cal App LEXIS 823, rehearing denied (1998, Cal App 2d Dist) 67 Cal App 4th 730a, 1998 Cal App LEXIS 873.

Because an insurer was not entitled to invoke the trade secret privilege under Ev C § 1060 to prevent the disclosure of its Record A data under Ins. Code § 1861.07, given that the statute did not incorporate the exemption from disclosure found in Gov C § 6254(k), the appellate court properly affirmed the grant of summary judgment in favor of the state insurance commissioner and two organizations. State Farm Mutual Automobile Ins. Co. v. Garamendi (2004) 32 Cal 4th 1029, 12 Cal Rptr 3d 343, 88 P3d 71, 2004 Cal LEXIS 3616.

Exemptions listed in Ins. Code § 1861.07 are meant to be examples, rather than an exhaustive listing of all those statutory exemptions that are inapplicable, and by giving the public access to all information provided to the California Insurance Commissioner pursuant to Ins. Code art. 10, Ins. Code §§ 1861.01-1861.14, the court's construction of Ins. Code § 1861.07 is consistent with Cal. Proposition 103's goal of fostering consumer participation in the rate-setting process; the language of Ins. Code § 1861.07 requires public disclosure of Record A data under Cal. Code Regs. tit. 10, § 2646.6(b), and the fact that insurers can invoke the trade secret privilege pursuant to Ins. Code § 1861.08 does not dictate a different result, and the court concludes that Ins. Code § 1861.07 does not incorporate the exemption to disclosure found in Gov C § 6254(k) and trade secret information in therefore not exempt from disclosure. State Farm Mutual Automobile Ins. Co. v. Garamendi (2004) 32 Cal 4th 1029, 12 Cal Rptr 3d 343, 88 P3d 71, 2004 Cal LEXIS 3616.

Only information subject to Pen C § 832.7 and incorporated into Gov C § 6254(k) of the California Public Records Act (CPRA) is the written material maintained in the peace officer's personnel file or oral testimony that is a recitation from material in that file, and testimony of a percipient witness to events, or from documents not maintained in the personnel file, is not information subject to Pen C § 832.7 even though that information may be identical to or duplicative of information in the personnel file; thus, Gov C § 6254(k) does not exempt from the required disclosures under the CPRA information relating to a disciplinary appeal from sources other than the peace officer's personnel file. The Copley Press, Inc. v. Superior Court (2004, Cal App 4th Dist) 122 Cal App 4th 489, 18 Cal Rptr 3d 657, 2004 Cal App LEXIS 1553, rev'd Copley Press, Inc. v. Superior Court (2006) 39 Cal 4th 1272, 48 Cal Rptr 3d 183, 141 P3d 288, 2006 Cal LEXIS 10229.

Because records of appeal of a county civil service commission (CSC) that were not documents from a personnel file or recited from documents in a personnel file were outside the definitional limitations applicable to Pen C § 832.7, a California Public Records Act (CPRA) request for those records by a company could not be denied under Gov C § 6254(k)'s exemption, and the exemption under § 6254(c) could not be invoked to shield the record of the appeal hearing unless that information was within the limitation of Pen C § 832.8, and although information from an appeal proceeding could be added to an officer's file, the records themselves did not become personnel files under § 832.8; the court noted that the CPRA still permitted the CSC to withhold records, if warranted, pursuant to Gov C § 6255, the CSC erred in denying the company's request under Gov C § 6254, and the court granted the company's writ petition insofar as it sought the release of a peace officer's identity and other information, redacted to exclude information within Pen C §§ 832.7, 832.8. The Copley Press, Inc. v. Superior Court (2004, Cal App 4th Dist) 122 Cal App 4th 489, 18 Cal Rptr 3d 657, 2004 Cal App LEXIS 1553, rev'd Copley Press, Inc. v. Superior Court (2006) 39 Cal 4th 1272, 48 Cal Rptr 3d 183, 141 P3d 288, 2006 Cal LEXIS 10229.

Publisher could not obtain disciplinary records that included a peace officer's name because the county civil service commission's records of an appeal hearing were exempt from disclosure under Gov C § 6254(k); the records were deemed confidential files of the employing agency within the meaning of Pen C §§ 832.5, 832.8, a peace officer's identity is confidential under Pen C § 832.7, and the application of § 832.7 is not limited to criminal and civil proceedings, Copley Press, Inc. v. Superior Court (2006) 39 Cal 4th 1272, 48 Cal Rptr 3d 183, 141 P3d 288, 2006 Cal LEXIS 10229.

Pen C §§ 832.7 and 832.8 do not mandate that city payroll records reflecting peace officer salary information be excluded from disclosure merely because some of the facts relied upon in determining the amount of salary may be recorded in the agency's personnel files. International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007, Cal) 42 Cal 4th 319, 64 Cal Rptr 3d 693, 165 P 3d 488, 2007 Cal LEXIS 8918.

Term "records relating" to the kinds of information specified in Pen C § 832.8 is more reasonably understood as a reference to records that actually reflect the enumerated items, and records of salary expenditures do not reflect any of the items enumerated in the statute. Thus, Pen C §§ 832.7 and 832.8 do not mandate that peace officer salary information be excluded from disclosure under the California Public Records Act, Gov C § 6250 et seq.International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007, Cal) 42 Cal 4th 319, 64 Cal Rptr 3d 693, 165 P 3d 488, 2007 Cal LEXIS 8918.

Additional information briefly discussing prehistoric Native American artifacts did not require recirculation of a draft environmental impact report under Pub Res C §§ 21092.1, 21166 because the changes were not significant in light of disclosure restrictions in Gov C § 6254(r), Pub Res C §§ 5097.9, 5097.993, and Cal. Code Regs., tit. 14, § 15120(d). Clover Valley Foundation v. City of Rocklin (2011, 3d Dist) 2011 Cal App LEXIS 884.

4. Procedure

In actions seeking reimbursement from the State of California and the California Highway Patrol for allegedly illegal charges made for copies of traffic accident reports and an injunction against such practice, the trial court properly sustained defendants' demurrers, where, though the reports were public records within the meaning of Gov C § 6252, subd. (d), and thus subject to the limitation of former Gov C § 6257 (see now Gov C § 6253), as to charges for copies, the complaints failed to allege that plaintiffs were persons entitled, under Gov C § 6254, subd. (f), and Veh C § 20012, to such otherwise confidential information. However, the court should have granted plaintiffs leave to amend to allege such entitlement if the facts permitted. Vallejos v. California Highway Patrol (1979, Cal App 2d Dist) 89 Cal App 3d 781, 152 Cal Rptr 846, 1979 Cal App LEXIS 1424.

In the case of a third party seeking to challenge an agency's decision to disclose documents, a petition for writ of mandate is the appropriate procedure to present the issue to the court. Marken v. Santa Monica-Malibu Unified School Dist. (2012, 2d Dist) 202 Cal App 4th 1250, 2012 Cal App LEXIS 47.

5. Police and Correctional Matters

In seeking to avoid excessive and therefore prejudicial publicity in a pending prosecution, the trial court's order that copies of the transcript of the grand jury proceedings in possession of the clerk remain sealed and which restricted and limited the disclosure of the transcript contents by the clerk and district attorney to unauthorized personnel, specifically newspapers, was unreasonable, where the effect of the order was to permanently deny the right of public inspection of the grand jury records in question. Craemer v. Superior Court of Marin County (1968, Cal App 1st Dist) 265 Cal App 2d 216, 71 Cal Rptr 193, 1968 Cal App LEXIS 1617.

In keeping with a trial judge's duty to insure that a defendant will receive a fair trial the judge may, in order to prevent even the probability of unfairness, make such orders as are reasonably designed to avert improper prejudice to indicted defendants, and, accordingly, a proper order can require that grand jury transcripts not be disclosed to any person (other than those specifically mentioned in Pen C § 938.1) until a specified reasonable period of time after a copy thereof has been delivered to the defendant, provided that if the defendant, during such time, shall move the court that such transcript, or any portion thereof, not be available for public inspection pending trial, such time shall be extended subject to the court's ruling on such motion. Craemer v. Superior Court of Marin County (1968, Cal App 1st Dist) 265 Cal App 2d 216, 71 Cal Rptr 193, 1968 Cal App LEXIS 1617.

Gov C § 6254, subd (f), exempting from disclosure records used for correctional, law enforcement, or licensing purposes, applies only when the prospect of enforcement proceedings is concrete and definite; the exemption does not apply when an agency merely labels its file "investigatory" and suggests that enforcement proceedings may be initiated at some unspecified future date or were previously considered. Uribe v. Howie (1971, Cal App 4th Dist) 19 Cal App 3d 194, 96 Cal Rptr 493, 1971 Cal App LEXIS 1271.

Gov C § 6254, subd. (f), exempting from disclosure all public files compiled for law enforcement purposes, was not applicable to files maintained by the Division of Industrial Safety which were the subject of a discovery order in personal injury and wrongful death actions arising out of the collapse of a bridge under construction. While the Division of Industrial Safety does make investigations in the course of enforcement of certain aspects of the California Occupational Safety and Health Act of 1973, and undoubtedly compiles files of its investigations, all of such files are not necessarily files compiled for "law enforcement purposes" within the meaning of the subdivision. The adjective "law enforcement," as used in the subdivision, refers to law enforcement in the traditional sense, that is, to the enforcement of penal statutes, etc., and unless there is a concrete and definite prospect of such criminal law enforcement, the subdivision does not apply. Furthermore, the terms "law enforcement" and "investigatory files" would not be given the same interpretations those terms have been given in the regulations of the United States Department of Labor, since the interpretations reflect the point of view of the agency and have not been approved by the federal courts. State of California ex rel. Division of Industrail Safety v. Superior Court (1974, Cal App 2d Dist) 43 Cal App 3d 778, 117 Cal Rptr 726, 1974 Cal App LEXIS 1355.

The Public Records Act which establishes a general right of public access to governmental documents does not authorize persons with arrest records to have access to state arrest record information furnished to a city by the Attorney General and Department of Justice, since certain documents in the possession of a municipality are expressly exempt from disclosure under Gov C § 6254 including records of intelligence information or security procedures of the office of the Attorney General and the Department of Justice, or any such investigatory or security files compiled for correctional or law enforcement purposes. Furthermore, Pen C §§ 11120–11127, dealing with the access of private individuals to their arrest records, are special legislation and they take precedence

over any general legislation such as the Public Records Act. Younger v. Berkeley City Council (1975, Cal App 1st Dist) 45 Cal App 3d 825, 119 Cal Rptr 830, 1975 Cal App LEXIS 1734.

A church's verified complaint to require disclosure of any records a police department maintained of its activities, and its declarations and documents filed in support of its motion for temporary injunction, which was denied, clearly established that the records sought, if they in fact existed, were of the type embraced in Gov C § 6254, subd. (f), exempt as records of "intelligence information," where the complaint referred repeatedly to "information, documents, reports and records" allegedly maintained by the police department relating to the church, where, in oral argument on the motion for preliminary injunction, the church's attorney admitted that "the statutory intent relating to intelligence files and relating to investigatory files is that they are exempt," and where it was plain that the records of "intelligence information" requested fell within the ambit of the exemption. Los Angeles Police Dept. v. Superior Court (1977, Cal App 2d Dist) 65 Cal App 3d 661, 135 Cal Rptr 575, 1977 Cal App LEXIS 1076.

Interrogatories that seek information about records exempt from public disclosure, either as "intelligence information" exempt under Gov C § 6254, subd. (f), or as exempt in the public interest, are not permitted. Ancillary discovery through written interrogatories is not permissible to determine whether "intelligence information" has been gathered by police intelligence divisions, whether a file is maintained therefore, or the names and titles of persons who might have reviewed the file. Los Angeles Police Dept. v. Superior Court (1977, Cal App 2d Dist) 65 Cal App 3d 661, 135 Cal Rptr 575, 1977 Cal App LEXIS 1076.

Disclosure of a public entity's investigatory or security records is not prohibited under Gov C § 6254, subd. (f), unless the agency itself asserts a privilege under that section. Thus, police department employees were not entitled to an injunction prohibiting disclosure of records by the police chief to a citizens' review commission on the basis of privilege under Gov C § 6254, subd. (f), where it did not appear that the city or the department had asserted any privilege of nondisclosure. Berkeley Police Assn. v. City of Berkeley (1977, Cal App 1st Dist) 76 Cal App 3d 931, 143 Cal Rptr 255, 1977 Cal App LEXIS 2128.

In an action under the Public Records Act (Gov C §§ 6250 et seq.), to compel the disclosure of various documents utilized by the California Highway Patrol in training its officers, the trial court properly exempted from disclosure matters dealing with security and safety procedures of the highway patrol in the performance of its police function (Gov C § 6254, subd. (f) (exemption for specified police records). Northern Cal. Police Practices Project v. Craig (1979, Cal App 3d Dist) 90 Cal App 3d 116, 153 Cal Rptr 173, 1979 Cal App LEXIS 1457.

Personal identifiers contained in certain law enforcement documents where not exempt from disclosure under Gov C § 6254, subd. (c), since the exemption from disclosure provided by such subdivision is confined to "personnel, medical, or similar files." However, they were exempt under a similar exemption for personal identifiers which was read into the "intelligence information" exemption from disclosure provided by Gov C § 6254, subd. (f). American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal 3d 440, 186 Cal Rptr 235, 651 P2d 822, 1982 Cal LEXIS 229.

In an action under the Public Records Act (Gov C §§ 6250 et seq.) to compel disclosure of certain index cards compiled by law enforcement departments which listed organized crime suspects, the trial court erred in concluding the exemption from disclosure accorded intelligence information (Gov C § 6254, subd. (f)) was confined to personal identifiers and information which might reveal confidential sources. While not exempting all information reasonably related to criminal activity, the "intelligence information" exemption also bars the disclosure of information supplied in confidence, even if such information does not reveal the identity of a confidential source. Further, the exclusion of personal identifiers includes information from which the identity of the individual in question might be inferred. American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal 3d 440, 186 Cal Rptr 235, 651 P2d 822, 1982 Cal LEXIS 229.

In invoking the Public Record Act's exemption from disclosure accorded investigatory records compiled for law enforcement purposes (Gov C § 6254, (f)), the requirement that the information sought relate to a definite prospect of enforcement proceedings is applicable only to information which is not itself exempt from compelled disclosure, but claims exemption only as part of an investigatory file. Information independently exempt, such as intelligence information, is not subject to the requirement that it relate to a definite prospect of enforcement proceedings. American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal 3d 440, 186 Cal Rptr 235, 651 P2d 822, 1982 Cal LEXIS 229.

A sheriff's investigation report undertaken at the county's instance to determine the validity of a jail inmate's tort liability claim based on a jailhouse assault was not protected from disclosure by Gov C § 6254, subd. (f) (California Public Records Act), which exempts from disclosure records of complaints or investigations conducted for correctional, law enforcement or licensing purposes. Even if the sheriff's report had law enforcement

implications, the exemption is applicable only when the prospect of law enforcement is "concrete and definite." Register Div. of Freedom Newspapers, Inc. v. County of Orange (1984, Cal App 4th Dist) 158 Cal App 3d 893, 205 Cal Rptr 92, 1984 Cal App LEXIS 2371.

Under the California Public Records Act (Gov C §§ 6500 et seq.), exemptions from disclosure of records of complaints or investigations conducted for correctional or law enforcement purposes (Gov C § 6254, subd. (f)) are permissive, not mandatory. Thus, it did not forbid disclosure of investigation reports of an assault on a jail inmate undertaken in connection with a tort claim, and, since disclosure was not forbidden by state law, the absolute privilege of Evi C § 1040, subd. (b)(1), granting governmental entities a privilege against disclosure of information if disclosure is forbidden by a federal or state statute, was not applicable in an action by a newspaper against the county for disclosure of the reports. Register Div. of Freedom Newspapers, Inc. v. County of Orange (1984, Cal App 4th Dist) 158 Cal App 3d 893, 205 Cal Rptr 92, 1984 Cal App LEXIS 2371.

Under Gov C § 6254, subd. (f)(2), which provides an exemption from disclosure for "[r]ecords of complaints to or investigations conducted by…any state or local police agency," a city had a duty to provide information contained in a police report to the public, notwithstanding the report was not the result of a formal, written complaint made by a citizen to the police department, but rather was the result of an independent police investigation. By its terms, § 6254, subd. (f)(2), requires disclosure of information in investigatory files "to the extent such information regarding crimes alleged or committed or any other incident investigated is recorded." The investigation by police was recorded. Therefore, the statute required disclosure of specific information about the investigation. If the language of § 6254, subd. (f)(2), is in any way ambiguous, it should be resolved in favor of the legislative intent of the California Public Records Act (Gov C §§ 6250 et seq.) to maximize disclosure of the conduct of governmental operations. South Coast Newspapers, Inc. v. City of Oceanside (1984, Cal App 4th Dist) 160 Cal App 3d 261, 206 Cal Rptr 527, 1984 Cal App LEXIS 2539.

The 1982 amendments to Gov C § 6254, subd. (f), which exempts from disclosure records of complaints to or investigations conducted by any state or local police agency, enacted as subds. (1) and (2) of § 6254, subd. (f), did not so significantly alter the statute that its federal counterpart, 5 USCS § 552(b)(7), is no longer an appropriate guide to its construction. The effect of these amendments was simply to extend public access to information contained in agency records which are themselves exempt from disclosure by § 6254, subd. (f). The amendments are in keeping with the original, shared purpose of the California Public Records Act (Gov C §§ 6250 et seq.) and the federal Freedom of Information Act (5 USCS § 552) to provide public access to government information. South Coast Newspapers, Inc. v. City of Oceanside (1984, Cal App 4th Dist) 160 Cal App 3d 261, 206 Cal Rptr 527, 1984 Cal App LEXIS 2539.

In a declaratory relief action by a newspaper seeking to inspect or obtain a copy of a police report of an investigation of a high school principal for his alleged failure to report an incident of child abuse, the trial court erred in ruling that the report was absolutely privileged under Gov C § 6254, subd. (f), which exempts from disclosure records of complaints to or investigations by any state or local police agency. Under the California Public Records Act (Gov C §§ 6250 et seq.), the newspaper was entitled to a copy of the report if no confidential sources would be revealed, disclosure would not interfere with enforcement proceedings, no person would be deprived of a fair trial, release of the report would not constitute an unwarranted invasion of privacy, secret police investigative techniques or procedures would not be revealed, and the life or physical safety of law enforcement personnel would not be endangered. Accordingly, the trial court was required to conduct an *in camera* inspection and to release the report or parts thereof, or an accurate edited summary, unless the court found disclosure would result in an invasion of statutorily protected areas of information. South Coast Newspapers, Inc. v. City of Oceanside (1984, Cal App 4th Dist) 160 Cal App 3d 261, 206 Cal Rptr 527, 1984 Cal App LEXIS 2539.

The purpose of the exemption under the California Public Records Act (Gov C §§ 6250 et seq.) regarding police records, as originally enacted, was to allow the law enforcement agency to develop a discretionary policy for disclosure of such records. The addition in 1982 of Gov C § 6254, subd. (f)(1), and Gov C § 6254, subd. (f)(2), specifying information contained within such reports that must be disclosed, had the effect of extending public access to information contained in agency records themselves exempted from disclosure by Gov C § 6254, subd. (f). City of Santa Rosa v. Press Democrat (1986, Cal App 1st Dist) 187 Cal App 3d 1315, 232 Cal Rptr 445, 1986 Cal App LEXIS 2341.

On appeal from a judgment ordering a county sheriff to partially disclose to a newspaper records of disciplinary proceedings against two deputies, the Court of Appeal erred in concluding that the exemption from disclosure under the California Public Records Act (Gov C § 6250 et seq.) for law enforcement investigatory records (Gov C § 6254, subd. (f)) was limited by the criteria set forth in the federal Freedom of Information Act (5 USCS § 552). In drafting Gov C § 6254, subd. (f), the Legislature expressly imposed several precise limitations

on the confidentiality of law enforcement investigatory records. Clearly, the Legislature was capable of articulating additional limitations if that is what it intended to do. Further, the Legislature has already enacted appropriate statutory provisions, as part of the California Public Records Act, to address the concerns articulated in the Freedom of Information Act criteria. Williams v. Superior Court (1993) 5 Cal 4th 337, 19 Cal Rptr 2d 882, 852 P2d 377, 1993 Cal LEXIS 2500.

The California Public Records Act (Gov C §§ 6250 et seq.) is not properly interpreted as giving the custodian of law enforcement records unreviewable power to decide whether Gov C § 6254, subd. (f) (information subject to disclosure from records of complaints to or investigations by law enforcement agencies), requires the disclosure of particular items of information from such records. While Gov C § 6259, expressly mentions only the court's power to order the public official to make the record itself public (Gov C § 6254, subd. (b)), that greater power necessarily includes the lesser. Otherwise, the statutory right of access to information from law enforcement records would be meaningless. Williams v. Superior Court (1993) 5 Cal 4th 337, 19 Cal Rptr 2d 882, 852 P2d 377, 1993 Cal LEXIS 2500.

On appeal from a judgment ordering a county sheriff to partially disclose to a newspaper records of disciplinary proceedings against two deputies, the Court of Appeal erred in concluding that such records remain exempt only so long as they continue to relate to a "pending" investigation. The exemption for law enforcement investigatory files (Gov C § 6254, subd. (f)) does not terminate with the conclusion of the investigation. Once an investigation has come into being because there is a concrete and definite prospect of enforcement proceedings at that time, materials that relate to the investigation and, thus, properly belong in the file remain subject to the terms of the statute. Williams v. Superior Court (1993) 5 Cal 4th 337, 19 Cal Rptr 2d 882, 852 P2d 377, 1993 Cal LEXIS 2500.

In a mandate proceeding by a newspaper, the trial court erred in ordering disclosure to plaintiff of records of an internal investigation conducted by a city police department into the actions of a police sergeant (focusing on whether he had improperly used city property, investigated drug use on county property while on duty as a city officer, or used his police status to obtain confidential information from a school). Gov C § 6254, subd. (k), provides that disclosure is not required for public records the disclosure of which is exempted or prohibited pursuant to federal or state law, including the Evidence Code privileges. Pen C § 832.7, subd. (a), provides that peace officer personnel records and records of citizen complaints against law enforcement personnel are confidential and may not be disclosed except by discovery pursuant to Evi C §§ 1043 and 1046. The confidentiality provided by these more specific provisions would be illusory unless incorporated into the California Public Records Act through Gov C § 6254, subd. (k). City of Hemet v. Superior Court (1995, Cal App 4th Dist) 37 Cal App 4th 1411, 44 Cal Rptr 2d 532, 1995 Cal App LEXIS 824, rehearing denied (1995, Cal App 4th Dist) 1995 Cal App LEXIS 906, review denied City of Hemet v. Riverside County Superior Court (1995, Cal) 1995 Cal LEXIS 6986.

Amendment to Gov C § 6254(f)(3) (prohibiting release of arrestee addresses only to people who intend to use those addresses for commercial purposes, while allowing release to other people who intend to use the addresses for scholarly, journalistic, political, governmental, or investigative purposes) is an impermissible restriction on commercial speech which violates the First Amendment. United Reporting Publ'g Corp. v. Lungren (1996, SD Cal) 946 F Supp 822, 1996 US Dist LEXIS 17756, aff'd United Reporting Publ'g Corp. v. California Highway Patrol (1998, CA9 Cal) 146 F3d 1133, 1998 US App LEXIS 13549.

Where a person from a minority, seeking all documents relating to any internal investigation and a deputy sheriff's personnel file, filed suit against a county for violations of his civil rights and state law by the deputy, the county could not successfully object to the requested discovery upon the grounds internal investigation reports were protected by Gov C § 6254, Pen C §§ 832 et seq., and Ev C §§ 1040 and 1043 and that disclosure would infringe the deputy because the county failed to demonstrate any statutory or other privacy bar to disclosure of the requested information. Jackson v. County of Sacramento (1997, ED Cal) 175 FRD 653, 1997 US Dist LEXIS 14615.

The court reversed a judgment for respondent publishing company which provided the names and addresses of recently arrested individuals to its customers, who included attorneys, insurance companies, drug and alcohol counselors, and driving schools. It received this information from petitioner and other California state and local law enforcement agencies until the State amended Gov C § 6254(f)(3) to require that a person requesting an arrestee's address declare that the request is being made for one of five prescribed purposes and that the address will not be used directly or indirectly to sell a product or service. Respondent was not entitled to prevail on a "facial attack" on the statute. At least for the purposes of facial invalidation, the statute was not an abridgment of anyone's right to engage in speech, but simply a law regulating access to information in the government's hands.

The government was not prohibiting a speaker from conveying information that the speaker already possessed. California law merely required respondent to qualify under the statute if it wished to obtain arrestees' addresses. California could decide not to give out arrestee information at all without violating the First Amendment. Los Angeles Police Dep't v. United Reporting Publ'g Corp. (1999) 528 US 32, 145 L Ed 2d 451, 120 S Ct 483, 1999 US LEXIS 8239.

The exemption from disclosure for "records of investigation" by local police agencies (Gov C § 6254(f)), as distinct from "investigatory files," was not subject to the qualification that the prospect of enforcement proceedings be concrete and definite. Records of investigation, no less than records of complaints and intelligence information, were exempt on their face, whether or not they were ever included in an investigatory file. Limiting the § 6254(f) exemption only to records of investigation where the likelihood of enforcement had ripened into something concrete and definite would expose to the public the very sensitive investigative stages of determining whether a crime had been committed or who had committed it. However, the records of investigation exemption under § 6254(f) encompassed only those investigations undertaken for the purpose of determining whether a violation of law might occur or had occurred. If a violation or potential violation had been detected, the exemption also extended to records of investigations conducted for the purpose of uncovering information surrounding the commission of the violation and its agency. Here, the investigation that included a deputy sheriff's decision to stop a motorist and the stop itself were for the purpose of discovering whether a violation of law had occurred and, if so, the circumstances of its commission. Records relating to that investigation were exempt from disclosure by § 6254(f). Haynie v. Superior Court (2001) 26 Cal 4th 1061, 112 Cal Rptr 2d 80, 31 P3d 760, 2001 Cal LEXIS 6478.

A television network's request for disclosure of the identity of every individual granted a criminal conviction exemption to work in a licensed daycare facility and the identity of each facility employing such individuals was a proper request under the Public Records Act (Gov C § 6250). The state's disclosure in detail of how it operated the exemption process did not satisfy the statutory directive that the public have access to information concerning the conduct of the people's business. Further, nondisclosure was not compelled under the personnel records exemption (Gov C § 6254(c)), or by Pen C §§ 11105, 11142, which would thereby serve as an underlying basis for nondisclosure under § 6254(k). The network was not seeking information about the convictions suffered by the individuals at issue or any other privileged information. In any event, the fact that an individual suffered a criminal conviction was a matter of public record. Nor was nondisclosure compelled by reason of the "catchall" provision of Gov C § 6255, since the state, which did not set forth any protectable privacy interest of a licensed child care facility which would justify nondisclosure of its identity as a facility which employed an individual who had been granted a criminal conviction exemption, failed to carry its burden. Additionally, to the extent the individuals had any privacy interest in nondisclosure, they subjected themselves to public review by virtue of applying for a license to work at, operate, or own a child care facility. CBS Broadcasting Inc. v. Superior Court (2001, Cal App 2d Dist) 91 Cal App 4th 892, 110 Cal Rptr 2d 889, 2001 Cal App LEXIS 654.

Undisclosed letter directly related to a definite and concrete investigation of an officer and it had no purpose other than to report the deputy DA's thoughts, opinions, and conclusions; thus, the letter was exempt from disclosure under the California Public Records Act, Gov C § 6250 et seq., pursuant to the investigation exemption in Gov C § 6254(f). Rackauckas v. Superior Court (2002, Cal App 4th Dist) 104 Cal App 4th 169, 128 Cal Rptr 2d 234, 2002 Cal App LEXIS 5114.

Although authorized by the California Public Records Act, Gov C § 6250 et seq., under Gov C § 6259, the newspaper never asked the trial court to conduct an in camera review to determine whether the nonpublic letter about the investigation of a police officer had been improperly withheld; thus, the appellate court considered the investigators' declarations to sufficiently establish that the letter actually related to the investigation and fells within the investigation exemption contained in Gov C § 6254(f). Rackauckas v. Superior Court (2002, Cal App 4th Dist) 104 Cal App 4th 169, 128 Cal Rptr 2d 234, 2002 Cal App LEXIS 5114.

District attorney did not waive the investigation exemption in Gov C § 6254(f) by providing a nonpublic letter to the police department, which initiated the criminal investigation and employed the officer, as the district attorney did so with the understanding that the document would remain confidential. Rackauckas v. Superior Court (2002, Cal App 4th Dist) 104 Cal App 4th 169, 128 Cal Rptr 2d 234, 2002 Cal App LEXIS 5114.

Regarding police officers' personnel files, urinalysis test results contained in police investigative files and the files of a district attorney are not subject to disclosure under the Gov C § 6254(f) of the California Public Records Act, Gov C § 6250 et seq.Fagan v. Superior Court (2003, Cal App 1st Dist) 111 Cal App 4th 607, 4 Cal Rptr 3d 239, 2003 Cal App LEXIS 1288.

Letters in a district attorney's investigation file were exempt from disclosure under Gov C §§ 6254, 6254.5. County of Los Angeles v. Superior Court (2005, Cal App 2d Dist) 130 Cal App 4th 1099, 30 Cal Rptr 3d 708, 2005 Cal App LEXIS 1039, review denied County of Los Angeles v. Los Angeles County Superior Court (2005, Cal) 2005 Cal LEXIS 10348.

Coroner and autopsy reports that constitute investigations of a suspected homicide death, in which the prospect of criminal law enforcement proceedings is concrete and definite, are public records that are exempt from disclosure under Gov C § 6254(f). Dixon v. Superior Court (2009, 3d Dist) 170 Cal App 4th 1271, 88 Cal Rptr 3d 847, 2009 Cal App LEXIS 145, review denied Dixon (Kathryn J.) v. S.C. (Neves) (2009, Cal.) 2009 Cal. LEXIS 4729.

Disclosure of coroner and autopsy reports was properly denied under the investigatory file exemption of Gov C § 6254(f) because substantial evidence supported a factual finding that the reports were investigatory files of a local agency for law enforcement purposes that involved a definite prospect of criminal law enforcement; reports investigated the death of a person left in an open field with multiple bullet wounds, and that death led to a criminal trial for murder, and it was irrelevant that the party requesting the public records was a reporter. Dixon v. Superior Court (2009, 3d Dist) 170 Cal App 4th 1271, 88 Cal Rptr 3d 847, 2009 Cal App LEXIS 145, review denied Dixon (Kathryn J.) v. S.C. (Neves) (2009, Cal.) 2009 Cal. LEXIS 4729.

Office of the Inspector General (OIG) should not have been ordered to disclose investigative materials underlying a report relating to a parolee who kidnapped a young girl and held her for 18 years because Pen C § 6131 gave the Inspector General complete discretion as to disclosure of those material. Further, the exemption from disclosure in Gov C § 6254(f), applied because OIG launched its investigation into supervision of the parolee by the California Department of Corrections and Rehabilitation (CDCR) to determine whether CDCR's parole policies were adequate and whether they were followed in this instance; thus, the prospect of enforcement proceedings was concrete and definite when the investigation was launched. Office of the Inspector Gen. v. Superior Court (2010, 3d Dist) 189 Cal App 4th 695, 117 Cal Rptr 3d 388, 2010 Cal App LEXIS 1848.

Good cause requirement of CCP § 1985 was inapplicable to a subpoena duces tecum issued by a grand jury to a police department because the investigation was not a civil proceeding. The records were not confidential under Pen C § 832.7 or exempt from disclosure under Gov C § 6254, subd. (f), because they were sought pursuant to the grand jury's authority under Pen C §§ 925, 925a. City of Woodlake v. Tulare County Grand Jury (2011, 5th Dist) 2011 Cal App LEXIS 994.

Absent an evidentiary showing that the disclosure of a particular officer's identity would jeopardize that officer's safety or efficacy, protecting the anonymity of a peace officer did not outweigh the public interest in disclosure under Gov C §§ 6254(c) and 6255 of the names of police officers involved in shooting incidents. Long Beach Police Officers Assn. v. City of Long Beach (2012, 2d Dist) 2012 Cal App LEXIS 109.

6. Licensing Matters

Monthly pesticide spray reports submitted in accordance with Fd & Ag C § 11733, to a county agricultural commissioner, each containing the name of the operator, the location and owners of the lands to which pesticides were applied, the chemical combinations, quantities, concentrations, and dates of such applications, and the crops and pests involved, were not "crop reports" within the meaning of the disclosure exemption provisions of Gov C § 6254, where the reports did not yield information concerning the magnitude of the crops sprayed, their state of preparation, or their likely marketing dates, and could not affect the privacy of either the growers' or applicators' financial dealings, nor affect prices in commodity markets. Uribe v. Howie (1971, Cal App 4th Dist) 19 Cal App 3d 194, 96 Cal Rptr 493, 1971 Cal App LEXIS 1271.

Monthly pesticide spray reports submitted in accordance with Fd & Ag C § 11733, to a county agricultural commissioner, each containing the name of the operator, the location and owners of the lands to which pesticides were applied, the chemical combinations, quantities, concentrations, and dates of such applications, and the crops and pests involved, could not, in an action seeking public disclosure of such reports, be validly deemed to be records used for "correctional, law enforcement or licensing purposes" within the meaning of the disclosure exemption provisions of Gov C § 6254, subd (f), where, although pesticide spray reports had been used to review applicators' licenses on various occasions, this was not the primary purpose for which they were compiled, and where there was no evidence that any of the reports were being put to such purpose at the time of trial. Uribe v. Howie (1971, Cal App 4th Dist) 19 Cal App 3d 194, 96 Cal Rptr 493, 1971 Cal App LEXIS 1271.

In a proceeding under the Public Records Act for the disclosure of certain documents from a county transportation authority regarding a licensing agreement for the installation of automated public toilets and the award of advertising space to the successful bidder, the trial court erred in finding that the attorney-client privilege was

waived (Gov C § 6254(k); Ev C §§ 912, 952), where the documents at issue were prepared by counsel for the successful bidder and were circulated between two parties bound by an offer and acceptance in contemplation of a binding, detailed license agreement. STI Outdoor v. Superior Court (2001, Cal App 2d Dist) 91 Cal App 4th 334, 109 Cal Rptr 2d 865, 2001 Cal App LEXIS 615, review denied STI Outdoor v. Los Angeles County Superior Court (2001, Cal) 2001 Cal LEXIS 7398.

7. Miscellaneous Matters

In a proceeding for appointment of a guardian of a minor child committed to the care of the welfare department and placed in a foster home for adoption, the trial court abused its discretion in ordering the welfare department to answer interrogatories as to the identity of persons having custody of the child following commitment and other particulars concerning the activities of the department in connection with attempts to arrange adoptive placement for the child, where the information concerning the placement and adoption of the child was acquired in confidence by the department and its employees in the course of their duties, and was not open or officially disclosed to the public prior to the time a claim of privilege was made, and where no preliminary basis had been established for finding that the adoption procedure was not running its proper course, and that the agency was unfit to have temporary custody of the child, or that it was improbable that the child would be adopted; while there is no absolute statutory ban on disclosure of such information, nor any absolute privilege with respect thereto, Ev C § 1040, requires a weighing of necessity for preserving confidentiality with the necessity for disclosure in the interest of justice. Terzian v. Superior Court (1970, Cal App 1st Dist) 10 Cal App 3d 286, 88 Cal Rptr 806, 1970 Cal App LEXIS 1841.

Gov C § 6254, exempting crop reports from public disclosure, applies only to reports specifying the nature, extent, type, or magnitude of crops being grown, disclosure of which might adversely affect the confidentiality of growers' enterprises and interfere with trading in futures on commodity markets. Uribe v. Howie (1971, Cal App 4th Dist) 19 Cal App 3d 194, 96 Cal Rptr 493, 1971 Cal App LEXIS 1271.

The trial court properly denied issuance of a writ of mandate to compel a county assessor to permit a corporation to inspect documents and records enabling it to more easily compare market values of real property with assessed values. Though the documents are the working papers used by the assessor in the performance of his duties, there is no provision requiring him to prepare and keep them and they therefore fall within the purview of Rev & Tax C § 408, providing "…any information and records in the assessor's office which are not required by law to be kept and prepared by the assessor are not public documents and shall not be open to public inspection." Statewide Homeowners, Inc. v. Williams (1973, Cal App 4th Dist) 30 Cal App 3d 567, 106 Cal Rptr 479, 1973 Cal App LEXIS 1187.

Medical records of a tort claimant appended to a letter sent to a county requesting settlement of the claim were not exempt from disclosure under Gov C § 6254, subd. (c) (California Public Records Act), intended to protect information of a highly personal nature on file with a public agency. By making the claim, the claimant placed his alleged physical injuries and medical records substantiating them in issue and tacitly waived any expectation of privacy regarding the medical records. Because the county utilized the supporting medical records in arriving at its decision to settle the claim, it could not hide behind the claimant's privacy to justify its concealment of the records from public scrutiny. Register Div. of Freedom Newspapers, Inc. v. County of Orange (1984, Cal App 4th Dist) 158 Cal App 3d 893, 205 Cal Rptr 92, 1984 Cal App LEXIS 2371.

The Governor's daily, weekly, and monthly appointment calendars were not exempt from disclosure under the Public Records Act by Gov C § 6254, subd. (1), exempting from disclosure correspondence of and to the Governor or employees of the Governor's office. For purposes of the act, the correspondence exemption must be confined to communications by letter, and the Governor's appointment calendars and schedules did not meet that definition. Times Mirror Co. v. Superior Court (1991) 53 Cal 3d 1325, 283 Cal Rptr 893, 813 P2d 240, 1991 Cal LEXIS 3059.

In an action brought under the California Public Records Act (Gov C § 6250 et seq.) by a private organization to compel the Governor to disclose the names and qualifications of applicants for a temporary appointment to a local board of supervisors, the letters and application forms received by the Governor's Office from applicants for appointment to the vacant supervisor position constituted "[c]orrespondence of and to the Governor or employees of the Governor's office" within the meaning of Gov C § 6254, subd. (*l*). The correspondence exemption was intended to protect communications to the Governor and members of the Governor's staff from correspondents outside of government. The application forms from private citizens, like formal letters and other mail from citizens, did not become public records until received by the Governor's Office. Gov C § 6254 permits the Governor to receive such communications in confidence. California First Amendment Coalition v. Superior

Court (1998, Cal App 3d Dist) 67 Cal App 4th 159, 78 Cal Rptr 2d 847, 1998 Cal App LEXIS 854, review or rehearing denied California First Amendment v. Sacramento County Superior Court (1998, Cal) 1998 Cal LEXIS 8581.

Public records containing names of county retirees and their pension amounts were not exempt from California Public Records Act disclosure under Gov C § 6253(a). Because Gov C § 31532 did not exempt the records, Gov C § 6254(k) did not apply; moreover, the balancing test applied under Gov C § 6255(a) weighed in favor of disclosure. San Diego County Employees Retirement Assn. v. Superior Court (2011, 4th Dist) 2011 Cal App LEXIS 823.

8. Records of Complaints

Gov C § 6254, subd. (f), exempting from the disclosure requirements of the Public Records Act, "records of complaints to," or investigations conducted by, the office of the Attorney General and the Department of Justice, and any state or local agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes, does not violate First Amendment guarantees of freedom to communicate. Decisional law generally accepts the assumption that a statute calling for general disclosure may validly define reasonably restricted areas of nondisclosure, provided that they are justified by a genuine public policy concern, such as the privacy of citizens whose information gets into government files. Black Panther Party v. Kehoe (1974, Cal App 3d Dist) 42 Cal App 3d 645, 117 Cal Rptr 106, 1974 Cal App LEXIS 1256.

Gov C § 6254, subd. (f), exempting from the disclosure requirements of the Public Records Act, "records of or complaints to," or investigations conducted by, the office of the Attorney General and the Department of Justice, and any state or local police agency, "or any such investigatory…files compiled by any other state or local agency for correctional, law enforcement or licensing purposes," is properly interpreted as exempting records of complaints, as well as records of investigation maintained for licensing purposes by agencies of the Department of Consumer Affairs. The words "any such" would be surplusage if they did not embrace the same records as the preceding clause, and that textual interpretation comports with the dual legislative concern, appearing throughout the act, for individual privacy as well as disclosure "concerning the conduct of the people's business." Both complaining witnesses, who often demand anonymity, and the public have an interest in the confidentiality of complaints of wrongdoing prior to the inception of formal enforcement or disciplinary proceedings. Black Panther Party v. Kehoe (1974, Cal App 3d Dist) 42 Cal App 3d 645, 117 Cal Rptr 106, 1974 Cal App LEXIS 1256.

In holding that letters of complaint to the Bureau of Collections and Investigative Services charging unethical or abusive practices by licensed collection agencies are exempt from disclosure as "records of complaint" within the meaning of Gov C § 6254, subd. (f), the trial court erred in failing to find on the material factor, urged as a special basis of plaintiffs' demand for disclosure under the Public Records Act, of the bureau's practice of furnishing copies of consumer complaints to the affected licensees. Gov C § 6254, setting forth various categories of exemptions, and further providing that it is not to be construed as "preventing" public inspection of exempted material not otherwise prohibited by law, does not permit selective disclosure. The practice of disclosing complaints to the affected licensees destroys the privilege of confidentiality otherwise permitted by the statute, and, when a record loses its exempt status, it becomes subject to the provision of Gov C § 6253, subd. (a), that "every citizen has a right to inspect any public record." Black Panther Party v. Kehoe (1974, Cal App 3d Dist) 42 Cal App 3d 645, 117 Cal Rptr 106, 1974 Cal App LEXIS 1256.

The procedural regulations of the California Highway Patrol governing the investigation of citizen complaints concerning conduct of personnel in that department come within the meaning of "Public Records" in Gov C § 6252, subd (d), defining terms used in the Public Records Act (Gov C §§ 6250 et seq.), and since such regulations are not themselves "records of complaints" or "investigations" within the meaning of Gov C § 6254, subd (f), and are thus not exempt from disclosure thereunder, or under Gov C § 6254, subd (k), they are required by the Public Records Act to be made available by the department for public inspection and copying. Cook v. Craig (1976, Cal App 3d Dist) 55 Cal App 3d 773, 127 Cal Rptr 712, 1976 Cal App LEXIS 1289.

In an action by a newspaper under the California Public Records Act (CPRA) (Gov C § 6250 et seq.) to compel a city to comply with its request for public access to certain records regarding investigations of citizens' complaints against the city's police department, the trial court erred in ordering disclosure in camera of the requested records and preparation of a descriptive index of the documents with reasons for exempting them from disclosure. Pen C § 832.7, establishes the confidentiality of the records, since the term "confidential," as used therein, has independent significance and, thus, the statute does not merely define procedures for disclosure of

such records in criminal and civil proceedings. And, although the CPRA procedures applied to the newspaper's request, Pen C § 832.7, is a provision of state law within the meaning of Gov C § 6254, subd. (k), which exempts from disclosure records exempted pursuant to state law. Pen C § 832.7, allows the dissemination of data regarding the number, type, and disposition of complaints, provided the individuals involved are not identified, but the newspaper's request was not narrowly drawn with that section in mind. Also, Gov C § 6259, permits an in camera examination of records to determine if they have been properly withheld, but only if the records are clearly subject to disclosure. City of Richmond v. Superior Court (1995, Cal App 1st Dist) 32 Cal App 4th 1430, 38 Cal Rptr 2d 632, 1995 Cal App LEXIS 200, rehearing denied (1995, Cal App 1st Dist) 1995 Cal App LEXIS 313, review denied City of Richmond v. Contra Costa County Superior Court (1995, Cal) 1995 Cal LEXIS 4046.

9. Pending Litigation; Discovery

In a personal injury action against a city for battery by a policeman, information relating to any suspension of the officer resulting from the alleged battery would not be discoverable, in view of the rule prohibiting the use of remedial measures undertaken after an event to prove negligence or culpability in connection with the event itself. City of Los Angeles v. Superior Court (1973, Cal App 2d Dist) 33 Cal App 3d 778, 109 Cal Rptr 365, 1973 Cal App LEXIS 932.

Gov C § 6254, subd. (b), exempting from disclosure records "pertaining to" pending litigation to which a public agency is a party, was not applicable to an order for discovery of information and documents in the possession of the Division of Industrial Safety, in personal injury and wrongful death actions arising out of the collapse of a bridge under construction. The exception in question essentially provides public agencies with the protection of the attorney-client privilege, including work product, for a limited period while there is ongoing litigation, and the discovery order did not require the disclosure of any documents or records coming within the attorney-client privilege. State of California ex rel. Division of Industrail Safety v. Superior Court (1974, Cal App 2d Dist) 43 Cal App 3d 778, 117 Cal Rptr 726, 1974 Cal App LEXIS 1355.

In a wrongful death action against a city and certain of its employees including police officers who allegedly inflicted fatal gunshot wounds on the deceased, the district attorney could not successfully resist plaintiff's efforts to discover materials in his possession under the absolute privilege established as to official information by Evi C § 1040, subd (b)(1), if disclosure is forbidden by federal or state statutes, on the ground that Gov C § 6254, subd (f), a part of the Public Records Act relating to "records of complaints to or investigations conducted by, or records of intelligence information or security procedures of" law enforcement agencies, forbids disclosure of such material. The statute, by its terms, deals only with public inspection of certain governmental documents, and the act further specifically provides in Gov C § 6260, that its provision "shall not be deemed in any manner to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery." Shepherd v. Superior Court of Alameda County (1976) 17 Cal 3d 107, 130 Cal Rptr 257, 550 P2d 161, 1976 Cal LEXIS 279.

The trial court's discovery order in a professor's defamation action against his former university employer that allowed the professor discovery of his tenure and promotion files, save and except letters of recommendation or reference to the university concerning the professor written when he was being considered for employment constituted error insofar as it failed to provide appropriate protection of the privacy interests of those who had furnished confidential information for the files after the professor's employment. Protection should have been afforded not only to those who had furnished confidential information prior to the professor's employment, but also to all those who had subsequently furnished confidential information concerning the professor's qualifications for employment, promotion, additional compensation, or termination. Since there was no compelling state purpose in maintenance of confidentiality of the contents of letters of reference in the file, the professor was entitled to the disclosure thereof, subject to protection of the confidential communications' authors by withholding their names and other identification. Courts should impose partial limitations rather than outright denial of discovery when by doing so otherwise affected constitutional rights may be preserved. Board of Trustees v. Superior Court of Santa Clara County (1981, Cal App 1st Dist) 119 Cal App 3d 516, 174 Cal Rptr 160, 1981 Cal App LEXIS 1766.

The Public Records Act (Gov C §§ 6250 et seq.) did not require disclosure of a letter a city attorney prepared for the city council, in which the attorney expressed legal opinions concerning a resident's pending appeal of a parcel map. Although the letter was a "public record" within the meaning of the act, it was a confidential communication within the attorney-client privilege. Further, Gov C § 6254, subd. (b), which exempts from disclosure records pertaining to pending litigation until the litigation is terminated, does not operate to limit the scope of the attorney-client privilege to matters pertaining to pending litigation. This subdivision pertains to all public

records, but does not address the privilege. Gov C § 6254, subd. (k), expressly exempts from disclosure matters privileged under the Evidence Code. This includes the attorney-client privilege. Thus, the city could assert the privilege without the necessity of alleging that the letter was a document pertaining to pending litigation. Roberts v. City of Palmdale (1993) 5 Cal 4th 363, 20 Cal Rptr 2d 330, 853 P2d 496, 1993 Cal LEXIS 3190.

Under the "pending litigation" exemption from the disclosure of public records (Gov C § 6254, subd. (b)), a document is protected from disclosure only if it was specifically prepared for use in litigation. Thus, records of an internal investigation conducted by a city police department into the actions of a police sergeant (focusing on whether he had improperly used city property, investigated drug use on county property while on duty as a city officer, or used his police status to obtain confidential information from a school) were not protected from disclosure to a newspaper under that exemption, even though they later became relevant to a tort claim arising from the sergeant's conduct, which was filed by a deputy sheriff two weeks after the investigation had concluded. City of Hemet v. Superior Court (1995, Cal App 4th Dist) 37 Cal App 4th 1411, 44 Cal Rptr 2d 532, 1995 Cal App LEXIS 824, rehearing denied (1995, Cal App 4th Dist) 1995 Cal App LEXIS 906, review denied City of Hemet v. Riverside County Superior Court (1995, Cal) 1995 Cal LEXIS 6986.

A city was required, under the California Public Records Act (Gov C §§ 6250 et seq.), to disclose to an individual deposition transcripts from litigation in which the city was a party. Although it asserted the depositions fell under the Civil Discovery Act, the California Public Records Act contemplates that litigation documents fall within its purview. Gov C § 6254, subd. (b), exempts records of pending litigation from disclosure only until the litigation is completed, and it is not limited to attorney-client privilege or work product matters. The depositions also related to conduct of public business subject to disclosure. Nor was the city exempt under Gov C § 6254, subd. (k) (disclosure not required for records exempted under federal or state law). Although it asserted that, under Gov C § 6254.5, subd. (b), no waiver of exemption occurred since it was compelled to take part in discovery in the underlying cases, that section references the exemption of Gov C § 6254, subd. (b), which lasts only while litigation is pending, and the cases were completed. Nor were the depositions exempt under Gov C § 6255 (exemption if public interest served by withholding record outweighs public interest served by disclosure). The cases involved claims of excessive force with police dogs, and disclosure served a public interest. There was also no evidence of invasion of the privacy rights of people involved in the cases. Finally, there was no evidence of the burden or prejudice the city faced in having to review the depositions for exemptions, nor did the city cite any provision that this was a valid ground for nondisclosure. City of Los Angeles v. Superior Court (1996, Cal App 2d Dist) 41 Cal App 4th 1083, 49 Cal Rptr 2d 35, 1996 Cal App LEXIS 23.

A claim form submitted by a minor to a public school district under the California Tort Claims Act (Gov C § 910 et seq.), where a student was sodomized with a broomstick by classmates during a hazing incident, was not protected against disclosure under exemptions in the Public Records Act (Gov C § 6254(b) or Gov C § 6255), or Ed C § 49060. Gov C § 6254(b) was primarily designed to prevent a litigant opposing the government from using the Public Records Act's disclosure provisions to accomplish earlier or greater access to records pertaining to pending litigation or tort claims than would otherwise be allowed under the rules of discovery. No unfair advantage inures against the public entity by disclosure of the mere claim form. Thus, a Claims Act form itself does not fall within the exemption of Gov C § 6254(b). In addition, the claim form is not exempt under Gov C § 6255 in that the public interest served by withholding the claims does not clearly outweigh the public interest served by disclosure of the record. Given the facts of the case, there was no reasonable expectation of privacy, nor was there conduct constituting a serious invasion of privacy. However, there is a legitimate and important competing public interest in ending school hazing practices that potentially endanger many children. Finally, the District failed to justify withholding any record under Ed C § 49060. A Claims Act claim, even if presented on behalf of a student, is not an "educational record" or "pupil record" within the purview of such exemption. Just because a litigant has chosen to sue a school does not transmogrify the Claims Act claim into such a record. Poway Unified Sch. Dist. v. Superior Court (1998, Cal App 4th Dist) 62 Cal App 4th 1496, 73 Cal Rptr 2d 777, 1998 Cal App LEXIS 318, review denied Poway Unified Sch. Dist. v. San Diego County Superior Court (1998, Cal) 1998 Cal LEXIS 5101.

A petitioner sought a writ of mandate to compel the respondent superior court to order the real party in interest, a city, to provide the petitioner with all documents relating to his arrest, pursuant to his request for the documents under the California Public Records Act (CPRA; Gov C § 6250 et seq.). The trial court denied the writ on the basis that the documents at issue were exempted from disclosure under the "pending litigation" provision found in Gov C § 6254, subd. (b). After the petition for writ of mandate was filed in this case, the city provided petitioner with all of the documents in its possession pertaining to petitioner's arrest. This did not render the matter moot, however, because the question of petitioner's entitlement to the documents in the first place remained

to be determined. Further, if the question was to be decided in petitioner's favor, he would be entitled to collect his attorney fees and costs. (Gov C § 6259, subd. (d).) In addition, the interpretation of the "pending litigation" exemption to the CPRA was a matter of public interest and continuing concern. Fairley v. Superior Court (1998, Cal App 2d Dist) 66 Cal App 4th 1414, 78 Cal Rptr 2d 648, 1998 Cal App LEXIS 823, rehearing denied (1998, Cal App 2d Dist) 67 Cal App 4th 730a, 1998 Cal App LEXIS 873.

Where a petitioner sought a writ of mandate to compel the respondent superior court to order the real party in interest, a city, to provide the petitioner with all documents relating to his arrest, pursuant to his request for the documents under the California Public Records Act (CPRA; Gov C § 6250 et seq.), the trial court erred in denying the writ on the basis that the documents at issue were exempted from disclosure under the "pending litigation" provision found in Gov C § 6254, subd. (b). "Pending litigation," which focuses on the purpose of the document, serves to protect documents created by a public entity for its own use in anticipation of litigation, which documents it reasonably has an interest in keeping to itself until litigation is finalized. In this way, a litigant opposing a public entity is prevented from taking unfair advantage of the public agency status of his or her opponent. Through this exemption, a public entity may refuse to disclose documents which it prepares for use in litigation. There appears to be no grave danger in allowing a litigant or potential litigant to obtain documents from a public agency through the CPRA, rather than waiting to file suit and obtaining the documents through formal discovery. In fact, to the extent that settlement of disputes may be aided by prompt access to documents, it would be better. Fairley v. Superior Court (1998, Cal App 2d Dist) 66 Cal App 4th 1414, 78 Cal Rptr 2d 648, 1998 Cal App LEXIS 823, rehearing denied (1998, Cal App 2d Dist) 67 Cal App 4th 730a, 1998 Cal App LEXIS 873.

A plaintiff who has filed suit against a public agency may, either directly or indirectly through a representative, file a Public Records Act request for the purpose of obtaining documents for use in the plaintiff's civil action; the documents must be produced unless one or more of the statutory exemptions apply (Gov C § 6254). Nor is a court bound by prior discovery rulings unless all of the elements of collateral estoppel are present. County of Los Angeles v. Superior Court (2000, Cal App 2d Dist) 82 Cal App 4th 819, 98 Cal Rptr 2d 564, 2000 Cal App LEXIS 607, review denied County of Los Angeles v. Los Angeles County Superior Court (2000, Cal) 2000 Cal LEXIS 8971.

A document is protected from disclosure under the pending litigation exemption only if the document was specifically prepared for use in litigation. Section 6254(b), however, is not duplicative of subdivision (k), through which CCP § 2018 (repealed) applies and protects attorney work product, but rather subdivision (b) confers upon public agencies a broader exemption from disclosure by protecting the work product generated by a public agency in anticipation of litigation. County of Los Angeles v. Superior Court (2000, Cal App 2d Dist) 82 Cal App 4th 819, 98 Cal Rptr 2d 564, 2000 Cal App LEXIS 607, review denied County of Los Angeles v. Los Angeles County Superior Court (2000, Cal) 2000 Cal LEXIS 8971.

Newspaper was not entitled to disclosure of communications between a university and two employees relating to the employees' law suits because the parties intended that their correspondence not be disclosed to third parties. Board of Trustees of California State University v. Superior Court (2005, Cal App 4th Dist) 132 Cal App 4th 889, 34 Cal Rptr 3d 82, 2005 Cal App LEXIS 1443, review denied UC Board of Trustees v. S.C. (Copley Press) (2005, Cal) 2005 Cal LEXIS 12210.

Pending litigation exemption of Gov C § 6254(b) applies to litigation-related documents, when sought by persons or entities not party to the litigation, which the parties to the litigation do not intend to be revealed outside the litigation. Board of Trustees of California State University v. Superior Court (2005, Cal App 4th Dist) 132 Cal App 4th 889, 34 Cal Rptr 3d 82, 2005 Cal App LEXIS 1443, review denied UC Board of Trustees v. S.C. (Copley Press) (2005, Cal) 2005 Cal LEXIS 12210.

Deposition transcripts are not covered by the pending litigation exemption of Gov C § 6254(b) because they are available to the public under CCP § 2025.570. Board of Trustees of California State University v. Superior Court (2005, Cal App 4th Dist) 132 Cal App 4th 889, 34 Cal Rptr 3d 82, 2005 Cal App LEXIS 1443, review denied UC Board of Trustees v. S.C. (Copley Press) (2005, Cal) 2005 Cal LEXIS 12210.

Newspaper was entitled to disclosure of deposition transcripts relating to litigation between a university and two employees. Board of Trustees of California State University v. Superior Court (2005, Cal App 4th Dist) 132 Cal App 4th 889, 34 Cal Rptr 3d 82, 2005 Cal App LEXIS 1443, review denied UC Board of Trustees v. S.C. (Copley Press) (2005, Cal) 2005 Cal LEXIS 12210.

In a case in which a card room operator challenged a city ordinance that prohibited operation of card rooms between 2:00 a.m. and 6:00 a.m. and backline betting, the trial court properly issued a discovery order protecting specified documents from disclosure on the ground that their discovery would violate the mental processes principle, which precludes judicial inquiry into the motivation or mental processes of legislators in enacting legisla-

tion. Because evidence relating to the mental processes of individual legislators was irrelevant to the judicial task, the evidence was not the proper subject of discovery requests. Sutter's Place v. Superior Court (2008, 6th Dist) 161 Cal App 4th 1370, 75 Cal Rptr 3d 9, 2008 Cal App LEXIS 541, review denied Sutter's Place, Inc. v. S.C. (City of San Jose) (2008, Cal.) 2008 Cal. LEXIS 7750.

10. Evidentiary Privileges

An agreement entered into between a school district and a private corporation, providing for performance by the corporation of research and development work and services for a fee, could not be said to require the district to violate Gov C § 6253, requiring generally that public records be open to inspection during an agency's office hours, but giving the agency the right to adopt regulations stating the procedures to be followed when making records available, where the agreement specifically permitted the disclosure of any confidential material for which there was a reasonable and proper need, on the condition that the person receiving the material agree not to publish or sell it. Moreover, Gov C § 6254, provides that nothing in the Public Records Act shall be construed to require disclosure of records exempted by provisions of the Evidence Code relating to privilege, and, under Evi C § 1060, the owner of a trade secret is privileged to refuse to disclose, and to prevent another from disclosing the secret. California Sch. Employees Assn. v. Sunnyvale Elementary Sch. Dist. (1973, Cal App 1st Dist) 36 Cal App 3d 46, 111 Cal Rptr 433, 1973 Cal App LEXIS 636.

In an action by former faculty members of a state university against the chancellor and others, predicated on their alleged denial of tenure or retention in retaliation for opposing the election of their department chairman, in which the faculty members made a strong showing in a motion for discovery that certain official information was essential to determine whether they were dismissed for exercising constitutional rights, rather than for the stated reasons, the trial court did not comply with applicable principles requiring it, on being confronted with a claim of conditional privilege for official information under Ev C § 1040, subd. (b)(2), to engage in a weighing process to determine whether the disclosure would be against the public interest, where the trial court's one-sentence and one-word orders denying the motions contained no findings that disclosure would be against the public interest. Parnes v. Superior Court (1978, Cal App 1st Dist) 81 Cal App 3d 831, 146 Cal Rptr 818, 1978 Cal App LEXIS 1627.

Financial data supplied by a waste disposal company to a city which the city relied on in granting a rate increase to the disposal company pursuant to an exclusive contract between the city and the waste disposal company for the collection of waste and garbage within the city limits, was not exempt from disclosure as a public record by Gov C § 6254, subd. (k), which exempts from disclosure records exempted from disclosure under federal or state law, including Evid. Code, §§ 1040 (privilege for official information) and 1060 (privilege to protect trade secret). There was no showing that the city would be injured by revealing the data. Moreover, under Evid. Code, § 1040, there was no showing that disclosure of the information was against the public interest; disclosure was shown to weigh in favor of the public's interest in view of the fact that the rate increase amounted to a 15 to 25 percent increase in just two years that the public—not the city—would have to pay. Further, assurances of confidentiality were insufficient in themselves to justify withholding pertinent public information from the public. Nor was a showing of egregious conduct necessary to gain access to relevant data, since in many cases knowledge of such could only be gained by access. San Gabriel Tribune v. Superior Court (1983, Cal App 2d Dist) 143 Cal App 3d 762, 192 Cal Rptr 415, 1983 Cal App LEXIS 1811.

Rejection of a county sheriff's claim for exemption from disclosure to a television and broadcasting company of records pertaining to licenses to carry concealed weapons, under Gov C § 6255, the "catch-all" exemption to the general policy of disclosure of public records under the Public Records Act (Gov C §§ 6250 et seq.), on the ground that the public interest weighed in favor of disclosure as opposed to nondisclosure, required rejection of a claim for exemption made by the sheriff with respect to the same records, under Gov C § 6254, subd. (k), exempting records, disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege, since the same weighing process is involved under both provisions. Rejection of the sheriff's claim for exemption from disclosure of the records sought, based on Evid. Code, § 1040, which creates a privilege for official information acquired in confidence, under certain circumstances, was mandated for the same reason. CBS, Inc. v. Block (1986) 42 Cal 3d 646, 230 Cal Rptr 362, 725 P2d 470, 1986 Cal LEXIS 270.

In a civil action in which the defendant sought to compel discovery of memoranda from a state agency to the Governor's office, the trial court erred in denying the motion on grounds that such memoranda were absolutely privileged. The applicable privilege was not absolute but conditional under Ev C § 1040(b)(2), which required the trial court to consider the party's need for disclosure in the interest of justice, and to determine whether that

interest was outweighed by the public interest in preserving confidentiality. The Public Records Act exemption for the Governor's correspondence (Gov C § 6254 (*l*)) did not apply to the issue whether records were privileged in pending litigation so as to defeat a party's right to discovery (Gov C § 6260). Marylander v. Superior Court (2000, Cal App 2d Dist) 81 Cal App 4th 1119, 97 Cal Rptr 2d 439, 2000 Cal App LEXIS 516.

11. Deliberative Process Exemption

Under the "deliberative process" exemption to disclosure of public records (Gov C § 6254, subd. (a)) in the Public Records Act, the key question is whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions. Even if the content of a document is purely factual, it is nonetheless exempt from public scrutiny if it is actually related to the process by which policies are formulated or inextricably intertwined with policymaking processes. Times Mirror Co. v. Superior Court (1991) 53 Cal 3d 1325, 283 Cal Rptr 893, 813 P2d 240, 1991 Cal LEXIS 3059.

12. Personnel Matters

In a prosecution of a state prison inmate for the murder of a prison employee, the trial court did not abuse its discretion in denying defendant's pretrial discovery motion for production, for impeachment purposes, of the complete personnel files of all prison staff members and the inmate files of all prisoners that each side was considering calling to testify at trial, where the prosecutor had offered to go through the files and disclose any material which might be relevant to impeachment, but defense counsel apparently rejected that offer. The blanket request failed to describe the requested information with sufficient specificity and there is a legitimate public interest in protecting against wholesale disclosure of the matter requested. People v. Gaulden (1974, Cal App 3d Dist) 36 Cal App 3d 942, 111 Cal Rptr 803, 1974 Cal App LEXIS 733.

In determining, under Gov C § 6259, whether a public official is justified in refusing to publicly disclose records of investigations of complaints against employees on the ground that the public interest in protection of personal privacy outweighs the public interest in disclosure (Gov C §§ 6254, subd. (c), and 6255), the court should consider whether there is reasonable cause to believe the charges were well founded and whether they were substantial in nature. Thus, in an action to compel disclosure of an audit report of financial activities of university employees, the trial court abused its discretion in refusing to order disclosure of portions of the audit report that indicated certain substantial charges against the employees to be well founded. American Federation of State Etc. Employees v. Regents of University of California (1978, Cal App 1st Dist) 80 Cal App 3d 913, 146 Cal Rptr 42, 1978 Cal App LEXIS 1474.

Information sought by a citizens' assistant, appointed pursuant to a city charter, relating to a complaining citizen's evaluation, by a city department, on her application for employment was not exempt from disclosure under the Public Records Act. The assistant was clothed with official dignity and prestige comparable to that of other city officials and his official acts were those of the city itself. A disclosure, such as the one sought, by one official or department to another is not a "public disclosure." In the exercise of his functions, the citizens' assistant, like all other of the city's officials and employees, was subject to the provisions of any law forbidding public, or private, disclosure of designated records or information to citizens or others. Parrott v. Rogers (1980, Cal App 1st Dist) 103 Cal App 3d 377, 163 Cal Rptr 75, 1980 Cal App LEXIS 1582.

Financial data supplied by a waste disposal company to a city which the city relied on in granting a rate increase to the company pursuant to an exclusive contract between the city and company for the collection of waste and garbage within the city limits, was not exempt from disclosure as a public record by Gov C § 6254, subd. (c), which exempts from disclosure "[p]ersonal, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." When the city publicly based its decision to permit the company to increase waste and garbage collection rates on the financial data supplied by the disposal company, the data lost its exempt status. San Gabriel Tribune v. Superior Court (1983, Cal App 2d Dist) 143 Cal App 3d 762, 192 Cal Rptr 415, 1983 Cal App LEXIS 1811.

Two letters in a city firefighter's personnel file—one letter appointing him to the position of transit administrator and the other rescinding the appointment and reinstating him as a firefighter-were not exempt from disclosure under Gov C § 6254, subd. (c), which exempts personnel files, the disclosure of which would constitute an unwarranted invasion of personal privacy, from disclosure under the Public Records Act (Gov C §§ 6250 et seq.). The letters contained no personal information. Although reclassification may be embarrassing to an individual, in California, employment contracts are public records and may not be considered exempt. (Gov C

§ 6254.8.) The letters were memoranda of the firefighter's appointment to a position and the rescission thereof; they therefore manifested his employment contract. Because the letters regarded business transactions and contained no personal information, the trial court properly ordered disclosure of the letters under the act. Braun v. City of Taft (1984, Cal App 5th Dist) 154 Cal App 3d 332, 201 Cal Rptr 654, 1984 Cal App LEXIS 1890.

The trial court did not err in ordering disclosure of the first page of a city firefighter's salary card under the Public Records Act (Gov C §§ 6250 et seq.), to show that the firefighter's employment record had been altered, although the card contained personal information (the firefighter's address, birth date, phone number, social security and credit union numbers, and salary) which was not relevant to the inquiry. The trial court could have ordered the personal information taken out before the card was made public; however, the data listed on the card was not in any way embarrassing and, although personal, was not secret. Thus, the court was within its discretion in finding that the disclosure of the face sheet of the salary card would not constitute an unwarranted invasion of personal privacy under Gov C § 6254, subd. (c), and was not exempt from disclosure thereunder. Braun v. City of Taft (1984, Cal App 5th Dist) 154 Cal App 3d 332, 201 Cal Rptr 654, 1984 Cal App LEXIS 1890.

Although Gov C § 6254, subd. (c), exempts personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of privacy, from disclosure under the Public Records Act (Gov C §§ 6250 et seq.), the Legislature, by using the word "files," did not intend to exempt the entire file and thus to prohibit the selective disclosure of certain documents from the file. In view of Gov C § 6250, which states that "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state" and the policy favoring disclosure of public records, it is unlikely that the Legislature intended such an all or nothing approach. Braun v. City of Taft (1984, Cal App 5th Dist) 154 Cal App 3d 332, 201 Cal Rptr 654, 1984 Cal App LEXIS 1890.

In cases involving the disclosure of personnel, medical, or similar files under the Public Records Act (Gov C §§ 6250 et seq.), the weighing process under Gov C § 6254, subd. (c), to determine whether the disclosure would constitute an unwarranted invasion of privacy, and thus make the records exempt from disclosure, requires a consideration of almost exactly the same elements that should be considered under Gov C § 6255, which provides that a public agency shall justify withholding any record by demonstrating that, on the facts of the particular case, the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record. Braun v. City of Taft (1984, Cal App 5th Dist) 154 Cal App 3d 332, 201 Cal Rptr 654, 1984 Cal App LEXIS 1890.

Disclosure of material from a city employee's personnel file under the Public Records Act (Gov C §§ 6250 et seq.) was not prohibited by the employee's constitutional right to privacy (Cal. Const., Art. I, § 1). The balancing test employed by the trial court in its determination that the records were not exempt under Gov C § 6254, subd. (c), because they did not constitute an unwarranted invasion of privacy, is the same one which should be utilized in weighing the right of privacy against the right of the public to oversee the actions of governmental employees. The trial court carefully considered the clash between the need for public disclosure of its business and the need of the individual to privacy when making its determination under § 6254, subd. (c); no more was required under Cal. Const., Art. I, § 1. Braun v. City of Taft (1984, Cal App 5th Dist) 154 Cal App 3d 332, 201 Cal Rptr 654, 1984 Cal App LEXIS 1890.

The Medical Board of California did not violate the Information Practices Act (CC § 1798.61(a)) or the California Public Records Act (Gov C §§ 6254(c), 6254.3(a)) by posting on its internet web site the "addresses of record" of licensed physicians, including those employed by state and local clinics and prisons who were unable to receive mail where they treated patients. Licensees were free to designate a post office box as their "address of record," in which case their home addresses would remain confidential. To the extent a licensee chose to continue using a home address as an address of record, knowing that it would be posted on the board's web site, the physician may be deemed to have waived any interest he or she may have in the confidentiality of such information. Lorig v. Medical Board (2000, Cal App 1st Dist) 78 Cal App 4th 462, 92 Cal Rptr 2d 862, 2000 Cal App LEXIS 108.

In an invasion of privacy case concerning a publisher's request for information about city employees' salaries, a preliminary injunction prohibiting the cities from disclosing salaries received by individually identifiable employees was appropriate; the California Public Records Act recognizes the right of privacy in personnel files by virtue of the exemption for such files in Gov C § 6254(c). Teamsters Local 856 v. Priceless, LLC (2003, Cal App 1st Dist) 112 Cal App 4th 1500, 5 Cal Rptr 3d 847, 2003 Cal App LEXIS 1639, review denied Teamsters Local 856 v. Priceless (2004, Cal) 2004 Cal LEXIS 523.

In an action brought by a newspaper company for disclosure of highly paid municipal employees' salaries, the employees had no legally protected privacy interest in the information because its disclosure did not violate the state constitutional right to privacy under Cal Const Art I, § 1 and was not an unwarranted invasion of personal privacy under Gov C § 6254(c); public salaries are matters of substantial public interest warranting open discussion, and in accordance with Cal Const Art I, § 3(b)(2), statutes restricting public access to information concerning the conduct of public business must be narrowly construed. Internat. Federation of Prof. & Technical Engineers, Local 21, AFL-CIO v. Superior Court (2005, Cal App 1st Dist) 128 Cal App 4th 586, 27 Cal Rptr 3d 262, 2005 Cal App LEXIS 607, aff'd International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007, Cal) 42 Cal 4th 319, 64 Cal Rptr 3d 693, 165 P 3d 488, 2007 Cal LEXIS 8918.

While public employment does not entail the loss of privacy rights, and public employees have the same financial privacy rights as anyone else after they have received their salaries, it does require a surrender of anonymity due to the fact that public employees are engaged in the people's business; the public is entitled to know the names as well as the salaries of its highly paid employees. Internat. Federation of Prof. & Technical Engineers, Local 21, AFL-CIO v. Superior Court (2005, Cal App 1st Dist) 128 Cal App 4th 586, 27 Cal Rptr 3d 262, 2005 Cal App LEXIS 607, aff'd International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007, Cal) 42 Cal 4th 319, 64 Cal Rptr 3d 693, 165 P 3d 488, 2007 Cal LEXIS 8918.

Community college district was not required under the California Public Records Act, Gov C § 6250 et seq., to disclose the personal performance goals of its former superintendent because the exemption of Gov C § 6254(c) for personnel files also applies to a public employee's personal performance goals. Versaci v. Superior Court (2005, Cal App 4th Dist) 127 Cal App 4th 805, 26 Cal Rptr 3d 92, 2005 Cal App LEXIS 385, rehearing denied (2005) 2005 Cal. App. LEXIS 640, review denied Versaci v. S.C. (Paloma Community College District) (2005) 2005 Cal. LEXIS 6523.

Where all information sought by a newspaper was obtained by the California Commission On Peace Officer Standards from peace officer personnel records within the meaning of Pen C §§ 832.7, 832.8, the requested information was exempt from disclosure under Gov C § 6254(k). California Com. on Peace Officer Standards & Training v. Superior Court (2005, Cal App 3d Dist) 128 Cal App 4th 281, 27 Cal Rptr 3d 108, 2005 Cal App LEXIS 541, rev'd Commission on Peace Officer Standards & Training v. Superior Court (2007, Cal) 42 Cal 4th 278, 64 Cal Rptr 3d 661, 165 P 3d 462, 2007 Cal LEXIS 8916.

Defendant's request for protective order to redact certain information was granted because the district court found that disclosure of the sensitive information contained in the applications to carry concealed weapons (CCW) threatened to subject judicial and law enforcement officers to heightened risk of attacks upon themselves or their families and the information could reveal the vulnerability to attack of persons who applied for a CCW. Mehl v. Blanas (2007, ED Cal) 241 FRD 653, 2007 US Dist LEXIS 25291.

California Supreme Court has rejected the notion that peace officers in general have a greater privacy interest in the amount of their salaries than that possessed by other public employees, and the public interest in disclosure is equally strong as between peace officers and other public employees. While individual peace officers, such as those working undercover, may have a legitimate interest in maintaining their anonymity, and that interest would warrant exempting their names from disclosure under the California Public Records Act, Gov C § 6250 et seq., that circumstance does not support the conclusion that peace officers as a general category have a privacy interest in their identity sufficient to render salary records confidential under Pen C § 832.8(f) whenever those records include individually identified officers. International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007, Cal) 42 Cal 4th 319, 64 Cal Rptr 3d 693, 165 P 3d 488, 2007 Cal LEXIS 8918.

In a case in which newspapers sought the disclosure of salary information of all city employees who earned $ 100,000 or more in a particular fiscal year, the information sought was not private information that happened to be collected in the records of a public entity, but, rather, it was information regarding an aspect of government operations, the disclosure of which contributed to the public's understanding and oversight of those operations by allowing interested parties to monitor the expenditure of public funds. The disclosure of such information under the California Public Records Act, Gov C § 6250 et seq., does not violate the right of privacy protected by the California Constitution. International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007, Cal) 42 Cal 4th 319, 64 Cal Rptr 3d 693, 165 P 3d 488, 2007 Cal LEXIS 8918.

In a case in which newspapers sought the disclosure of salary information of all city employees who earned $ 100,000 or more in a particular fiscal year, disclosure of the salary information would not constitute an unwar-

ranted invasion of personal privacy because salary information should not be exempt from disclosure under the California Public Records Act, Gov C § 6250 et seq. To the extent that some public employees may expect their salaries to remain a private matter, that expectation is not a reasonable one and is, accordingly, entitled to diminished weight in the balancing test that a court applies under Gov C § 6254(c), and counterbalancing any cognizable interest that public employees may have in avoiding disclosure of their salaries is the strong public interest in knowing how the government spends its money. International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007, Cal) 42 Cal 4th 319, 64 Cal Rptr 3d 693, 165 P 3d 488, 2007 Cal LEXIS 8918.

Public Records Act did not require a county to disclose an attorney report relating to the facts underlying a high ranking employee's resignation, unless and until the county waived the attorney-client privilege under Gov C § 6254 subd. (k). Moreover, a confidentiality provision in the severance agreement essentially made it a breach of contract for the county to waive the privilege. Sanchez v. County of San Bernardino (2009, 4th Dist) 176 Cal App 4th 516, 98 Cal Rptr 3d 96, 2009 Cal App LEXIS 1302, review denied Sanchez (Elizabeth) v. County of San Bernardino (2009, Cal.) 2009 Cal. LEXIS 11661.

In accordance with the narrow construction required by Cal Const Art I, § 3, subd. (b)(2), for statutory exemptions from disclosure of records under Gov C §§ 6253, 6254, subd. (k), the names and benefit amounts of county retirees are not confidential under Gov C § 31532; further, the catchall exemption in Gov C § 6255, subd. (a), did not prevent a newspaper from obtaining disclosure of county retirees' names and amounts. The newspaper could not obtain disclosure of the retirees' ages, however, because § 31532 protects this information either as part of the member's sworn statement under Gov C § 31526 or as otherwise nonpublic information. Retirement Assn. v. Sonoma County Superior Court (2011, 1st Dist) 2011 Cal App LEXIS 1124.

High school teacher could not enjoin the school district's disclosure, at the request of a parent, of an investigation report and letter of reprimand relating to a student's complaint of sexual harassment. Disclosure was not an unwarranted invasion of personal privacy under the exemption in Gov C § 6254(c) because the teacher was found to have violated the sexual harassment policy and the public had a legitimate interest in knowing whether and how the district enforced its sexual harassment policy. Marken v. Santa Monica-Malibu Unified School Dist. (2012, 2d Dist) 202 Cal App 4th 1250, 2012 Cal App LEXIS 47.

Names of police officers involved in shooting incidents were not exempt from disclosure under the California Public Records Act, Gov C §§ 6250 et seq., and Cal Const Art I, § 3(b), because officer names were not personnel information exempted by Pen C §§ 832.7(a) and 832.8, as incorporated into Gov C § 6254(k). Long Beach Police Officers Assn. v. City of Long Beach (2012, 2d Dist) 2012 Cal App LEXIS 109.

13. Federal Law

As recognized in both the Critical Infrastructure Information Act of 2002, 6 USCS § 131 through § 134, and the accompanying regulations promulgated by Department of Homeland Security, there is a distinction between submitters of critical infrastructure information and recipients of protected critical infrastructure information and the federal prohibition on disclosure of protected confidential infrastructure information applies only to recipients of protected confidential information; accordingly, in a case in which a requester sought a copy of a county's geographic information system basemap under the California Public Records Act, Gov C § 6250 et seq., the federal provisions did not apply because the county was a submitter of critical infrastructure information and did not receive protected confidential information. County of Santa Clara v. Superior Court (2009, 6th Dist) 170 Cal App 4th 1301, 89 Cal Rptr 3d 374, 2009 Cal App LEXIS 148.

Exemption provisions of Federal Freedom of Information Act, rather than Ev C § 1040 and Gov C § 6254(f), are determinative in suit against California Adult Authority on defendant's motion to withhold allegedly privileged personnel files. Kerr v. United States Dist. Court for Northern Dist. (1975, 9th Cir) 511 F2d 192, 1975 US App LEXIS 16555, aff'd (1976) 426 US 394, 96 S Ct 2119, 48 L Ed 2d 725, 1976 US LEXIS 62.

In light of the fact that the California Public Records Act (Gov C §§ 6250 et seq.) was modeled after the federal Freedom of Information Act (5 USCS § 552), Gov C § 6254, subd. (f), which provides an exemption from disclosure for records of complaints to or investigations conducted by any state or local police agency, should receive a parallel construction with 5 USCS § 552(b)(7), which exempts investigatory records compiled for law enforcement purposes, including the 1974 amendments to § 552(b)(7), which limit the investigatory records exemption and were intended to restate and clarify the original purpose of the federal act. South Coast Newspapers, Inc. v. City of Oceanside (1984, Cal App 4th Dist) 160 Cal App 3d 261, 206 Cal Rptr 527, 1984 Cal App LEXIS 2539.

14. Particular Determinations

Because the confidentiality conferred by Gov C § 31532, protected information provided by a member or on the member's behalf to a county employees' retirement system, not all information held by the county employees' retirement system that pertained to or related to the member, a trial court correctly concluded that the information, as requested by a newspaper under the California Public Records Act, Gov C §§ 6251 et seq., was not protected from disclosure by § 31532. Moreover, the county employees' retirement system had not shown the privacy interest served by nondisclosure clearly outweighed the public interest served by disclosure, and because individual county retirees were not entitled to notice and a hearing before their individual pensions were disclosed, there was no cause to remand to the trial court for a hearing on whether each individual's pension benefits should be kept confidential. Sacramento County Employees' Retirement System v. Superior Court (2011, 3d Dist) 195 Cal App 4th 440, 2011 Cal App LEXIS 569.

Because the confidentiality conferred by Gov C § 31532, protected information provided by a member or on the member's behalf to a county employees' retirement system, not all information held by the county employees' retirement system that pertained to or related to the member, a trial court correctly concluded that the information, as requested by a newspaper under the California Public Records Act, Gov C § 6251 et seq., was not protected from disclosure by § 31532. Moreover, the county employees' retirement system had not shown the privacy interest served by nondisclosure clearly outweighed the public interest served by disclosure, and because individual county retirees were not entitled to notice and a hearing before their individual pensions were disclosed, there was no cause to remand to the trial court for a hearing on whether each individual's pension benefits should be kept confidential. Scott v. Sanches (2010, ED Cal) 2010 US Dist LEXIS 130513.

In a case under the California Public Records Act, Gov C §§ 6250 et seq., in which petitioner sought the names of pharmaceutical companies and other businesses and individuals the California Department of Corrections and Rehabilitation (CDCR) contacted in order to acquire sodium thiopental, a prescription drug used by the State in executing condemned inmates, the trial court erred in concluding that the public interest favoring withholding of the information sought by petitioner outweighed that favoring disclosure, because the record contained no evidence that disclosure of the names would threaten privacy and security interests, nor a basis in fact or law upon which to apply either the conditional privilege for confidential information set forth in Ev C § 1040, or the deliberative process privilege, which the trial court considered in the weighing process mandated by Gov C §§ 6254 and 6255. CDCR failed to present any competent evidence in support of nondisclosure, and when the competing considerations were weighed independently, the public interest served by revealing the requested information clearly outweighed that favoring nondisclosure. American Civil Liberties Union of Northern California v. Superior Court (2011, 1st Dist) 2011 Cal App LEXIS 1590.

§ 6254.26. Disclosure of specified records regarding alternative investments in which public investment funds invest

(a) Notwithstanding any provision of this chapter or other law, the following records regarding alternative investments in which public investment funds invest shall not be subject to disclosure pursuant to this chapter, unless the information has already been publicly released by the keeper of the information:

(1) Due diligence materials that are proprietary to the public investment fund or the alternative investment vehicle.

(2) Quarterly and annual financial statements of alternative investment vehicles.

(3) Meeting materials of alternative investment vehicles.

(4) Records containing information regarding the portfolio positions in which alternative investment funds invest.

(5) Capital call and distribution notices.

(6) Alternative investment agreements and all related documents.

(b) Notwithstanding subdivision (a), the following information contained in records described in subdivision (a) regarding alternative investments in which public investment funds invest shall be subject to disclosure pursuant to this chapter and shall not be considered a trade secret exempt from disclosure:

(1) The name, address, and vintage year of each alternative investment vehicle.

(2) The dollar amount of the commitment made to each alternative investment vehicle by the public investment fund since inception.

(3) The dollar amount of cash contributions made by the public investment fund to each alternative investment vehicle since inception.

(4) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund from each alternative investment vehicle.

(5) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund plus remaining value of partnership assets attributable to the public investment fund's investment in each alternative investment vehicle.

(6) The net internal rate of return of each alternative investment vehicle since inception.

(7) The investment multiple of each alternative investment vehicle since inception.

(8) The dollar amount of the total management fees and costs paid on an annual fiscal yearend basis, by the public investment fund to each alternative investment vehicle.

(9) The dollar amount of cash profit received by public investment funds from each alternative investment vehicle on a fiscal year-end basis.

(c) For purposes of this section, the following definitions shall apply:

(1) "Alternative investment" means an investment in a private equity fund, venture fund, hedge fund, or absolute return fund.

(2) "Alternative investment vehicle" means the limited partnership, limited liability company, or similar legal structure through which the public investment fund invests in portfolio companies.

(3) "Portfolio positions" means individual portfolio investments made by the alternative investment vehicles.

(4) "Public investment fund" means any public pension or retirement system, and any public endowment or foundation.

Added by Stats 2005 ch 258 § 2 (SB 439), effective January 1, 2006. Amended by Stats 2006 ch 538 § 233 (SB 1852), effective January 1, 2007.

2006 Amendment: Substituted "year-end" for "yearend" after "on a fiscal" in subd (b)(9).

§ 7480. Exempted disclosures (First of two)

Nothing in this chapter shall prohibit any of the following:

(a) The dissemination of any financial information that is not identified with, or identifiable as being derived from, the financial records of a particular customer.

(b) When any police or sheriff's department or district attorney in this state certifies to a bank, credit union, or savings association in writing that a crime report has been filed that involves the alleged fraudulent use of drafts, checks, access cards, or other orders drawn upon any bank, credit union, or savings association in this state, the police or sheriff's department or district attorney, a county adult protective services office when investigating the financial abuse of an elder or dependent adult, or a long-term care ombudsman when investigating the financial abuse of an elder or dependent adult, may request a bank, credit union, or savings association to furnish, and a bank, credit union, or savings association shall furnish, a statement setting forth the following information with respect to a customer account specified by the requesting party for a period 30 days prior to, and up to 30 days following, the date of occurrence of the alleged illegal act involving the account:

(1) The number of items dishonored.

(2) The number of items paid that created overdrafts.

(3) The dollar volume of the dishonored items and items paid which created overdrafts and a statement explaining any credit arrangement between the bank, credit union, or savings association and customer to pay overdrafts.

(4) The dates and amounts of deposits and debits and the account balance on these dates.

(5) A copy of the signature card, including the signature and any addresses appearing on a customer's signature card.

(6) The date the account opened and, if applicable, the date the account closed.

(7) Surveillance photographs and video recordings of persons accessing the crime victim's financial account via an automated teller machine (ATM) or from within the financial institution for dates on which illegal acts involving the account were alleged to have occurred. Nothing in this paragraph does any of the following:

(A) Requires a financial institution to produce a photograph or video recording if it does not possess the photograph or video recording.

(B) Affects any existing civil immunities as provided in Section 47 of the Civil Code or any other provision of law.

(8) A bank, credit union, or savings association that provides the requesting party with copies of one or more complete account statements prepared in the regular course of business shall be deemed to be in compliance with paragraphs (1), (2), (3), and (4).

(c) When any police or sheriff's department or district attorney in this state certifies to a bank, credit union, or savings association in writing that a crime report has been filed that involves the alleged fraudulent use of drafts, checks, access cards, or other orders drawn upon any bank, credit union, or savings association doing business in this state, the police or sheriff's department or district attorney, a county adult protective services office when investigating the financial abuse of an elder or dependent adult, or a long-term care ombudsman when investigating the financial abuse of an elder or dependent adult, may request, with the consent of the accountholder, the bank, credit union, or savings association to furnish, and the bank, credit union, or savings association shall furnish, a statement setting forth the following information with respect to a customer account specified by the requesting party for a period 30 days prior to, and up to 30 days following, the date of occurrence of the alleged illegal act involving the account:

(1) The number of items dishonored.

(2) The number of items paid that created overdrafts.

(3) The dollar volume of the dishonored items and items paid which created overdrafts and a statement explaining any credit arrangement between the bank, credit union, or savings association and customer to pay overdrafts.

(4) The dates and amounts of deposits and debits and the account balance on these dates.

(5) A copy of the signature card, including the signature and any addresses appearing on a customer's signature card.

(6) The date the account opened and, if applicable, the date the account closed.

(7) Surveillance photographs and video recordings of persons accessing the crime victim's financial account via an automated teller machine (ATM) or from within the financial institution for dates on which illegal acts involving this account were alleged to have occurred. Nothing in this paragraph does any of the following:

(A) Requires a financial institution to produce a photograph or video recording if it does not possess the photograph or video recording.

(B) Affects any existing civil immunities as provided in Section 47 of the Civil Code or any other provision of law.

(8) A bank, credit union, or savings association doing business in this state that provides the requesting party with copies of one or more complete account statements prepared in the regular course of business shall be deemed to be in compliance with paragraphs (1), (2), (3), and (4).

(d) For purposes of subdivision (c), consent of the accountholder shall be satisfied if an accountholder provides to the financial institution and the person or entity seeking disclosure, a signed and dated statement containing all of the following:

(1) Authorization of the disclosure for the period specified in subdivision (c).

(2) The name of the agency or department to which disclosure is authorized and, if applicable, the statutory purpose for which the information is to be obtained.

(3) A description of the financial records that are authorized to be disclosed.

(e) (1) The Attorney General, a supervisory agency, the Franchise Tax Board, the State Board of Equalization, the Employment Development Department, the Controller or an inheritance tax referee when administering the Prohibition of Gift and Death Taxes (Part 8 (commencing with Section 13301) of Division 2 of the Revenue and Taxation Code), a police or sheriff's department or district attorney, a county adult protective services office when investigating the financial abuse of an elder or dependent adult, a long-term care ombudsman when investigating the financial abuse of an elder or dependent adult, a county welfare department when investigating welfare fraud, a county auditor-controller or director of finance when investigating fraud against the county, or the Department of Corporations when conducting investigations in connection with the enforcement of laws administered by the Commissioner of Corporations, from requesting of an office or branch of a financial institution, and the office or branch from responding to a request, as to whether a person has an account or accounts at that office or branch and, if so, any identifying numbers of the account or accounts.

(2) No additional information beyond that specified in this section shall be released to a county welfare department without either the accountholder's written consent or a judicial writ, search warrant, subpoena, or other judicial order.

(3) A county auditor-controller or director of finance who unlawfully discloses information he or she is authorized to request under this subdivision is guilty of the unlawful disclosure of confidential data, a misdemeanor, which shall be punishable as set forth in Section 7485.

(f) The examination by, or disclosure to, any supervisory agency of financial records that relate solely to the exercise of its supervisory function. The scope of an agency's supervisory function shall be determined by reference to statutes that grant authority to examine, audit, or require reports of financial records or financial institutions as follows:

(1) With respect to the Commissioner of Financial Institutions by reference to Division 1 (commencing with Section 99), Division 1.5 (commencing with Section 4800), Division 2 (commencing with Section 5000), Division 5 (commencing with Section 14000), Division 7 (commencing with Section 18000), Division 15 (commencing with Section 31000), and Division 16 (commencing with Section 33000), of the Financial Code.

(2) With respect to the Controller by reference to Title 10 (commencing with Section 1300) of Part 3 of the Code of Civil Procedure.

(3) With respect to the Administrator of Local Agency Security by reference to Article 2 (commencing with Section 53630) of Chapter 4 of Part 1 of Division 2 of Title 5 of the Government Code.

(g) The disclosure to the Franchise Tax Board of (1) the amount of any security interest that a financial institution has in a specified asset of a customer or (2) financial records in connection with the filing or audit of a tax return or tax information return that are required to be filed by the financial institution pursuant to Part 10 (commencing with Section 17001), Part 11 (commencing with Section 23001), or Part 18 (commencing with Section 38001), of the Revenue and Taxation Code.

(h) The disclosure to the State Board of Equalization of any of the following:

(1) The information required by Sections 6702, 6703, 8954, 8957, 30313, 30315, 32383, 32387, 38502, 38503, 40153, 40155, 41122, 41123.5, 43443, 43444.2, 44144, 45603, 45605, 46404, 46406, 50134, 50136, 55203, 55205, 60404, and 60407 of the Revenue and Taxation Code.

(2) The financial records in connection with the filing or audit of a tax return required to be filed by the financial institution pursuant to Part 1 (commencing with Section 6001), Part 2 (commencing with Section 7301), Part 3 (commencing with Section 8601), Part 13 (commencing with Section 30001), Part 14 (commencing with Section 32001), and Part 17 (commencing with Section 37001), of Division 2 of the Revenue and Taxation Code.

(3) The amount of any security interest a financial institution has in a specified asset of a customer, if the inquiry is directed to the branch or office where the interest is held.

(i) The disclosure to the Controller of the information required by Section 7853 of the Revenue and Taxation Code.

(j) The disclosure to the Employment Development Department of the amount of any security interest a financial institution has in a specified asset of a customer, if the inquiry is directed to the branch or office where the interest is held.

(k) The disclosure by a construction lender, as defined in Section 8006 of the Civil Code, to the Registrar of Contractors, of information concerning the making of progress payments to a prime contractor requested by the registrar in connection with an investigation under Section 7108.5 of the Business and Professions Code.

(l) Upon receipt of a written request from a local child support agency referring to a support order pursuant to Section 17400 of the Family Code, a financial institution shall disclose the following information concerning the account or the person named in the request, whom the local child support agency shall identify, whenever possible, by social security number:

(1) If the request states the identifying number of an account at a financial institution, the name of each owner of the account.

(2) Each account maintained by the person at the branch to which the request is delivered, and, if the branch is able to make a computerized search, each account maintained by the person at any other branch of the financial institution located in this state.

(3) For each account disclosed pursuant to paragraphs (1) and (2), the account number, current balance, street address of the branch where the account is maintained, and, to the extent available through the branch's computerized search, the name and address of any other person listed as an owner.

(4) Whenever the request prohibits the disclosure, a financial institution shall not disclose either the request or its response, to an owner of the account or to any other person, except the officers and employees of the financial institution who are involved in responding to the request and to attorneys, employees of the local child support agencies, auditors, and regulatory authorities who have a need to know in order to perform their duties, and except as disclosure may be required by legal process.

(5) No financial institution, or any officer, employee, or agent thereof, shall be liable to any person for (A) disclosing information in response to a request pursuant to this subdivision, (B) failing to notify the owner of an account, or complying with a request under this paragraph not to disclose to the owner, the request or disclosure under this subdivision, or (C) failing to discover any account owned by the person named in the request pursuant to a computerized search of the records of the financial institution.

(6) The local child support agency may request information pursuant to this subdivision only when the local child support agency has received at least one of the following types of physical evidence:

(A) Any of the following, dated within the last three years:

(i) Form 599.

(ii) Form 1099.

(iii) A bank statement.

(iv) A check.

(v) A bank passbook.

(vi) A deposit slip.

(vii) A copy of a federal or state income tax return.

(viii) A debit or credit advice.

(ix) Correspondence that identifies the child support obligor by name, the bank, and the account number.

(x) Correspondence that identifies the child support obligor by name, the bank, and the banking services related to the account of the obligor.

(xi) An asset identification report from a federal agency.

(B) A sworn declaration of the custodial parent during the 12 months immediately preceding the request that the person named in the request has had or may have had an account at an office or branch of the financial institution to which the request is made.

(7) Information obtained by a local child support agency pursuant to this subdivision shall be used only for purposes that are directly connected with the administration of the duties of the local child support agency pursuant to Section 17400 of the Family Code.

(m) (1) As provided in paragraph (1) of subdivision (c) of Section 666 of Title 42 of the United States Code, upon receipt of an administrative subpoena on the current federally approved interstate child support enforcement form, as approved by the federal Office of Management and Budget, a financial institution shall provide the information or documents requested by the administrative subpoena.

(2) The administrative subpoena shall refer to the current federal Office of Management and Budget control number and be signed by a person who states that he or she is an authorized agent of a state or county agency responsible for implementing the child support enforcement program set forth in Part D (commencing with Section 651) of Subchapter IV of Chapter 7 of Title 42 of the United States Code. A financial institution may rely on the statements made in the subpoena and has no duty to inquire into the truth of any statement in the subpoena.

(3) If the person who signs the administrative subpoena directs a financial institution in writing not to disclose either the subpoena or its response to any owner of an account covered by the subpoena, the financial institution shall not disclose the subpoena or its response to the owner.

(4) No financial institution, or any officer, employee, or agent thereof, shall be liable to any person for (A) disclosing information or providing documents in response to a subpoena pursuant to this subdivision, (B) failing to notify any owner of an account covered by the subpoena or complying with a request not to disclose to the owner, the subpoena or disclosure under this subdivision, or (C) failing to discover any account owned by the person named in the subpoena pursuant to a computerized search of the records of the financial institution.

(n) The dissemination of financial information and records pursuant to any of the following:

(1) Compliance by a financial institution with the requirements of Section 2892 of the Probate Code.

(2) Compliance by a financial institution with the requirements of Section 2893 of the Probate Code.

(3) An order by a judge upon a written ex parte application by a peace officer showing specific and articulable facts that there are reasonable grounds to believe that the records or information sought are relevant and material to an ongoing investigation of a felony violation of Section 186.10 or of any felony subject to the enhancement set forth in Section 186.11.

(A) The ex parte application shall specify with particularity the records to be produced, which shall be only those of the individual or individuals who are the subject of the criminal investigation.

(B) The ex parte application and any subsequent judicial order shall be open to the public as a judicial record unless ordered sealed by the court, for a period of 60 days. The sealing of these records may be extended for 60-day periods upon a showing to the court that it is necessary for the continuance of the investigation. Sixty-day extensions may continue for up to one year or until termination of the investigation of the individual or individuals, whichever is sooner.

(C) The records ordered to be produced shall be returned to the peace officer applicant or his or her designee within a reasonable time period after service of the order upon the financial institution.

(D) Nothing in this subdivision shall preclude the financial institution from notifying a customer of the receipt of the order for production of records unless a court orders the financial institution to withhold notification to the customer upon a finding that the notice would impede the investigation.

(E) Where a court has made an order pursuant to this paragraph to withhold notification to the customer under this paragraph, the peace officer or law enforcement agency who obtained the financial information shall notify the customer by delivering a copy of the ex parte order to the customer within 10 days of the termination of the investigation.

(4) An order by a judge issued pursuant to subdivision (c) of Section 532f of the Penal Code.

(5) No financial institution, or any officer, employee, or agent thereof, shall be liable to any person for any of the following:

(A) Disclosing information to a probate court pursuant to Sections 2892 and 2893.

(B) Disclosing information in response to a court order pursuant to paragraph (3).

(C) Complying with a court order under this subdivision not to disclose to the customer, the order, or the dissemination of information pursuant to the court order.

(o) Disclosure by a financial institution to a peace officer, as defined in Section 830.1 of the Penal Code, pursuant to the following:

(1) Paragraph (1) of subdivision (a) of Section 1748.95 of the Civil Code, provided that the financial institution has first complied with the requirements of paragraph (2) of subdivision (a) and subdivision (b) of Section 1748.95 of the Civil Code.

(2) Paragraph (1) of subdivision (a) of Section 4002 of the Financial Code, provided that the financial institution has first complied with the requirements of paragraph (2) of subdivision (a) and subdivision (b) of Section 4002 of the Financial Code.

(3) Paragraph (1) of subdivision (a) of Section 22470 of the Financial Code, provided that any financial institution that is a finance lender has first complied with the requirements of paragraph (2) of subdivision (a) and subdivision (b) of Section 22470 of the Financial Code.

(p) When the governing board of the Public Employees' Retirement System or the State Teachers' Retirement System certifies in writing to a financial institution that a benefit recipient has died and that transfers to the benefit recipient's account at the financial institution from the retirement system occurred after the benefit recipient's date of death, the financial institution shall furnish the retirement system with the name and address of any coowner, cosigner, or any other person who had access to the funds in the account following the date of the benefit recipient's death, or if the account has been closed, the name and address of the person who closed the account.

(q) When the retirement board of a retirement system established under the County Employees Retirement Law of 1937 certifies in writing to a financial institution that a retired member or the beneficiary of a retired member has died and that transfers to the account of the retired member or beneficiary of a retired member at the financial institution from the retirement system occurred after the date of death of the retired member or beneficiary of a retired member, the financial institution shall furnish the retirement system with the name and address of any coowner, cosigner, or any other person who had access to the funds in the account following the date of death of the retired member or beneficiary of a retired member, or if the account has been closed, the name and address of the person who closed the account.

(r) When the Franchise Tax Board certifies in writing to a financial institution that (1) a taxpayer filed a tax return that authorized a direct deposit refund with an incorrect financial institution account or routing number that resulted in all or a portion of the refund not being received, directly or indirectly, by the taxpayer; (2) the direct deposit refund was not returned to the Franchise Tax Board; and (3) the refund was deposited directly on a specified date into the account of an accountholder of the financial institution who was not entitled to receive the refund, then the financial institution shall furnish to the Franchise Tax Board the name and address of any coowner, cosigner, or any other person who had access to the funds in the account following the date of direct deposit refund, or if the account has been closed, the name and address of the person who closed the account.

Added Stats 1976 ch 1320 § 5. Amended Stats 1977 ch 1164 § 4; Stats 1978 ch 1347 § 8, operative January 1, 1979; Stats 1979 ch 1021 § 1; Stats 1981 ch 74 § 1, effective June 21, 1981; Stats 1982 ch 1589 § 1; Stats 1984 ch 1448 § 1; Stats 1985 ch 591 § 1; Stats 1986 ch 698 § 6; Stats 1987 ch 1453 § 7; Stats 1992 ch 847 § 2 (AB 2621), effective September 22, 1992; Stats 1993 ch 677 § 1 (AB 823); Stats 1995 ch 555 § 1 (SB 718); Stats 1996 ch 1064 § 782 (AB 3351), ch 1087 § 1 (SB 1827), operative until July 1, 1997, ch 1087 § 1.5 (SB 1827), operative July 1, 1997; Stats 1997 ch 170 § 1 (AB 433); Stats 1998 ch 757 § 3 (AB 976), ch 771 § 2 (AB 2452); Stats 2000 ch 808 § 96 (AB 1358), effective September 28, 2000; Stats 2001 ch 493 § 4 (SB 125), ch 563 § 3.5 (AB 1286); Stats 2004 ch 506 § 1 (AB 3094), ch 629 § 3 (AB 1776); Stats 2005 ch 140 (SB 1018) § 2, operative January 1, 2007; 2006 ch 705 § 1 (AB 618); Stats 2008 ch 234 § 1 (AB 2249), effective January 1, 2009, operative until

January 1, 2013; Stats 2010 ch 697 § 29 (SB 189), effective January 1, 2011, operative July 1, 2012 (ch 697 prevails), ch 709 § 1 (SB 1062); Stats 2011 ch 304 § 2 (SB 428), effective January 1, 2012.

Editor's Notes—Rev & Tax C §§ 37001 et seq., referred to in this section, was repealed by Stats 1976 ch 1333 § 18. Rev & Tax C § 44144, referred to in this section, was repealed by Stats 1987 ch 163 § 3. Sections 186.10 and 186.11, referred to in subd (n)(3), are Pen C §§ 186.10 and 186.11.

Amendments

1977 Amendment: Added "and Division 13 (commencing with Section 31000)" in subd (d)(1).

1978 Amendment: Substituted **(1)** ", Division 15 (commencing with Section 31000), and Division 16 (commencing with Section 33000)" for "and Division 13 (commencing with Section 31000)" in subd (d)(1); and **(2)** "Loan" for "Loans" in subd (d)(2).

1979 Amendment: Added **(1)** "or credit union" after "bank" wherever it appears in the introductory clause of subd (b) and in subd (b)(iii); and **(2)** "the Employment Development Department, the Controller or an inheritance tax referee when administering the Inheritance Tax Law (Part 8 (commencing with Section 13301), Division 2, Revenue and Taxation Code)," in subd (c).

1981 Amendment: Substituted ", credit union, or savings and loan association" for "or credit union" wherever it appears in subd (b).

1982 Amendment: (1) Substituted "Controller" for "State Controller" in subds (d)(4) and (g); **(2)** substituted "; or" for the period at the end of subd (f)(2); **(3)** added subd (f)(3); and **(4)** added subd (h).

1984 Amendment: (1) Redesignated former subds (b)(i)–(b)(vi) to be subds (b)(1)–(b)(6); and **(2)** amended subd (c) by adding **(a)** "or a county welfare department when investigating welfare fraud" in the first paragraph; and **(b)** the second paragraph.

1985 Amendment: Amended subd (f)(1) by **(1)** adding reference to Sections 6703, 8957, 30315, 32387, 40155, 41123.5, 43444.2, and 44144; and **(2)** deleting "and" after "38502,".

1986 Amendment: Added ", or the Department of Corporations when conducting investigations in connection with the enforcement of laws administered by the Commissioner of Corporations," in subd (c).

1987 Amendment: In addition to making technical changes, **(1)** added "a supervisory agency," after "Attorney General," in the first paragraph of subd (c); **(2)** substituted subd (f)(2) for former subd (f)(2) which read: "(2) The financial records in connection with the filing or audit of a tax return required to be filed by the financial institution pursuant to Parts 1, 2, 3, 13, 14, and 17 of the Revenue and Taxation Code."; and **(3)** added subd (i).

1992 Amendment: (1) Substituted "these" for "such" after "account balance on" in subd (b)(4); **(2)** substituted "the" for "such" after "identifying numbers of" in the first paragraph of subd (c); **(3)** substituted "Part 10 (commencing with Section 17001), 11 (commencing with Section 23001), or 18 (commencing with Section 38001)" for "Part 10, 11, or 18" in subd (e); and **(4)** added subd (j).

1993 Amendment: (1) Substituted "the" for "such" before "police and sheriff's" the second time it appears in the introductory clause of subd (b); **(2)** deleted "such" after "responding to" in subd (c); and **(3)** amended the fourth paragraph of subd (j) by adding **(a)** "at least one of the following types of physical evidence:"; **(b)** subd (j)(3)(A); and **(c)** subdivision designation (j)(3)(B).

1995 Amendment: Substituted **(1)** "Prohibition of Gift and Death Taxes" for "Inheritance Tax Law" in the first paragraph of subd (c); and **(2)** "38503, 40153, 40155, 41122, 41123.5, 43443, 43444.2, 44144, 45603, 45605, 46406, 50134, 50136, and 55205" for "40153, 40155, 41123.5, 43444.2, and 44144" in subd (f)(1).

1996 Amendment (§ 1): Substituted "46404, 46406, 50134, 50136, 55203, 55205, 60404, and 60407" for "46406, 50134, 50136, and 55205" in subd (f)(1).

1996 Amendment (§ 1.5): (1) Deleted "and loan" after "credit union, or savings" wherever it appears in the introductory clause of subd (b) and in subd (b)(3); **(2)** amended subd (d)(1) by **(a)** substituting "Commissioner of Financial Institutions" for "Superintendent of Banks"; and **(b)** adding "Division 1.5 (commencing with Section 4800), Division 2 (commencing with Section 5000), Division 5 (commencing with Section 14000), Division 7 (commencing with Section 18000),"; **(3)** deleted former subds (d)(2) and (d)(3) which read: "(2) With respect to the Department of Savings and Loan by reference to Division 2 (commencing with Section 5000) of the Financial Code.""(3) With respect to the Corporations Commissioner by reference to Division 5 (commencing with Section 14000) and Division 7 (commencing with Section 18000) of the Financial Code."; and **(4)** redesignated former subds (d)(4) and (d)(5) to be subds (d)(2) and (d)(3).

1997 Amendment: (1) Amended subd (c) by **(a)** adding "a county auditor-controller or director of finance when investigating fraud against the county,"; and **(b)** the last paragraph; and **(2)** "Part" wherever it appears in subds (e) and (f)(2).

1998 Amendment: In addition to making technical changes, **(1)** Substituted "that" for "which" in subd (a); **(2)** amended subd (b) by **(a)** substituting "furnish" for "supply" after "savings association shall"; **(b)** adding the comma after "30 days following" in the introductory clause; **(c)** adding "card, including the signature" in subd (b)(5); and **(d)** adding subd (b)(7); **(3)** added subdivision designations (c)(1)–(c)(3); **(4)** added subdivision designations (j)(4)–(j)(7); and **(5)** added subds (k) and (*l*). (As amended Stats 1998 ch 771, compared to the section as it read prior to 1998. This section was also amended by an earlier chapter, ch 757. See Gov C § 9605.)

2000 Amendment: Amended subd (j) by substituting **(1)** "local child support agency" for "district attorney" both times it appears in the introductory clause and in subds (j)(6) and (j)(7); **(2)** substituting "Section 17400 of the Family Code" for "Section 11475.1 of the Welfare and Institutions Code" in the introductory clause and in subd (j)(7); and **(3)** adding "employees of the local child support agencies," in subd (j)(4).

2001 Amendment: (1) Substituted "any of the following:" and subds (*l*)(1)–(*l*)(3) for the former first sentence of subd (*l*) which read: "The dissemination of financial information and records pursuant to an order by a judge upon a written ex parte application by a peace officer showing specific and articulable facts that there are reasonable grounds to believe that the records or information sought are relevant and material to an ongoing investigation of a felony violation of Section 186.10 or of any felony subject to the enhancement set forth in Section 186.11."; **(2)** added subdivision designations (*l*)(3)(A)–(*l*)(3)(E); **(3)** added "pursuant to this paragraph" in subd (*l*)(3)(E); and **(4)** substituted subd (*l*)(4) for the former last paragraph which read: "No financial institution, or any officer, employee, or agent thereof, shall be liable to any person for (1) disclosing information in response to an order pursuant to this subdivision, or (2) complying with an order under this subdivision not to disclose to the customer, the order, or the dissemination of information pursuant to the order."

2004 Amendment: (1) Added subds (c), (d), and (p); **(2)** redesignated former subds (c)–(m) to be subds (e)–(o); **(3)** substituted "with" for "within" in subd (*l*)(7); and **(4)** added subds (p) and (q). (As amended Stats 2004 ch 629, compared to the section as it read prior to 2004. This section was amended by an earlier chapter, ch 506. See Gov C § 9605.)

2005 Amendment: (1) Added "a county adult protective services office when investigating the financial abuse of an elder or dependent adult, a long-term care ombudsman when investigating the financial abuse of an elder or dependent adult," to subd (e)(1); and **(2)** added subd (r).

2006 Amendment: (1) Substituting "shall prohibit" for "prohibits" in the introductory clause; **(2)** added "access cards," after "use of checks, drafts" in subds (b) and (c); **(3)** added subd (b)(7); **(4)** redesignated former subd (b)(7) to be subd (b)(8); **(5)** added subd (c)(7); **(6)** redesignated former subd (c)(7) to be subd (c)(8); **(7)** deleted "a county protective services office when investigating the financial abuse of an elder or dependent adult, a long-term care ombudsman when investigating the financial abuse of an elder or dependent adult," after "or district attorney," in subd (e)(1); and **(8)** added "with" after "the retirement system" in subd (q).

2008 Amendment: (1) Added ", a county adult protective services office when investigating the financial abuse of an elder or dependent adult, or a long-term care ombudsman when investigating the financial abuse of an elder or dependent adult," in the introductory clause of subds (b), (c), and in subd (e)(1); **(2)** substituted "requesting party" for "police or sheriff's department or district attorney" near the end of the introductory clause of subds (b) and (c); and **(3)** added subd (r).

2010 Amendment: Substituted "Section 8006" for "Section 3087" in subd (k).

2011 Amendment: (1) Added subd (n)(4); and **(2)** redesignated former subd (n)(4) to be subd (n)(5).

Annotations:

Search and seizure of bank records pertaining to customer as violation of customer's rights under state law, 33 ALR5th 453.

NOTES OF DECISIONS

1. Constitutionality

Gov C § 7480, permitting police access to bank records without probable cause to arrest, does not violate the guaranty of privacy contained in Cal Const Art I, § 1. The right to privacy does not apply when the customer is using a bank account to defraud the bank. People v. Muchmore (1979, Cal App 4th Dist) 92 Cal App 3d 32, 154 Cal Rptr 488, 1979 Cal App LEXIS 1651.

2. Notice

The police were not obligated to notify a bank customer, who had passed a number of bad checks, at the same time they sent a request to his bank for information on his account, as provided by Gov C § 7480, subd. (b). The police had evidence the customer was attempting to defraud; the challenged request was not a sweeping exploratory invasion into the customer's finances, but rather the scope of the inquiry was restricted by statute and concerned only those records associated with the purported fraudulent acts; and the request itself was part of an ongoing criminal investigation in which there was already enough information for a crime report to have been filed. Under the circumstances, the customer's interest in protecting his privacy was outweighed by the bank's self-interest in protecting itself from wrong-doing and society's interest in investigating and apprehending criminals. Thus, no advance notification was required. People v. Muchmore (1979, Cal App 4th Dist) 92 Cal App 3d 32, 154 Cal Rptr 488, 1979 Cal App LEXIS 1651.

§ 7480. Exempted disclosures (Second of two)

Nothing in this chapter shall prohibit any of the following:

(a) The dissemination of any financial information that is not identified with, or identifiable as being derived from, the financial records of a particular customer.

(b) When any police or sheriff's department or district attorney in this state certifies to a bank, credit union, or savings association in writing that a crime report has been filed that involves the alleged fraudulent use of drafts, checks, access cards, or other orders drawn upon any bank, credit union, or savings association in this state, the police or sheriff's department or district attorney, a county adult protective services office when investigating the financial abuse of an elder or dependent adult, or a long-term care ombudsman when investigating the financial abuse of an elder or dependent adult, may request a bank, credit union, or savings association to furnish, and a bank, credit union, or savings association shall furnish, a statement setting forth the following information with respect to a customer account specified by the requesting party for a period 30 days prior to, and up to 30 days following, the date of occurrence of the alleged illegal act involving the account:

(1) The number of items dishonored.

(2) The number of items paid that created overdrafts.

(3) The dollar volume of the dishonored items and items paid which created overdrafts and a statement explaining any credit arrangement between the bank, credit union, or savings association and customer to pay overdrafts.

(4) The dates and amounts of deposits and debits and the account balance on these dates.

(5) A copy of the signature card, including the signature and any addresses appearing on a customer's signature card.

(6) The date the account opened and, if applicable, the date the account closed.

(7) Surveillance photographs and video recordings of persons accessing the crime victim's financial account via an automated teller machine (ATM) or from within the financial institution for dates on which illegal acts involving the account were alleged to have occurred. Nothing in this paragraph does any of the following:

(A) Requires a financial institution to produce a photograph or video recording if it does not possess the photograph or video recording.

(B) Affects any existing civil immunities as provided in Section 47 of the Civil Code or any other provision of law.

(8) A bank, credit union, or savings association that provides the requesting party with copies of one or more complete account statements prepared in the regular course of business shall be deemed to be in compliance with paragraphs (1), (2), (3), and (4).

(c) When any police or sheriff's department or district attorney in this state certifies to a bank, credit union, or savings association in writing that a crime report has been filed that involves the alleged fraudulent use of drafts, checks, access cards, or other orders drawn upon any bank, credit union, or savings association doing business in this state, the police or sheriff's department or district attorney, a county adult protective services office when investigating the financial abuse of an elder or dependent

adult, or a long-term care ombudsman when investigating the financial abuse of an elder or dependent adult, may request, with the consent of the accountholder, the bank, credit union, or savings association to furnish, and the bank, credit union, or savings association shall furnish, a statement setting forth the following information with respect to a customer account specified by the requesting party for a period 30 days prior to, and up to 30 days following, the date of occurrence of the alleged illegal act involving the account:

(1) The number of items dishonored.

(2) The number of items paid that created overdrafts.

(3) The dollar volume of the dishonored items and items paid which created overdrafts and a statement explaining any credit arrangement between the bank, credit union, or savings association and customer to pay overdrafts.

(4) The dates and amounts of deposits and debits and the account balance on these dates.

(5) A copy of the signature card, including the signature and any addresses appearing on a customer's signature card.

(6) The date the account opened and, if applicable, the date the account closed.

(7) Surveillance photographs and video recordings of persons accessing the crime victim's financial account via an automated teller machine (ATM) or from within the financial institution for dates on which illegal acts involving this account were alleged to have occurred. Nothing in this paragraph does any of the following:

(A) Requires a financial institution to produce a photograph or video recording if it does not possess the photograph or video recording.

(B) Affects any existing civil immunities as provided in Section 47 of the Civil Code or any other provision of law.

(8) A bank, credit union, or savings association doing business in this state that provides the requesting party with copies of one or more complete account statements prepared in the regular course of business shall be deemed to be in compliance with paragraphs (1), (2), (3), and (4).

(d) For purposes of subdivision (c), consent of the accountholder shall be satisfied if an accountholder provides to the financial institution and the person or entity seeking disclosure, a signed and dated statement containing all of the following:

(1) Authorization of the disclosure for the period specified in subdivision (c).

(2) The name of the agency or department to which disclosure is authorized and, if applicable, the statutory purpose for which the information is to be obtained.

(3) A description of the financial records that are authorized to be disclosed.

(e) (1) The Attorney General, a supervisory agency, the Franchise Tax Board, the State Board of Equalization, the Employment Development Department, the Controller or an inheritance tax referee when administering the Prohibition of Gift and Death Taxes (Part 8 (commencing with Section 13301) of Division 2 of the Revenue and Taxation Code), a police or sheriff's department or district attorney, a county adult protective services office when investigating the financial abuse of an elder or dependent adult, a long-term care ombudsman when investigating the financial abuse of an elder or dependent adult, a county welfare department when investigating welfare fraud, a county auditor-controller or director of finance when investigating fraud against the county, or the Department of Corporations when conducting investigations in connection with the enforcement of laws administered by the Commissioner of Corporations, from requesting of an office or branch of a financial institution, and the office or branch from responding to a request, as to whether a person has an account or accounts at that office or branch and, if so, any identifying numbers of the account or accounts.

(2) No additional information beyond that specified in this section shall be released to a county welfare department without either the accountholder's written consent or a judicial writ, search warrant, subpoena, or other judicial order.

(3) A county auditor-controller or director of finance who unlawfully discloses information he or she is authorized to request under this subdivision is guilty of the unlawful disclosure of confidential data, a misdemeanor, which shall be punishable as set forth in Section 7485.

(f) The examination by, or disclosure to, any supervisory agency of financial records that relate solely to the exercise of its supervisory function. The scope of an agency's supervisory function shall be determined by reference to statutes that grant authority to examine, audit, or require reports of financial records or financial institutions as follows:

(1) With respect to the Commissioner of Financial Institutions by reference to Division 1 (commencing with Section 99), Division 1.5 (commencing with Section 4800), Division 2 (commencing with Section 5000), Division 5 (commencing with Section 14000), Division 7 (commencing with Section 18000), Division 15 (commencing with Section 31000), and Division 16 (commencing with Section 33000), of the Financial Code.

(2) With respect to the Controller by reference to Title 10 (commencing with Section 1300) of Part 3 of the Code of Civil Procedure.

(3) With respect to the Administrator of Local Agency Security by reference to Article 2 (commencing with Section 53630) of Chapter 4 of Part 1 of Division 2 of Title 5 of the Government Code.

(g) The disclosure to the Franchise Tax Board of (1) the amount of any security interest that a financial institution has in a specified asset of a customer or (2) financial records in connection with the filing or audit of a tax return or tax information return that are required to be filed by the financial institution pursuant to Part 10 (commencing with Section 17001), Part 11 (commencing with Section 23001), or Part 18 (commencing with Section 38001), of the Revenue and Taxation Code.

(h) The disclosure to the State Board of Equalization of any of the following:

(1) The information required by Sections 6702, 6703, 8954, 8957, 30313, 30315, 32383, 32387, 38502, 38503, 40153, 40155, 41122, 41123.5, 43443, 43444.2, 44144, 45603, 45605, 46404, 46406, 50134, 50136, 55203, 55205, 60404, and 60407 of the Revenue and Taxation Code.

(2) The financial records in connection with the filing or audit of a tax return required to be filed by the financial institution pursuant to Part 1 (commencing with Section 6001), Part 2 (commencing with Section 7301), Part 3 (commencing with Section 8601), Part 13 (commencing with Section 30001), Part 14 (commencing with Section 32001), and Part 17 (commencing with Section 37001), of Division 2 of the Revenue and Taxation Code.

(3) The amount of any security interest a financial institution has in a specified asset of a customer, if the inquiry is directed to the branch or office where the interest is held.

(i) The disclosure to the Controller of the information required by Section 7853 of the Revenue and Taxation Code.

(j) The disclosure to the Employment Development Department of the amount of any security interest a financial institution has in a specified asset of a customer, if the inquiry is directed to the branch or office where the interest is held.

(k) The disclosure by a construction lender, as defined in Section 8006 of the Civil Code, to the Registrar of Contractors, of information concerning the making of progress payments to a prime contractor requested by the registrar in connection with an investigation under Section 7108.5 of the Business and Professions Code.

(l) Upon receipt of a written request from a local child support agency referring to a support order pursuant to Section 17400 of the Family Code, a financial institution shall disclose the following information concerning the account or the person named in the request, whom the local child support agency shall identify, whenever possible, by social security number:

(1) If the request states the identifying number of an account at a financial institution, the name of each owner of the account.

(2) Each account maintained by the person at the branch to which the request is delivered, and, if the branch is able to make a computerized search, each account maintained by the person at any other branch of the financial institution located in this state.

(3) For each account disclosed pursuant to paragraphs (1) and (2), the account number, current balance, street address of the branch where the account is maintained, and, to the extent available through the branch's computerized search, the name and address of any other person listed as an owner.

(4) Whenever the request prohibits the disclosure, a financial institution shall not disclose either the request or its response, to an owner of the account or to any other person, except the officers and employees of the financial institution who are involved in responding to the request and to attorneys, employees of the local child support agencies, auditors, and regulatory authorities who have a need to know in order to perform their duties, and except as disclosure may be required by legal process.

(5) No financial institution, or any officer, employee, or agent thereof, shall be liable to any person for (A) disclosing information in response to a request pursuant to this subdivision, (B) failing to notify the owner of an account, or complying with a request under this paragraph not to disclose to the owner, the request or disclosure under this subdivision, or (C) failing to discover any account owned by the person named in the request pursuant to a computerized search of the records of the financial institution.

(6) The local child support agency may request information pursuant to this subdivision only when the local child support agency has received at least one of the following types of physical evidence:

(A) Any of the following, dated within the last three years:

(i) Form 599.

(ii) Form 1099.

(iii) A bank statement.

(iv) A check.

(v) A bank passbook.

(vi) A deposit slip.

(vii) A copy of a federal or state income tax return.

(viii) A debit or credit advice.

(ix) Correspondence that identifies the child support obligor by name, the bank, and the account number.

(x) Correspondence that identifies the child support obligor by name, the bank, and the banking services related to the account of the obligor.

(xi) An asset identification report from a federal agency.

(B) A sworn declaration of the custodial parent during the 12 months immediately preceding the request that the person named in the request has had or may have had an account at an office or branch of the financial institution to which the request is made.

(7) Information obtained by a local child support agency pursuant to this subdivision shall be used only for purposes that are directly connected with the administration of the duties of the local child support agency pursuant to Section 17400 of the Family Code.

(m) (1) As provided in paragraph (1) of subdivision (c) of Section 666 of Title 42 of the United States Code, upon receipt of an administrative subpoena on the current federally approved interstate child support enforcement form, as approved by the federal Office of Management and Budget, a financial institution shall provide the information or documents requested by the administrative subpoena.

(2) The administrative subpoena shall refer to the current federal Office of Management and Budget control number and be signed by a person who states that he or she is an authorized agent of a state or county agency responsible for implementing the child support enforcement program set forth in Part D (commencing with Section 651) of Subchapter IV of Chapter 7 of Title 42 of the United States Code. A financial institution may rely on the statements made in the subpoena and has no duty to inquire into the truth of any statement in the subpoena.

(3) If the person who signs the administrative subpoena directs a financial institution in writing not to disclose either the subpoena or its response to any owner of an account covered by the subpoena, the financial institution shall not disclose the subpoena or its response to the owner.

(4) No financial institution, or any officer, employee, or agent thereof, shall be liable to any person for (A) disclosing information or providing documents in response to a subpoena pursuant to this subdivision, (B) failing to notify any owner of an account covered by the subpoena or complying with a request not to disclose to the owner, the subpoena or disclosure under this subdivision, or (C) failing to

discover any account owned by the person named in the subpoena pursuant to a computerized search of the records of the financial institution.

(n) The dissemination of financial information and records pursuant to any of the following:

(1) Compliance by a financial institution with the requirements of Section 2892 of the Probate Code.

(2) Compliance by a financial institution with the requirements of Section 2893 of the Probate Code.

(3) An order by a judge upon a written ex parte application by a peace officer showing specific and articulable facts that there are reasonable grounds to believe that the records or information sought are relevant and material to an ongoing investigation of a felony violation of Section 186.10 or of any felony subject to the enhancement set forth in Section 186.11.

(A) The ex parte application shall specify with particularity the records to be produced, which shall be only those of the individual or individuals who are the subject of the criminal investigation.

(B) The ex parte application and any subsequent judicial order shall be open to the public as a judicial record unless ordered sealed by the court, for a period of 60 days. The sealing of these records may be extended for 60-day periods upon a showing to the court that it is necessary for the continuance of the investigation. Sixty-day extensions may continue for up to one year or until termination of the investigation of the individual or individuals, whichever is sooner.

(C) The records ordered to be produced shall be returned to the peace officer applicant or his or her designee within a reasonable time period after service of the order upon the financial institution.

(D) Nothing in this subdivision shall preclude the financial institution from notifying a customer of the receipt of the order for production of records unless a court orders the financial institution to withhold notification to the customer upon a finding that the notice would impede the investigation.

(E) Where a court has made an order pursuant to this paragraph to withhold notification to the customer under this paragraph, the peace officer or law enforcement agency who obtained the financial information shall notify the customer by delivering a copy of the ex parte order to the customer within 10 days of the termination of the investigation.

(4) An order by a judge issued pursuant to subdivision (c) of Section 532f of the Penal Code.

(5) No financial institution, or any officer, employee, or agent thereof, shall be liable to any person for any of the following:

(A) Disclosing information to a probate court pursuant to Sections 2892 and 2893.

(B) Disclosing information in response to a court order pursuant to paragraph (3).

(C) Complying with a court order under this subdivision not to disclose to the customer, the order, or the dissemination of information pursuant to the court order.

(o) Disclosure by a financial institution to a peace officer, as defined in Section 830.1 of the Penal Code, pursuant to the following:

(1) Paragraph (1) of subdivision (a) of Section 1748.95 of the Civil Code, provided that the financial institution has first complied with the requirements of paragraph (2) of subdivision (a) and subdivision (b) of Section 1748.95 of the Civil Code.

(2) Paragraph (1) of subdivision (a) of Section 4002 of the Financial Code, provided that the financial institution has first complied with the requirements of paragraph (2) of subdivision (a) and subdivision (b) of Section 4002 of the Financial Code.

(3) Paragraph (1) of subdivision (a) of Section 22470 of the Financial Code, provided that any financial institution that is a finance lender has first complied with the requirements of paragraph (2) of subdivision (a) and subdivision (b) of Section 22470 of the Financial Code.

(p) When the governing board of the Public Employees' Retirement System or the State Teachers' Retirement System certifies in writing to a financial institution that a benefit recipient has died and that transfers to the benefit recipient's account at the financial institution from the retirement system occurred after the benefit recipient's date of death, the financial institution shall furnish the retirement system with the name and address of any coowner, cosigner, or any other person who had access to the

funds in the account following the date of the benefit recipient's death, or if the account has been closed, the name and address of the person who closed the account.

(q) When the retirement board of a retirement system established under the County Employees Retirement Law of 1937 certifies in writing to a financial institution that a retired member or the beneficiary of a retired member has died and that transfers to the account of the retired member or beneficiary of a retired member at the financial institution from the retirement system occurred after the date of death of the retired member or beneficiary of a retired member, the financial institution shall furnish the retirement system with the name and address of any coowner, cosigner, or any other person who had access to the funds in the account following the date of death of the retired member or beneficiary of a retired member, or if the account has been closed, the name and address of the person who closed the account.

(r) When the Franchise Tax Board certifies in writing to a financial institution that (1) a taxpayer filed a tax return that authorized a direct deposit refund with an incorrect financial institution account or routing number that resulted in all or a portion of the refund not being received, directly or indirectly, by the taxpayer; (2) the direct deposit refund was not returned to the Franchise Tax Board; and (3) the refund was deposited directly on a specified date into the account of an accountholder of the financial institution who was not entitled to receive the refund, then the financial institution shall furnish to the Franchise Tax Board the name and address of any coowner, cosigner, or any other person who had access to the funds in the account following the date of direct deposit refund, or if the account has been closed, the name and address of the person who closed the account.

Added Stats 2005 ch 140 § 3 (SB 1018), operative January 1, 2013. Amended Stats 2008 ch 234 § 2, effective January 1, 2009, operative January 1, 2013; Stats 2010 ch 697 § 30 (SB 189), effective January 1, 2011, operative July 1, 2012 (ch 697 prevails), ch 709 § 2 (SB 1062); Stats 2011 ch 304 § 3 (SB 428), effective January 1, 2012.

Amendments

2010 Amendment: (1) Substituted "shall prohibit" for "prohibits" in the introductory clause; **(2)** added "access cards," in the introductory clause of subds (b) and (c); **(3)** added subds (b)(7) and (c)(7); **(4)** redesignated former subds (b)(7) and (c)(7) to be subds (b)(8) and (c)(8); **(5)** added the comma after "Section 33000)" in subd (f)(1); **(6)** added the comma after "Section 38001)" in subd (g); **(7)** added the comma after "Section 37001)" in subd (h)(2); **(8)** substituted "Section 8006" for "Section 3087" in subd (k); **(9)** added "with" after "furnish the retirement system" in subds (p) and (q); and **(10)** deleted former subd (s) which read: "(s) This section shall become operative on January 1, 2013."

2011 Amendment: (1) Added subd (n)(4); and **(2)** redesignated former subd (n)(4) to be subd (n)(5).

§ 7500. Sex differential in contribution rate

Any city with a population of 1,000,000 or more, and any agency thereof, which has established any pension and retirement plan which requires officers and employees of one sex to pay greater contributions than those of another sex who are the same age shall revise the plan so that the contributions are the same commencing with contributions for service on and after January 1, 1975. This section shall not be construed as requiring or authorizing an increase in the contributions of any members of a pension and retirement plan.

This section shall not be applicable to the Public Employees' Retirement System.

Added by Stats 1974 ch 1478 § 1.

§ 7501. Legislative intent

It is the intent and purpose of the Legislature, in enacting this chapter, to safeguard the solvency of all public retirement systems and funds. The Legislature finds and declares that public agencies main-

taining retirement systems can benefit from periodic and independent analysis of their financial condition. It is the purpose of Sections 7502, 7503, and 7504 to enable the State Controller to gather information to compare and evaluate the financial condition of such systems and to make such comparisons and evaluations.

Added by Stats 1977 ch 928 § 1, effective September 20, 1977, operative January 1, 1978. Amended by Stats 1978 ch 388 § 1, effective July 11, 1978; Stats 1982 ch 821 § 1.

Amendments

1978 Amendment: Substituted "gather information to compare and evaluate the financial condition of such systems and to make such comparisons and evaluations" for "perform this service" after "Controller to".

1982 Amendment: Substituted **(1)** "this chapter" for "Sections 7502, 7503, and 7504" in the first sentence; and **(2)** "Sections 7502, 7503, and 7504" for "those sections" in the third sentence.

§ 7502. Review of financial reports and triennial valuations of public retirement systems; Advisory committee

The State Controller shall review the annual financial report of each state and local public retirement system submitted pursuant to Section 7504 giving particular consideration to the adequacy of funding of each system. The State Controller shall also review the triennial valuation of each public retirement system submitted pursuant to Section 7504 and shall give particular consideration to the assumption concerning the inflation element in salary and wage increases, mortality, service retirement rates, withdrawal rates, disability retirement rates, and rate of return on total assets.

The State Controller shall establish an advisory committee which shall include enrolled actuaries, as defined in Section 7504, and state and local public retirement system administrators, to assist in carrying out the duties imposed by this section.

Added by Stats 1977 ch 928 § 2, effective September 20, 1977, operative January 1, 1978. Amended by Stats 1978 ch 388 § 2, effective July 11, 1978.

Amendments

1978 Amendment: Substituted "total assets" for "investments" at the end of the first paragraph.

§ 7503. Preparation of annual report by state and local public retirement systems

All state and local public retirement systems shall prepare an annual report in accordance with generally accepted accounting principles.

Added by Stats 1977 ch 928 § 3, effective September 20, 1977, operative January 1, 1978. Amended by Stats 1978 ch 388 § 3, effective July 11, 1978.

Amendments

1978 Amendment: Substituted the section for the former section which read: "All state and local public retirement systems shall prepare an annual report which shall contain the following financial information:

"(a) Balance sheet as of the close of the system's fiscal year.

"(b) Statement of income and credits to reserves.

"(c) Statement of changes in reserves.

"(d) Statement of cash receipts and disbursements.

"The balance sheet shall show the cost of assets held, distributed among the reserves for employer contributions, employee contributions, and retired members. The balance sheet shall also show the present value of the total existing and future liabilities of the system to be met from future contributions as certified by an enrolled

actuary based on the most recent triennial valuation. The assets of the retirement system shall be stated in accordance with generally accepted accounting principles."

§ 7504. Services to be performed by enrolled actuary; Submission of audited financial statements

(a) All state and local public retirement systems shall, not less than triennially, secure the services of an enrolled actuary. An enrolled actuary, for the purposes of this section, means an actuary enrolled under subtitle C of Title III of the federal Employee Retirement Income Security Act of 1974 (Public Law 93–406) and who has demonstrated experience in public retirement systems. The actuary shall perform a valuation of the system utilizing actuarial assumptions and techniques established by the agency that are, in the aggregate, reasonably related to the experience and the actuary's best estimate of anticipated experience under the system. Any differences between the actuarial assumptions and techniques used by the actuary that differ significantly from those established by the agency shall be disclosed in the actuary's report and the effect of the differences on the actuary's statement of costs and obligations shall be shown.

(b) All state and local public retirement systems shall secure the services of a qualified person to perform an attest audit of the system's financial statements. A qualified person means any of the following:

(1) A person who is licensed to practice as a certified public accountant in this state by the California Board of Accountancy.

(2) A person who is registered and entitled to practice as a public accountant in this state by the California Board of Accountancy.

(3) A county auditor in any county subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3).

(4) A county auditor in any county having a pension trust and retirement plan established pursuant to Section 53216.

(c) All state and local public retirement systems shall submit audited financial statements to the State Controller at the earliest practicable opportunity within six months of the close of each fiscal year. However, the State Controller may delay the filing date for reports due in the first year until the time as report forms have been developed that, in his or her judgment, will satisfy the requirements of this section. The financial statements shall be prepared in accordance with generally accepted accounting principles in the form and manner prescribed by the State Controller. The penalty prescribed in Section 53895 shall be invoked for failure to comply with this section. Upon a satisfactory showing of good cause, the State Controller may waive the penalty for late filing provided by this subdivision.

(d) The The State Controller shall compile and publish a report annually on the financial condition of all state and local public retirement systems containing, but not limited to, the data required in Section 7502. The report shall be published within 12 months of the receipt of the information, and in no case later than 18 months after the end of the fiscal year upon which the information in the report is based.

Added Stats 1977 ch 928 § 4, effective September 20, 1977, operative January 1, 1978. Amended Stats 1978 ch 388 § 4, effective July 11, 1978; Stats 1979 ch 20 § 1, effective April 3, 1979; Stats 1980 ch 1102 § 1; Stats 1981 ch 800 § 2; Stats 2000 ch 1055 § 24 (AB 2889), effective September 30, 2000; Stats 2008 ch 369 § 3 (AB 1844), effective January 1, 2009.

Amendments

1978 Amendment: (1) Amended subd (a) by **(a)** deleting the comma after "systems"; **(b)** adding ", for the purposes of this section," after "actuary" the first time it appears in the second sentence; and **(c)** adding "and who has demonstrated experience in public retirement systems" after "Act of 1974"; and **(2)** added the second and fifth sentences in subd (c).

1979 Amendment: Amended subd (b) by **(1)** substituting "person" for "public accountant" after "qualified" wherever it appears; **(2)** adding "any of the following" in the introductory clause; **(3)** substituting the periods for ", or" at the end of subds (b)(1) and (b)(2); and **(4)** adding subd (b)(4).

1980 Amendment: (1) Amended subd (a) by **(a)** substituting "actuary's" for "actuaries' " in the third sentence; and **(b)** adding the last sentence; and **(2)** amended the second sentence of subd (c) by **(a)** substituting "State Controller" for "Controller"; and **(b)** adding the commas after "developed which" and after "his judgment".

1981 Amendment: Added "at the earliest practicable opportunity" in the first sentence of subd (c).

2000 Amendment: In addition to making technical changes, **(1)** amended subd (a) by adding **(a)** "federal" after "Title III of the"; and **(b)** "(Public Law 93–406)" in the first sentence of subd (a); **(2)** substituting "California Board of Accountancy" in subds (b)(1) and (b)(2); and **(3)** adding "(Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3)" in subd (b)(3).

2008 Amendment: Added the last sentence of subd (d).

§ 7505. Direct transmission of benefits into payee's bank account

Every state and local public retirement system shall permit any person entitled to the receipt of benefits to designate that payment of such benefits shall be transmitted to a bank, savings and loan association, or credit union for deposit in the person's account, and the transmittal of such payment pursuant to this section shall discharge the public agency's obligations in respect to such payment.

Added by Stats 1979 ch 454 § 1.

§ 7506. Direct deposit of beneficiary's funds

Notwithstanding any other provision of law, any person entitled to the receipt of benefits from any state retirement system may authorize the payment of the benefits to be directly deposited by electronic fund transfer into the person's account at the financial institution of his or her choice under a program for direct deposit by electronic transfer established by the Controller pursuant to Section 7506.5. The direct deposit shall discharge the state agency's obligation in respect to that payment.

Added by Stats 1982 ch 1270 § 22, ch 1317 § 1.

§ 7506.5. Agreements regarding direct deposits programs

The Controller shall make an agreement with one or more financial institutions participating in the Automated Clearing House pursuant to the local rules, and shall establish a program, for the direct deposit by electronic fund transfer of the benefits, after any withholding required by law and authorized deductions, of any person entitled to the receipt of benefits from any state retirement system who authorizes the direct deposit thereof by electronic fund transfer into the person's account at the financial institution of his or her choice.

Added by Stats 1982 ch 1317 § 2. Amended by Stats 1985 ch 600 § 2, ch 1344 § 1, operative January 1, 1987.

Amendments

1985 Amendment: Substituted "shall" for "may" both times it appears.

§ 7507. Actuarial evaluations of future annual costs; Applicability

(a) For the purpose of this section:

(1) "Actuary" means an actuary who is an associate or fellow of the Society of Actuaries.

(2) "Future annual costs" includes, but is not limited to, annual dollar changes, or the total dollar changes involved when available, as well as normal cost and any change in accrued liability.

(b) (1) Except as provided in paragraph (2), the Legislature and local legislative bodies, including community college district governing boards, when considering changes in retirement benefits or other postemployment benefits, shall secure the services of an actuary to provide a statement of the actuarial impact upon future annual costs, including normal cost and any additional accrued liability, before authorizing changes in public retirement plan benefits or other postemployment benefits.

(2) The requirements of this subdivision do not apply to:

(A) An annual increase in a premium that does not exceed 3 percent under a contract of insurance.

(B) A change in postemployment benefits, other than pension benefits, mandated by the state or federal government or made by an insurance carrier in connection with the renewal of a contract of insurance.

(c) (1) (A) With regard to local legislative bodies, including community college district governing boards, the future costs of changes in retirement benefits or other postemployment benefits, as determined by the actuary, shall be made public at a public meeting at least two weeks prior to the adoption of any changes in public retirement plan benefits or other postemployment benefits. If the future costs of the changes exceed one-half of 1 percent of the future annual costs, as defined in paragraph (2) of subdivision (a), of the existing benefits for the legislative body, an actuary shall be present to provide information as needed at the public meeting at which the adoption of a benefit change shall be considered. The adoption of any benefit to which this section applies shall not be placed on a consent calendar.

(B) The requirements of this paragraph do not apply to:

(i) An annual increase in a premium that does not exceed 3 percent under a contract of insurance.

(ii) A change in postemployment benefits, other than pension benefits, mandated by the state or federal government or made by an insurance carrier in connection with the renewal of a contract of insurance.

(2) With regard to the Legislature, the future costs as determined by the actuary shall be made public at the policy and fiscal committee hearings to consider the adoption of any changes in public retirement plan benefits or other postemployment benefits. The adoption of any benefit to which this section applies shall not be placed on a consent calendar.

(d) Upon the adoption of any benefit change to which this section applies, the person with the responsibilities of a chief executive officer in an entity providing the benefit, however that person is denominated, shall acknowledge in writing that he or she understands the current and future cost of the benefit as determined by the actuary. For the adoption of benefit changes by the state, this person shall be the Director of Human Resources.

(e) The requirements of this section do not apply to a school district or a county office of education, which shall instead comply with requirements regarding public notice of, and future cost determination for, benefit changes that have been enacted to regulate these entities. These requirements include, but are not limited to, those enacted by Chapter 1213 of the Statutes of 1991 and by Chapter 52 of the Statutes of 2004.

Added Stats 2008 ch 371 § 3 (SB 1123), effective January 1, 2009. Amended Stats 2012 ch 665 § 41 (SB 1308), effective January 1, 2013.

Editor's Notes—2011 Governor's Reorganization Plan No. 1 was submitted to the Legislature on June 9, 2011, and became effective September 9, 2011, pursuant to Gov C § 12080.5, and substantively operative July 1, 2012.

Stats 2012 ch 665 (SB 1308) enacts the statutory changes necessary to reflect the changes made by the Governor's Reorganization Plan No. 1 of 2011.

Former Sections: Former Gov C § 7507, similar to the present section, was added Stats 1977 ch 941 § 1, amended Stats 1980 ch 481 § 3, and repealed Stats 2008 ch 371 § 2.

Amendments

2011 Amendment: Substituted "Director of the Department of Human Resources" for "director of the Department of Personnel Administration" in the second sentence of subd (d).

2012 Amendment: Substituted "Director of Human Resources" for "director of the Department of Personnel Administration" in the second sentence of subd (d).

Notes of Decisions

1. Generally

Arbitrator who interpreted a memorandum of understanding (MOU) exceeded her powers under CCP § 1286.2(a)(4), by mandating the State to reclassify certain employees retroactively as safety members because the MOU as presented to the Legislature for approval under Gov C §§ 3517.5, 3517.6(b), did not inform the Legislature that it would be applied retroactively and the Legislature was not provided under Gov C § 7507(b)(1) with a fiscal analysis of the cost of doing so. Because Gov C §§ 19816.21, 20405.1, pertaining to safety member retirement benefits, are not sources cited in the Dills Act, Gov C §§ 3512 et seq., provisions of the MOU requiring their amendment could not become effective without legislative approval, notwithstanding the delegation of authority to the California Department of Personnel Administration in Gov C §§ 20068, 20405.1. California Statewide Law Enforcement Assn. v. California Dept. of Personnel Admin. (2011, 3d Dist) 192 Cal App 4th 1, 120 Cal Rptr 3d 374, 2011 Cal App LEXIS 84.

§ 7507.2. California Actuarial Advisory Panel

(a) There is hereby enacted the California Actuarial Advisory Panel. The panel shall provide impartial and independent information on pensions, other postemployment benefits, and best practices to public agencies and shall meet quarterly.

(b) The responsibilities of the California Actuarial Advisory Panel shall include, but are not limited to:

(1) Defining the range of actuarial model policies and best practices for public retirement plan benefits, including pensions and other postemployment benefits.

(2) Developing pricing and disclosure standards for California public sector benefit improvements.

(3) Developing quality control standards for California public sector actuaries.

(4) Gathering model funding policies and practices.

(5) Replying to policy questions from public retirement systems in California.

(6) Providing comment upon request by public agencies.

(c) The California Actuarial Advisory Panel shall consist of eight members. Each member shall be an actuary, as defined in Section 7507, with public sector clients. Members shall be appointed by the entities listed below, and each member shall serve a three-year term, provided that, in the initial appointments only, the panelists named by the University of California, the Senate, and one of the panelists named by the Governor shall serve two-year terms. The Governor shall appoint two panelists, and one panelist shall be appointed by each of the following:

(1) The Teachers' Retirement Board.

(2) The Board of Administration of the Public Employees' Retirement System.

(3) The State Association of County Retirement Systems.

(4) The Board of Regents of the University of California.

(5) The Speaker of the Assembly.

(6) The Senate Committee on Rules.

(d) The California Actuarial Advisory Panel shall be located in the Controller's office, which shall provide support staff to the panel.

(e) The opinions of the California Actuarial Advisory Panel are nonbinding and advisory only. The opinions of the panel shall not, in any case, be used as the basis for litigation.

(f) A member of the California Actuarial Advisory Panel shall receive reimbursement for expenses that shall be paid by the authority that appointed the member.

(g) The California Actuarial Advisory Panel shall report to the Legislature on or before February 1 of each year.

Added Stats 2008 ch 371 § 4 (SB 1123), effective January 1, 2009.

§ 7507.5. Notice to Legislature concerning proposed changes in University of California Retirement System

It is the intent of the Legislature that the Regents of the University of California provide written notice to the Legislature of any proposed changes to retirement plan benefits, employer or employee contribution rates, or actuarial assumptions affecting the University of California Retirement System, at least 60 days prior to the effective date thereof. The written notice shall be provided to the Joint Legislative Budget Committee and the fiscal subcommittees and shall consist of:

(a) A description and explanation of each specific proposed change to the benefit structure, contribution rates, or actuarial assumptions.

(b) The actuarial impact upon future annual costs of each proposed change.

Added by Stats 1984 ch 268 § 16.95, effective June 30, 1984.

§ 7508. Service on public boards by retired members of state retirement system

A retired member of a state retirement system, other than the University of California Retirement System, the Judges' Retirement System, the Judges' Retirement System II, and the State Teachers' Retirement System, may, notwithstanding Section 9359.12, serve on a public board or commission and be entitled to receive for that service, per diem compensation for every day or portion thereof of actual attendance at meetings of the board or commission or any committee thereof, and necessary traveling expenses incurred in connection with the performance of his or her official duties, without loss or interruption of benefits provided by the system, so long as the service does not exceed a total of 50 meeting days.

This section shall not apply to service as a member of a board or commission the annual salary for which is prescribed by Chapter 6 (commencing with Section 11550) of Division 3 of Title 2.

Added by Stats 1986 ch 1458 § 1, effective September 30, 1986. Amended by Stats 1994 ch 879 § 1 (SB 65), effective September 26, 1994, operative November 9, 1994.

Former Sections: Former § 7508, relating to mandatory retirement age, was added Stats 1978 ch 385 § 1, effective July 11, 1978, operative January 1, 1979, amended Stats 1978 ch 810 § 1, effective September 18, 1978, operative January 1, 1979, and repealed Stats 1983 ch 666 § 7.

§ 7508.5. Representation before retirement board prohibited

Except as otherwise provided in Section 20098 or 31528 of this code, or Section 22212.5 of the Education Code, an individual who was a member of the retirement board of a public pension or retirement system, as defined in subdivision (h) of Section 17 of Article XVI of the California Constitution, or an administrator, executive officer, investment officer, or general counsel of that board, shall not, for a period of two years after leaving that position, for compensation, act as agent or attorney for, or otherwise represent, any other person except the public entity maintaining that pension or retirement system, by making any formal or informal appearance before, or any oral or written communication to, the pension or retirement system, or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, contract, or sale or purchase of goods or property.

Added Stats 2009 ch 301 § 2 (AB 1584), effective October 11, 2009.

§ 7509. Exemption from interest rate restrictions

(a) The restrictions upon rates of interest contained in Section 1 of Article XV of the California Constitution shall not apply to any loans made by, or forbearances of, any state or local public retirement system, including, but not limited to, any public retirement system authorized and regulated by the State Teachers' Retirement Law, the Public Employees' Retirement Law, the County Employees Retirement Law of 1937, any public retirement system administered by the Teachers Retirement Board or Board of Administration of the Public Employees' Retirement System, or any public retirement system acting pursuant to the laws of this state or the laws of any local agency.

(b) For the purposes of this section, "local agency" means county, city, city and county, district, school district, or any public or municipal corporation, political subdivision, or other public agency of the state, or any instrumentality of one or more of these agencies.

(c) This section creates and authorizes any state or local retirement system as an exempt class of persons pursuant to Section 1 of Article XV of the California Constitution.

Added by Stats 1982 ch 821 § 2. Amended by Stats 2006 ch 538 § 236 (SB 1852), effective January 1, 2007.

Amendments

2006 Amendment: (1) Added subd designations (a)–(c); **(2)** added ", including," after "public retirement system" in subd (a); **(3)** amended subd (b) by **(a)** adding " 'local agency' " after "purposes of this section,"; **(b)** substituting "means" for "shall mean" after " 'local agency' "; **(c)** substituting "subdivision" for "subdivison" after "municipal corporation, political"; and **(d)** substituting "these" for "any such" after "one or more of"; and **(4)** substituted "California" for "State" after "Article XV of the" in subd (c).

§ 7510. Investments by public retirement systems in real property

(a)(1) Except as provided in subdivision (b), a public retirement system, which has invested assets in real property and improvements thereon for business or residential purposes for the production of income, shall pay annually to the city or county, in whose jurisdiction the real property is located and has been removed from the secured roll, a fee for general governmental services equal to the difference between the amount that would have accrued as real property secured taxes and the amount of possessory interest unsecured taxes paid for that property. The governing bodies of local entities may adopt ordinances and regulations authorizing retirement systems to invest assets in real property subject to the foregoing requirements.

(2) This subdivision shall not apply to any retirement system which is established by a local governmental entity if that entity is presently authorized by statute or ordinance to invest retirement assets in real property.

(3) This subdivision shall not apply to property owned by any state public retirement system.

(b)(1) Whenever a state public retirement system, which has invested assets in real property and improvements thereon for business or residential purposes for the production of income, leases the property, the lease shall provide, pursuant to Section 107.6 of the Revenue and Taxation Code, that the lessee's possessory interest may be subject to property taxation and that the party in whom the possessory interest is vested may be subject to the payment of property taxes levied on that interest. The lease shall also provide that the full cash value, as defined in Sections 110 and 110.1 of the Revenue and Taxation Code, of the possessory interest upon which property taxes will be based shall equal the greater of (A) the full cash value of the possessory interest, or (B), if the lessee has leased less than all of the property, the lessee's allocable share of the full cash value of the property that would have been enrolled if the property had been subject to property tax upon acquisition by the state public retirement system. The full cash value as provided for pursuant to either (A) or (B) of the preceding sentence shall reflect the anticipated term of possession if, on the lien date described in Section 2192 of the Revenue and Taxation Code, that term is expected to terminate prior to the end of the next succeeding

fiscal year. The lessee's allocable share shall, subject to the preceding sentence, be the lessee's leasable square feet divided by the total leasable square feet of the property.

(2) Except as provided in this subdivision, the property shall be assessed and its taxes computed and collected in the same manner as privately owned property. The lessee's possessory interest shall be placed on the unsecured roll and the tax on the possessory interest shall be subject to the collection procedures for unsecured property taxes.

(3) An investment by a state public retirement system in a legal entity that invests assets in real property and improvements thereon shall not constitute an investment by the state public retirement system of assets in real property and improvements thereon. For purposes of this paragraph, "legal entity" includes, but is not limited to, partnership, joint venture, corporation, trust, or association. When a state public retirement system invests in a legal entity, the state public retirement system shall be deemed to be a person for the purpose of determining a change in ownership under Section 64 of the Revenue and Taxation Code.

(4) Notwithstanding any other provision of law, fees charged pursuant to this section and collected prior to July 1, 1992, shall be deemed valid and not refundable under any circumstance. Notwithstanding any other provision of law, fees, interest and penalties, if any, asserted to be due pursuant to this section that were not charged or collected prior to July 1, 1992, shall be deemed invalid and not collectable under any circumstance.

(5) This subdivision shall apply to the assessment, computation, and collection of taxes for the fiscal year beginning on July 1, 1992, and each fiscal year thereafter. For the 1992–93 and 1993–94 fiscal years, in the case where a lessee's possessory interest existed for less than the full fiscal year for which the tax was levied, the amount of tax shall be prorated in accordance with the number of months for which the lessee's interest existed.

Added by Stats 1982 ch 24 § 2. Amended by Stats 1992 ch 1158 § 1 (SB 1687), effective September 29, 1992; Stats 1993 ch 1187 § 2 (SB 70); Stats 1994 ch 1281 § 1 (SB 1972), effective September 30, 1994.

Amendments

1992 Amendment: (1) Added subdivisions designations (a)(1) and (a)(2); **(2)** added "Except as provided in subdivision (b)," in subd (a)(1); **(3)** substituted "subdivision" for "section" in subd (a)(2); and **(4)** added subds (a)(3) and (b).

1993 Amendment: (1) Substituted "this section" for "Section 7510" wherever it appears in subd (b)(4); and **(2)** amended subd (b)(5) by adding **(a)** "each fiscal year" before "thereafter" at the end of the first sentence; and **(b)** the second sentence.

1994 Amendment: Amended subd (b)(1) by adding **(1)** the third sentence; and **(2)** ", subject to the preceding sentence," in the fourth sentence.

§ 7511. Authority to purchase insurance for fiduciaries

Notwithstanding any other provision to the contrary:

(a) A public retirement system may purchase insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if the insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by the fiduciary.

(b) A fiduciary may purchase insurance to cover liability under this section from and for his or her own account.

(c) An employer or an employee organization may purchase insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

Added by Stats 1984 ch 1503 § 4.

§ 7512. Provision of annual report to members

Each state and local public pension or retirement system shall, on and after the 90th day following the completion of the annual audit of the system, mail or otherwise provide to any member who makes a request therefor and pays, if required, a fee, a concise annual report on the investments and earnings of the system and other related matters. The report shall be published in a low–cost format.

Each local public pension or retirement system may impose a fee for each copy of the report in an amount sufficient to pay all costs incurred in the preparation and dissemination of the report.

Added by Stats 1985 ch 655 § 1. Amended by Stats 1991 ch 281 § 1 (AB 113).

Amendments

1991 Amendment: Deleted the former third paragraph which read: "This section shall remain in effect only until January 1, 1992, and as of such date is repealed, unless a later enacted statute, which is chaptered before January 1, 1992, deletes or extends such date."

§ 7513. Election to have distribution paid directly to eligible retirement plan; Direct rollover

(a) In the case of a state or local retirement system or plan that is subject to Section 401(a)(31) of the Internal Revenue Code, if, under the terms of the system or plan, a person becomes entitled to a distribution that constitutes an "eligible rollover distribution" within the meaning of Section 401(a)(31)(C) of the Internal Revenue Code, the person may elect, under terms and conditions to be established by the administrator of the system or plan, to have the distribution or a portion thereof paid directly to a plan that constitutes an "eligible retirement plan" within the meaning of Section 401(a)(31)(D) of the Internal Revenue Code, as specified by the person. Upon the exercise of the election by a person with respect to a distribution or portion thereof, the distribution by the system or plan of the amount so designated, once distributable under the terms of the system or plan, shall be made in the form of a direct rollover to the eligible retirement plan so specified.

(b) The purpose and intent of this section is to enable the state and local retirement systems and plans that are subject to Section 401(a)(31) of the Internal Revenue Code of 1986, as amended, to comply with the requirements of that section regarding the provision of an election for direct rollover of certain plan distributions.

Added by Stats 1992 ch 1047 § 1 (AB 2721).

§ 7513.5. Compliance with nondiscrimination laws by corporations doing business in Northern Ireland in which systems have invested assets

(a) On or before the first day of March of each year, the Teachers' Retirement Board and the Board of Administration of the Public Employees' Retirement System, respectively, shall investigate and report to the Legislature on the extent to which United States and international corporations operating in Northern Ireland, in which the assets of the State Teachers' Retirement System and the Public Employees' Retirement System are invested, adhere, in compliance with the law applicable in Northern Ireland, to the principles of nondiscrimination in employment and freedom of workplace opportunity.

(b) The Teachers' Retirement Board and the Board of Administration of the Public Employees' Retirement System, respectively, shall compile a list of domestic and international corporations that, directly or through a subsidiary, do business in Northern Ireland, and in whose stocks or obligations it has invested, and determine whether each corporation on the list has, during the preceding year, taken substantial action, in compliance with the law applicable in Northern Ireland, designed to lead toward the achievement of the following goals:

(1) Increased representation of individuals from underrepresented religious groups in the work force, including managerial, supervisory, administrative, clerical, and technical jobs.

(2) Adequate security for the protection of minority employees both at the workplace and while traveling to and from work.

(3) Banning of provocative religious or political emblems from the workplace.

(4) Public advertisement of all job openings and the use of special recruitment efforts to attract applicants from underrepresented religious groups.

(5) Establishment of layoff, recall, and termination procedures which do not, in practice, favor particular religious groupings.

(6) Abolition of job reservations, apprenticeship restrictions, and differential employment criteria, which discriminate on the basis of religion or ethnic origin.

(7) The development of training programs that will prepare substantial numbers of current minority employees for skilled jobs, including the expansion of existing programs and the creation of new programs to train, upgrade, and improve the skills of minority employees.

(8) The establishment of procedures to assess, identify, and actively recruit minority employees with potential for further advancement.

(9) The appointment of senior management staff members to oversee affirmative action efforts and the setting up of timetables to carry out affirmative action principles.

(c) Whenever feasible and consistent with their fiduciary responsibility, the Teachers' Retirement Board and the Board of Administration of the Public Employees' Retirement System, respectively, shall support shareholder resolutions designed to encourage domestic and international corporations in which the Teachers' Retirement Board and the Board of Administration of the Public Employees' Retirement System, respectively, has invested to pursue, in compliance with the law applicable in Northern Ireland, a policy of affirmative action in Northern Ireland in accordance with the goals listed in subdivision (b).

Added by Stats 1999 ch 341 § 2 (SB 105).

§ 7513.6. Investments in Sudan prohibited in specified circumstances

(a) As used in this section, the following definitions shall apply:

(1) "Active business operations" means a company engaged in business operations that provide revenue to the government of Sudan or a company engaged in oil-related activities.

(2) "Board" means the Board of Administration of the Public Employees' Retirement System or the Teachers' Retirement Board of the State Teachers' Retirement System, as applicable.

(3) "Business operations" means maintaining, selling, or leasing equipment, facilities, personnel, or any other apparatus of business or commerce in Sudan, including the ownership or possession of real or personal property located in Sudan.

(4) "Company" means a sole proprietorship, organization, association, corporation, partnership, venture, or other entity, its subsidiary or affiliate that exists for profitmaking purposes or to otherwise secure economic advantage. "Company" also means a company owned or controlled, either directly or indirectly, by the government of Sudan, that is established or organized under the laws of or has its principal place of business in the Republic of the Sudan.

(5) "Government of Sudan" means the government of Sudan or its instrumentalities.

(6) "Invest" or "investment" means the purchase, ownership, or control of stock of a company, association, or corporation, the capital stock of a mutual water company or corporation, bonds issued by the government or a political subdivision of Sudan, corporate bonds or other debt instruments issued by a company, or the commitment of funds or other assets to a company, including a loan or extension of credit to that company.

(7) "Military equipment" means weapons, arms, or military defense supplies.

(8) "Oil-related activities" means, but is not limited to, the export of oil, extracting or producing oil, exploration for oil, or the construction or maintenance of a pipeline, refinery, or other oil field infrastructure.

(9) "Public employee retirement funds" means the Public Employees' Retirement Fund described in Section 20062 of this code, and the Teachers' Retirement Fund described in Section 22167 of the Education Code.

(10) "Research firm" means a reputable, neutral third-party research firm.

(11) "Substantial action" means a boycott of the government of Sudan, curtailing business in Sudan until that time described in subdivision (m), selling company assets, equipment, or real and personal property located in Sudan, or undertaking significant humanitarian efforts in the eastern, southern, or western regions of Sudan.

(12) "Sudan" means the Republic of the Sudan, a territory under the administration or control of the Sudan, including but not limited to, the Darfur region, or an individual, company, or public agency located in Khartoum, northern Sudan, or the Nile River Valley that supports the Republic of the Sudan.

(b) The board shall not invest public employee retirement funds in a company with business operations in Sudan that meets all of the following criteria:

(1) The company is engaged in active business operations in Sudan. If that company is not engaged in oil-related activities, that company also lacks significant business operations in the eastern, southern, and western regions of Sudan.

(2) Either of the following apply:

(A) The company is engaged in oil-related activities or energy or power-related operations, or contracts with another company with business operations in the oil, energy, and power sectors of Sudan, and the company failed to take substantial action related to the government of Sudan because of the Darfur genocide.

(B) The company has demonstrated complicity in the Darfur genocide.

(c) Notwithstanding subdivision (b), the board shall not invest public employee retirement funds in a company that supplies military equipment within the borders of Sudan. If a company provides equipment within the borders of Sudan that may be readily used for military purposes, including, but not limited to, radar systems and military-grade transport vehicles, there shall also be a strong presumption against investing in that company unless that company implements safeguards to prevent the use of that equipment for military purposes.

(d)(1) The board shall, without regard to the provisions regarding competitive bidding, contract with a research firm or firms to determine those companies that have business operations in Sudan. Those research firms shall, in the aggregate, obtain data on a majority of companies with business operations in Sudan. On or before March 30, 2007, those research firms shall report any findings to the board and those research firms shall submit further findings to the board if there is a change of circumstances in Sudan.

(2) In addition to the reports described in paragraph (1), the board shall take all of the following actions no later than March 30, 2007:

(A) Review publicly available information regarding companies with business operations in Sudan.

(B) Contact other institutional investors that invest in companies with business operations in Sudan.

(C) Send written notice to a company with business operations in Sudan that the company may be subject to this section.

(e)(1) The board shall determine, by the next applicable board meeting and based on the information and reports described in subdivision (d), if a company meets the criteria described in subdivision (b) or (c). If the board plans to invest or has investments in a company that meets the criteria described in subdivision (b) or (c), that planned or existing investment shall be subject to subdivisions (g) and (h).

(2) Investments of the board in a company that does not meet the criteria described in subdivision (b) or (c) or does not have active business operations in Sudan are not subject to subdivision (h), pro-

vided that the company does not subsequently meet the criteria described in subdivision (b) or (c) or engage in active business operations. The board shall identify the reasons why that company does not satisfy the criteria described in subdivision (b) or (c) or does not engage in active business operations in the report to the Legislature described in subdivision (i).

(f)(1) Notwithstanding subdivision (e), if the board's investment in a company described in subdivision (b) or (c) is limited to investment via an externally and actively managed commingled fund, the board shall contact that fund manager in writing and request that the fund manager remove that company from the fund as described in subdivision (h). On or before June 30, 2007, if the fund or account manager creates a fund or account devoid of companies described in subdivision (b) or (c), the transfer of board investments from the prior fund or account to the fund or account devoid of companies with business operations in Sudan shall be deemed to satisfy subdivision (h).

(2) If the board's investment in a company described in subdivision (b) or (c) is limited to an alternative fund or account, the alternative fund or account manager creates an actively managed commingled fund that excludes companies described in subdivision (b) or (c), and the new fund or account is deemed to be financially equivalent to the existing fund or account, the transfer of board investments from the existing fund or account to the new fund or account shall be deemed to satisfy subdivision (h). If the board determines that the new fund or account is not financially equivalent to the existing fund, the board shall include the reasons for that determination in the report described in subdivision (i).

(3) The board shall make a good faith effort to identify any private equity investments that involve companies described in subdivision (b) or (c) or are linked to the government of Sudan. If the board determines that a private equity investment clearly involves a company described in subdivision (b) or (c) or is linked to the government of Sudan, the board shall consider, at its discretion, if those private equity investments shall be subject to subdivision (h). If the board determines that a private equity investment clearly involves a company described in subdivision (b) or (c) or is linked to the government of Sudan and the board does not take action as described in subdivision (h), the board shall include the reasons for its decision in the report described in subdivision (i).

(g) Except as described in subdivision (f) or paragraph (2) of subdivision (e), the board, in the board's capacity of shareholder or investor, shall notify any company described in paragraph (1) of subdivision (e) that the company is subject to subdivision (h) and permit that company to respond to the information and reports described in subdivision (d). The board shall request that the company take substantial action no later than 90 days from the date the board notified the company under this subdivision. If the board determines that a company has taken substantial action or has made sufficient progress towards substantial action before the expiration of that 90-day period, that company shall not be subject to subdivision (h). The board shall, at intervals not to exceed 90 days, continue to monitor and review the progress of the company until that company has taken substantial action in Sudan. A company that fails to complete substantial action or continue to make sufficient progress towards substantial action by the next time interval shall be subject to subdivision (h).

(h) If a company described in paragraph (1) of subdivision (e) fails to complete substantial action by the time described in subdivision (g), the board shall take the following actions:

(1) The board shall not make additional or new investments or renew existing investments in that company.

(2) The board shall liquidate the investments of the board in that company no later than 18 months after this subdivision applies to that company. The board shall liquidate those investments in a manner to address the need for companies to take substantial action in Sudan and consistent with the board's fiduciary responsibilities as described in Section 17 of Article XVI of the California Constitution.

(i) On or before January 1, 2008, and every year thereafter, the board shall file a report with the Legislature. The report shall describe the following:

(1) A list of investments the board has in companies with business operations in Sudan, including, but not limited to, the issuer, by name, of the stock, bonds, securities, and other evidence of indebtedness.

(2) A detailed summary of the business operations a company described in paragraph (1) has in Sudan and whether that company satisfies all of the criteria in subdivision (b) or (c).

(3) Whether the board has reduced its investments in a company that satisfies the criteria in subdivision (b) or (c).

(4) If the board has not completely reduced its investments in a company that satisfies the criteria in subdivision (b) or (c), when the board anticipates that the board will reduce all investments in that company or the reasons why a sale or transfer of investments is inconsistent with the fiduciary responsibilities of the board as described in Section 17 of Article XVI of the California Constitution.

(5) Any information described in subdivision (e).

(6) A detailed summary of investments that were transferred to funds or accounts devoid of companies with business operations in Sudan as described in subdivision (f).

(j) If the board voluntarily sells or transfers all of its investments in a company with business operations in Sudan, this section shall not apply except that the board shall file a report with the Legislature related to that company as described in subdivision (i).

(k) Nothing in this section shall require the board to take action as described in this section unless the board determines, in good faith, that the action described in this section is consistent with the fiduciary responsibilities of the board as described in Section 17 of Article XVI of the California Constitution.

(l) Subdivision (h) shall not apply to any of the following:

(1) Investments in a company that is primarily engaged in supplying goods or services intended to relieve human suffering in Sudan.

(2) Investments in a company that promotes health, education, journalistic, or religious activities in or welfare in the western, eastern, or southern regions of Sudan.

(3) Investments in a United States company that is authorized by the federal government to have business operations in Sudan.

(m) This section shall remain in effect only until one of the following occurs, and as of the date of that action, is repealed:

(1) The government of Sudan halts the genocide in Darfur for 12 months as determined by both the Department of State and the Congress of the United States.

(2) The United States revokes its current sanctions against Sudan.

Added by Stats 2006 ch 442 § 2 (AB 2941), effective January 1, 2007.

§ 7513.7. California Public Divest from Iran Act (Operative term contingent)

(a) As used in this section, the following definitions shall apply:

(1) "Board" means the Board of Administration of the Public Employees' Retirement System or the Teachers' Retirement Board of the State Teachers' Retirement System, as applicable.

(2) "Business operations" means maintaining, selling, or leasing equipment, facilities, personnel, or any other apparatus of business or commerce in Iran, including the ownership or possession of real or personal property located in Iran.

(3) "Company" means a sole proprietorship, organization, association, corporation, partnership, venture, or other entity, its subsidiary or affiliate that exists for profitmaking purposes or to otherwise secure economic advantage. "Company" also means a company owned or controlled, either directly or indirectly, by the government of Iran, that is established or organized under the laws of or has its principal place of business in Iran.

(4) "Energy sector of Iran" means activities to develop petroleum or natural gas resources or nuclear power in Iran.

(5) "Invest" or "investment" means the purchase, ownership, or control of stock of a company, association, or corporation, the capital stock of a mutual water company or corporation, bonds issued by the government or a political subdivision of Iran, corporate bonds or other debt instruments issued by

a company, or the commitment of funds or other assets to a company, including a loan or extension of credit to that company.

(6) "Iran" means the government of Iran and any agency or instrumentality of Iran.

(7) "Public employee retirement funds" means the Public Employees' Retirement Fund described in Section 20062 of this code, and the Teachers' Retirement Fund described in Section 22167 of the Education Code.

(8) "Substantial action" means a boycott of the government of Iran, curtailing business in Iran until that time described in subdivision (m), or selling company assets, equipment, or real and personal property located in Iran.

(b) The board shall not invest public employee retirement funds in a company which has business operations in Iran as identified by the board through, as the board deems appropriate, publicly available information including, but not limited to, information provided by nonprofit and other organizations and government entities, that meets either of the following criteria:

(1) The company (A) is invested in or engaged in business operations with entities in the defense or nuclear sectors of Iran or (B) has an investment of twenty million dollars ($20,000,000) or more in the energy sector of Iran, including in a company that provides oil or liquefied natural gas tankers, or products used to construct or maintain pipelines used to transport oil or liquefied natural gas, for the energy sector of Iran, and that company is subject to sanctions under Public Law 104-172, as renewed and amended in 2001 and 2006.

(2) The company has demonstrated complicity with an Iranian organization that has been labeled as a terrorist organization by the United States government.

(c) Annually, on or before June 30, the board shall review its investment portfolio and determine which companies are subject to divestment.

(d) After the determination described in subdivision (c), the board shall determine, by the next applicable board meeting, if a company meets the criteria described in subdivision (b). If the board plans to invest or has investments in a company that meets the criteria described in subdivision (b), that planned or existing investment shall be subject to subdivisions (g) and (h).

(e) Investments of the board in a company that does not meet the criteria described in subdivision (b) are not subject to subdivision (h) if the company does not subsequently meet the criteria described in subdivision (b). The board shall identify the reasons why that company does not satisfy the criteria described in subdivision (b) in the report to the Legislature described in subdivision (i).

(f) (1) Notwithstanding subdivisions (d) and (e), if the board's investment in a company described in subdivision (b) is limited to investment via an externally and actively managed commingled fund, the board shall contact that fund manager in writing and request that the fund manager remove that company from the fund as described in subdivision (h). On or before June 30, if the fund or account manager creates a fund or account devoid of companies described in subdivision (b), the transfer of board investments from the prior fund or account to the fund or account devoid of companies with business operations in Iran shall be deemed to satisfy subdivision (h).

(2) If the board's investment in a company described in subdivision (b) is limited to an alternative fund or account, the alternative fund or account manager creates an actively managed commingled fund that excludes companies described in subdivision (b), and the new fund or account is deemed to be financially equivalent to the existing fund or account, the transfer of board investments from the existing fund or account to the new fund or account shall be deemed to satisfy subdivision (h). If the board determines that the new fund or account is not financially equivalent to the existing fund, the board shall include the reasons for that determination in the report described in subdivision (i).

(3) The board shall make a good faith effort to identify any private equity investments that involve companies described in subdivision (b), or are linked to the government of Iran. If the board determines that a private equity investment clearly involves a company described in subdivision (b), or is linked to the government of Iran, the board shall consider, at its discretion, if those private equity investments shall be subject to subdivision (h). If the board determines that a private equity investment clearly involves a company described in subdivision (b), or is linked to the government of Iran and the

board does not take action as described in subdivision (h), the board shall include the reasons for its decision in the report described in subdivision (i).

(g) Except as described in subdivisions (e) and (f), the board, in the board's capacity of shareholder or investor, shall notify any company described in subdivision (d) that the company is subject to subdivision (h) and permit that company to respond to the board. The board shall request that the company take substantial action no later than 90 days from the date the board notified the company under this subdivision. If the board determines based on credible information available to the public that a company has taken substantial action or has made sufficient progress toward substantial action before the expiration of that 90-day period, that company shall not be subject to subdivision (h). The board shall, at intervals not to exceed 90 days, continue to monitor and review the progress of the company until that company has taken substantial action in Iran. Any determination made at each 90-day interval that a company has taken substantial action shall be supported by findings adopted by a rollcall vote of the board following a presentation and discussion of the findings in open session, during a properly noticed public hearing of the full board. All proposed findings of the board shall be made public 72 hours before they are considered by the board, and the board shall maintain a list of interested parties who shall be notified of proposed findings 72 hours before the board's consideration. The findings and any public comments regarding the adopted findings and determinations made pursuant to this subdivision shall be included in the report to the Legislature required by subdivision (i). A company that fails to complete substantial action within one year from the date of the initial notice by the board shall be subject to subdivision (h).

(h) If a company described in subdivision (d) fails to complete substantial action by the time described in subdivision (g), the board shall take the following actions:

(1) The board shall not make additional or new investments or renew existing investments in that company.

(2) The board shall liquidate the investments of the board in that company no later than 18 months after this subdivision applies to that company. The board shall liquidate those investments in a manner to address the need for companies to take substantial action in Iran and consistent with the board's fiduciary responsibilities as described in Section 17 of Article XVI of the California Constitution.

(i) On or before January 1, 2009, and every year thereafter, the board shall file a report with the Legislature. The report shall describe the following:

(1) A list of investments the board has in companies with business operations that satisfy the criteria in subdivision (b), including, but not limited to, the issuer, by name, of the stock, bonds, securities, and other evidence of indebtedness.

(2) A detailed summary of the business operations a company described in paragraph (1) has in Iran.

(3) Whether the board has reduced its investments in a company that satisfies the criteria in subdivision (b).

(4) If the board has not completely reduced its investments in a company that satisfies the criteria in subdivision (b), when the board anticipates that the board will reduce all investments in that company or the findings adopted in support of a determination made pursuant to subdivision (k) pertaining to why a sale or transfer of investments is inconsistent with the fiduciary responsibilities of the board as described in Section 17 of Article XVI of the California Constitution.

(5) Any information described in subdivisions (d) and (e).

(6) A detailed summary of investments that were transferred to funds or accounts devoid of companies with business operations in Iran as described in subdivision (f).

(7) An annual calculation of any costs or investment losses or other financial results incurred in compliance with the provisions of this section.

(j) If the board voluntarily sells or transfers all of its investments in a company with business operations in Iran, this section shall not apply except that the board shall file a report with the Legislature related to that company as described in subdivision (i).

(k) Nothing in this section shall require the board to take action as described in this section if the board determines, and adopts findings, in good faith and based on credible information available to the public, that the action described in this section would fail to satisfy the fiduciary responsibilities of the board as described in Section 17 of Article XVI of the California Constitution. Any adopted findings shall demonstrate how divestment disadvantages the fund and that any feasible investment alternatives would yield a lower rate of return with commensurate degrees of risk, or create a higher degree of risk with commensurate rates of return. Notwithstanding any other law, any determination that an action would fail to satisfy the fiduciary responsibilities of the board as described in Section 17 of Article XVI of the California Constitution shall require a recorded rollcall vote of the full board, following a presentation and discussion of findings in open session, during a properly noticed public hearing of the full board. All proposed findings of the board shall be made public 72 hours before they are considered by the board, and the board shall maintain a list of interested parties who shall be notified of proposed findings 72 hours before board consideration. The findings and any public comments regarding the adopted findings and determinations made pursuant to this subdivision shall be included in the report to the Legislature required by subdivision (i).

(*l*) This section shall cease to be operative if the President of the United States has made the certifications specified in paragraphs (1) and (2) of subdivision (a) of Section 8551 of Title 22 of the United States Code.

(m) This section shall be known and may be cited as the California Public Divest from Iran Act.

(n) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Added Stats 2007 ch 671 § 2 (AB 221), effective January 1, 2008. Amended Stats 2011 ch 441 § 2 (AB 1151), effective January 1, 2012, operative term contingent.

Editor's Notes–For contingent operation, see subdivision (m) of this section.

Amendments

2011 Amendment: (1) Deleted "the Islamic Republic of" after "of business in" in the second sentence of subd (a)(3); **(2)** substituted subd (a)(4) for former subd (a)(4) which read: "(4) 'Government of Iran' means the government of Iran or its instrumentalities or political subdivisions. 'Government of Iran' also means an individual, company, or public agency located in Iran that provides material or financial support to the Islamic Republic of Iran."; **(3)** substituted "government of Iran and any agency or instrumentality" for "Islamic Republic of Iran or a territory under the administration or control" in subd (a)(6); **(4)** deleted former subd (a)(7) which read: "(7) 'Military equipment' means weapons, arms, or military defense supplies."; **(5)** redesignated former subds (a)(8) and (a)(9) to be subds (a)(7) and (a)(8); **(6)** substituted "has an investment of twenty million dollars ($20,000,000) or more in the energy sector of Iran, including in a company that provides oil or liquefied natural gas tankers, or products used to construct or maintain pipelines used to transport oil or liquefied natural gas, for the energy sector" for "is invested in or engaged in business operations with entities involved in the development of petroleum or natural gas resources" in subd (b)(1); **(7)** amended subd (c) by adding **(a)** "Annually,"; and **(b)** "review its investment portfolio and"; **(8)** deleted "2008," after "June 30," in subd (c) and in the second sentence of subd (f)(1); **(9)** amended the third sentence of subd (g) by **(a)** adding "based on credible information available to the public"; and **(b)** substituting "toward" for "towards"; **(10)** added the fifth through seventh sentences of subd (g); **(11)** substituted "findings adopted in support of a determination made pursuant to subdivision (k) pertaining to" for "reasons" in subd (i)(4); **(12)** amended the first sentence of subd (k) by substituting **(a)** "if the board determines, and adopts findings, in good faith and based on credible information available to the public" for "unless the board determines, in good faith"; and **(b)** "would fail to satisfy" for "is consistent with"; **(13)** added the second through last sentences of subd (k); **(14)** deleted former subd (*l*) which read: "(*l*) Subdivision (h) shall not apply to any of the following: (1) Investments in a company that is primarily engaged in supplying goods or services intended to relieve human suffering in Iran. (2) Investments in a company that promotes health, education, or journalistic, religious, or welfare activities in Iran. (3) Investments in a United States company that is authorized by the federal government to have business operations in Iran."; **(15)** redesignated former

subds (m) and (n) to be subds (*l*) and (m); **(16)** substituted present subd (*l*) for former subd (m) which read: "(m) This section shall cease to be operative if both of the following apply: (1) Iran is removed from the United States Department of State's list of countries that have been determined to repeatedly provide support for acts of international terrorism. (2) Pursuant to Public Law 104-172, as amended, the President of the United States determines and certifies to the appropriate committee of the Congress of the United States that Iran has ceased its efforts to design, develop, manufacture, or acquire a nuclear explosive device or related materials and technology. "; and **(17)** added subd (n).

§ 7513.8. Definitions for Sections 7513.85, 7513.86, 7513.87, 7513.9, 7513.95

As used in this section and Sections 7513.85, 7513.86, 7513.87, 7513.9, and 7513.95:

(a) "Board" means the retirement board of a public pension or retirement system, as defined in subdivision (h) of Section 17 of Article XVI of the California Constitution.

(b) "External manager" means either of the following:

(1) A person who is seeking to be, or is, retained by a board or an investment vehicle to manage a portfolio of securities or other assets for compensation.

(2) A person who manages an investment fund and who offers or sells, or has offered or sold, an ownership interest in the investment fund to a board or an investment vehicle.

(c) (1) "Investment fund" means a private equity fund, public equity fund, venture capital fund, hedge fund, fixed income fund, real estate fund, infrastructure fund, or similar pooled investment entity that is, or holds itself out as being, engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, owning, holding, or trading securities or other assets.

(2) Notwithstanding paragraph (1), an investment company that is registered with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.) and that makes a public offering of its securities is not an investment fund.

(d) "Investment vehicle" means a corporation, partnership, limited partnership, limited liability company, association, or other entity, either domestic or foreign, managed by an external manager in which a board is the majority investor and that is organized in order to invest with, or retain the investment management services of, other external managers.

(e) "Person" means an individual, corporation, partnership, limited partnership, limited liability company, or association, either domestic or foreign.

(f) (1) "Placement agent" means any person directly or indirectly hired, engaged, or retained by, or serving for the benefit of or on behalf of, an external manager or an investment fund managed by an external manager, and who acts or has acted for compensation as a finder, solicitor, marketer, consultant, broker, or other intermediary in connection with the offer or sale to a board or an investment vehicle either of the following:

(A) In the case of an external manager within the meaning of paragraph (1) of subdivision (b), the investment management services of the external manager.

(B) In the case of an external manager within the meaning of paragraph (2) of subdivision (b), an ownership interest in an investment fund managed by the external manager.

(2) Notwithstanding paragraph (1), an individual who is an employee, officer, director, equityholder, partner, member, or trustee of an external manager and who spends one-third or more of his or her time, during a calendar year, managing the securities or assets owned, controlled, invested, or held by the external manager is not a placement agent.

Added Stats 2009 ch 301 § 3 (AB 1584), effective October 11, 2009. Amended Stats 2010 ch 668 § 1 (AB 1743), effective January 1, 2011; Stats 2011 ch 704 § 1 (SB 398), effective October 9, 2011.

Amendments

2010 Amendment: (1) Substituted "Sections 7513.85, 7513.86, 7513.87, 7513.9, and 7513.95" for "Sections 7513.85, 7513.9, and 7513.95" in the introductory clause; **(2)** substituted subd (b) for former subd (b) which read: "(b) 'External manager' means an asset management firm that is seeking to be, or has been, retained by a

public retirement system in California to manage a portfolio of assets, including securities, for a fee."; **(3)** added subd (c); **(4)** redesignated former subd (c) to be subd (d); and **(5)** substituted subd (d) for former subd (d) which read: "(d) 'Placement agent' means any person or entity hired, engaged, or retained by, or acting on behalf of, an external manager, or on behalf of another placement agent, as a finder, solicitor, marketer, consultant, broker, or other intermediary to raise money or investment from, or to obtain access to, a public retirement system in California, directly or indirectly, including, without limitation, through an investment vehicle."

2011 Amendment: (1) Inserted "this section and" after "As used in" in the first sentence of the section; **(2)** amended subd (b)(2) by **(a)** substituting "manages an investment fund" for "is engaged, or proposes to be engaged, in the business of investing, reinvesting, owning, holding, or trading securities or other assets"; and **(b)** substituting "an ownership interest in the investment fund to a board or an investment vehicle" for "securities to a board"; **(3)** inserted new subds (c) and (d); **(4)** redesignated former subd (c) to be subd (e); and **(5)** redesignated former subd (d) to be subd (f) and amended subd (f) by **(a)** inserting "directly or indirectly" following "means any person"; **(b)** substituting "or an investment fund managed by an external manager, and" for ", or on behalf of another placement agent,"; **(c)** deleting "of the securities, assets, or services of an external manager"; **(d)** substituting "either of the following:" for ", either directly or indirectly."; **(e)** inserting new subds (f)(1)(A) and (f)(1)(B); and **(f)** deleting subd (3) which read: "(3) For purposes of this subdivision, "investment vehicle" means a corporation, partnership, limited partnership, limited liability company, association, or other entity, either domestic or foreign, constituting or managed by an external manager in which a board is the majority investor and that is organized in order to invest with, or retain the investment management services of, other external managers."

§ 7513.85. Disclosure of payments to placement agents; Violation

(a) The board shall develop and implement, on or before June 30, 2010, a policy requiring the disclosure of payments to placement agents in connection with system investments in or through external managers. The policy shall include, but not be limited to, the following requirements:

(1) Disclosure of the existence of relationships between external managers and placement agents.

(2) A resume for each officer, partner, or principal of the placement agent detailing the person's education, professional designations, regulatory licenses, and investment and work experience.

(3) A description of any and all compensation of any kind provided, or agreed to be provided, to a placement agent.

(4) A description of the services to be performed by the placement agent.

(5) A statement whether the placement agent, or any of its affiliates, are registered with the Securities and Exchange Commission or the Financial Industry Regulatory Association, or any similar regulatory agent in a country other than the United States, and the details of that registration or explanation as to why no registration is required.

(6) A statement whether the placement agent, or any of its affiliates, is registered as a lobbyist with any state or national government.

(b) Any external manager or placement agent that violates the policy shall not solicit new investments from the system for five years after the violation was committed. However, this prohibition may be reduced by a majority vote of the board at a public session upon a showing of good cause.

(c) The system shall not enter into any agreement with an external manager that does not agree in writing to comply with the policy.

(d) Nothing in this section shall require the board to take action as described in this section unless the board determines, in good faith, that the action described in this section is consistent with the fiduciary responsibilities of the board as described in Section 17 of Article XVI of the California Constitution.

Added Stats 2009 ch 301 § 4 (AB 1584), effective October 11, 2009.

§ 7513.86. Placement agent registered as lobbyist

Except as provided in subdivisions (b) and (c) of Section 82047.3, a person shall not act as a placement agent in connection with any potential system investment made by a state public retirement sys-

tem unless that person is registered as a lobbyist in accordance with Chapter 6 (commencing with Section 86100) of Title 9 and is in full compliance with the Political Reform Act of 1974 (Title 9 (commencing with Section 81000)) as that act applies to lobbyists.

Added Stats 2010 ch 668 § 2 (AB 1743), effective January 1, 2011.

§ 7513.87. Filing of reports by person acting as placement agent

(a) A person acting as a placement agent in connection with any potential system investment made by a local public retirement system shall file any applicable reports with a local government agency that requires lobbyists to register and file reports and shall comply with any applicable requirements imposed by a local government agency pursuant to Section 81013.

(b) This section does not apply to either of the following:

(1) An individual who is an employee, officer, director, equityholder, partner, member, or trustee of an external manager who spends one-third or more of his or her time, during a calendar year, managing the securities or assets owned, controlled, invested, or held by the external manager.

(2) An employee, officer, or director of an external manager, or of an affiliate of an external manager, if all of the following apply:

(A) The external manager is registered as an investment adviser or a broker-dealer with the Securities and Exchange Commission or, if exempt from or not subject to registration with the Securities and Exchange Commission, any appropriate state securities regulator.

(B) The external manager is participating in a competitive bidding process, such as a request for proposals, or has been selected through that process and is providing services pursuant to a contract executed as a result of that competitive bidding process.

(C) The external manager, if selected through a competitive bidding process described in subparagraph (B), has agreed to a fiduciary standard of care, as defined by the standards of conduct applicable to the retirement board of a public pension or retirement system and set forth in Section 17 of Article XVI of the California Constitution, when managing a portfolio of assets of a public retirement system in California.

Added Stats 2010 ch 668 § 3 (AB 1743), effective January 1, 2011. Amended Stats 2011 ch 704 § 2 (SB 398), effective October 9, 2011.

Amendments

2011 Amendment: (1) Amended subd (b) by **(a)** deleting "either of the following: (1)" after "not apply to"; and **(b)** adding "and" before "who spends"; and **(2)** deleted former subd (b)(2) which read: "(2) An employee, officer, or director of an external manager, or of an affiliate of an external manager, if all of the following apply: "(A) The external manager is registered as an investment adviser or a broker dealer with the Securities and Exchange Commission or, if exempt from or not subject to registration with the Securities and Exchange Commission, any appropriate state securities regulator. "(B) The external manager is participating in a competitive bidding process, such as a request for proposals, or has been selected through that process and is providing services pursuant to a contract executed as a result of that competitive bidding process. "(C) The external manager, if selected through a competitive bidding process described in subparagraph (B), has agreed to a fiduciary standard of care, as defined by the standards of conduct applicable to the retirement board of a public pension or retirement system and set forth in Section 17 of Article XVI of the California Constitution, when managing a portfolio of assets of a public retirement system in California."

§ 7513.9. Campaign contributions by placement agent

(a) Any placement agent, prior to acting as a placement agent in connection with any potential system investment, shall disclose to the board all campaign contributions made by the placement agent to any elected member of the board during the prior 24-month period. Additionally, any subsequent campaign contribution made by the placement agent to an elected member of the board during the time the

placement agent is receiving compensation in connection with a system investment shall also be disclosed.

(b) Any placement agent, prior to acting as a placement agent in connection with any potential system investment, shall disclose to the board all gifts, as defined in Section 82028, given by the placement agent to any member of the board during the prior 24-month period. Additionally, any subsequent gift given by the placement agent to any member of the board during the time the placement agent is receiving compensation in connection with a system investment shall also be disclosed.

Added Stats 2009 ch 301 § 5 (AB 1584), effective October 11, 2009.

§ 7513.95. Provision of investment product prohibited

A member or employee of the board shall not, directly or indirectly, by himself or herself, or as an agent, partner, or employee of a person or entity other than the board, sell or provide any investment product that would be considered an asset of the fund to any public retirement system in California.

Added Stats 2009 ch 301 § 6 (AB 1584), effective October 11, 2009.

§ 7513.97. Investment in bonds or other evidences of indebtedness unconditionally guaranteed by foreign governments

As used in Section 11 of Article VII of the Constitution, the following terms have the following meanings:

(a) "Actuarial equivalent" means a benefit of equal value when computed upon the basis of the mortality tables adopted and the actuarial interest rate fixed by the Board of Administration of the Public Employees' Retirement System.

(b) "Beneficiary" means any person or corporation designated by a member, a retired member, or statute, or the estate of a member or retired member designated by the member or retired member, to receive a benefit under the retirement system, on account of the death of the member or retired member.

(c) "Salary" means the actual wages paid but shall not include any other benefits, such as, but not limited to, health and dental benefits, retirement benefits, vacation pay, and per diem.

(d) "Unmodified pension or retirement allowance" means the maximum pension or retirement allowance receivable, prior to any selection of an optional settlement and includes any cost-of-living adjustment and any other increase granted subsequent to retirement.

Added Stats 1993 ch 440 § 1 (AB 216), as Gov C § 7514. Amended Stats 1994 ch 30 § 1 (SB 1285), effective March 30, 1994, ch 31 § 1 (AB 2448), effective March 30, 1994, ch 46 § 1 (AB 2237). Amended and renumbered by Stats 2011 ch 296 § 117 (AB 1023), effective January 1, 2012.

Amendments

1994 Amendment (ch 31): Deleted "Chapter 5 (commencing with Section 16640) and" before "Chapter 7" in subd (a). (As amended Stats 1994 ch 31, compared to the section as it read prior to 1994. This section was also amended by an earlier chapter, ch 30. See Gov C § 9605.)

1994 Amendment (ch 46): Substituted "Mexico, or South Africa" for "or Mexico" at the end of subd (b).

2011 Amendment: Renumbered section from Gov C § 7514 and substituted "receivable" for "receiveable" in subd (d).

§ 7514. Investment in bonds or other evidences of indebtedness unconditionally guaranteed by foreign governments

(a) Notwithstanding any other provision of law except Chapter 7 (commencing with Section 16649.80) of Part 2 of Division 4 of Title 2, any state or local public retirement system may invest,

subject to and consistent with the standard for prudent investment set forth in Section 17 of Article XVI of the California Constitution, its assets in the bonds or other evidences of indebtedness unconditionally guaranteed by any foreign government that has met the payments of similar bonds or other evidences of indebtedness when due.

(b) A portion of the assets invested pursuant to this section may be used to purchase rated or unrated bonds, notes, or other instruments unconditionally guaranteed by Canada, Israel, Mexico, or South Africa.

Added Stats 1993 ch 440 § 1 (AB 216). Amended Stats 1994 ch 30 § 1 (SB 1285), effective March 30, 1994, ch 31 § 1 (AB 2448), effective March 30, 1994, ch 46 § 1 (AB 2237).

Editor's Notes—There was another section of this number, relating to definitions, as added Stats 1984 ch 220 § 1, operative upon adoption of SCA No. 36 of the 1983-84 Regular Session, and renumbered Gov C § 7513.97 by Stats 2011 ch 296 § 117.

§ 7514.1. Investment of state or local retirement system in obligations of international financial institutions

Notwithstanding any other provision of law except Chapter 7 (commencing with Section 16649.80) of Part 2 of Division 4 of Title 2, any state or local public retirement system may invest, subject to and consistent with the standard for prudent investment set forth in Section 17 of Article XVI of the California Constitution, and the state and any political subdivision of the state may, invest its assets in rated bonds, notes, or other obligations issued, assumed, or unconditionally guaranteed by the African Development Bank, the Asian Development Bank, the Caribbean Development Bank, the Inter–American Development Bank, the International Finance Corporation, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, and any other international financial institution that has met the payments of similar bonds, notes, or other obligations when due and in which the United States is a member.

Added by Stats 1994 ch 1084 § 1 (SB 1459). Amended by Stats 1995 ch 91 § 45 (SB 975).

Amendments

1995 Amendment: Added the comma after "the state may".

§ 7514.2. Prioritization of investment in in-state infrastructure projects

(a) As used in this section, the following definitions shall apply:

(1) "Board" means the Board of Administration of the Public Employees' Retirement System and the Teachers' Retirement Board.

(2) "Infrastructure" includes, but is not limited to, telecommunications, power, transportation, ports, petrochemical, and utilities.

(b) A board may, subject to and consistent with its fiduciary duties and the standard for prudent investment set forth in Section 20190 of this code, Section 22203 of the Education Code, and Section 17 of Article XVI of the California Constitution, prioritize investment in an in-state infrastructure project over a comparable out-of-state project.

(c) The Legislature encourages each board to prioritize investment in in-state infrastructure projects over alternative out-of-state infrastructure projects if the investments in the in-state projects are consistent with the board's fiduciary duties to minimize the risk of loss and to maximize the rate of return.

(d) Nothing in this section shall require a board to take action that is inconsistent with its plenary authority and fiduciary responsibilities, as described in Section 17 of Article XVI of the California Constitution.

Added Stats 2012 ch 760 § 2 (SB 955), effective January 1, 2013.

§ 7514.3. Establishment of credit enhancement programs by state pension systems

Notwithstanding any other provision of law, state pension systems may, subject to and consistent with their fiduciary duties and the standard for prudent investment set forth in Section 20190 of this code and Section 17 of Article XVI of the California Constitution, establish credit enhancement programs to assist entities of state and local government and other issuers of municipal and public finance debt to secure more favorable financing terms through a variety of types of credit enhancement including, but not limited to, enhancement of the credit of bonds, notes, and other indebtedness. Any credit enhancement program shall comply with the requirements of Section 503 of the Internal Revenue Code.

Added by Stats 2004 ch 266 § 1 (AB 2364), effective August 23, 2004.

§ 7514.5. Membership in another retirement system; Specified period of time

Notwithstanding any other provision of law, whenever the rights of a member of the Public Employees' Retirement System, the State Teachers' Retirement System, or a retirement system established under the County Employees Retirement Law of 1937, because of membership in another retirement system, are conditional upon employment within a specified period of time after termination of service in another retirement system, that specified period shall be the period of service in full–time elective office on and after November 6, 1990, if the member was a full–time elective officer on or after that date and becomes a member of any of those retirement systems within 120 days after termination of the full–time elective office.

Added by Stats 1998 ch 1074 § 1 (SB 1021), effective September 30, 1998.

§ 7515. Intent of chapter

It is the intent of this chapter to authorize and encourage the Public Employees' Retirement System and the State Teachers' Retirement System to regularly cooperate and share information that may assist both systems in developing and implementing appropriate investment strategies, with the advice of investment experts selected by the systems who are willing to share their knowledge and expertise.

Added by Stats 2000 ch 320 § 3 (SB 2122).

Former Sections: Former § 7515, relating to review of controlling statutes by Teacher's Retirement Board and Board of Administration, was added Stats 1988 ch 241 § 1 and repealed Stats 2000 ch 320 § 2.

§ 7516. Confidential information

Notwithstanding any other provision of law, confidential information or documents relating to investments in the possession of the Public Employees' Retirement System or the State Teachers' Retirement System shall not lose their confidential status due to the fact that the information or documents are shared with the other system or with investment advisors selected by the systems to advise on asset allocation, active verses passive management, or other investment issues of mutual interest and concern. Nothing in this chapter shall be construed to authorize the release or sharing of documents or information in violation of federal law or the terms of a contract.

Added by Stats 2000 ch 320 § 3 (SB 2122).

§ 7520. Deposits with savings and loan associations in exchange for residential construction loans

(a) Notwithstanding any other provision of law, any public pension fund or retirement system of this state or local agency of this state may contract with a savings and loan association doing business in this state under terms by which the association shall receive deposits of money from the fund or system for a term of 12 months or longer upon the association's agreement to offer loans for the construction of new residential structures and related improvements, including apartment buildings or other multiple-unit structures, in an amount equal to the amount of the deposit, at a rate of interest equal to the rate of interest on the deposit plus 200 basis points. The savings and loan association may require additionally an origination fee not exceeding the amount required by the savings and loan association for comparable loans not subject to this section, but in no case exceeding 5 percent of the loan amount. This fee shall not be deemed to include any expenses of the association directly related to approving, processing, or recording loans made pursuant to this section. Reasonable charges to cover those expenses may be imposed in connection with the loans.

(b) Nothing in this section shall authorize a pension fund or retirement system to make deposits at less than the otherwise applicable rate of interest nor prohibit the fund or system from depositing funds with other financial institutions or under other conditions.

Added by Stats 1982 ch 1144 § 1. Amended by Stats 2006 ch 538 § 237 (SB 1852), effective January 1, 2007.

Amendments

2006 Amendment: (1) Added subd designations (a) and (b); **(2)** substituted "those expenses may be imposed in connection with the" for "such expenses may be imposed in connection with such" after "charges to cover" in subd (a); and **(3)** substituted "or" for "of" after "prohibit the fund" in subd (b).

§ 7522. Citation of article

This article shall be known as the California Public Employees' Pension Reform Act of 2013.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.02. Applicability of article; Retirement plan for individuals employed by subsequent employer for first time or after specified date; Defined benefit pension plan; Defined contribution plan

(a) (1) Notwithstanding any other law, except as provided in this article, on and after January 1, 2013, this article shall apply to all state and local public retirement systems and to their participating employers, including the Public Employees' Retirement System, the State Teachers' Retirement System, the Legislators' Retirement System, the Judges' Retirement System I, the Judges' Retirement System II, county and district retirement systems created pursuant to the County Employees Retirement Law of 1937, independent public retirement systems, and to individual retirement plans offered by public employers. However, this article shall be subject to the Internal Revenue Code and Section 17 of Article XVI of the California Constitution. The administration of the requirements of this article shall comply with applicable provisions of the Internal Revenue Code and the Revenue and Taxation Code.

(2) Notwithstanding paragraph (1), this article shall not apply to the entities described in Section 9 of Article IX of, and Sections 4 and 5 of Article XI of, the California Constitution, except to the extent that these entities continue to be participating employers in any retirement system governed by state statute. Accordingly, any retirement plan approved before January 1, 2013, by the voters of any entity excluded from coverage by this section shall not be affected by this article.

(b) The benefit plan required by this article shall apply to public employees who are new members as defined in Section 7522.04.

(c) Individuals who were employed by any public employer before January 1, 2013, and who became employed by a subsequent public employer for the first time on or after January 1, 2013, shall be subject to the retirement plan that would have been available to employees of the subsequent employer who were first employed by the subsequent employer on or before December 31, 2012, if the individual was subject to reciprocity established under any of the following provisions:

(1) Article 5 (commencing with Section 20350) of Chapter 3 of Part 3 of Division 5 of Title 2.

(2) Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3.

(3) Any agreement between public retirement systems to provide reciprocity to members of the systems.

(d) If a public employer, before January 1, 2013, offers a defined benefit pension plan that provides a defined benefit formula with a lower benefit factor at normal retirement age and results in a lower normal cost than the defined benefit formula required by this article, that employer may continue to offer that defined benefit formula instead of the defined benefit formula required by this article, and shall not be subject to the requirements of Section 7522.10 for pensionable compensation subject to that formula. However, if the employer adopts a new defined benefit formula on or after January 1, 2013, that formula must conform to the requirements of this article or must be determined and certified by the retirement system's chief actuary and the retirement board to have no greater risk and no greater cost to the employer than the defined benefit formula required by this article and must be approved by the Legislature. New members of the defined benefit plan may only participate in the lower cost defined benefit formula that was in place before January 1, 2013, or a defined benefit formula that conforms to the requirements of this article or is approved by the Legislature as provided in this subdivision.

(e) If a public employer, before January 1, 2013, offers a retirement benefit plan that consists solely of a defined contribution plan, that employer may continue to offer that plan instead of the defined benefit pension plan required by this article. However, if the employer adopts a new defined benefit pension plan or defined benefit formula on or after January 1, 2013, that plan or formula must conform to the requirements of this article or must be determined and certified by the retirement system's chief actuary and the system's board to have no greater risk and no greater cost to the employer than the defined benefit formula required by this article and must be approved by the Legislature. New members of the employer's plan may only participate in the defined contribution plan that was in place before January 1, 2013, or a defined contribution plan or defined benefit formula that conforms to the requirements of this article.

(f) The Judges' Retirement System I and the Judges' Retirement System II shall not be required to adopt the defined benefit formula required by Section 7522.25 or 7522.30 or the compensation limitations defined in Section 7522.10.

(g) This article shall not be construed to provide membership in any public retirement system for an individual who would not otherwise be eligible for membership under that system's applicable rules or laws.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.04. Definitions

For the purposes of this article:

(a) "Defined benefit formula" means a formula used by the retirement system to determine a retirement benefit based on age, years of service, and pensionable compensation earned by an employee up to the limit defined in Section 7522.10.

(b) "Employee contributions" means the contributions to a public retirement system required to be paid by a member of the system, as fixed by law, regulation, administrative action, contract, contract

amendment, or other written agreement recognized by the retirement system as establishing an employee contribution.

(c) "Federal system" means the old age, survivors, disability, and health insurance provisions of the federal Social Security Act (42 U.S.C. Sec. 301 et seq.).

(d) "Member" means a public employee who is a member of any type of a public retirement system or plan.

(e) "New employee" means either of the following:

(1) An employee, including one who is elected or appointed, of a public employer who is employed for the first time by any public employer on or after January 1, 2013, and who was not employed by any other public employer prior to that date.

(2) An employee, including one who is elected or appointed, of a public employer who is employed for the first time by any public employer on or after January 1, 2013, and who was employed by another public employer prior to that date, but who was not subject to reciprocity under subdivision (c) of Section 7522.02.

(f) "New member" means any of the following:

(1) An individual who becomes a member of any public retirement system for the first time on or after January 1, 2013, and who was not a member of any other public retirement system prior to that date.

(2) An individual who becomes a member of a public retirement system for the first time on or after January 1, 2013, and who was a member of another public retirement system prior to that date, but who was not subject to reciprocity under subdivision (c) of Section 7522.02.

(3) An individual who was an active member in a retirement system and who, after a break in service of more than six months, returned to active membership in that system with a new employer. For purposes of this subdivision, a change in employment between state entities or from one school employer to another shall not be considered as service with a new employer.

(g) "Normal cost" means the portion of the present value of projected benefits under the defined benefit that is attributable to the current year of service, as determined by the public retirement system's actuary according to the most recently completed valuation.

(h) "Public employee" means an officer, including one who is elected or appointed, or an employee of a public employer.

(i) "Public employer" means:

(1) The state and every state entity, including, but not limited to, the Legislature, the judicial branch, including judicial officers, and the California State University.

(2) Any political subdivision of the state, or agency or instrumentality of the state or subdivision of the state, including, but not limited to, a city, county, city and county, a charter city, a charter county, school district, community college district, joint powers authority, joint powers agency, and any public agency, authority, board, commission, or district.

(3) Any charter school that elects or is required to participate in a public retirement system.

(j) "Public retirement system" means any pension or retirement system of a public employer, including, but not limited to, an independent retirement plan offered by a public employer that the public employer participates in or offers to its employees for the purpose of providing retirement benefits, or a system of benefits for public employees that is governed by Section 401(a) of Title 26 of the United States Code.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.10. Modification of plans required; Pensionable compensation; Limitations on defined or combination of defined benefits; Employer contributions

(a) On and after January 1, 2013, each public retirement system shall modify its plan or plans to comply with the requirements of this section for each public employer that participates in the system.

(b) Whenever pensionable compensation, as defined in Section 7522.34, is used in the calculation of a benefit, the pensionable compensation shall be subject to the limitations set forth in subdivision (c).

(c) The pensionable compensation used to calculate the defined benefit paid to a new member who retires from the system shall not exceed the following applicable percentage of the contribution and benefit base specified in Section 430(b) of Title 42 of the United States Code on January 1, 2013:

(1) One hundred percent for a member whose service is included in the federal system.

(2) One hundred twenty percent for a member whose service is not included in the federal system.

(d) (1) The retirement system shall adjust the pensionable compensation described in subdivision (c) following each actuarial valuation based on changes to the Consumer Price Index for All Urban Consumers. The adjustment shall be effective annually on January 1 following the annual valuation.

(2) The Legislature reserves the right to modify the requirements of this subdivision with regard to all public employees subject to this section, except that the Legislature may not modify these provisions in a manner that would result in a decrease in benefits accrued prior to the effective date of the modification.

(e) A public employer shall not offer a defined benefit or any combination of defined benefits, including a defined benefit offered by a private provider, on compensation in excess of the limitation in subdivision (c).

(f) (1) A public employer may provide a contribution to a defined contribution plan for compensation in excess of the limitation in subdivision (c) provided the plan and the contribution meet the requirements and limits of federal law.

(2) A public employee who receives an employer contribution to a defined contribution plan shall not have a vested right to continue receiving the employer contribution.

(g) Any employer contributions to any employee defined contribution plan above the pensionable compensation limits in subdivision (c) shall not, when combined with the employer's contribution to the employee's retirement benefits below the compensation limit, exceed the employer's contribution level, as a percentage of pay, required to fund the retirement benefits of employees with income below the compensation limits.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.15. Offer of defined benefit formulas

Except as provided in subdivisions (d) and (e) of Section 7522.02, each public employer and each public retirement system that offers a defined benefit plan shall offer only the defined benefit formulas established pursuant to Sections 7522.20 and 7522.25 to new members.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.18. Offer of supplemental defined benefit plan

(a) A public employer that does not offer a supplemental defined benefit plan before January 1, 2013, shall not offer a supplemental defined benefit plan for any employee on or after January 1, 2013.

(b) A public employer that provides a supplemental defined benefit plan, including a defined benefit plan offered by a private provider, before January 1, 2013, shall not offer a supplemental defined benefit plan to any additional employee group to which the plan was not provided before January 1, 2013.

(c) Except as provided in Chapter 38 (commencing with Section 25000) of Article 1 of Part 13 of Title 1 of the Education Code, a public employer shall not offer or provide a supplemental defined benefit plan, including a defined benefit plan offered by a private provider, to any employee hired on or after January 1, 2013.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.20. Formula for retirement systems offering a defined benefit plan for nonsafety members; Pensionable compensation; New members of State Teachers' Retirement System

(a) Each retirement system that offers a defined benefit plan for nonsafety members of the system shall use the formula prescribed by this section. The defined benefit plan shall provide a pension at retirement for service equal to the percentage of the member's final compensation set forth opposite the member's age at retirement, taken to the preceding quarter year, in the following table, multiplied by the number of years of service in the system as a nonsafety member. A member may retire for service under this section after five years of service and upon reaching 52 years of age.

Age of Retirement	Fraction
52	1.00
52¼	1.025
52½	1.050
52¾	1.075
53	1.100
53¼	1.125
53½	1.150
53¾	1.175
54	1.200
54¼	1.225
54½	1.250
54¾	1.275
55	1.300
55¼	1.325
55½	1.350
55¾	1.375
56	1.400
56¼	1.425
56½	1.450
56¾	1.475
57	1.500
57¼	1.525
57½	1.550
57¾	1.575
58	1.600
58¼	1.625
58½	1.650
58¾	1.675
59	1.700
59¼	1.725
59½	1.750
59¾	1.775
60	1.800
60¼	1.825
60½	1.850
60¾	1.875
61	1.900
61¼	1.925
61½	1.950
61¾	1.975

Age of Retirement	Fraction
62	2.000
62¼	2.025
62½	2.050
62¾	2.075
63	2.100
63¼	2.125
63½	2.150
63¾	2.175
64	2.200
64¼	2.225
64½	2.250
64¾	2.275
65	2.300
65¼	2.325
65½	2.350
65¾	2.375
66	2.400
66¼	2.425
66½	2.450
66¾	2.475
67	2.500

(b) Pensionable compensation used to calculate the defined benefit shall be limited as described in Section 7522.10.

(c) A new member of the State Teachers' Retirement System shall be subject to the formula established pursuant to Section 24202.6 of the Education Code.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.25. Formula for retirement systems offering a defined benefit plan for safety members; Basic Safety Plan; Safety Option Plan One; Safety Option Plan Two; Duties of employer; Pensionable compensation

(a) Each retirement system that offers a defined benefit plan for safety members of the system shall use one or more of the defined benefit formulas prescribed by this section. A member may retire for service under any of the formulas in this section after five years of service and upon reaching 50 years of age.

(b) The Basic Safety Plan shall provide a pension at retirement for service equal to the percentage of the member's final compensation set forth opposite the member's age at retirement, taken to the preceding quarter year, in the following table, multiplied by the number of years of service in the system as a safety member.

Age at Retirement	Fraction
50	1.426
50¼	1.447
50½	1.467
50¾	1.488
51	1.508
51¼	1.529
51½	1.549
51¾	1.570
52	1.590

Age at Retirement	Fraction
52¼	1.611
52½	1.631
52¾	1.652
53	1.672
53¼	1.693
53½	1.713
53¾	1.734
54	1.754
54¼	1.775
54½	1.795
54¾	1.816
55	1.836
55¼	1.857
55½	1.877
55¾	1.898
56	1.918
56¼	1.939
56½	1.959
56¾	1.980
57 and over	2.000

(c) The Safety Option Plan One shall provide a pension at retirement for service equal to the percentage of the member's final compensation set forth opposite the member's age at retirement, taken to the preceding quarter year, in the following table, multiplied by the number of years of service in the system as a safety member.

Age at Retirement	Fraction
50	2.000
50¼	2.018
50½	2.036
50¾	2.054
51	2.071
51¼	2.089
51½	2.107
51¾	2.125
52	2.143
52¼	2.161
52½	2.179
52¾	2.196
53	2.214
53¼	2.232
53½	2.250
53¾	2.268
54	2.286
54¼	2.304
54½	2.321
54¾	2.339
55	2.357
55¼	2.375
55½	2.393
55¾	2.411

Age at Retirement	Fraction
56	2.429
56¼	2.446
56½	2.464
56¾	2.482
57 and over	2.500

(d) The Safety Option Plan Two shall provide a pension at retirement for service equal to the percentage of the member's final compensation set forth opposite the member's age at retirement, taken to the preceding quarter year, in the following table, multiplied by the number of years of service in the system as a safety member.

Age at Retirement	Fraction
50	2.000
50¼	2.025
50½	2.050
50¾	2.075
51	2.100
51¼	2.125
51½	2.150
51¾	2.175
52	2.200
52¼	2.225
52½	2.250
52¾	2.275
53	2.300
53¼	2.325
53½	2.350
53¾	2.375
54	2.400
54¼	2.425
54½	2.450
54¾	2.475
55	2.500
55¼	2.525
55½	2.550
55¾	2.575
56	2.600
56¼	2.625
56½	2.650
56¾	2.675
57 and over	2.700

(e) On and after January 1, 2013, an employer shall offer one or more of the safety formulas prescribed by this section to new employees who are safety employees eligible for membership in the system. The formula offered shall be the formula that is closest to, and provides a lower benefit at 55 years of age than, the formula provided to members in the same retirement classification offered by the employer on December 31, 2012.

(f) On and after January 1, 2013, an employer and its employees subject to Safety Option Plan One or Safety Option Plan Two may agree in a memorandum of understanding to be subject to Safety Option Plan One or the Basic Safety Plan, subject to the following:

(1) The lower plan shall apply to members first employed on or after the effective date of the lower plan, and shall be agreed to in a memorandum of understanding that has been collectively bargained in accordance with applicable laws.

(2) A retirement plan contract amendment with a public retirement system to alter a retirement formula pursuant to this subdivision shall not be implemented by the employer in the absence of a memorandum of understanding that has been collectively bargained in accordance with applicable laws.

(3) An employer shall not use impasse procedures to impose the lower plan.

(4) An employer shall not provide a different defined benefit for nonrepresented, managerial, or supervisory employees than the employer provides for other public employees, including represented employees, of the same employer who are in the same membership classifications.

(g) Pensionable compensation used to calculate the defined benefit shall be limited as described in Section 7522.10.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.30. Equal sharing of normal costs between public employers and public employees; Standard; Contribution rate; Prior contract

(a) This section shall apply to all public employers and to all new members. Equal sharing of normal costs between public employers and public employees shall be the standard. The standard shall be that employees pay at least 50 percent of normal costs and that employers not pay any of the required employee contribution.

(b) The "normal cost rate" shall mean the annual actuarially determined normal cost for the defined benefit plan of an employer expressed as a percentage of payroll.

(c) New employees employed on and after January 1, 2013, by those public employers defined in paragraphs (2) and (3) of subdivision (i) of Section 7522.04, the California State University, and the judicial branch who participate in a defined benefit plan shall have an initial contribution rate of at least 50 percent of the normal cost rate for that defined benefit plan, rounded to the nearest quarter of 1 percent, or the current contribution rate of similarly situated employees, whichever is greater. This contribution shall not be paid by the employer on the employee's behalf.

(d) Notwithstanding subdivision (c), once established, the employee contribution rate described in subdivision (c) shall not be adjusted on account of a change to the normal cost rate unless the normal cost rate increases or decreases by more than 1 percent of payroll above or below the normal cost rate in effect at the time the employee contribution rate is first established or, if later, the normal cost rate in effect at the time of the last adjustment to the employee contribution rate under this section.

(e) Notwithstanding subdivision (c), employee contributions may be more than one-half of the normal cost rate if the increase has been agreed to through the collective bargaining process, subject to the following conditions:

(1) The employer shall not contribute at a greater rate to the plan for nonrepresented, managerial, or supervisory employees than the employer contributes for other public employees, including represented employees, of the same employer who are in related retirement membership classifications.

(2) The employer shall not increase an employee contribution rate in the absence of a memorandum of understanding that has been collectively bargained in accordance with applicable laws.

(3) The employer shall not use impasse procedures to increase an employee contribution rate above the rate required by this section.

(f) If the terms of a contract, including a memorandum of understanding, between a public employer and its public employees, that is in effect on January 1, 2013, would be impaired by any provision of this section, that provision shall not apply to the public employer and public employees subject to that contract until the expiration of that contract. A renewal, amendment, or any other extension of that contract shall be subject to the requirements of this section.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.32. Determination of retirement benefit for new member of public retirement system; Final compensation

For the purposes of determining a retirement benefit to be paid to a new member of a public retirement system, the following shall apply:

(a) Final compensation shall mean the highest average annual pensionable compensation earned by the member during a period of at least 36 consecutive months, or at least three school years if applicable, immediately preceding his or her retirement or last separation from service if earlier, or during any other period of at least 36 consecutive months during the member's applicable service that the member designates on the application for retirement.

(b) On or after January 1, 2013, an employer shall not modify a benefit plan to permit a calculation of final compensation on a basis of less than the average annual compensation earned by the member during a consecutive 36-month period, or three school years if applicable, for members who have been subject to at least a 36-month or three-school-year calculation prior to that date.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.34. "Pensionable compensation" of new member of public retirement system

(a) "Pensionable compensation" of a new member of any public retirement system means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules.

(b) Compensation that has been deferred shall be deemed pensionable compensation when earned rather than when paid.

(c) "Pensionable compensation" does not include the following:

(1) Any compensation determined by the board to have been paid to increase a member's retirement benefit under that system.

(2) Compensation that had previously been provided in kind to the member by the employer or paid directly by the employer to a third party other than the retirement system for the benefit of the member and which was converted to and received by the member in the form of a cash payment.

(3) Any one-time or ad hoc payments made to a member.

(4) Severance or any other payment that is granted or awarded to a member in connection with or in anticipation of a separation from employment, but is received by the member while employed.

(5) Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, regardless of when reported or paid.

(6) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.

(7) Any employer-provided allowance, reimbursement, or payment, including, but not limited to, one made for housing, vehicle, or uniforms.

(8) Compensation for overtime work, other than as defined in Section 207(k) of Title 29 of the United States Code.

(9) Employer contributions to deferred compensation or defined contribution plans.

(10) Any bonus paid in addition to the compensation described in subdivision (a).

(11) Any other form of compensation a public retirement board determines is inconsistent with the requirements of subdivision (a).

(12) Any other form of compensation a public retirement board determines should not be pensionable compensation.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.40. Limitations on health benefit vesting schedule or other specified retirement benefits for manager or employee or officer excluded from collective bargaining

A public employer shall not provide to a public employee who is elected or appointed, a trustee, excluded from collective bargaining, exempt from civil service, or a manager any health benefit vesting schedule that is more advantageous than that provided generally to other public employees, including represented employees, of the same public employer who are in related retirement membership classifications.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.42. Determination of retirement benefit for new member of public retirement; Maximum salary, compensation, or payrate taken into account under plan

(a) In addition to any other benefit limitation prescribed by law, for the purposes of determining a public retirement benefit paid to a new member of a public retirement system, the maximum salary, compensation, or payrate taken into account under the plan for any year shall not exceed the amount permitted to be taken into account under Section 401(a)(17) of Title 26 of the United States Code or its successor.

(b) A public employer shall not seek an exception to the prohibition in subdivision (a) on or after January 1, 2013.

(c) For employees first hired on or after January 1, 2013, a public employer shall not make employer contributions to any qualified retirement plan or plans on behalf of an employee based on that portion of the amount of total pensionable compensation that exceeds the amount specified in Section 401(a)(17) of Title 26 of the United States Code, or its successor.

(d) This section shall not apply to salary, compensation, or payrate paid to individuals who, due to their dates of hire, are not subject to the limits specified in subdivision (a).

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.43. Plan of replacement benefits for members, survivors or beneficiaries

(a) A public employer shall not offer a plan of replacement benefits for members and any survivors or beneficiaries whose retirement benefits are limited by Section 415 of Title 26 of the United States Code. This section shall apply to new employees.

(b) A public retirement system may continue to administer a plan of replacement benefits for employees first hired prior to January 1, 2013.

(c) A public employer that does not offer a plan of replacement benefits prior to January 1, 2013, shall not offer such a plan for any employee on or after January 1, 2013.

(d) A public employer that offers a plan of replacement benefits prior to January 1, 2013, shall not offer such a plan to any additional employee group to which the plan was not provided prior to January 1, 2013.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.44. Enhancement to public employee's retirement formula or retirement benefit

This section shall apply to all public employers and to all public employees:

(a) Any enhancement to a public employee's retirement formula or retirement benefit adopted on or after January 1, 2013, shall apply only to service performed on or after the operative date of the en-

hancement and shall not be applied to any service performed prior to the operative date of the enhancement.

(b) If a change to a member's retirement membership classification or a change in employment results in an enhancement in the retirement formula or retirement benefit applicable to that member, that enhancement shall apply only to service performed on or after the operative date of the change and shall not be applied to any service performed prior to the operative date of the change.

(c) For purposes of this section, "operative date" in a collective bargaining agreement means one of the following:

(1) The date that the agreement is signed by the parties.

(2) A date agreed to by the parties that will occur after the date that the agreement is signed by the parties.

(3) A date designated by the parties that occurred prior to the date the agreement was signed if the most recent collective bargaining contract was expired at the time of the agreement and the date designated is not earlier than 12 months prior to the date of the agreement or the day after the last day of the expired bargaining contract, whichever occurred later.

(d) For purposes of this section, an increase to a retiree's annual cost-of-living adjustment within existing statutory limits shall not be considered to be an enhancement to a retirement benefit.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.46. Purchase of nonqualified service credit

(a) A public retirement system shall not allow the purchase of nonqualified service credit, as defined by Section 415(n)(3)(C) of the Internal Revenue Code of 1986 (26 U.S.C. Sec. 415(n)(3)(C)).

(b) Subdivision (a) shall not apply to an official application to purchase nonqualified service credit that is received by the public retirement system prior to January 1, 2013, that is subsequently approved by the system.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.48. Final compensation of pension or benefit for elective or appointed officer on city council or county board of supervisors

(a) Final compensation of a member for the purpose of determining any pension or benefit resulting from service as an elective or appointed officer on a city council or a county board of supervisors accrued while in membership of a public retirement system shall be based on the highest average annual pensionable compensation earned by the member during the period of service in each elective or appointed office. Where that elective or appointed service is a consideration in the computation of any pension or benefit, the member may have more than one final compensation.

(b) Any final compensation calculation shall otherwise be subject to this article except that if any individual period of elective service is less than 36 months or three years, then the entire period of that individual's elected service shall be used to determine the final compensation for that period of service.

(c) This section shall apply to a member first elected or appointed to a city council or a county board of supervisors on or after January 1, 2013.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.52. Employer's contribution to defined benefit plan in combination with employee contributions; Suspension of contributions

(a) In any fiscal year, a public employer's contribution to a defined benefit plan, in combination with employee contributions to that defined benefit plan, shall not be less than the normal cost rate, as defined in Section 7522.30, for that defined benefit plan for that fiscal year.

(b) The board of a public retirement system may suspend contributions when all of the following apply:

(1) The plan is funded by more than 120 percent, based on a computation by the retirement system actuary in accordance with the Governmental Accounting Standards Board requirements that is included in the annual valuation.

(2) The retirement system actuary, based on the annual valuation, determines that continuing to accrue excess earnings could result in disqualification of the plan's tax-exempt status under the provisions of the federal Internal Revenue Code.

(3) The board determines that the receipt of any additional contributions required under this section would conflict with its fiduciary responsibility set forth in Section 17 of Article XVI of the California Constitution.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.56. Provisions applicable to person receiving pension benefit from public retirement system; Section supersedes conflicting provisions

(a) This section shall apply to any person who is receiving a pension benefit from a public retirement system and shall supersede any other provision in conflict with this section.

(b) A retired person shall not serve, be employed by, or be employed through a contract directly by, a public employer in the same public retirement system from which the retiree receives the benefit without reinstatement from retirement, except as permitted by this section.

(c) A person who retires from a public employer may serve without reinstatement from retirement or loss or interruption of benefits provided by the retirement system upon appointment by the appointing power of a public employer either during an emergency to prevent stoppage of public business or because the retired person has skills needed to perform work of limited duration.

(d) Appointments of the person authorized under this section shall not exceed a total for all employers in that public retirement system of 960 hours or other equivalent limit, in a calendar or fiscal year, depending on the administrator of the system. The rate of pay for the employment shall not be less than the minimum, nor exceed the maximum, paid by the employer to other employees performing comparable duties, divided by 173.333 to equal an hourly rate. A retired person whose employment without reinstatement is authorized by this section shall acquire no service credit or retirement rights under this section with respect to the employment unless he or she reinstates from retirement.

(e) (1) Notwithstanding subdivision (c), any retired person shall not be eligible to serve or be employed by a public employer if, during the 12-month period prior to an appointment described in this section, the retired person received any unemployment insurance compensation arising out of prior employment subject to this section with a public employer. A retiree shall certify in writing to the employer upon accepting an offer of employment that he or she is in compliance with this requirement.

(2) A retired person who accepts an appointment after receiving unemployment insurance compensation as described in this subdivision shall terminate that employment on the last day of the current pay period and shall not be eligible for reappointment subject to this section for a period of 12 months following the last day of employment.

(f) A retired person shall not be eligible to be employed pursuant to this section for a period of 180 days following the date of retirement unless he or she meets one of the following conditions:

(1) The employer certifies the nature of the employment and that the appointment is necessary to fill a critically needed position before 180 days has passed and the appointment has been approved by

the governing body of the employer in a public meeting. The appointment may not be placed on a consent calendar.

(2) The state employer certifies the nature of the employment and that the appointment is necessary to fill a critically needed state employment position before 180 days has passed and the appointment has been approved by the Department of Human Resources. The department may establish a process to delegate appointing authority to individual state agencies, but shall audit the process to determine if abuses of the system occur. If necessary, the department may assume an agency's appointing authority for retired workers and may charge the department an appropriate amount for administering that authority.

(3) The retiree is eligible to participate in the Faculty Early Retirement Program pursuant to a collective bargaining agreement with the California State University that existed prior to January 1, 2013, or has been included in subsequent agreements.

(4) The retiree is a public safety officer of firefighter.

(g) A retired person who accepted a retirement incentive upon retirement shall not be eligible to be employed pursuant to this section for a period of 180 days following the date of retirement and subdivision (f) shall not apply.

(h) This section shall not apply to a person who is retired from the State Teachers' Retirement System, and who is subject to Section 24214, 24214.5, or 26812 of the Education Code.

(i) This section shall not apply to (1) a subordinate judicial officer whose position, upon retirement, is converted to a judgeship pursuant to Section 69615, and he or she returns to work in the converted position, and the employer is a trial court, or (2) a retiree who takes office as a judge of a court of record pursuant to Article VI of the California Constitution or a retiree of the Judges' Retirement System I or the Judges' Retirement System II who is appointed to serve as a retired judge.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.57. Provisions applicable to retired person receiving pension benefit appointed to salaried position on state board or commission after specified date; Section supersedes conflicting provisions

(a) This section shall apply to any retired person who is receiving a pension benefit from a public retirement system and is first appointed on or after January 1, 2013, to a salaried position on a state board or commission. This section shall supersede any other provision in conflict with this section.

(b) A person who is retired from a public retirement system may serve without reinstatement from retirement or loss or interruption of benefits provided that appointment is to a part-time state board or commission. A retired person whose employment without reinstatement is authorized by this subdivision shall acquire no benefits, service credit, or retirement rights with respect to the employment. Unless otherwise defined in statute, for the purpose of this section, a part-time appointment shall mean an appointment with a salary of no more than $60,000 annually, which shall be increased in any fiscal year in which a general salary increase is provided for state employees. The amount of the increase provided by this section shall be comparable to, but shall not exceed, the percentage of the general salary increases provided for state employees during that fiscal year.

(c) A person who is retired from the Public Employees' Retirement System shall not serve on a full-time basis on a state board or commission without reinstatement unless that person serves as a nonsalaried member of the board or commission and receives only per diem authorized to all members of the board or commission. A person who serves as a nonsalaried member of a board or commission shall not earn any service credit or benefits in the Public Employees' Retirement System or make contributions with respect to the service performed.

(d) A person retired from a public retirement system other than the Public Employees' Retirement System who is appointed on a full-time basis to a state board or commission shall choose one of the following options:

(1) The person may serve as a nonsalaried member of the board or commission and continue to receive his or her retirement allowance, in addition to any per diem authorized to all members of the board or commission. The person shall not earn service credit or benefits in the Public Employees' Retirement System and shall not make contributions with respect to the service performed.

(2) (i) The person may suspend his or her retirement allowance or allowances and instate as a new member of the Public Employees' Retirement System for the service performed on the board or commission. The pensionable compensation earned pursuant to this paragraph shall not be eligible for reciprocity with any other retirement system or plan.

(ii) Upon retiring for service after serving on the board or commission, the appointee shall be entitled to reinstatement of any suspended benefits, including employer provided retiree health benefits, that he or she was entitled to at the time of being appointed to the board or commission.

(e) Notwithstanding subdivisions (c) and (d), a person who retires from a public employer may serve without reinstatement from retirement or loss or interruption of benefits provided by the retirement system upon appointment to a full-time state board pursuant to Section 5075 of the Penal Code.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.66. Provisions applicable to safety member retired for industrial disability

(a) A safety member of a public retirement system who retires for industrial disability shall receive an industrial disability retirement benefit equal to the greater of the following:

(1) Fifty percent of his or her final compensation attributable to the defined benefit plan, plus an annuity purchased with his or her accumulated contributions, if any.

(2) A service retirement allowance, if he or she is qualified for service retirement.

(3) An actuarially reduced factor, as determined by the actuary, for each quarter year that his or her service age is less than 50 years of age, multiplied by the number of years of safety service subject to the applicable formula, if he or she is not qualified for service retirement.

(b) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.70. Effects of conviction for crimes arising out of official duties as public official

(a) This section shall apply to any elected public officer who takes public office, or is reelected to public office, on or after January 1, 2006.

(b) If an elected public officer is convicted during or after holding office of any felony involving accepting or giving, or offering to give, any bribe, the embezzlement of public money, extortion or theft of public money, perjury, or conspiracy to commit any of those crimes arising directly out of his or her official duties as an elected public officer, he or she shall forfeit all rights and benefits under, and membership in, any public retirement system in which he or she is a member, effective on the date of final conviction.

(c) The elected public officer described in subdivision (b) shall forfeit only that portion of his or her rights and benefits that accrued on or after January 1, 2006, on account of his or her service in the elected public office held when the felony occurred.

(d) Any contributions made by the elected public officer described in subdivision (b) to the public retirement system that arose directly from or accrued solely as a result of his or her forfeited service as an elected public officer shall be returned, without interest, to the public officer.

(e) The public agency that employs an elected public officer described in subdivision (b) shall notify the public retirement system in which the officer is a member of the officer's conviction.

(f) An elected public officer shall not forfeit his or her rights and benefits pursuant to subdivision (b) if the governing body of the elected public officer's employer, including, but not limited to, the

governing body of a city, county, or city and county, authorizes the public officer to receive those rights and benefits.

(g) For purposes of this section, "public officer" means an officer of the state, or an officer of a county, city, city and county, district, or authority, or any department, division, bureau, board, commission, agency, or instrumentality of any of these entities.

(h) This section applies to any person appointed to service for the period of an elected public officer's unexpired term of office.

(i) On and after January 1, 2013, this section shall not apply in any instance in which Section 7522.72 or 7522.74 applies.

Added Stats 2005 ch 322 § 1 (AB 1044), effective January 1, 2006 as Gov C § 1243. Amended and renumbered by Stats 2012 ch 296 § 9 (AB 340), effective January 1, 2013.

Amendments

2012 Amendment: Added subd (i).

§ 7522.72. Provisions applicable to employee first employed by public employer or first elected or appointed to office before January 1, 2013; Applicability of certain laws

(a) This section shall apply to a public employee first employed by a public employer or first elected or appointed to an office before January 1, 2013, and, on and after that date, Section 7522.70 shall not apply.

(b) (1) If a public employee is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.

(2) If a public employee who has contact with children as part of her official duties is convicted of a felony that was committed within the scope of his or her official duties against or involving a child who he or she has contact with as part of his or her official duties, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.

(c) (1) A public employee shall forfeit all the retirement benefits earned or accrued from the earliest date of the commission of any felony described in subdivision (b) to the forfeiture date, inclusive. The retirement benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the public employee's conviction. Retirement benefits attributable to service performed prior to the date of the first commission of the felony for which the public employee was convicted shall not be forfeited as a result of this section.

(2) For purposes of this subdivision, "forfeiture date" means the date of the conviction.

(d) (1) Any contributions to the public retirement system made by the public employee described in subdivision (b) on or after the earliest date of the commission of any felony described in subdivision (b) shall be returned, without interest, to the public employee upon the occurrence of a distribution event unless otherwise ordered by a court or determined by the pension administrator.

(2) Any funds returned to the public employee pursuant to subdivision (d) shall be disbursed by electronic funds transfer to an account of the public employee, in a manner conforming with the requirements of the Internal Revenue Code, and the public retirement system shall notify the court and the district attorney at least three business days before that disbursement of funds.

(3) For the purposes of this subdivision, a "distribution event" means any of the following:

(A) Separation from employment.

(B) Death of the member.

(C) Retirement of the member.

(e) (1) Upon conviction, a public employee as described in subdivision (b) and the prosecuting agency shall notify the public employer who employed the public employee at the time of the commission of the felony within 60 days of the felony conviction of all of the following information:

(A) The date of conviction.

(B) The date of the first known commission of the felony.

(2) The operation of this section is not dependent upon the performance of the notification obligations specified in this subdivision.

(f) The public employer that employs or employed a public employee described in subdivision (b) and that public employee shall each notify the public retirement system in which the public employee is a member of that public employee's conviction within 90 days of the conviction. The operation of this section is not dependent upon the performance of the notification obligations specified in this subdivision.

(g) A public retirement system may assess a public employer a reasonable amount to reimburse the cost of audit, adjustment, or correction, if it determines that the public employer failed to comply with this section.

(h) If a public employee's conviction is reversed and that decision is final, the employee shall be entitled to do either of the following:

(1) Recover the forfeited retirement benefits as adjusted for the contributions received pursuant to subdivision (d).

(2) Redeposit those contributions and interest, as determined by the system actuary, and then recover the full amount of the forfeited benefits.

(i) A public employee first employed by a public employer or first elected or appointed to an office on or after January 1, 2013, shall be subject to Section 7522.74.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 7522.74. Provisions applicable to employee first employed by public employer or first elected or appointed to office on or after January 1, 2013; Applicability of certain laws

(a) This section shall apply to a public employee first employed by a public employer or first elected or appointed to an office on or after January 1, 2013, and on and after that date, Section 7522.70 shall not apply.

(b) (1) If a public employee is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.

(2) If a public employee who has contact with children as part of his or her official duties is convicted of a felony that was committed within the scope of his or her official duties against or involving a child who he or she has contact with as part of his or her official duties, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.

(c) (1) A public employee shall forfeit all the retirement benefits earned or accrued from the earliest date of the commission of any felony described in subdivision (b) to the forfeiture date, inclusive. The retirement benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the public employee's conviction. Retirement benefits attribut-

able to service performed prior to the date of the first commission of the felony for which the public employee was convicted shall not be forfeited as a result of this section.

(2) For purposes of this subdivision, "forfeiture date" means the date of the conviction.

(d) (1) Any contributions to the public retirement system made by the public employee described in subdivision (b) on or after the earliest date of the commission of any felony described in subdivision (b) shall be returned, without interest, to the public employee upon the occurrence of a distribution event unless otherwise ordered by a court or determined by the pension administrator.

(2) Any funds returned to the public employee pursuant to subdivision (d) shall be disbursed by electronic funds transfer to an account of the public employee, in a manner conforming with the requirements of the Internal Revenue Code, and the public retirement system shall notify the court and the district attorney at least three business days before that disbursement of funds.

(3) For the purposes of this subdivision, a "distribution event" means any of the following:

(A) Separation from employment.

(B) Death of the member.

(C) Retirement of the member.

(e) (1) Upon conviction, a public employee as described in subdivision (b) and the prosecuting agency shall notify the public employer who employed the public employee at the time of the commission of the felony within 60 days of the felony conviction of all of the following information:

(A) The date of conviction.

(B) The date of the first known commission of the felony.

(2) The operation of this section is not dependent upon the performance of the notification obligations specified in this subdivision.

(f) The public employer that employs or employed a public employee described in subdivision (b) and that public employee shall each notify the public retirement system in which the public employee is a member of that public employee's conviction within 90 days of the conviction. The operation of this section is not dependent upon the performance of the notification obligations specified in this subdivision.

(g) A public retirement system may assess a public employer a reasonable amount to reimburse the cost of audit, adjustment, or correction, if it determines that the public employer failed to comply with this section.

(h) If a public employee's conviction is reversed and that decision is final, the employee shall be entitled to do either of the following:

(1) Recover the forfeited retirement benefits as adjusted for the contributions received pursuant to subdivision (d).

(2) Redeposit those contributions and interest, as determined by the system actuary, and then recover the full amount of the forfeited benefits.

(i) A public employee first employed by a public employer or first elected or appointed to an office before January 1, 2013, shall be subject to Section 7522.72.

Added Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.

§ 11126. Closed session on issues relating to public employee; Employee's right to public hearing; Closed sessions not prohibited by article; Abrogation of lawyer-client privilege

(a) (1) Nothing in this article shall be construed to prevent a state body from holding closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, or dismissal of a public employee or to hear complaints or charges brought against that employee by another person or employee unless the employee requests a public hearing.

(2) As a condition to holding a closed session on the complaints or charges to consider disciplinary action or to consider dismissal, the employee shall be given written notice of his or her right to have a public hearing, rather than a closed session, and that notice shall be delivered to the employee perso-

nally or by mail at least 24 hours before the time for holding a regular or special meeting. If notice is not given, any disciplinary or other action taken against any employee at the closed session shall be null and void.

(3) The state body also may exclude from any public or closed session, during the examination of a witness, any or all other witnesses in the matter being investigated by the state body.

(4) Following the public hearing or closed session, the body may deliberate on the decision to be reached in a closed session.

(b) For the purposes of this section, "employee" does not include any person who is elected to, or appointed to a public office by, any state body. However, officers of the California State University who receive compensation for their services, other than per diem and ordinary and necessary expenses, shall, when engaged in that capacity, be considered employees. Furthermore, for purposes of this section, the term employee includes a person exempt from civil service pursuant to subdivision (e) of Section 4 of Article VII of the California Constitution.

(c) Nothing in this article shall be construed to do any of the following:

(1) Prevent state bodies that administer the licensing of persons engaging in businesses or professions from holding closed sessions to prepare, approve, grade, or administer examinations.

(2) Prevent an advisory body of a state body that administers the licensing of persons engaged in businesses or professions from conducting a closed session to discuss matters that the advisory body has found would constitute an unwarranted invasion of the privacy of an individual licensee or applicant if discussed in an open meeting, provided the advisory body does not include a quorum of the members of the state body it advises. Those matters may include review of an applicant's qualifications for licensure and an inquiry specifically related to the state body's enforcement program concerning an individual licensee or applicant where the inquiry occurs prior to the filing of a civil, criminal, or administrative disciplinary action against the licensee or applicant by the state body.

(3) Prohibit a state body from holding a closed session to deliberate on a decision to be reached in a proceeding required to be conducted pursuant to Chapter 5 (commencing with Section 11500) or similar provisions of law.

(4) Grant a right to enter any correctional institution or the grounds of a correctional institution where that right is not otherwise granted by law, nor shall anything in this article be construed to prevent a state body from holding a closed session when considering and acting upon the determination of a term, parole, or release of any individual or other disposition of an individual case, or if public disclosure of the subjects under discussion or consideration is expressly prohibited by statute.

(5) Prevent any closed session to consider the conferring of honorary degrees, or gifts, donations, and bequests that the donor or proposed donor has requested in writing to be kept confidential.

(6) Prevent the Alcoholic Beverage Control Appeals Board from holding a closed session for the purpose of holding a deliberative conference as provided in Section 11125.

(7) (A) Prevent a state body from holding closed sessions with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the state body to give instructions to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease.

(B) However, prior to the closed session, the state body shall hold an open and public session in which it identifies the real property or real properties that the negotiations may concern and the person or persons with whom its negotiator may negotiate.

(C) For purposes of this paragraph, the negotiator may be a member of the state body.

(D) For purposes of this paragraph, "lease" includes renewal or renegotiation of a lease.

(E) Nothing in this paragraph shall preclude a state body from holding a closed session for discussions regarding eminent domain proceedings pursuant to subdivision (e).

(8) Prevent the California Postsecondary Education Commission from holding closed sessions to consider matters pertaining to the appointment or termination of the Director of the California Postsecondary Education Commission.

(9) Prevent the Council for Private Postsecondary and Vocational Education from holding closed sessions to consider matters pertaining to the appointment or termination of the Executive Director of the Council for Private Postsecondary and Vocational Education.

(10) Prevent the Franchise Tax Board from holding closed sessions for the purpose of discussion of confidential tax returns or information the public disclosure of which is prohibited by law, or from considering matters pertaining to the appointment or removal of the Executive Officer of the Franchise Tax Board.

(11) Require the Franchise Tax Board to notice or disclose any confidential tax information considered in closed sessions, or documents executed in connection therewith, the public disclosure of which is prohibited pursuant to Article 2 (commencing with Section 19542) of Chapter 7 of Part 10.2 of Division 2 of the Revenue and Taxation Code.

(12) Prevent the Corrections Standards Authority from holding closed sessions when considering reports of crime conditions under Section 6027 of the Penal Code.

(13) Prevent the State Air Resources Board from holding closed sessions when considering the proprietary specifications and performance data of manufacturers.

(14) Prevent the State Board of Education or the Superintendent of Public Instruction, or any committee advising the board or the Superintendent, from holding closed sessions on those portions of its review of assessment instruments pursuant to Chapter 5 (commencing with Section 60600) of, or pursuant to Chapter 9 (commencing with Section 60850) of, Part 33 of Division 4 of Title 2 of the Education Code during which actual test content is reviewed and discussed. The purpose of this provision is to maintain the confidentiality of the assessments under review.

(15) Prevent the California Integrated Waste Management Board or its auxiliary committees from holding closed sessions for the purpose of discussing confidential tax returns, discussing trade secrets or confidential or proprietary information in its possession, or discussing other data, the public disclosure of which is prohibited by law.

(16) Prevent a state body that invests retirement, pension, or endowment funds from holding closed sessions when considering investment decisions. For purposes of consideration of shareholder voting on corporate stocks held by the state body, closed sessions for the purposes of voting may be held only with respect to election of corporate directors, election of independent auditors, and other financial issues that could have a material effect on the net income of the corporation. For the purpose of real property investment decisions that may be considered in a closed session pursuant to this paragraph, a state body shall also be exempt from the provisions of paragraph (7) relating to the identification of real properties prior to the closed session.

(17) Prevent a state body, or boards, commissions, administrative officers, or other representatives that may properly be designated by law or by a state body, from holding closed sessions with its representatives in discharging its responsibilities under Chapter 10 (commencing with Section 3500), Chapter 10.3 (commencing with Section 3512), Chapter 10.5 (commencing with Section 3525), or Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 as the sessions relate to salaries, salary schedules, or compensation paid in the form of fringe benefits. For the purposes enumerated in the preceding sentence, a state body may also meet with a state conciliator who has intervened in the proceedings.

(18) (A) Prevent a state body from holding closed sessions to consider matters posing a threat or potential threat of criminal or terrorist activity against the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by the state body, where disclosure of these considerations could compromise or impede the safety or security of the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by the state body.

(B) Notwithstanding any other provision of law, a state body, at any regular or special meeting, may meet in a closed session pursuant to subparagraph (A) upon a two-thirds vote of the members present at the meeting.

(C) After meeting in closed session pursuant to subparagraph (A), the state body shall reconvene in open session prior to adjournment and report that a closed session was held pursuant to subparagraph (A), the general nature of the matters considered, and whether any action was taken in closed session.

(D) After meeting in closed session pursuant to subparagraph (A), the state body shall submit to the Legislative Analyst written notification stating that it held this closed session, the general reason or reasons for the closed session, the general nature of the matters considered, and whether any action was taken in closed session. The Legislative Analyst shall retain for no less than four years any written notification received from a state body pursuant to this subparagraph.

(19) Prevent the California Sex Offender Management Board from holding a closed session for the purpose of discussing matters pertaining to the application of a sex offender treatment provider for certification pursuant to Sections 290.09 and 9003 of the Penal Code. Those matters may include review of an applicant's qualifications for certification.

(d) (1) Notwithstanding any other provision of law, any meeting of the Public Utilities Commission at which the rates of entities under the commission's jurisdiction are changed shall be open and public.

(2) Nothing in this article shall be construed to prevent the Public Utilities Commission from holding closed sessions to deliberate on the institution of proceedings, or disciplinary actions against any person or entity under the jurisdiction of the commission.

(e) (1) Nothing in this article shall be construed to prevent a state body, based on the advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the state body in the litigation.

(2) For purposes of this article, all expressions of the lawyer-client privilege other than those provided in this subdivision are hereby abrogated. This subdivision is the exclusive expression of the lawyer-client privilege for purposes of conducting closed session meetings pursuant to this article. For purposes of this subdivision, litigation shall be considered pending when any of the following circumstances exist:

(A) An adjudicatory proceeding before a court, an administrative body exercising its adjudicatory authority, a hearing officer, or an arbitrator, to which the state body is a party, has been initiated formally.

(B) (i) A point has been reached where, in the opinion of the state body on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the state body.

(ii) Based on existing facts and circumstances, the state body is meeting only to decide whether a closed session is authorized pursuant to clause (i).

(C) (i) Based on existing facts and circumstances, the state body has decided to initiate or is deciding whether to initiate litigation.

(ii) The legal counsel of the state body shall prepare and submit to it a memorandum stating the specific reasons and legal authority for the closed session. If the closed session is pursuant to paragraph (1), the memorandum shall include the title of the litigation. If the closed session is pursuant to subparagraph (A) or (B), the memorandum shall include the existing facts and circumstances on which it is based. The legal counsel shall submit the memorandum to the state body prior to the closed session, if feasible, and in any case no later than one week after the closed session. The memorandum shall be exempt from disclosure pursuant to Section 6254.25.

(iii) For purposes of this subdivision, “litigation” includes any adjudicatory proceeding, including eminent domain, before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator.

(iv) Disclosure of a memorandum required under this subdivision shall not be deemed as a waiver of the lawyer-client privilege, as provided for under Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code.

(f) In addition to subdivisions (a), (b), and (c), nothing in this article shall be construed to do any of the following:

(1) Prevent a state body operating under a joint powers agreement for insurance pooling from holding a closed session to discuss a claim for the payment of tort liability or public liability losses incurred by the state body or any member agency under the joint powers agreement.

(2) Prevent the examining committee established by the State Board of Forestry and Fire Protection, pursuant to Section 763 of the Public Resources Code, from conducting a closed session to consider disciplinary action against an individual professional forester prior to the filing of an accusation against the forester pursuant to Section 11503.

(3) Prevent the enforcement advisory committee established by the California Board of Accountancy pursuant to Section 5020 of the Business and Professions Code from conducting a closed session to consider disciplinary action against an individual accountant prior to the filing of an accusation against the accountant pursuant to Section 11503. Nothing in this article shall be construed to prevent the qualifications examining committee established by the California Board of Accountancy pursuant to Section 5023 of the Business and Professions Code from conducting a closed hearing to interview an individual applicant or accountant regarding the applicant's qualifications.

(4) Prevent a state body, as defined in subdivision (b) of Section 11121, from conducting a closed session to consider any matter that properly could be considered in closed session by the state body whose authority it exercises.

(5) Prevent a state body, as defined in subdivision (d) of Section 11121, from conducting a closed session to consider any matter that properly could be considered in a closed session by the body defined as a state body pursuant to subdivision (a) or (b) of Section 11121.

(6) Prevent a state body, as defined in subdivision (c) of Section 11121, from conducting a closed session to consider any matter that properly could be considered in a closed session by the state body it advises.

(7) Prevent the State Board of Equalization from holding closed sessions for either of the following:

(A) When considering matters pertaining to the appointment or removal of the Executive Secretary of the State Board of Equalization.

(B) For the purpose of hearing confidential taxpayer appeals or data, the public disclosure of which is prohibited by law.

(8) Require the State Board of Equalization to disclose any action taken in closed session or documents executed in connection with that action, the public disclosure of which is prohibited by law pursuant to Sections 15619 and 15641 of this code and Sections 833, 7056, 8255, 9255, 11655, 30455, 32455, 38705, 38706, 43651, 45982, 46751, 50159, 55381, and 60609 of the Revenue and Taxation Code.

(9) Prevent the California Earthquake Prediction Evaluation Council, or other body appointed to advise the Secretary of Emergency Management or the Governor concerning matters relating to volcanic or earthquake predictions, from holding closed sessions when considering the evaluation of possible predictions.

(g) This article does not prevent either of the following:

(1) The Teachers' Retirement Board or the Board of Administration of the Public Employees' Retirement System from holding closed sessions when considering matters pertaining to the recruitment, appointment, employment, or removal of the chief executive officer or when considering matters pertaining to the recruitment or removal of the Chief Investment Officer of the State Teachers' Retirement System or the Public Employees' Retirement System.

(2) The Commission on Teacher Credentialing from holding closed sessions when considering matters relating to the recruitment, appointment, or removal of its executive director.

(h) This article does not prevent the Board of Administration of the Public Employees' Retirement System from holding closed sessions when considering matters relating to the development of rates and competitive strategy for plans offered pursuant to Chapter 15 (commencing with Section 21660) of Part 3 of Division 5 of Title 2.

(i) This article does not prevent the Managed Risk Medical Insurance Board from holding closed sessions when considering matters related to the development of rates and contracting strategy for entities contracting or seeking to contract with the board, entities with which the board is considering a contract, or entities with which the board is considering or enters into any other arrangement under which the board provides, receives, or arranges services or reimbursement, pursuant to Part 6.2 (commencing with Section 12693), Part 6.3 (commencing with Section 12695), Part 6.4 (commencing with Section 12699.50), Part 6.5 (commencing with Section 12700), Part 6.6 (commencing with Section 12739.5), or Part 6.7 (commencing with Section 12739.70) of Division 2 of the Insurance Code.

(j) Nothing in this article shall be construed to prevent the board of the State Compensation Insurance Fund from holding closed sessions in the following:

(1) When considering matters related to claims pursuant to Chapter 1 (commencing with Section 3200) of Division 4 of the Labor Code, to the extent that confidential medical information or other individually identifiable information would be disclosed.

(2) To the extent that matters related to audits and investigations that have not been completed would be disclosed.

(3) To the extent that an internal audit containing proprietary information would be disclosed.

(4) To the extent that the session would address the development of rates, contracting strategy, underwriting, or competitive strategy, pursuant to the powers granted to the board in Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code, when discussion in open session concerning those matters would prejudice the position of the State Compensation Insurance Fund.

(k) The State Compensation Insurance Fund shall comply with the procedures specified in Section 11125.4 of the Government Code with respect to any closed session or meeting authorized by subdivision (j), and in addition shall provide an opportunity for a member of the public to be heard on the issue of the appropriateness of closing the meeting or session.

Added Stats 1967 ch 1656 § 122. Amended Stats 1968 ch 1272 § 1; Stats 1970 ch 346 § 5; Stats 1972 ch 431 § 43, ch 1010 § 63, effective August 17, 1972, operative July 1, 1972; Stats 1974 ch 1254 § 1, ch 1539 § 1; Stats 1975 ch 197 § 1, ch 959 § 5; Stats 1977 ch 730 § 5, effective September 12, 1977; Stats 1980 ch 1197 § 1, ch 1284 § 11; Stats 1981 ch 180 § 1, ch 968 § 12; Stats 1982 ch 454 § 40; Stats 1983 ch 143 § 187; Stats 1984 ch 678 § 1, ch 1284 § 4; Stats 1985 ch 186 § 1; ch 1091 § 1; Stats 1986 ch 575 § 1; Stats 1987 ch 1320 § 2; Stats 1988 ch 1448 § 29; Stats 1989 ch 177 § 2, ch 882 § 2, ch 1360 § 52 (ch 1427 prevails), ch 1427 § 1, effective October 2, 1989, operative January 1, 1990; Stats 1991 ch 788 § 4 (AB 1440); Stats 1992 ch 1050 § 17 (AB 2987); Stats 1994 ch 26 § 230 (AB 1807), effective March 30, 1994, ch 422 § 15.5 (AB 2589), effective September 6, 1994, ch 845 § 1 (SB 1316); Stats 1995 ch 975 § 3 (AB 265); Stats 1996 ch 1041 § 2 (AB 3358); Stats 1997 ch 949 § 8 (SB 95); Stats 1998 ch 210 § 1 (SB 2008), ch 972 § 1 (SB 989); Stats 1999 ch 735 § 9 (SB 366), effective October 10, 1999; Stats 2000 ch 1002 § 1 (SB 1998), ch 1055 § 30 (AB 2889), effective September 30, 2000; Stats 2001 ch 21 § 1 (SB 54), effective June 25, 2001, ch 243 § 10 (AB 192); Stats 2002 ch 664 § 93.7 (AB 3034), ch 2002 ch 1113 § 1 (AB 2072); Stats 2005 ch 288 § 1 (AB 277), effective January 1, 2006; Stats 2007 ch 577 § 4 (AB 1750), effective October 13, 2007; Stats 2008 ch 179 § 91 (SB 1498), effective January 1, 2008, ch 344 § 3 (SB 1145) (ch 344 prevails), effective September 26, 2008; Stats 2010 ch 32 § 2 (AB 1887), effective June 29, 2010, ch 328 § 81 (SB 1330), effective January 1, 2011, ch 618 § 124 (AB 2791) (ch 618 prevails), effective January 1, 2011; Stats 2011 ch 357 § 1 (AB 813), effective January 1, 2012.

Editor's Notes—There was another section of this number, similar to the present section, which was added Stats 2002 ch 1113 § 2, to become operative January 1, 2006, and repealed Stats 2005 ch 288 § 2.

The reference in this section to Part 6.3 (commencing with Section 12695) of the Insurance Code, appears as enacted by the Legislature; however, the publisher believes the intended reference should be Part 6.3 (commencing with Section 12694).

Amendments

1968 Amendment: Added the last paragraph.

1970 Amendment: Substituted "State Air Resources" for "Motor Vehicle Pollution Control" in the eleventh paragraph.

1972 Amendment: Added the thirteenth paragraph. (As amended Stats 1972 ch 1010, compared to the section as it read prior to 1972. This section was also amended by an earlier chapter, ch 431. See Gov C § 9605.)

1974 Amendment: Added the last paragraph. (As amended Stats 1974 ch 1539, compared to the section as it read prior to 1974. This section was also amended by an earlier chapter, ch 1254. See Gov C § 9605.)

1975 Amendment: (1) Amended the first paragraph by deleting **(a)** "officer or" after "a public", "against such", and "unless such"; **(b)** "public officer" after "by another"; and **(c)** "officer or" after "dismissal such" and "against any" wherever it appears; **(2)** added the second paragraph to read: "For the purposes of this section, the term 'employee' shall not include any person who is elected to, or appointed to a public office by, any state agency; provided, however, that officers of the California State University and Colleges who receive compensation for their services other than per diem and ordinary and necessary expenses shall, when engaged in such capacity, be considered employees."; **(3)** substituted "Employees' " for "Employees" in the thirteenth paragraph; **(4)** added the sixteenth paragraph to read: "Notwithstanding any other provision of law, any meeting of the Public Utilities Commission at which the rates of entities under the commission's jurisdiction are changed shall be open and public."; and **(5)** amended the seventeenth paragraph by deleting **(a)** "(1)" after "deliberate on"; **(b)** "enforcement" after "institution of"; and **(c)** "or litigation or (2) decisions to be reached in matters for which public hearings have been held pursuant to the applicable provisions of the Public Utilities Code" at the end. (As amended Stats 1975 ch 959, compared to the section as it read prior to 1975. This section was also amended by an earlier chapter, ch 197. See Gov C § 9605.)

1977 Amendment: Added the tenth paragraph.

1980 Amendment: (1) Substituted "a closed" for "an executive" and "closed" for "executive" wherever it appears; **(2)** amended the second sentence of the first paragraph by **(a)** adding "or her" after "notice of his"; and **(b)** substituting "the employee" for "him" after "delivered to"; **(3)** added the fourth paragraph.; **(4)** added ", or from considering matters pertaining to the appointment or removal of the executive officers of the Franchise Tax Board" at the end of the eleventh paragraph; **(5)** amended the sixteenth paragraph by **(a)** substituting "state" for "public" after "body of a"; and **(b)** adding the second and third sentences; and **(6)** added the last two paragraphs. (As amended by Stats 1980 ch 1284, compared to the section as it read prior to 1980. This section was also amended by an earlier chapter, ch 1197. See Gov C § 9605.)

1981 Amendment: In addition to adding subdivision designations, **(1)** substituted "body" for "agency" wherever it appears in subd (a); **(2)** substituted "closed session" for "private meeting" in subd (a); **(3)** substituted "bodies" for "agencies" in subd (b); **(4)** substituted "state body" for "state agency" wherever it appears in subds (c)–(m); **(5)** added "University and" and "university and" in subd (i); **(6)** deleted the former fourteenth paragraph which read: "Nothing in this article shall be construed to prevent the Board of Administration of the Public Employees' Retirement System from holding closed sessions when considering investment decisions."; **(7)** deleted the former fifteenth paragraph which read: "Nothing in this article shall be construed to prevent the Teachers' Retirement Board of the State Teachers' Retirement System from holding closed sessions when considering investment decisions."; **(8)** added subd (n); **(9)** amended the first sentence of subd (o) by **(a)** substituting "a state body" for "the governing body of a state agency"; **(b)** substituting "state body" for "governing body"; and **(c)** deleting "at any time" after "representatives"; **(10)** amended the second sentence of subd (o) by **(a)** substituting "body" for "agency"; and **(b)** deleting ", providing a quorum of the state agency is present" at the end; **(11)** deleted the former last sentence of subd (o) which read: "For purposes of this paragraph, a state agency may not otherwise meet without using a designated representative, but it may appoint from its membership a member or members to act as its designated representative, with whom it may meet in closed session."; **(12)** amended the second paragraph of subd (p) by **(a)** adding "or" before "disciplinary"; and **(b)** deleting ", or litigation" at the end; **(13)** added subds (q) and (r); and **(14)** added subds (u)–(x). (As amended by Stats 1981 ch 968, compared to the section as it read prior to 1981. This section was also amended by an earlier chapter, ch 180. See Gov C § 9605.)

1982 Amendment: Routine code maintenance.

1983 Amendment: Redesignated California State University and Colleges to be California State University and made technical changes.

1984 Amendment: Added subd (y). (As amended by Stats 1984 ch 1284, compared to the section as it read prior to 1984. This section was also amended by an earlier chapter, ch 678. See Gov C § 9605.)

1985 Amendment: Amended subd (x) by adding **(1)** "for either of the following: (1)"; and **(2)** subd (x)(2). (As amended by Stats 1985 ch 1091, compared to the section as it read prior to 1985. This section was also amended by an earlier chapter, ch 186. See Gov C § 9605.)

1986 Amendment: (1) Deleted "contained" after "Nothing" in the first sentence of subd (a); **(2)** substituted "provisions" for "provision" near the end of subd (d); **(3)** deleted "the provisions of" before "Section 6027" in subd (1); and **(4)** added subd (z).

1987 Amendment: (1) Amended subd (i) by **(a)** substituting all that part following "to prevent" for "the Trustees of the California State University from holding closed sessions dealing with site selection for the state university" in the first paragraph; and **(b)** adding the second through fifth paragraphs; **(2)** added the third sentence of subd (n); **(3)** amended the first paragraph of subd (q) by **(a)** adding ", based on the advice of its legal counsel,"; **(b)** adding ", or receive advice from, its"; and **(c)** substituting "prejudice the position of the state body in the litigation" for "adversely affect or be detrimental to the public interest" at the end; **(4)** added the second through fifth paragraphs of subd (q); **(5)** deleted former subd (r) which read: "(r) Nothing in this article shall be construed to prevent a state body which invests in retirement, pension, or endowment funds from holding closed sessions to confer with legal counsel regarding pending litigation, when discussion in open session concerning these matters would adversely affect, or be detrimental to, those funds. For purposes of subdivision (q) and this subdivision, litigation shall be considered pending when a complaint, claim or petition for writ of mandate has been filed, or the threat of litigation is imminent in the sound opinion of the state body"; and **(6)** redesignated former subds (s)–(z) to be subds (r)–(y).

1988 Amendment: Substituted "Section 5020 or 5020.3" for "Section 5020" in subd (s).

1989 Amendment: (1) Amended subd (o) by **(a)** deleting "such" after "state body, or"; and **(b)** substituting "that" for "as" after "other representatives"; **(2)** added subd (r); **(3)** redesignated former subds (r)–(x) to be subds (s)–(y); and **(4)** substituted subd (z) for the former subdivision which read: "This article shall not prevent the Teachers' Retirement Board from holding closed sessions when considering matters pertaining to the appointment or removal of the chief executive officer of the State Teachers' Retirement System." (As amended Stats 1989 ch 1427, compared to the section as it read prior to 1989. This section was also amended by two earlier chapters, chs 177 and 882. See Gov C § 9605.)

1991 Amendment: (1) Redesignated former subd (j) to be subd (j)(1); and **(2)** added subd (j)(2).

1992 Amendment: In addition to technical changes, added subd (aa).

1994 Amendment (ch 26): Deleted "based upon evidence introduced" after "to be reached" in subd (d).

1994 Amendment (ch 422): Added subd (j)(3).

1994 Amendment (ch 845): (1) Added the last sentence in the first paragraph of subd (a); and **(2)** deleted former subd (j)(3) which read: "(3) Nothing in this article shall be construed to prevent the Student Aid Commission from holding closed sessions to consider matters pertaining to the appointment or termination of the Director of the Student Aid Commission."

1995 Amendment: Added subd (bb).

1996 Amendment: In addition to making technical and subdivision designation changes, **(1)** added subd (b); **(2)** added subd (c)(1); **(3)** deleted "Nothing in this article shall be construed" at the beginning of subd (c)(2)–(c)(14), (c)(16), (c)(17), and (f)(1)–(f)(8); **(4)** added subds (c)(8)(B)–(c)(8)(E); **(5)** added subd (c)(15); **(6)** added subd (d)(2); **(7)** added subds (e)(5)(B)–(e)(5)(D), and(f); **(8)** added subd (g); and **(9)** deleted "This article shall not prevent" at the beginning of subds (g)(1) and (g)(2).

1997 Amendment: In addition to making technical and subdivision designation changes, **(1)** added "evaluation of performance," after "appointment, employment," in subd (a)(1); **(2)** deleted former subd (c)(4) which read: "(4) Prevent any state body from holding a closed session to consider matters affecting the national security."; **(3)** added subd (c)(11); and **(4)** added subd (f)(8).

1998 Amendment: Substituted **(1)** "any person or entity under the jurisdiction of the commission" for "regulated utilities" in subd (d)(2); and **(2)** "State Board of Forestry and Fire Protection" for "State Board of Forestry" in subd (f)(2). (As amended Stats 1998 ch 972, compared to the section as it read prior to 1998. This section was also amended by an earlier chapter, ch 210. See Gov C § 9605.)

1999 Amendment: Amended subd (c)(14) by **(1)** substituting "or the Superintendent of Public Instruction, or any committee advising the board or the superintendent" for "or any committee advising the State Board of Education"; and **(2)** adding ", or pursuant to Chapter 8 (commencing with Section 60850) of,".

2000 Amendment: (1) Amended subd (f)(3) by **(a)** substituting "California" for "State" the first time it appears; **(b)** substituting "Section 5020" for "Section 5020 or 5020.3"; and **(c)** adding "California" the second time it appears; **(2)** substituted "Section 11121 or 11121.2" for "Section 11121, 11121.2, or 11121.5" in subd (f)(5);

and **(3)** deleted "pursuant to Section 8590" after "or the Governor" in subd (f)(9). (As amended Stats 2000 ch 1055, compared to the section as it read prior to 2000. This section was also amended by an earlier chapter, ch 1002. See Gov C § 9605.)

2001 Amendment (ch 21): (1) Added ", Chapter 10.3 (commencing with Section 3512), Chapter 10.5 (commencing with Section 3525, or Chapter 10.7 (commencing of Section 3540)" in subd (c)(17); and **(2)** substituted "Section 11121 or 11121.2" for "Section 11121, 11121.2, or 11121.5" in subd (f)(5).

2001 Amendment (ch 243): (1) Substituted "does" for "shall" before "not include any" in the first sentence of subd (b) and after "article" in the introductory clause of subd (g); **(2)** substituted "includes" for "shall include" after "term employee" in the second sentence of subd (b); **(3)** deleted "of Part 1 of Division 3 of title 2" after "Section 11500)" in subd (c)(3); **(4)** added the closing parenthesis after "Section 3525" in subd (c)(17); and **(5)** amended subd (f) by substituting **(a)** "subdivision (b) of Section 11121" for "Section 11121.2" in subd (f)(4); **(b)** "subdivision (d) of Section 11121" for "Section 11121.7" in subd (f)(5); **(c)** "subdivision (a) or (b) of Section 11121" for "Section 11121 or 11121.2" in subd (f)(5); and **(d)** "subdivision (c) of Section 11121" for "Section 11121.8" in subd (f)(6).

2002 Amendment: (1) Added subds (c)(18)(A)–(c)(18)(D); and **(2)** added subd (h). (As amended Stats 2002 ch 1113, compared to the section as it read prior to 2002. This section was also amended by an earlier chapter, ch 664. See Gov C § 9605.)

2005 Amendment: Substituted subd (h) for former subd (h) which read: "(h) This section shall remain in effect only until January 1, 2006, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 2006, deletes or extends that date."

2007 Amendment: (1) Amended subd (c) by **(a)** adding "Division 2 of" in subd (c)(11); and **(b)** substituting "Chapter 9 (commencing with Section 60850) of, Part 33 of Division 4 of Title 2" for "Chapter 8 (commencing with Section 60850) of, Part 33" in subd (c)(14); and **(2)** added subd (i).

2008 Amendment: (1) Substituted "Corrections Standards Authority" for "Board of Corrections" in subd (c)(12); **(2)** substituted "Superintendent" for "superintendent" after "board or the" in subd (c)(14); **(3)** substituted "with" for "of" after "Chapter 10.7 (commencing" in subd (c)(17); and **(4)** added subds (j) and (k).

2010 Amendment (ch 32): Amended subd (i) by **(1)** adding ", entities with which the board is considering a contract, or entities with which the board is considering or enters into any other arrangement under which the board provides, receives, or arranges services or reimbursement," after "contract with the board"; **(2)** deleting "or" after "Section 12699.50),"; and **(3)** adding ", Part 6.6 (commencing with Section 12739.5), or Part 6.7 (commencing with Section 12739.70)" after "Section 12700)".

2010 Amendment (ch 618): (1) Amended subd (f)(3) by substituting (a) "the enforcement advisory" for "an administrative" in the first sentence; and (b) "the qualifications" for "an" in the second sentence; **(2)** substituted "Secretary of Emergency Management" for "Director of the Office of Emergency Services" in subd (f)(9); and **(3)** deleted "or" after "Section 12699.50)," in subd (i).

2011 Amendment: Added subd (c)(19).

NOTES OF DECISIONS

1. Generally

Gov C § 11126(e) merely allows a state agency to meet in closed session to confer with, or receive advice from, its legal counsel regarding pending litigation - not to take action, and certainly not to issue regulatory orders. S. Cal. Edison Co. v. Lynch (2002, 9th Cir Cal) 307 F3d 794, 2002 US App LEXIS 19796.

2. Construction

The Legislature, in enacting the pending litigation exception to the Bagley Keene Open Meeting Act (Gov C § 11126, subd. (q)) (See now subd (e)(2)(C)(ii)), did not exempt every discussion involving litigation from public scrutiny. Rather, a state body is allowed to conduct a closed session when discussion in an open session would prejudice the position of the state body in litigation. The state body has the burden of proving a compelling necessity for a closed session. Accordingly, its counsel must prepare a memorandum giving the specific reasons and legal authority for a closed session, and that memorandum must be submitted to the state body, at the latest, within a week after the closed session. The memorandum must describe the existing facts and circumstances that would prejudice the state body's position if the discussion were to occur in an open session, so as to justify deviation from the presumption that all discussions of public business should be held in public. The presence of the lawyer or the existence of a lawsuit cannot be used as a ruse or pretext for an otherwise unlawful

closed session. Funeral Sec. Plans, Inc. v. State Bd. of Funeral Directors & Embalmers (1993, Cal App 3d Dist) 14 Cal App 4th 715, 18 Cal Rptr 2d 39, 1993 Cal App LEXIS 311, superseded by questionable precedent Funeral Sec. Plans v. State Bd. of Funeral Directors & Embalmers (1993, Cal. App. 3d Dist.) 16 Cal. App. 4th 1672, 21 Cal. Rptr. 2d 92, 1993 Cal. App. LEXIS 704, superseded by questionable precedent Funeral Security Plans, Inc. v. State Bd. of Funeral Directors and Embalmers (1993, Cal. App. 3d Dist.) 16 Cal. App. 4th 1672.

3. Construction with Other Law

Under Gov C § 18653, providing for meetings of the State Personnel Board, the Board is required to hold public hearings, but when the hearing has reached the decisional stage, it may hold an executive session for the sole purpose of deliberating on the decision to be reached, and at the conclusion of the executive session, the Board must reconvene the public hearing and make public announcement of its decision. The provision in Gov C § 18653, authorizing the Board to hold executive sessions "as provided in" Gov C § 11126, containing exceptions to the declared policy of public hearings, was intended to identify the exceptions in Gov C § 18653, with those in Gov C § 11126, and as so construed, the words "as provided in" are synonymous with "in accordance with" rather than being interpreted as "only as provided in." California State Employees' Assn. v. State Personnel Board (1973, Cal App 3d Dist) 31 Cal App 3d 1009, 108 Cal Rptr 57, 1973 Cal App LEXIS 1127.

4. Applicability

In a disciplinary hearing before the Psychology Examining Committee on allegations that a licensed psychologist had illegally prescribed and furnished dangerous drugs and engaged in sexual and other physical intimacies with three female patients, committee members and the hearing office did not violate the requirements of Gov C §§ 11120–11131, of open and public action and deliberation by state agencies, by convening in executive sessions on six occasions during the hearing, where it appeared that the objective in conducting each of the sessions was to reach "a decision…based upon evidence introduced" at the hearing, as permitted by Gov C § 11126. Moreover, the subject matter of each session and the decision discussed at it were fully placed on the record before each session, or afterward, or on both occasions in some instances, and the accused had the opportunity to examine and challenge each of the decisions made in executive session and in fact did so. Cooper v. Board of Medical Examiners (1975, Cal App 1st Dist) 49 Cal App 3d 931, 123 Cal Rptr 563, 1975 Cal App LEXIS 1266.

The State Board of Funeral Directors and Embalmers did not violate the Bagley Keene Open Meeting Act by meeting in closed sessions to listen to facts presented by its counsel and counsel's advice as to whether to file a civil action against a seller of preneed funeral contracts to enjoin alleged violations of the preneed arrangements law, and to deliberate and make decisions on the basis of the advice received. The litigation exception of the act, which provides that a state body may hold a closed session to confer with, or receive advice from, its legal counsel (Gov C § 11126, subd. (q)) (See now subd (e)(2)(C)(ii)), encompasses the presentation of facts by counsel, together with the necessary deliberation and decision making by the state body. The board, assisted by counsel, had been inquiring into the funeral contractor's possible legal violations, and the facts were inextricably intertwined with the legal advice offered by counsel. At that stage, the funeral contractor was not entitled to notice that it was a target of inquiry. Such a right to notice does not accrue until the filing of an action. Funeral Sec. Plans, Inc. v. State Bd. of Funeral Directors & Embalmers (1993, Cal App 3d Dist) 14 Cal App 4th 715, 18 Cal Rptr 2d 39, 1993 Cal App LEXIS 311, superseded by questionable precedent Funeral Sec. Plans v. State Bd. of Funeral Directors & Embalmers (1993, Cal. App. 3d Dist.) 16 Cal. App. 4th 1672, 21 Cal. Rptr. 2d 92, 1993 Cal. App. LEXIS 704, superseded by questionable precedent Funeral Security Plans, Inc. v. State Bd. of Funeral Directors and Embalmers (1993, Cal. App. 3d Dist.) 16 Cal. App. 4th 1672.

Gov C § 11126, subd. (d), which permits a state body to hold a closed session to deliberate on a decision to be reached on the basis of evidence introduced in a proceeding conducted under the Administrative Procedure Act, applies to administrative hearings held under the Funeral Directors and Embalmers Law (B & P C §§ 7600 et seq.). Funeral Sec. Plans, Inc. v. State Bd. of Funeral Directors & Embalmers (1993, Cal App 3d Dist) 14 Cal App 4th 715, 18 Cal Rptr 2d 39, 1993 Cal App LEXIS 311, superseded by questionable precedent Funeral Sec. Plans v. State Bd. of Funeral Directors & Embalmers (1993, Cal. App. 3d Dist.) 16 Cal. App. 4th 1672, 21 Cal. Rptr. 2d 92, 1993 Cal. App. LEXIS 704, superseded by questionable precedent Funeral Security Plans, Inc. v. State Bd. of Funeral Directors and Embalmers (1993, Cal. App. 3d Dist.) 16 Cal. App. 4th 1672.

When a party accused by the State Board of Funeral Directors and Embalmers of violations of the Funeral Directors and Embalmers Law (B & P C §§ 7600 et seq.) waives the right to an administrative hearing and attempts to settle the dispute with the board, the pending litigation exception of the Bagley Keene Open Meeting Act

(Gov C § 11126, subd. (q)) (See now subd (e)(2)(C)(ii)) applies. This permits the board to seek legal advice and confer with counsel in a closed session about the propriety of a proposed stipulated settlement, if the board demonstrates that the board would be prejudiced by an open discussion. The board, however, has a formidable task to demonstrate such prejudice. The public has a great interest in overseeing the board's execution of its regulatory powers. The accusation is made publicly, and when there is no administrative hearing, the process is resolved in secrecy. Thus, legal counsel must justify such a closed session by preparing a memorandum, as required by Gov C § 11126, subd. (q) (See now subd (e)(2)(C)(ii)), that specifically describes the facts and circumstances that would prejudice the board if an open hearing were held on the disposition. Funeral Sec. Plans, Inc. v. State Bd. of Funeral Directors & Embalmers (1993, Cal App 3d Dist) 14 Cal App 4th 715, 18 Cal Rptr 2d 39, 1993 Cal App LEXIS 311, superseded by questionable precedent Funeral Sec. Plans v. State Bd. of Funeral Directors & Embalmers (1993, Cal. App. 3d Dist.) 16 Cal. App. 4th 1672, 21 Cal. Rptr. 2d 92, 1993 Cal. App. LEXIS 704, superseded by questionable precedent Funeral Security Plans, Inc. v. State Bd. of Funeral Directors and Embalmers (1993, Cal. App. 3d Dist.) 16 Cal. App. 4th 1672.

Gov C § 11126.3 was strictly followed when the California Public Utilities Commission (PUC) entered into a stipulation with the power company; PUC was authorized not only to discuss, but also to conclude the settlement in closed session. Southern California Edison Co. v. Peevey (2003) 31 Cal 4th 781, 3 Cal Rptr 3d 703, 74 P3d 795, 2003 Cal LEXIS 6095, rehearing denied Southern California Edison Co. v. Lynch (2003, Cal) 2003 Cal LEXIS 8097.

State university trustees did not violate the Bagley-Keene Open Meeting Act, Gov C § 11120 et seq., when they met in closed session to discuss a former chancellor's controversial decision to return from a lengthy leave of absence and assume a teaching post; the personnel exception in Gov C § 11126(a)(1) was applicable. Travis v. Board of Trustees of the California State University (2008, 2d Dist) 161 Cal App 4th 335, 73 Cal Rptr 3d 854, 2008 Cal App LEXIS 411.

When the personnel exception in Gov C § 11126(a)(1) authorizes closed sessions to consider the employment of a public employee, it includes discussions about an employee's return from a leave of absence. Travis v. Board of Trustees of the California State University (2008, 2d Dist) 161 Cal App 4th 335, 73 Cal Rptr 3d 854, 2008 Cal App LEXIS 411.

§ 16642. Indemnification for decisions pursuant to Government Code §§ 7513.6, 7513.7

Present, future, and former board members of the Public Employees' Retirement System or the State Teachers' Retirement System, jointly and individually, state officers and employees, research firms as described in subdivision (d) of Section 7513.6, and investment managers under contract with the Public Employees' Retirement System or the State Teachers' Retirement System shall be indemnified from the General Fund and held harmless by the State of California from all claims, demands, suits, actions, damages, judgments, costs, charges and expenses, including court costs and attorney's fees, and against all liability, losses, and damages of any nature whatsoever that these present, future, or former board members, officers, employees, research firms as described in subdivision (d) of Section 7513.6, or contract investment managers shall or may at any time sustain by reason of any decision to restrict, reduce, or eliminate investments pursuant to Sections 7513.6 and 7513.7.

Added by Stats 2006 ch 442 § 3 (AB 2941), effective January 1, 2007. Amended by Stats 2007 ch 671 § 3 (AB 221), effective January 1, 2008.

Former Sections: Former § 16642, relating to loans to South Africa, was added Stats 1986 ch 1254 § 2 and repealed Stats 1994 ch 30 § 4.

Amendments

2007 Amendment: (1) Added "as described in subdivision (d) of Section 7513.6" after "research firms"; and **(2)** substituted "Sections 7513.6 and 7513.7" for "Section 7513.6" at the end.

CHAPTER 7. THE CALIFORNIA PENSION OBLIGATION FINANCING ACT

PART 3 OF DIVISION 4

TITLE 2 OF THE GOVERNMENT CODE

Article 1. General Provisions

§ 16910. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to citation of chapter.

§ 16911. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to legislative intent.

§ 16912. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to legislative findings and declarations.

§ 16913. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to definitions.

Article 2. Issuance of Bonds to Finance the Program

§ 16920. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Amended Stats 2004 ch 215 § 2 (SB 1106), effective August 11, 2004. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to pension Obligation Bond Committee created; membership.

§ 16921. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to powers of committee.

§ 16922. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to authorization to issue bonds.

§ 16923. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to responsibility of treasurer.

§ 16924. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to application of bond proceeds.

§ 16925. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to transfer from special fund or nongovernmental cost fund when bond proceeds used to pay pension obligation for members compensated from fund other than General Fund.

§ 16926. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to abatement to General Fund when bond proceeds used to pay pension obligation for members compensated from General Fund.

§ 16927. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to securing bonds by trust agreement, indenture, or resolution; provisions.

§ 16928. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to issuance of bonds to refund outstanding bonds.

§ 16929. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Amended Stats 2004 ch 215 § 3 (SB 1106), effective August 11, 2004. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to pension Obligation Bond Fund created; deposits; continuous appropriation.

Article 3. Miscellaneous Provisions

§ 16930. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to construction of chapter.

§ 16931. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to chapter supplemental and additional to other laws.

§ 16932. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to application of Public Contract Code.

§ 16933. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to bonds as legal investments.

§ 16934. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003. Repealed January 1, 2010, by the terms of Gov C § 16935. The repealed section related to action to determine validity of bonds or ancillary obligations and other contracts.

§ 16935. [Section repealed 2010.]

Added Stats 1st Ex Sess 2003–2004 ch 11 § 1 (SB 29X), effective May 5, 2003, inoperative June 30, 2009, repealed January 1, 2010. Repealed January 1, 2010, by its own terms. The repealed section related to operative term of chapter.

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§ 20098. Compensation for specified investment officers and portfolio managers; Principles; Civil service appointments; Limits on taking specified actions for two years after leaving such positions in certain circumstances

(a) The board shall appoint and, notwithstanding Sections 19816, 19825, 19826, 19829, and 19832 shall fix the compensation of an executive officer, a general counsel, a chief actuary, a chief investment officer, a chief financial officer, and other investment officers and portfolio managers whose positions are designated managerial pursuant to Section 18801.1.

(b) The executive officer, deputy executive officers, and the assistant executive officers may administer oaths.

(c) When fixing the compensation for the positions specified in subdivision (a), the board shall be guided by the principles contained in Sections 19826 and 19829, consistent with its fiduciary responsibility to its members to recruit and retain highly qualified and effective employees for these positions.

(d) When a position specified in subdivision (a) is filled through a general civil service appointment, it shall be filled from an eligible list based on an examination that was held on an open basis, and tenure in the position shall be subject to the provisions of Article 2 (commencing with Section 19590) of Chapter 7 of Part 2 of Division 5 of Title 2. In addition to the causes for action specified in that article, the board may take action under the article for causes related to its fiduciary responsibility to its members, including the employee's failure to meet specified performance objectives.

(e) An individual who held a position designated in subdivision (a), or was a member of the board, a deputy executive officer, or an assistant executive officer, shall not, for a period of two years after leaving that position, for compensation, act as agent or attorney for, or otherwise represent, any other person, except the state, by making any formal or informal appearance before, or any oral or written communication to, the Public Employees' Retirement System, or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing administrative or legislative action or any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, contract, or sale or purchase of goods or property.

Added Stats 1995 ch 379 § 2 (SB 541). Amended Stats 2003 ch 856 § 3 (SB 269); Stats 2005 ch 328 § 1 (AB 1166), effective January 1, 2006; Stats 2007 ch 333 § 2 (AB 1317), effective January 1, 2008; Stats 2009 ch 301 § 7 (AB 1584), effective October 11, 2009; Stats 2011 ch 688 § 1 (AB 1042), effective January 1, 2012.

Historical Derivation: (a) Former Gov C § 20105, as added Stats 1945 ch 123 § 1, amended Stats 1947 ch 206 § 1, Stats 1951 ch 612 § 3, Stats 1973 ch 389 § 2.

(b) Stats 1931 ch 700 § 43, as amended Stats 1937 ch 806 § 5, Stats 1939 ch 922 § 5.

Amendments

2003 Amendment: Substituted the section for the former section which read: "The board shall appoint and fix the compensation of an executive officer, assistant executive officers, and other necessary employees. The executive officer and the assistant executive officers may administer oaths."

2005 Amendment: Substituted "Sections 19816, 19825, 19826, 19829, and 19832" for "Sections 19816, 19825, and 19826" in subd (a).

2007 Amendment: Added "general counsel, a" after "executive officer, a" in subd (a).

2009 Amendment: Amended subd (e) by **(1)** substituting ", or was a member of the board, a deputy executive officer, or an assistant executive officer, shall not" for "for less than five years may not"; and **(2)** adding the commas after "appearance before" and after "communication to".

2011 Amendment: Added "a chief financial officer," in subd (a).

§ 20309. Election as to retirement system

(a) A member of the system described in subdivision (b) who subsequently is employed to perform service subject to coverage by the Defined Benefit Program of the State Teachers' Retirement Plan, may elect to retain coverage by this system for that subsequent service. An election to retain coverage under this system shall be submitted in writing by the member to the system on a form prescribed by the system, and a copy of the election shall be submitted to the State Teachers' Retirement System, within 60 days after the member's date of hire to perform service that requires membership in the Defined Benefit Program of the State Teachers' Retirement Plan. A member who elects to retain coverage under this system pursuant to this section shall be deemed to be a school member while employed by a school employer.

(b) This section shall apply to a member of the system who either (1) is employed by a school employer, the Board of Governors of the California Community Colleges, or the State Department of Education or (2) has at least five years of credited service under this system.

(c) Any election made pursuant to this section shall become effective as of the first day of employment in the position that qualified the member to make an election.

Added by Stats 1997 ch 838 § 5 (SB 227). Amended by Stats 2000 ch 880 § 2 (SB 1694); Stats 2001 ch 77 § 2 (SB 165).

Amendments

2000 Amendment: Substituted the section for the former section read: "A member of the Public Employees' Retirement System who is employed by the Board of Governors of the California Community Colleges and who subsequently is employed by a community college district to perform service subject to coverage by the 'State Teachers' Retirement System, may elect to retain coverage by the Public Employees' Retirement System for that service. An election to retain coverage under the Public Employees' Retirement System shall be submitted in writing by the member of the Public Employees' Retirement System on a form prescribed by the system, and a copy of the election shall be submitted to the State Teachers' Retirement System, within 60 days of the date the member's change in employment is effective."

2001 Amendment: (1) Substituted "described in subdivision (b)" for "who is employed by a school employer, the Board of Governors of the California Community Colleges, or the State Department of Education and" in the first sentence of subd (a); **(2)** added subd (b); and **(3)** redesignated former subd (b) to be subd (c).

§ 20309.5. Subsequent employment of members

(a) Any person who is a member of the Defined Benefit Program of the State Teachers' Retirement Plan and who subsequently became employed, on or after July 1, 1991, and who continues to be employed by the state to perform service that requires membership in the Public Employees' Retirement System under Section 21071 and who meets the requirements of subdivision (b) of Section 22508.6 of the Education Code may elect to have his or her state service subject to coverage by the Defined Benefit Program of the State Teachers' Retirement Plan and excluded from coverage by the Public Employees' Retirement System.

(b) Upon an election being made pursuant to subdivision (a), the Public Employees' Retirement System shall transfer to the Teachers' Retirement Fund an amount equal to the actuarial accrued liability of the system for the service rendered by the person making the election on or after July 1, 1991, to the date of the election, inclusive. The actuarial accrued liability shall be calculated based on the actuarial assumptions of the system for the most recently completed actuarial valuation as of the date of the election.

Added by Stats 2000 ch 402 § 11 (AB 649), effective September 11, 2000.

§ 20343. Forfeiture of position

Notwithstanding Section 21259, a person ceases to be a member for any portion of his or her service as an elected public officer that is forfeited pursuant to Section 1243.

Added by Stats 2005 ch 322 § 2 (AB 1044), effective January 1, 2006.

§ 21267. Authorization for direct deposit of benefits; Refunds of deposits after date of death

(a) Notwithstanding any other provision of law, any person entitled to the receipt of benefits from any state retirement system may authorize the payment of the benefits to be directly deposited by electronic fund transfer into the person's account at the financial institution of his or her choice under a program for direct deposit by electronic transfer established pursuant to Section 21268. The direct deposit shall discharge the state agency's obligation with respect to that payment.

(b) Any payments directly deposited by electronic fund transfer following the date of death of a person who was entitled to the receipt of the benefits from a state retirement system shall be refunded to the retirement system.

Added by Stats 1995 ch 379 § 2 (SB 541). Amended by Stats 2004 ch 506 § 2 (AB 3094).

Historical Derivation: Former Gov C § 20212, as added Stats 1985 ch 993 § 1.

Amendments

2004 Amendment: (1) Designated the former section to be subd (a); **(2)** substituted "with" for "in" after "state agency's obligation" in the last sentence of subd (a); and **(3)** added subd (b).

§ 22009.03. Public agency

"Public agency" also includes a school district, a county superintendent of schools, and a regional occupational center or program established pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7 of Title 1, with respect to employees eligible for membership in the State Teachers' Retirement Plan.

Added by Stats 2005 ch 328 § 21 (AB 1166), effective January 1, 2006.

Former Sections: Former § 22009.03, relating to educational entities as public agencies, was added Stats 1989 ch 1006 § 2, operative July 1, 1990, operative until July 1, 1993, amended Stats 1991 ch 150 § 1, effective July 22, 1991, operative until July 1, 1993, Stats 1992 ch 673 § 3, operative until July 1, 1995, Stats 1996 ch 318 § 1, effective July 29, 1996, Stats 1998 ch 965 § 324, Stats 2003 ch 62 § 139, inoperative July 1, 2004, ch 519 § 28 (ch 519 prevails), inoperative July 1, 2004, and repealed, operative January 1, 2005, by its own terms.

§ 22009.1. What is included in "retirement system"

"Retirement system" includes:

(a) A pension, annuity, retirement or similar fund or system established by a public agency and covering only positions of that agency.

(b) The Public Employees' Retirement System with respect only to employees of the state and employees of the University of California in positions covered by that system.

(c) The Public Employees' Retirement System with respect to employees of all school districts in positions covered under each contract entered into by a county superintendent of schools and the system.

(d) The State Teachers' Retirement System with respect to all employees in positions subject to coverage under the Defined Benefit Program of the State Teachers' Retirement Plan except employees of a public agency having any employees in positions covered by that system who are also in positions covered by a local retirement system for the retirement of teachers, or for membership in which public school teachers are eligible, operated by a city, city and county, county or other public agency or combination of public agencies of the state.

(e) The Legislators' Retirement System with respect to all employees in positions covered by that system.

(f) The Judges' Retirement System with respect to all employees in positions covered by that system.

(g) The University of California Retirement Plan only with respect to all employees in positions covered by that system.

(h) The San Francisco Employees' Retirement System with respect to all employees in positions covered by that system.

(i) Any other retirement system with respect only to employees of any two or more of the public agencies having employees in positions covered by that system, as designated by the board and with regard to which the board authorizes conduct of a referendum.

(j) Any retirement system with respect only to employees of a hospital that is an integral part of a city incorporated between January 15, 1898, and July 15, 1898, in positions covered by the system, as designated by the board on request of the city.

(k) Except as otherwise provided in subdivisions (b) to (j), inclusive, any retirement system with respect to employees of each of the public agencies having employees in positions covered by the system.

(l) The State Teachers' Retirement System with respect to all employees of each public agency, as defined by Section 22009.03, in positions covered by the State Teachers' Retirement Plan.

(m) Each division or part of a retirement system, as defined in subdivisions (a), (b), (c), (e), (g), (h), (i), (j), (k), and (l) of this section, that is divided pursuant to this chapter into two parts:

(1) The part composed of the positions of members of the system who desire coverage under the federal system.

(2) The part composed of the positions of members of the system who do not desire coverage under the federal system.

Added by Stats 1957 ch 1993 § 2, effective July 10, 1957, operative August 30, 1957. Amended by Stats 1959 ch 2066 § 14, effective July 20, 1959; Stats 1961 ch 808 § 1, effective June 12, 1961; Stats 1967 ch 84 § 18; Stats 1971 ch 1300 § 1, effective October 29, 1971; Stats 1992 ch 673 § 4 (AB 3823); Stats 1996 ch 318 § 2 (AB 166), effective July 29, 1996; Stats 1998 ch 965 § 325 (AB 2765); Stats

2003 ch 62 § 140 (SB 600), ch 519 § 29 (AB 1584) (ch 519 prevails); Stats 2005 ch 328 § 22 (AB 1166), effective January 1, 2006; Stats 2006 ch 655 § 85 (SB 1466), effective January 1, 2007.

Amendments

1959 Amendment: (1) Deleted "only" after "respect" in subd (c); and **(2)** added "(b)," in subd (k).

1961 Amendment: (1) Added subd (j); **(2)** redesignated former subds (j) and (k) to be subds (k) and (l); **(3)** substituted "(j)" for "(i)" in subd (k); **(4)** deleted "and" before "(j)" in subd (l); and **(5)** added ", and (k)" in subd (l).

1967 Amendment: Substituted "Public" for "State" in subds (b) and (c).

1971 Amendment: (1) Deleted "Pension and Retiring Annuities System of the" before "University" in subd (g); **(2)** added "Retirement System" in subd (g); and **(3)** added "(e)," in subd (l).

1992 Amendment: (1) Substituted "(k), and (m)" for "and (k)" in subd (l); and **(2)** added subd (m).

1996 Amendment: Substituted "become inoperative on July 1, 1999" for "be deemed to have become operative on July 1, 1990, and shall become inoperative on July 1, 1995" in subd (m).

1998 Amendment: Substituted "July 1, 2004" for "July 1, 1999" in subd (m).

2003 Amendment: (1) Substituted "Defined Benefit Program of the State Teachers' Retirement Plan" for "Defined Benefit Program System" in subd (d); **(2)** substituted "that" for "such" after "covered by" in subds (d) and (i); **(3)** added "a" after "operated by" in subd (d); **(4)** substituted "that" for "which" after "of a hospital" in subd (j); **(5)** substituted "subdivision (b) to (j), inclusive" for "subdivisions (b) through (j) above" in subd (k); **(6)** substituted "the" for "such" after "of members of" in subds (j)(1) and (j)(2); and **(7)** substituted "the State Teachers' Retirement Plan" for "that system" at the end of subd (m).

2005 Amendment: (1) Substituted "Plan" for "System" in subd (g); **(2)** redesignated former subds (m) and (n) to be subds (l) and (m); **(3)** deleted the former last sentence of subd (l) which read: "This subdivision shall become inoperative on July 1, 2004."; and **(4)** substituted "that" for "which" in subd (m).

2006 Amendment: (1) Deleted "City and County" after "The San Francisco" in subd (h); and **(2)** added the commas after "January 15, 1898" and "July 15, 1989" in subd (j).

§ 22150. Divisions of retirement system

Unless otherwise provided in this article, the board shall authorize a division of a retirement system upon the request of any public agency having employees in positions covered by the system or upon authorization of the Legislature. An election among members of the system shall not be required. A retirement system as defined in subdivisions (d) and (f) of Section 22009.1 shall be divided pursuant to this article only if the division is otherwise authorized by the Legislature. The board shall designate the person to conduct the division, as defined in subdivision (m) of Section 22009.1, of a retirement system.

For purposes of this section and all coverage procedures under this part subsequent to division of the retirement system defined in subdivision (g) of Section 22009.1 the University of California shall be deemed to be a public agency.

Added by Stats 1957 ch 1993 § 4, effective July 10, 1957, operative August 30, 1957. Amended by Stats 1959 ch 777 § 2, effective June 3, 1959; Stats 1963 ch 663 § 1, effective May 30, 1963; Stats 1979 ch 1110 § 39, effective September 28, 1979, operative January 1, 1980. Amended by Stats 2005 ch 328 § 23 (AB 1166), effective January 1, 2006.

Former Sections: Former § 22150 was added Stats 1955 ch 1441 § 2, effective June 29, 1955, and amended and renumbered § 22125 by Stats 1957 ch 1993 § 3, effective July 10, 1957, operative August 30, 1957.

Amendments

1959 Amendment: Substituted the section for the former section which read: "A retirement system as defined in subdivisions (a), (h), and (j) of Section 22009.1 may be divided by the legislative or governing body of the public agency. A retirement system as defined in subdivisions (c), (g), and (i) of Section 22009.1 may be divided by the person or body authorized under this part to conduct a referendum among eligible employees in

positions covered by such system. Any such division of a retirement system shall be in accordance with applicable federal law and regulations and may be made only upon the affirmative vote of a majority of the persons voting in an election held among the members of the retirement system to be divided."

1963 Amendment: Amended the first paragraph by **(1)** deleting ", but only if a majority of the persons voting in an election held among members of the system to be divided, after due notice of the modification of the retirement plan proposed in the event positions covered by the system are included in the agreement, voted in favor of such division" at the end of the first sentence; **(2)** inserting the second sentence; **(3)** deleting "(b), (c)," after "subdivisions" in the third sentence; and **(4)** adding the fourth sentence.

1979 Amendment: Substituted "subdivisions (d) and (f)" for "subdivisions (d), (e), and (f)" in the third sentence.

2005 Amendment: (1) Substituted "the" for "such" after "article only if"; and **(2)** substituted "subdivision (m)" for "subdivision (l)" before "of Section 22009.1".

§ 22155. Modification to agreement for transfer to division of retirement system

Whenever, on the request of the governing body of a public agency, a retirement system has been divided pursuant to this article, the board, on the request of the governing body, shall execute in conformity with Section 218 of the Social Security Act and applicable federal regulations a modification to the agreement providing for transfer to the system as defined in paragraph (1) of subdivision (m) of Section 22009.1 created by the division, the position of any member included in the system, as defined in paragraph (2) of subdivision (m) of Section 22009.1, who requests a transfer pursuant to Section 218(d)(6)(F) of the Social Security Act and board rules.

Added by Stats 1959 ch 752 § 1. Amended by Stats 1961 ch 808 § 2, effective June 12, 1961; Stats 2005 ch 328 § 24 (AB 1166), effective January 1, 2006.

Amendments

1961 Amendment: Substituted "22009.1 (l)*(*1)" for "22009.1(k)(1)"; and "22009.1 (l)*(*2)" for "22009.1(k)(2)".

2005 Amendment: (1) Added the commas after "Whenever", after "public agency", and after "in the system"; **(2)** substituted "paragraph (1) of subdivision (m) of Section 22009.1" for "Section 22009.1(l)(1)"; **(3)** substituted "paragraph (2) of subdivision (m) of Section 22009.1" for "Section 22009.1(1)(2)"; and **(4)** substituted "a" for "such" before "transfer pursuant".

§ 22156. Medicare coverage through the State Teachers' Retirement Plan

(a) A division of the State Teachers' Retirement Plan is hereby authorized by the Legislature to provide Medicare coverage for employees of a public agency, as defined in Section 22009.03, upon the request of the public agency.

(b) The division authorized by subdivision (a) shall be conducted pursuant to this article.

(c) A member of the State Teachers' Retirement Plan on whose behalf a request is made pursuant to subdivision (a) may elect to be covered by Medicare, pursuant to Section 218 of the federal Social Security Act (42 U.S.C. Sec. 418), and applicable federal regulations if all of the following apply:

(1) The member was employed in a position covered by the plan on March 31, 1986.

(2) The member has not since been mandated into Medicare coverage due to the enactment of Public Law 99-272.

(3) The member is in a position covered or the member is eligible to elect to be covered by the retirement system on the date of the division.

(d) The public agency shall immediately make an application pursuant to Chapter 2 (commencing with Section 22200) of this part for Medicare coverage for those members who have elected to receive Medicare coverage.

(e) The effective date of the coverage may be retroactive, but not earlier than the last day of the sixth calendar year preceding the year in which the agreement or modifications, as the case may be, is submitted to the Commissioner of Social Security.

Added by Stats 2005 ch 328 § 25 (AB 1166), effective January 1, 2006.

Former Sections: Former § 22156, relating to provision of Medicaid coverage, was added Stats 1989 ch 1006 § 3, operative July 1, 1990, amended Stats 1992 ch 673 § 5, Stats 1996 ch 318 § 3, effective July 29, 1996, Stats 1998 ch 965 § 326, Stats 2003 ch 62 § 142, inoperative July 1, 2004, repealed January 1, 2005, ch 519 § 33 (ch 519 prevails), inoperative July 1, 2004, and repealed, January 1, 2005, by its own terms.

Former § 22156, relating to Legislator's Retirement System, was added Stats 1971 ch 1300 § 6 and repealed Stats 1974 ch 665 § 2, effective September 5, 1974.

§ 22201. Application; Execution of agreement with federal agency for coverage of employees of applicant public agency under federal insurance system

The board shall, upon application by any public agency except the state, in accordance with the provisions of this part execute on behalf of the state an agreement with the federal agency for the coverage of employees of such public agency under the federal system in conformity with the provisions of Section 218 of the Social Security Act and applicable federal regulations.

Added by Stats 1955 ch 1441 § 2, effective June 29, 1955. Amended by Stats 1967 ch 1353 § 7.

Historical Derivation: (a) Former § 23026, as added Stats 1955 ch 10 § 2.
(b) Former § 13776, as added Stats 3d Ex Sess 1950 ch 46 § 1, amended Stats 1951 ch 1569 § 1.

Amendments

1967 Amendment: Deleted "insurance" before "system in conformity".

§ 22202. When application deemed made by public agency

With respect to employees in the coverage group defined in subdivision (a) of Section 22100, the application shall be deemed to be made by a public agency if made by the Adjutant General. With respect to employees in positions covered by the retirement system set forth in subdivision (d) of Section 22009.1, the application shall be deemed to be made by a public agency if made by the Teachers' Retirement Board. With respect to employees in positions covered by the retirement system set forth in subdivision (g) of Section 22009.1, the application shall be deemed to be made by a public agency if made by the Regents of the University of California. With respect to employees in the coverage group defined in subdivision (l) of Section 22009.1, the application shall be deemed to be made by a public agency if made by the governing body of the public agency, as defined in Section 22009.03.

Added by Stats 1955 ch 1441 § 2, effective June 29, 1955. Amended by Stats 1957 ch 1993 § 5, effective July 10, 1957, operative August 30, 1957; Stats 1989 ch 1006 § 4; Stats 1992 ch 673 § 6 (AB 3823). Amended by Stats 2005 ch 328 § 26 (AB 1166), effective January 1, 2006.

Amendments

1957 Amendment: Substituted **(1)** "(d) of Section 22009.1" for "(b) of Section 22150" in the second sentence; and **(2)** "employees in positions covered by the retirement system set for in subdivision (g) of Section 22009.1" for "retirement system coverage group set forth in subdivision (f) of Section 22150" in the third sentence.

1989 Amendment: Substituted **(1)** "the" for "such" before "application shall" in the first and last sentences; and **(2)** the second sentence for the former second sentence, which read "With respect to employees in positions

covered by the retirement system set forth in subdivision (d) of Section 22009.1, such application shall be deemed to be made by a public agency if made by the State Teachers' Retirement Board."

1992 Amendment: Deleted "prior to July 1, 1993, by the legislative or governing body of a public agency as defined in Section 22009.03, or if made on or after July 1, 1993, the application shall be deemed to be made by a public agency if made by" after "agency if made" in the second sentence.

2005 Amendment: Added the last sentence.

§ 22203. Agreement between public agency and board

Notwithstanding Section 22201, before the board shall execute on behalf of the state an agreement with the federal agency as provided in this chapter, the public agency and the board shall enter into a written agreement, that shall include provisions not inconsistent with this part that the board deems necessary in the administration of the federal system as it affects the state and the public agency and its employees.

For the purposes of this section, the state shall not be deemed to be a public agency, but nevertheless an agreement entered into pursuant to this part by the board and the Teachers' Retirement Board or the Adjutant General or the Regents of the University of California or the governing body of a public agency, as defined in Section 22009.03, shall be deemed to be entered into by the board and a public agency.

Added by Stats 1955 ch 1441 § 2, effective June 29, 1955. Amended by Stats 1967 ch 1353 § 8; Stats 1989 ch 1006 § 5; Stats 1992 ch 673 § 7 (AB 3823). Amended by Stats 2005 ch 328 § 27 (AB 1166), effective January 1, 2006.

Amendments

1967 Amendment: Substituted "federal" for "said insurance" before "system as it affects" in the first sentence.

1989 Amendment: Substituted the section for the former section, which read: "Notwithstanding the provisions of Section 22201, however, before the board shall execute on behalf of the state an agreement with the federal agency as herein provided, the public agency and the board shall enter into a written agreement, which agreement shall include such provisions not inconsistent with this part which the board deems necessary in the administration of the federal system as it affects the state and the public agency and its employees."For the purposes of this section, the state shall not be deemed to be a public agency, but nevertheless an agreement entered into pursuant to this part by the board and the State Teachers Retirement Board or the Adjutant General of the Board of Regents of the University of California shall be deemed to be entered into by the board and a public agency."

1992 Amendment: Amended the second paragraph by **(1)** deleting ", (a) if prior to July 1, 1993, by the legislative or governing body of a public agency as defined in Section 22009.03; (b) if on or after July 1, 1993, by" after "the board and"; and **(2)** substituting "or" for "; or (c)" after "Teachers' Retirement Board".

2005 Amendment: (1) Substituted "that" for "which" both times it appears in the first paragraph; and **(2)** added "or the governing body of a public agency, as defined in Section 22009.03," in the second paragraph.

§ 22208. Formal application to board for inclusion of employees in groups included in agreement

With respect to each retirement system coverage group, the legislative or governing body of every public agency having employees in positions covered by a retirement system, may, upon the affirmative vote of a majority of eligible retirement system employees of the retirement system coverage group at a referendum conducted in accordance with Article 2 (commencing with Section 22300) of this chapter and the rules and regulations promulgated by the board pursuant to this part, make formal application to the board for the inclusion of the employees in each retirement system coverage group in the agreement.

Added by Stats 1955 ch 1441 § 2, effective June 29, 1955. Amended by Stats 1957 ch 1993 § 6, effective July 10, 1957, operative August 30, 1957; Stats 1989 ch 1006 § 7; Stats 1996 ch 318 § 4 (AB 166), effective July 29, 1996; Stats 1998 ch 965 § 327 (AB 2765); Stats 2005 ch 328 § 28 (AB 1166), effective January 1, 2006.

Amendments

1957 Amendment: Substituted **(1)** "positions covered by the retirement system" for "the retirement system coverage group" wherever it appears; **(2)** "subdivision (d) of Section 22009.1" for "subdivision (b) of Section 22150"; and **(3)** "subdivision (g) of Section 22009.1" for "subdivision (f) of Section 22150."

1989 Amendment: Substituted the section for the former section which read: "With respect to each retirement system coverage group, the legislative or governing body of every public agency having employes in positions covered by a retirement system, the State Teachers Retirement Board with respect to employes in positions covered by the retirement system set forth in subdivision (d) of Section 22009.1 upon authorization by the Legislature, and the Board of Regents of the University of California with respect to employees in positions covered by the retirement system set forth in subdivision (g) of Section 22009.1, may, upon the affirmative vote of a majority of eligible retirement system employees of the retirement system coverage group at a referendum conducted in accordance with the provisions of Article 2 of this chapter and the rules and regulations promulgated by the board pursuant to this part, make formal application to the board for the inclusion of the employees in each such retirement system coverage group in the agreement."

1996 Amendment: Substituted "July 1, 1999" for "July 1, 1993" both times it appears in the last sentence.

1998 Amendment: Substituted "July 1, 2004" for "July 1, 1999" both times it appears in the second sentence.

2005 Amendment: Deleted the former last sentence which read: "With respect to employees in positions covered by the retirement system set forth in subdivision (d) of Section 22009.1, the formal application shall be deemed to be made, if made prior to July 1, 2004, by the legislative or governing body of a public agency as defined in Section 22009.03, or if on or after July 1, 2004, by the Teachers' Retirement Board."

§ 22302. Referendum for specified employees

In the case of employees in positions covered by the retirement system set forth in subdivision (d) of Section 22009.1, the Teachers' Retirement Board shall conduct the referendum; if the referendum is authorized by the Legislature.

In the case of employees in positions covered by the retirement system set forth in subdivision (g) of Section 22009.1 the board shall authorize the referendum upon the request of the Regents of the University of California and the regents shall conduct the referendum.

In the case of employees in positions covered by the retirement system set forth in subdivision (l) of Section 22009.1, the board shall authorize the referendum upon the request of the governing body of a public agency, as defined by Section 22009.03.

Added by Stats 1955 ch 1441 § 2, effective June 29, 1955. Amended by Stats 1957 ch 1993 § 8, effective July 10, 1957, operative August 30, 1957; Stats 1989 ch 1006 § 8; Stats 1996 ch 318 § 5 (AB 166), effective July 29, 1996; Stats 1998 ch 965 § 328 (AB 2765); Stats 2005 ch 328 § 29 (AB 1166), effective January 1, 2006.

Amendments

1957 Amendment: Substituted **(1)** "positions covered by the retirement system" for "the retirement system coverage group" wherever it appears; **(2)** "subdivision (d) of Section 22009.1" for "subdivision (b) of Section 22150" in the first paragraph; and **(3)** "subdivision (g) of Section 22009.1" for "subdivision (f) of Section 22150" in the second paragraph.

1989 Amendment: Substituted **(1)** the first paragraph for the former first paragraph, which read "In the case of employees in positions covered by the retirement system set forth in subdivision (d) of Section 22009.1, the State Teachers' Retirement Board shall conduct such referendum; provided, such referendum is authorized by the Legislature." and **(2)** made technical changes in the second paragraph.

1996 Amendment: Substituted "July 1, 1999" for "July 1, 1993" both times it appears in the first paragraph.

1998 Amendment: Substituted "July 1, 2004" for "July 1, 1999" both times it appears in the first paragraph.
2005 Amendment: (1) Deleted "if prior to July 1, 2004, the legislative or governing body of a public agency as defined in Section 22009.03, or if on or after July 1, 2004," before "the Teachers' " in the first sentence; **(2)** substituted "Regents" for "regents" in the second sentence; and **(3)** added the last paragraph.

§ 22308. Inapplicability of article to divided system

This article does not apply to a retirement system composed of the positions of members of a divided system who desire coverage under the federal system as defined in subdivision (m) of Section 22009.1 and wherever in this part the conduct of a referendum is made a condition, the condition shall be fully satisfied by compliance with Article 2.5 (commencing with Section 22150) of Chapter 1 as to that retirement system.

Added by Stats 1959 ch 777 § 5, effective June 3, 1959. Amended by Stats 1961 ch 808 § 3, effective June 12, 1961; Stats 1984 ch 193 § 48; Stats 2005 ch 328 § 30 (AB 1166), effective January 1, 2006.

Amendments

1961 Amendment: Substituted "subdivision (l) "for "subdivision (k)".
1984 Amendment: Routine code maintenance.
2005 Amendment: Substituted "subdivision (m)" for "subdivision (l)".

§ 22560. Reimbursements of costs to state

The board may charge or assess each public agency as defined in Section 22009.03 and each public agency shall pay and reimburse the state at the times and in the amounts as the board may determine, the approximate cost to the state, of any and all work, services, equipment, and other administrative costs relating to a division under Article 2.5 (commencing with Section 22150) of Chapter 1 of this part or the referendum provided by Article 2 (commencing with Section 22300) of Chapter 2 of this part and requested by the agency. The charges may differ from public agency to public agency.

Added by Stats 1989 ch 1006 § 9. Amended by Stats 1992 ch 673 § 9 (AB 3823); Stats 1996 ch 318 § 6 (AB 166), effective July 29, 1996; Stats 2005 ch 328 § 31 (AB 1166), effective January 1, 2006.

Amendments

1992 Amendment: (1) Amended subd (a) by **(a)** substituting "assistant (typing)" for "assistant II (typing)" wherever it appears; and **(b)** adding "and 1.0 limited–term retirement program specialist II position and 1.0 limited–term office assistant (typing) position for the 1993–94 fiscal year" at the end; and **(2)** substituted "eighty thousand two hundred twenty dollars ($80,220)" for "thirty–six thousand fifty–one dollars ($36,051)" in subd (b)(3).
1996 Amendment: (1) Deleted former subds (a) and (b) which read:
"(a) Due to the required administrative services necessary for implementation of the act enacting this section, the Public Employees' Retirement System is authorized 3.0 limited–term retirement program specialist II positions and 2.0 limited–term office assistant (typing) positions for the 1990–91 fiscal year, 2.0 limited–term retirement program specialist II positions and 1.0 limited–term office assistant (typing) positions for the 1991–92 fiscal year, and 1.0 limited–term retirement program specialist II positions and 1.0 limited–term office assistant (typing) positions for the 1992–93 fiscal year and 1.0 limited–term retirement program specialist II position and 1.0 limited–term office assistant (typing) position for the 1993–94 fiscal year.
"(b) There is hereby appropriated, for salary and benefits, equipment, and work stations, and other administrative costs which result from the act enacting this section, from the Public Employees' Retirement Fund to the Board of Administration of the Public Employees' Retirement System as follows:"(1) For the 1990–91 fiscal year, the sum of three hundred two thousand three hundred four dollars ($302,304)."(2) For the 1991–92 fiscal year, the sum of one hundred thirty–eight thousand four hundred eighty–eight dollars ($138,488)."(3) For the 1992–93 fiscal year, the sum of eighty thousand two hundred twenty dollars ($80,220).";

(2) deleted subdivision designation (c); and **(3)** substituted "the" for "such" after "the state at" and after "times and in" in the first sentence.

2005 Amendment: Substituted "may" for "shall" before "charge or assess".

§ 22849. Public school employees health care pool feasibility study

(a) The board shall conduct a study to examine the feasibility and cost-effectiveness of creating a single statewide health care pool that would cover all public school employees working in school districts, county offices of education, community colleges, and in entities created or established by those school employers, including, but not limited to, joint powers agencies, regional occupational centers, and regional occupational programs.

(b) The health care school pool study shall, at a minimum, include the following:

(1) A review and analysis of the costs, cost savings, benefits, and drawbacks of creating a health care pool for all public school employees in California, including retirees.

(2) An analysis of rates, including both a regional rating structure and a single statewide rating structure.

(3) An analysis and reporting of any and all cost savings in the administration of a single health care pool for all school employees compared to the current process that includes hundreds of different plans.

(4) An examination of plan design options in the health care school pool.

(5) An analysis of the feasibility and cost savings of including all school employees under this part, as the health care pool for all school employees.

(6) An analysis of the feasibility and cost savings of creating a pool operated exclusively for school employees.

(7) An analysis and comparison of a mandatory pool versus a voluntary pool.

(c) The completion of the health care school pool study shall be contingent upon the ability to secure or budget for funding to cover the costs of the study. The completed study shall be reported to the Legislature within one year after funding is secured or budgeted.

(d) The board shall consult with the Teachers' Retirement Board of the State Teachers' Retirement System in preparing the study.

Added by Stats 2005 ch 708 § 3 (AB 256), effective January 1, 2006.

§ 31563. Forfeiture of position

Notwithstanding any other provision of law, a person ceases to be a member for any portion of his or her service as an elected public officer that is forfeited pursuant to Section 1243.

Added by Stats 2005 ch 322 § 3 (AB 1044), effective January 1, 2006.

§ 31565. Election to transfer membership to State Teachers' Retirement System; Withdrawal of accumulated contributions

Any member of a system established under this chapter who is employed in a status requisite for membership in the State Teachers' Retirement System, may elect to transfer his membership to that system. Any member who elects to transfer his membership pursuant to this section may also elect in writing to withdraw his accumulated contributions, and in such event he shall be paid all of his accumulated contributions in the county retirement system.

Added by Stats 1957 ch 1452 § 1.

§ 82002. "Administrative action"; "Ratemaking proceeding"; "Quasi–legislative proceeding"

(a) "Administrative action" means either of the following:

(1) The proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.

(2) With regard only to placement agents, the decision by any state agency to enter into a contract to invest state public retirement system assets on behalf of a state public retirement system.

(b) "Ratemaking proceeding" means, for the purposes of a proceeding before the Public Utilities Commission, any proceeding in which it is reasonably foreseeable that a rate will be established, including, but not limited to, general rate cases, performance–based ratemaking, and other ratesetting mechanisms.

(c) "Quasi–legislative proceeding" means, for purposes of a proceeding before the Public Utilities Commission, any proceeding that involves consideration of the establishment of a policy that will apply generally to a group or class of persons, including, but not limited to, rulemakings and investigations that may establish rules affecting an entire industry.

Added by initiative measure adopted June 4, 1974, operative January 7, 1975. Amended Stats 1991 ch 491 § 3 (SB 28); Stats 2001 ch 921 § 1 (AB 1325); Stats 2010 ch 668 § 4 (AB 1743), effective January 1, 2011.

Amendments

1991 Amendment: Substituted "Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2" for "Chapter 4.5 of Division 3 of Title 2 of the Government Code (beginning with Section 11371)".

2001 Amendment: (1) Added the subdivision (a) designation; **(2)** amended subd (a) by **(a)** adding the comma after "enactment" and "regulation"; and **(b)** substituting "ratemaking" for "rate making"; and **(3)** added subds (b) and (c).

2010 Amendment: Added **(1)** "either of the following:" in the introductory clause of subd (a); **(2)** subdivision designation (a)(1); **(3)** subd (a)(2); and **(4)** the comma after "class of persons" in subd (c).

Note—Stats 2001 ch 921 provides:

SEC. 5. The Legislature finds and declares that the provisions of this act further the purposes of both the Political Reform Act of 1974 and Proposition 208 of the 1996 statewide general election within the meaning of subdivision (a) of Section 81012 of the Government Code and Section 45 of that measure.

FPPC Decisions

The process of trademark registration is "quasi-judicial" rather than "quasi-legislative." Thus, an attorney's activities in registering clients' trademarks do not constitute attempting to influence administrative action and the attorney need not register as a lobbyist. *Carson, John M., Attorney* 1 FPPC 46 (No. 75-031, July 2, 1975).

(1) Reporting hazardous traffic locations by an automobile club to state agencies and recommending corrective action does not constitute an attempt to influence administrative action; **(2)** the furnishing of data or factual materials will be reportable under certain circumstances; **(3)** commenting on proposed regulations constitutes an attempt to influence administrative action regardless of whether the comment is in response to a request from the agency; **(4)** discussion of enforcement policies with Highway Patrol personnel may constitute an attempt to influence administrative action. *Nida, Robert H., Automobile Club of Southern California* 2 FPPC 1 (No. 75-075-A, Jan. 7, 1976).

Persons engaged in representing Bay Area Rapid Transit in quasi-legislative proceedings before the Public Utilities Commission are attempting to influence administrative action. The safety director of BART is not a lobbyist as a result of communicating with the PUC staff in compliance with a PUC order. *Leonard, Carl A., Bay Area Rapid Transit* 2 FPPC 54 (No. 75-042, April 22, 1976).

Proceedings before the PUC involving Southern Pacific and Airportransit passenger service are not administrative action. However, under the circumstances presented here, the PUC proceedings pursuant to an Order In-

stituting Investigation and examining Southern Pacific commuter services are administrative actions. Because the Southern Pacific discontinuance proceedings are combined with proceedings pursuant to the Order Instituting Investigation, the discontinuance proceeding must be considered administrative action. *Evans, J. L., United Transportation Union* 4 FPPC 84 (No. 78-008-B, Nov. 8, 1978).

§ 82013. "Committee"

"Committee" means any person or combination of persons who directly or indirectly does any of the following:

(a) Receives contributions totaling one thousand dollars ($1,000) or more in a calendar year.

(b) Makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year; or

(c) Makes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or committees.

A person or combination of persons that becomes a committee shall retain its status as a committee until such time as that status is terminated pursuant to Section 84214.

Added Stats 1980 ch 289 § 1.3. Amended Stats 1984 ch 670 § 1; Stats 1987 ch 632 § 1.

Former Sections: Former § 82013, similar to the present section, was added by initiative measure adopted June 4, 1974, operative January 7, 1975, amended Stats 1977 ch 1213 § 1, and repealed Stats 1980 ch 289 § 1.2.

Amendments

1984 Amendment: (1) Added "does any of the following" in the introductory clause; **(2)** substituted the period for the semicolon at the end of subd (a); and **(3)** substituted "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" in subd (c).

1987 Amendment: Substituted "one thousand dollars ($1,000)" for "five hundred dollars ($500)" wherever it appears.

Note—Stats 1987 ch 632 provides:

SEC. 3. The Legislature finds and declares that the provisions of this act further the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

Notes of Decisions

Gov C § 91004 states that the liability for negligently violating reporting requirements is not more than the value not reported. Gov C § 91005, by contrast, allows a liability for up to three times the amount of the unlawful contribution in certain more egregious cases, such as unlawful contributions by lobbyists. It would be patently absurd to read §§ 82013 and 84200 together to impose duties on advocacy groups for a single negligent violation so as to allow a private "bounty hunter" to get rich off of that violation. In statutory terms, such a reading of "committee" as defined in § 82013 would contravene the plain implications of the framework laid out in §§ 91004 and 91005. For purposes of the reporting requirement of § 84200, "committees" cannot include issue advocacy groups who are retroactively assigned that status by virtue of court decision. McCauley v. Howard Jarvis Taxpayers Assn. (1998, Cal App 4th Dist) 68 Cal App 4th 1255, 80 Cal Rptr 2d 900, 1998 Cal App LEXIS 1086, review denied (1999, Cal) 1999 Cal LEXIS 2158.

FPPC Decisions

A committee is required to have a treasurer. However, there is no requirement that the person designated "committee treasurer" of a corporation that qualifies as a committee be the same person who for corporate purposes holds the title "treasurer." Any responsible person may be named for verifying and signing campaign reports. *Augustine, John H., Union Oil Co.* 1 FPPC 69 (No. 75-064, July 2, 1975).

The governing board of a district which pays or offers the pay for the cost of candidate qualification statements would not become a committee. The district would not become a committee by virtue of purchasing space in a voters' pamphlet for the purpose of presenting arguments on both sides of a ballot measure. *Masini, H. L., County Clerk, Fresno* 2 FPPC 38 (No. 75-171-B, Feb. 4, 1976.

When an individual and a closely held corporation in which the individual is the majority shareholder make contributions of the type described in Section 82013(c), it is assumed that they are a "combination of persons" which is attempting to influence the voters for or against the nomination or election of a candidate or the passage or defeat of a measure. Accordingly, the individual and the corporation ordinarily must file campaign statements as a major donor committee if their combined contributions total $5,000 or more. A corporation and an individual who is both the corporation president and a trustee in a foundation which owns the stock of the corporation need not cumulate contributions for the purpose of determining whether the corporation and the individual are a major donor committee unless there is an agreement or mutual understanding, expressed or implied, that corporate and personal funds will be contributed toward the accomplishment of a common goal. *Lumsdon, Thomas G., Attorney* 2 FPPC 140 (No. 75-205, Sept. 7, 1976).

When contributions are made by a parent corporation and its wholly owned subsidiaries, it is assumed that they are a "combination of persons." Accordingly, a parent corporation and its subsidiaries ordinarily must file campaign statements as a major donor committee if their combined contributions total $5,000 or more in a calendar year. A contrary conclusion can be reached only when it is clear from the surrounding circumstances that the parent corporation and its subsidiaries acted completely independently of each other. If the parent corporation made no contributions, the conclusion would be the same. *Kahn, Harry H., American Building Maintenance Industries* 2 FPPC 151 (No. 75-185, Nov. 3, 1976).

§ 82023. "Elective office"

"Elective office" means any state, regional, county, municipal, district or judicial office that is filled at an election. "Elective office" also includes membership on a county central committee of a qualified political party, and membership through election on the Board of Administration of the Public Employees' Retirement System or the Teachers' Retirement Board.

Added by initiative measure adopted June 4, 1974, operative January 7, 1975. Amended Stats 1998 ch 923 § 8 (SB 1753); Stats 2010 ch 633 § 1 (SB 1007), effective January 1, 2011.

Amendments

1998 Amendment: Added ", and members elected to the Board of Administration of the Public Employees' Retirement System".

2010 Amendment: (1) Substituted "that" for "which" after "judicial office" in the first sentence; and **(2)** amended the second sentence by **(a)** substituting "membership through election on" for "members elected to"; and **(b)** adding "or the Teachers' Retirement Board".

Note—Stats 2010 ch 633 provides:

SEC. 13. The Legislature finds and declares that this bill furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

§ 82024. "Elective state office"

"Elective state office" means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Member of the Legislature, member elected to the Board of Administration of the Public Employees' Retirement System, member elected to the Teachers' Retirement Board, and member of the State Board of Equalization.

Added by initiative measure adopted June 4, 1974, operative January 7, 1975. Amended Stats 1991 ch 674 § 2 (SB 595); Stats 1998 ch 923 § 9 (SB 1753); Stats 2010 ch 633 § 2 (SB 1007), effective January 1, 2011.

Amendments

1991 Amendment: Added "Insurance Commissioner," after "Attorney General".

1998 Amendment: Added "member elected to the Board of Administration of the Public Employees' Retirement System,".

2010 Amendment: Added "member elected to the Teachers' Retirement Board,".

Note—Stats 2010 ch 633 provides:

SEC. 13. The Legislature finds and declares that this bill furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

§ 82025.3. "External manager"

(a) "External manager" means either of the following:

(1) A person who is seeking to be, or is, retained by a state public retirement system in California or an investment vehicle to manage a portfolio of securities or other assets for compensation.

(2) A person who manages an investment fund and who offers or sells, or has offered or sold, an ownership interest in the investment fund to a state public retirement system in California or an investment vehicle.

(b) For purposes of this section, "investment fund" has the same meaning as set forth in Section 7513.8.

(c) For purposes of this section, "investment vehicle" has the same meaning as set forth in Section 82047.3.

Added Stats 2010 ch 668 § 5 (AB 1743), effective January 1, 2011. Amended Stats 2011 ch 704 § 3 (SB 398), effective October 9, 2011.

Amendments

2011 Amendment: (1) Added subdivision designation (a); **(2)** added 'or an investment vehicle" in subd (a)(1); **(3)** amended subd (a)(2) by **(a)** substituting "manages an investment fund" for "is engaged, or proposes to be engaged, in the business of investing, reinvesting, owning, holding, or trading securities or other assets"; **(b)** substituting "an ownership interest in the investment fund" for "securities"; and **(c)** adding "or an investment vehicle" at the end; and **(4)** added subds (b) and (c).

§ 82036. "Late contribution"

"Late contribution" means any of the following:

(a) A contribution, including a loan, that totals in the aggregate one thousand dollars ($1,000) or more and is made to or received by a candidate, a controlled committee, or a committee formed or existing primarily to support or oppose a candidate or measure within 90 days before the date of the election at which the candidate or measure is to be voted on. For purposes of the Board of Administration of the Public Employees' Retirement System and the Teachers' Retirement Board, "the date of the election" is the deadline to return ballots.

(b) A contribution, including a loan, that totals in the aggregate one thousand dollars ($1,000) or more and is made to or received by a political party committee, as defined in Section 85205, within 90 days before the date of a state election.

Added Stats 1980 ch 289 § 5. Amended Stats 2004 ch 623 § 2 (AB 890), effective September 21, 2004; Stats 2005 ch 22 § 111 (SB 1108), effective January 1, 2006; Stats 2010 ch 633 § 3 (SB 1007), effective January 1, 2011; Stats 2012 ch 496 § 1 (AB 481), effective January 1, 2013.

Former Sections: Former § 82036, similar to the present section, was added by initiative measure adopted June 4, 1974, operative January 7, 1975, amended Stats 1977 ch 344 § 2, effective August 20, 1977, and repealed Stats 1980 ch 289 § 4.

Amendments

2004 Amendment: (1) Added "any of the following:" in the introductory clause; **(2)** added the subdivision designation (a); **(3)** substituted "loan that" for "loan which" in subd (a); and **(4)** added subd (b).

2005 Amendment: Added the comma after "Any contribution" in subd (b).

2010 Amendment: (1) Substituted "and" for "that" after "($1,000) or more" in the first sentence of subd (a) and in subd (b); **(2)** added the second sentence of subd (a); and **(3)** deleted the comma after "state election" in subd (b).

2012 Amendment: (1) Amended the first sentence of subd (a) and subd (b) by **(a)** substituting "A" for "Any" at the beginning; **(b)** adding "within 90 days"; and **(c)** deleting "but after the closing date of the last campaign statement required to be filed before the election" at the end; and **(2)** substituted "a state" for "any state" in subd (b).

§ 82036.5. "Late independent expenditure"

"Late independent expenditure" means an independent expenditure that totals in the aggregate one thousand dollars ($1,000) or more and is made for or against a specific candidate or measure involved in an election within 90 days before the date of the election. For purposes of the Board of Administration of the Public Employees' Retirement System and the Teachers' Retirement Board, "the date of the election" is the deadline to return ballots.

Added Stats 1980 ch 289 § 5.1. Amended Stats 2010 ch 633 § 4 (SB 1007), effective January 1, 2011; Stats 2012 ch 496 § 2 (AB 481), effective January 1, 2013.

Amendments

2010 Amendment: (1) Amended the first sentence by substituting **(a)** "that totals" for "which totals"; and **(b)** "the election" for "such election" at the end; and **(2)** added the second sentence.

2012 Amendment: Amended the first sentence by **(1)** substituting "an independent" for "any independent"; **(2)** substituting "a specific" for "any specific"; **(3)** adding "within 90 days"; and **(4)** deleting "but after the closing date of the last campaign statement required to be filed prior to the election by a candidate or committee participating in the election" at the end.

§ 82039. "Lobbyist"; When proceeding before commission constitutes "administrative action"

(a) "Lobbyist" means either of the following:

(1) Any individual who receives two thousand dollars ($2,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or whose principal duties as an employee are, to communicate directly or through his or her agents with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action.

(2) A placement agent, as defined in Section 82047.3.

(b) An individual is not a lobbyist by reason of activities described in Section 86300.

(c) For the purposes of subdivision (a), a proceeding before the Public Utilities Commission constitutes "administrative action" if it meets any of the definitions set forth in subdivision (b) or (c) of Section 82002. However, a communication made for the purpose of influencing this type of Public Utilities Commission proceeding is not within subdivision (a) if the communication is made at a public hearing, public workshop, or other public forum that is part of the proceeding, or if the communication is included in the official record of the proceeding.

Added by initiative measure adopted June 4, 1974, operative January 7, 1975. Amended Stats 1975 ch 915 § 2, effective September 20, 1975, operative January 7, 1975; Stats 1984 ch 161 § 1; amend-

ment adopted by voters, Prop 208 § 38, effective November 6, 1996, operative January 1, 1997; Stats 2001 ch 921 § 2 (AB 1325); Stats 2010 ch 668 § 6 (AB 1743), effective January 1, 2011.

Amendments

1975 Amendment: Substituted "legislative" for "legislation" after "influencing" wherever it appears.

1984 Amendment: (1) Substituted "individual" for "person" wherever it appears; and **(2)** added "or her" after "through his" and "or she" after "for which he" in the first sentence.

1996 Amendment: Substituted the first sentence for the former first sentence which read: " "Lobbyist" means any individual who is employed or contracts for economic consideration, other than reimbursement for reasonable travel expenses, to communicate directly or through his or her agents with any elective state official, agency official or legislative official for the purpose of influencing legislative or administrative action, if a substantial or regular portion of the activities for which he or she receives consideration is for the purpose of influencing legislative or administrative action."

2001 Amendment: (1) Added the subdivision (a) designation; **(2)** substituted "An individual not a" for "No individual a" in the last sentence of subd (a); and **(3)** added subd (b).

2010 Amendment: (1) Added "either of the following:" in the introductory clause of subd (a); **(2)** added subdivision designations (a)(1) and (b); **(3)** added subd (a)(2); **(4)** redesignated former subd (b) to be subd (c); and **(5)** added the comma after "public workshop" in the second sentence of subd (c).

Editor's Notes—For construction, legislative amendments, applicability of other laws, severability, effect of conflicting ballot measures, and operative date, see the 1996 Note following Article 1, commencing with Gov C § 85100.

Note—Stats 2001 ch 921 provides:

SEC. 5. The Legislature finds and declares that the provisions of this act further the purposes of both the Political Reform Act of 1974 and Proposition 208 of the 1996 statewide general election within the meaning of subdivision (a) of Section 81012 of the Government Code and Section 45 of that measure.

FPPC Decisions

The selection of a contractor for the mailing of legislative newsletters does not constitute legislative action. Therefore, employees of the mailing firm are not required to register as lobbyists. *Cohen, Les H., Advocation Inc.* 1 FPPC 10 (No. 75-006, May 1, 1975).

Organizations like the California Labor Federation are not lobbyists and, as employers of lobbyists, are not prohibited from making political campaign contributions. Officers of the Federation who are lobbyists may not participate in the making of Federation endorsements of candidates because the endorsement process is so closely related to the ultimate contributions as to constitute arranging contributions. A lobbyist may not serve as the chairman or director of an organization whose chief activities include the making of political contributions. *California Labor Federation, AFL-CIO* 1 FPPC 28 (No. 75-004, June 18, 1975).

The process of trademark registration is "quasi-judicial" rather than "quasi-legislative." Thus, an attorney's activities in registering clients' trademarks do not constitute attempting to influence administrative action and the attorney need not register as a lobbyist. *Carson, John, Attorney* 1 FPPC 46 (No. 75-031, July 2, 1975).

The State Building and Construction Trades Council is a state body of affiliated local building and construction trade councils, craft councils and local unions which employs a lobbyist and participates in political activities and makes contributions. The council may continue its political activities. No restrictions are imposed on the elected officers of the council so long as they are not lobbyists. An employee who spends 40 hours lobbying in a two-month period is required to register as a lobbyist regardless of the amount of his compensation. The $1,000 test is an additional one applied to a person not spending 40 hours in lobbying activities. *McCarthy, P. H., State Building and Construction Trades Council* 1 FPPC 50 (No. 75-035, July 2, 1975).

An association of five large school districts which is composed of members of their boards of education and their superintendents is not a lobbyist but is engaged in lobbyist but is engaged in lobbying activity and must report under Section 86108(b). *Stern, Ralph, The Big Five Association of Public School Districts* 1 FPPC 59 (No. 75-040, July 2, 1975).

A person who receives no economic consideration, other than reimbursement for reasonable travel expenses, does not come under the definition of a lobbyist. *Hardie, George G., Golden State Greyhound Assn.* 1 FPPC 140 (No. 75-003, Oct. 23, 1975).

(1) In determining whether an employee of an entity had become a lobbyist pursuant to then 2 Cal. Adm. Code Section 18239, or determining whether an employee had spent 10 percent of his compensated time in lobbying activity pursuant to then 2 Cal. Adm. Code Section 18620, all the time spent attending an administrative hearing was to be counted. **(2)** Pursuant to then 2 Cal. Adm. Code Section 18239(e)(3)(B), a person became a lobbyist by spending a total of 40 hours in administrative testimony before one or more agencies and a total of one hour indirect contact with the officials of the agency or agencies to which the administrative testimony was directed. *Evans, James L., United Transportation Union* 4 FPPC 54 (No. 78-008-A, Oct. 3, 1978).

In determining whether an employee of an entity has become a lobbyist, the time spent by an agent or other employee of that entity should be attributed to the employee only if the agent or other employee acts under the direct supervision or direct orders of the employee in order to aid or promote the employee's lobbying activity. *Evans, James L, United Transportation Union* 4 FPPC 54 (No. 78-008-A, Oct. 3, 1978).

An agent of a lobbyist may not make or arrange a contribution or gift which the lobbyist would be prohibited from making or arranging unless it is clear that the contribution or gift is not intended to further the goals of the lobbyist and thus is outside the scope of the agency relationship. *Zenz, Robert L., California State Employees Assn.* 1 FPPC 195 (No. 75-156, Dec. 3, 1975).

Persons engaged in representing the Bay Area Rapid Transit in quasi-legislative proceedings before the Public Utilities Commission are attempting to influence administrative action. They safety director of BART is not a lobbyist as a result of communicating with the PUC staff in compliance with a PUC order. *Leonard, Carl A., Bay Area Rapid Transit* 2 FPPC 54 (No. 75-042, April 22, 1976).

A member of the Bay Conservation and Development Commission's Citizens' Advisory Committee is not a lobbyist. *Morrissey, John C., Pacific Gas & Electric Co.* 2 FPPC 84 (No. 75-099, June 6, 1976).

§ 82047.3. "Placement agent"

(a) "Placement agent" means an individual directly or indirectly hired, engaged, or retained by, or serving for the benefit of or on behalf of, an external manager or an investment fund managed by an external manager, and who acts or has acted for compensation as a finder, solicitor, marketer, consultant, broker, or other intermediary in connection with the offer or sale to a state public retirement system in California or an investment vehicle either of the following:

(1) In the case of an external manager within the meaning of paragraph (1) of subdivision (a) of Section 82025.3, the investment management services of the external manager.

(2) In the case of an external manager within the meaning of paragraph (2) of subdivision (a) of Section 82025.3, an ownership interest in an investment fund managed by the external manager.

(b) Notwithstanding subdivision (a), an individual who is an employee, officer, director, equityholder, partner, member, or trustee of an external manager and who spends one-third or more of his or her time, during a calendar year, managing the securities or assets owned, controlled, invested, or held by the external manager is not a placement agent.

(c) Notwithstanding subdivision (a), an employee, officer, or director of an external manager, or of an affiliate of an external manager, is not a placement agent with respect to an offer or sale of investment management services described in subdivision (a) if all of the following apply:

(1) The external manager is registered as an investment adviser or a broker-dealer with the Securities and Exchange Commission or, if exempt from or not subject to registration with the Securities and Exchange Commission, any appropriate state securities regulator.

(2) The external manager is participating in a competitive bidding process, such as a request for proposals, subject to subdivision (a) of Section 22364 of the Education Code or subdivision (a) of Section 20153 of this code, as applicable, or has been selected through that process, and is providing services pursuant to a contract executed as a result of that competitive bidding process.

(3) The external manager, if selected through a competitive bidding process described in paragraph (2), has agreed to a fiduciary standard of care, as defined by the standards of conduct applicable to the retirement board of a public pension or retirement system and set forth in Section 17 of Article XVI of the California Constitution, when managing a portfolio of assets of a state public retirement system in California.

(d) For purposes of this section, "investment fund" has the same meaning as set forth in Section 7513.8.

(e) For purposes of this section, "investment vehicle" means a corporation, partnership, limited partnership, limited liability company, association, or other entity, either domestic or foreign, managed by an external manager in which a state public retirement system in California is the majority investor and that is organized in order to invest with, or retain the investment management services of, other external managers.

Added Stats 2010 ch 668 § 7 (AB 1743), effective January 1, 2011. Amended Stats 2011 ch 704 § 4 (SB 398), effective October 9, 2011.

Amendments

2011 Amendment: (1) Amended subd (a) by **(a)** adding "directly or indirectly" near the beginning; **(b)** substituting "or an investment fund managed by an external manager, and" for ", or on behalf of another placement agent,"; **(c)** deleting "of the securities, assets, or services of an external manager" after "offer or sale"; and **(d)** substituting "either of the following:" for ", either directly or indirectly."; **(2)** added subds (a)(1), (a)(2), and (d) and redesignated former subd (d) as subd (e); **(3)** added "with respect to an offer or sale of investment management services described in subdivision (a)" in subd (c); **(4)** amended subd (c)(2) by **(a)** substituting "is participating in" for "has been selected through"; **(b)** adding ", such as a request for proposals,"; and **(c)** adding "or has been selected through that process,"; **(5)** added ", if selected through a competitive bidding process described in paragraph (2)," in subd (c)(3); and **(6)** deleted "constituting or" after "either domestic or foreign," in subd (e).

§ 84101. Filing organizational statement; Recipient committee; Independent expenditure committee; Payments

(a) A committee that is a committee by virtue of subdivision (a) of Section 82013 shall file a statement of organization. The committee shall file the original of the statement of organization with the Secretary of State and shall also file a copy of the statement of organization with the local filing officer, if any, with whom the committee is required to file the originals of its campaign reports pursuant to Section 84215. The original and copy of the statement of organization shall be filed within 10 days after the committee has qualified as a committee. The Secretary of State shall assign a number to each committee that files a statement of organization and shall notify the committee of the number. The Secretary of State shall send a copy of statements filed pursuant to this section to the county elections official of each county that he or she deems appropriate. A county elections official who receives a copy of a statement of organization from the Secretary of State pursuant to this section shall send a copy of the statement to the clerk of each city in the county that he or she deems appropriate.

(b) In addition to filing the statement of organization as required by subdivision (a), if a committee qualifies as a committee under subdivision (a) of Section 82013 before the date of an election in connection with which the committee is required to file preelection statements, but after the closing date of the last campaign statement required to be filed before the election pursuant to Section 84200.7, 84200.8, or 84200.9, the committee shall file, by facsimile transmission, guaranteed overnight delivery, or personal delivery within 24 hours of qualifying as a committee, the information required to be reported in the statement of organization. The information required by this subdivision shall be filed with the filing officer with whom the committee is required to file the originals of its campaign reports pursuant to Section 84215.

(c) If an independent expenditure committee qualifies as a committee pursuant to subdivision (a) of Section 82013 during the time period described in Section 82036.5 and makes independent expenditures of one thousand dollars ($1,000) or more to support or oppose a candidate or candidates for office, the committee shall file, by facsimile transmission, online transmission, guaranteed overnight delivery, or personal delivery within 24 hours of qualifying as a committee, the information required to be reported in the statement of organization. The information required by this section shall be filed with the filing officer with whom the committee is required to file the original of its campaign reports

pursuant to Section 84215, and shall be filed at all locations required for the candidate or candidates supported or opposed by the independent expenditures. The filings required by this section are in addition to filings that may be required by Sections 84203.5 and 84204.

(d) For purposes of this section, in calculating whether one thousand dollars ($1,000) in contributions has been received, payments for a filing fee or for a statement of qualifications to appear in a sample ballot shall not be included if these payments have been made from the candidate's personal funds.

Added by initiative measure adopted June 4, 1974, operative January 7, 1975. Amended Stats 1978 ch 551 § 1; Stats 1979 ch 531 § 5; Stats 1986 ch 544 § 1; Stats 1992 ch 405 § 2 (SB 1802); Stats 2001 ch 901 § 1 (AB 2); Stats 2002 ch 221 § 45 (SB 1019); Stats 2004 ch 478 § 2 (SB 604), effective September 10, 2004; Stats 2010 ch 633 § 5 (SB 1007), effective January 1, 2011.

Amendments

1978 Amendment: Deleted the former second sentence which read: "Each such committee in existence at the date of enactment of this chapter shall file a statement with the Secretary of State within thirty days after the effective date of this chapter."

1979 Amendment: (1) Substituted "has qualified" for "is formed" near the end of the first sentence; **(2)** added "or she" in the third sentence; and **(3)** added the last sentence.

1986 Amendment: (1) Designated the former section to be subd (a); **(2)** added the second and third sentences of subd (a); and **(3)** added subd (b).

1992 Amendment: Added subd (c).

2001 Amendment: (1) Amended the first sentence of subd (a) by **(a)** substituting "A" for "Every"; and **(b)** substituting "that is a" for "which is a"; **(2)** substituted "that files a" for "which files a" in the fourth sentence of subd (a); **(3)** amended the last sentence of subd (a) by **(a)** substituting "the statement" for "such statement"; and **(b)** substituting "that he or she" for "which he or she"; **(4)** added subd (c); and **(5)** redesignated former subd (c) to be subd (c).

2002 Amendment: Amended subd (a) by **(1)** substituting "county elections official" for "clerk" in the fifth sentence; and **(2)** substituting "elections official" for "clerk" in the last sentence.

2004 Amendment: Substituted "facsimile transmission, guaranteed overnight delivery" for "telegram" in subd (b) and subd (c).

2010 Amendment: (1) Amended the first sentence of subd (a) by deleting **(a)** "with the Secretary of State" after "shall file"; and **(b)** "within 10 days after it has qualified as a committee" at the end; **(2)** substituted "that" for "which" after "each county" in the fifth sentence of subd (a); **(3)** substituted "Section 84200.7, 84200.8, or 84200.9" for "Section 84200.7 or 84200.8" in the first sentence of subd (b); and **(4)** amended subd (c) by **(a)** adding the comma after "shall file" in the first sentence; and **(b)** substituting "shall be filed at" for "to file at" in the second sentence.

Note—Stats 1992 ch 405 provides:

SEC. 6. The Legislature finds and declares that the provisions of this act further the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

Stats 2010 ch 633 provides:

SEC. 13. The Legislature finds and declares that this bill furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

Editor's Notes—For construction of 1979 amendment, see note following § 83113.

§ 84101.5. Filing fees

(a) Notwithstanding Section 81006, the Secretary of State shall charge each committee that is required to file a statement of organization pursuant to subdivision (a) of Section 84101, and each committee that is required to file a statement of organization pursuant to subdivision (a) of Section 84101 shall pay, a fee of fifty dollars ($50) per year until the committee is terminated pursuant to Section 84214.

(b) A committee shall pay the fee prescribed in subdivision (a) no later than 15 days after filing its statement of organization.

(c) (1) A committee annually shall pay the fee prescribed in subdivision (a) no later than January 15 of each year.

(2) A committee that is created and pays the initial fee pursuant to subdivision (b) in the final three months of a calendar year is not subject to the annual fee pursuant to paragraph (1) for the following calendar year.

(3) A committee that existed prior to January 1, 2013, shall pay the fee prescribed in subdivision (a) no later than February 15, 2013, and in accordance with paragraph (1) in each year thereafter. A committee that terminates pursuant to Section 84214 prior to January 31, 2013, is not required to pay a fee pursuant to this paragraph.

(d) (1) A committee that fails to timely pay a fee required by this section is subject to a penalty equal to three times the amount of the fee.

(2) The Commission shall enforce the requirements of this section.

Added Stats 2012 ch 506 § 1 (SB 1001), effective January 1, 2013.

§ 84200.5. Preelection statements

In addition to the campaign statements required by Section 84200, elected officers, candidates, and committees shall file preelection statements as follows:

(a) During an even-numbered year, all candidates for elective state office being voted upon in the statewide direct primary election or the statewide general election, their controlled committees, and committees primarily formed to support or oppose an elected state officer or a state candidate being voted upon shall file the applicable preelection statements specified in Section 84200.7 or 84200.8. All elected state officers who, during the applicable reporting periods covered by Section 84200.7 or 84200.8, contribute to any committee required to report receipts, expenditures, or contributions pursuant to this title, or make an independent expenditure, shall file the applicable preelection statements specified in Section 84200.7 or 84200.8. However, a candidate for an office that is not being voted upon in the November election, his or her controlled committee, and any committee primarily formed to support or oppose that candidate is not required to file statements in connection with the November election pursuant to subdivision (b) of Section 84200.7 unless, during the reporting periods covered by Section 84200.7, the candidate, his or her controlled committee, or any committee primarily formed to support or oppose that candidate contributes to any committee required to report receipts, expenditures, or contributions pursuant to this title or makes independent expenditures.

(b) During an even-numbered year, all candidates not specified in subdivision (a) who are running for offices being voted upon on the first Tuesday after the first Monday in June or November, their controlled committees, and committees primarily formed to support or oppose those candidates or a measure being voted upon on the first Tuesday after the first Monday in June or November of an even-numbered year shall file the preelection statements specified in subdivision (a) of Section 84200.7 in the case of a June election, or subdivision (b) of Section 84200.7 in the case of a November election.

(c) All candidates for offices being voted upon on a date other than the first Tuesday after the first Monday in June or November of an even-numbered year, their controlled committees, and committees primarily formed to support or oppose a candidate or a measure being voted upon on a date other than the first Tuesday after the first Monday in June or November of an even-numbered year shall file the preelection statements specified in Section 84200.8.

(d) During an election period for the Board of Administration of the Public Employees' Retirement System or the Teachers' Retirement Board, all candidates for these boards, their controlled committees, and committees primarily formed to support or oppose the candidates shall file the preelection statements specified in Section 84200.9.

(e) In an even-numbered year in which the statewide direct primary election is held on the first Tuesday after the first Monday in June, a state or county general purpose committee formed pursuant

to subdivision (a) of Section 82013, other than a political party committee as defined in Section 85205, shall file the preelection statements specified in Section 84200.7 if it makes contributions or independent expenditures totaling five hundred dollars ($500) or more during the period covered by the preelection statement. A state or county general purpose committee formed pursuant to subdivision (b) or (c) of Section 82013 is not required to file the statements specified in Section 84200.7.

(f) During an even-numbered year in which the statewide direct primary election is held on a date other than the first Tuesday after the first Monday in June, a state or county general purpose committee formed pursuant to subdivision (a) of Section 82013, other than a political party committee as defined in Section 85205, shall file the preelection statements specified in Section 84200.8 if it makes contributions or independent expenditures totaling five hundred dollars ($500) or more during the period covered by the preelection statement. A state or county general purpose committee formed pursuant to subdivision (b) or (c) of Section 82013 is not required to file the statements specified in Section 84200.8.

(g) During an election period for the Board of Administration of the Public Employees' Retirement System or the Teachers' Retirement Board, a state or county general purpose committee formed pursuant to subdivision (a) of Section 82013 shall file the preelection statements specified in Section 84200.9 if it makes contributions or independent expenditures totaling five hundred dollars ($500) or more during the period covered by the preelection statement to support or oppose a candidate, or a committee primarily formed to support or oppose a candidate, on the ballot for the Board of Administration of the Public Employees' Retirement System or the Teachers' Retirement Board. A state or county general purpose committee formed pursuant to subdivision (b) or (c) of Section 82013 is not required to file the statements specified in Section 84200.9.

(h) A political party committee as defined in Section 85205 shall file the applicable preelection statements specified in Section 84200.7 or 84200.8 in connection with a state election if the committee receives contributions totaling one thousand dollars ($1,000) or more, or if it makes contributions or independent expenditures totaling five hundred dollars ($500) or more, during the period covered by the preelection statement.

(i) City general purpose committees shall file statements as follows:

(1) City general purpose committees in a city that has an election on the first Tuesday after the first Monday in June or November of an even-numbered year shall file the statements specified in subdivision (a) or (b) of Section 84200.7 for the six-month period in which the city election is held, if they make contributions or independent expenditures totaling five hundred dollars ($500) or more during the period covered by the preelection statement.

(2) City general purpose committees in a city that has an election on a date other than the first Tuesday after the first Monday in June or November of an even-numbered year shall file the preelection statements specified in Section 84200.8 if they make contributions or independent expenditures totaling five hundred dollars ($500) or more during the period covered by the preelection statement.

Added Stats 1985 ch 1456 § 7. Amended Stats 1986 ch 542 § 2; Stats 1988 ch 704 § 2, ch 1281 § 1, effective September 24, 1988, ch 1281 § 1.5, effective September 24, 1988, operative January 1, 1989; Stats 1991 ch 505 § 1 (SB 397), ch 1077 § 2 (AB 559); Stats 1993 ch 769 § 3 (SB 253); Stats 1999 ch 158 § 3 (SB 50), effective July 23, 1999, ch 855 § 2 (SB 1025); Stats 2004 ch 623 § 3 (AB 890), effective September 21, 2004; Stats 2010 ch 633 § 6 (SB 1007), effective January 1, 2011.

Former Sections: Former § 84200.5 was added Stats 1975 ch 915 § 3, effective September 20, 1975, operative January 7, 1975, amended Stats 1976 ch 1106 § 6, and amended and renumbered Gov C § 84202 by Stats 1977 ch 1193 § 6.

Amendments

1986 Amendment: (1) Amended subd (a) by adding **(a)** "all state candidates being voted upon on the first Tuesday after the first Monday in June or November,"; **(b)** "or a state candidate being voted upon on the first Tuesday after the first Monday in June or November"; and **(c)** the second sentence; **(2)** amended subd (b) by **(a)**

adding "not specified in subdivision (a) who are"; **(b)** substituting "those candidates" for "a candidate"; and **(c)** adding "of Section 84200.7 in the case of a June election, or subdivision (b) of Section 84200.7 in the case of a"; and **(3)** substituted subd (f) for former subd (f) which read: "(f) Committees primarily formed to support or oppose the qualification of a ballot measure and proponents of a state ballot measure who control a committee primarily formed to support or oppose the qualification of a measure shall file a statement for the period ending 28 days after the deadline for filing petitions, or 28 days after the measure has either qualified or failed to qualify, no later than 35 days after the deadline for filing petitions, or 35 days after the measure has either qualified or failed to qualify, whichever is earlier."

1988 Amendment: Substituted subd (f) for former subd (f) which read: "(f) Committees formed or existing primarily to support or oppose the qualification of a ballot measure and proponents of a state ballot measure, as defined in Section 3502 of the Elections Code, who control a committee formed or existing primarily to support the qualification of a measure shall file statements as follows:"(1) In the case of a measure which has failed to qualify, a statement shall be filed no later than 35 days after the deadline for filing petitions, or the date of notification that the measure has failed to qualify, whichever is earlier. The closing date for the period covered by this statement shall be 28 days after the deadline for filing petitions, or 28 days after the date of notification that the measure has failed to qualify, whichever is earlier."(2) In the case of a measure which has qualified for the ballot, the statement shall be filed no later than 15 days prior to the deadline for submission of the ballot argument in favor of the measure, or 35 days after the date of notification that the measure has qualified, whichever is earlier. The closing date for the period covered by this statement shall be seven days prior to the deadline for filing the statement." (As amended by Stats 1988, ch 1281, compared to the section as it read prior to 1988. This section was also amended by an earlier chapter, ch 704. See Gov C § 9605.)

1991 Amendment: (1) Substituted "shall" for "must" in the introductory clause; **(2)** amended subd (a) by **(a)** substituting "candidates for elective state office" for "elected state officers, all state candidates" in the first sentence; **(b)** adding "and all elected state officers who, during the reporting periods covered by Section 84200.7, contribute to any committee required to report receipts, expenditures, or contributions pursuant to this title, or make an independent expenditure," in the first sentence; and **(c)** adding ", unless, during the reporting periods covered by Section 84200.7, the candidate, his or her controlled committee, or any committee primarily formed to support or oppose that candidate contributes to any committee required to report receipts, expenditures, or contributions pursuant to this title or makes independent expenditures" in the second sentence; and **(3)** amended subd (f) by **(a)** adding a comma after "measure" the third time it appears in the first sentence; **(b)** substituting "the deadline for filing petitions" for "any petitions are filed, or 21 days after the deadline for filing petitions, whichever is earlier" at the end of the first sentence; and **(c)** substituting "a statement required by this subdivision" for "this statement" in the second sentence. (As amended by Stats 1991, ch 1077, compared to the section as it read prior to 1991. This section was also amended by an earlier chapter, ch 505. See Gov C § 9605.)

1993 Amendment: Amendment made no change.

1999 Amendment (ch 158): (1) Substituted the first sentence of subd (d) for the former first sentence which read: "During an even–numbered year, state and county general purpose committees formed pursuant to subdivision (a) of Section 82013 shall file the statements specified in Section 84200.7 if they make contributions or independent expenditures totaling five hundred dollars ($500) or more during the period covered by the preelection statement."; **(2)** amended the second sentence of subd (d) by substituting **(a)** "A state or" for "State and"; **(b)** "committee" for "committees"; and **(c)** "is not" for "are not" after "Section 82013"; **(3)** added subd (e); and **(4)** redesignated former subd (e) to be subd (f).

2004 Amendment: (1) Deleted a comma before "unless" in the last sentence of subd (a); **(2)** added ", other than a political party committee as defined in Section 85205," in subds (d) and (e); **(3)** added "preelection" in the first sentence of subds (d) and (e); **(4)** added "statewide" in the first sentence of subd (e); **(5)** added subd (f); and **(6)** redesignated former subd (f) to be subd (g).

2010 Amendment: (1) Amended subd (a) by **(a)** deleting the comma before "shall file" in the first sentence; and **(b)** substituting "for an office that" for "who" in the last sentence; **(2)** added "running for offices" in subd (b); **(3)** added "for offices" in subd (c); **(4)** added subds (d) and (g); **(5)** redesignated former subds (d)–(g) to be subds (e), (f), (h), and (i); **(6)** added the comma after "($500) or more" in subd (h); and **(7)** substituted "that" for "which" after "a city" in subds (i)(1) and (i)(2).

Note—Stats 1988 ch 1281 provides:

SEC. 3. The Legislature finds and declares that the provisions of this act further the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

Stats 1991 ch 1077 provides:

SEC. 4. The Legislature finds and declares that this act furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

Stats 2010 ch 633 provides:

SEC. 13. The Legislature finds and declares that this bill furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

§ 84200.9. Filing of preelection statements for Board of Administration of Public Employees' Retirement System or Teachers' Retirement

Preelection statements for an election period for the Board of Administration of the Public Employees' Retirement System or the Teachers' Retirement Board shall be filed as follows:

(a) For the period ending five days before the beginning of the ballot period, as determined by the relevant board, a statement shall be filed no later than two days before the beginning of the ballot period.

(b) For the period ending five days before the deadline to return ballots, as determined by the relevant board, a statement shall be filed no later than two days before the deadline to return ballots.

(c) In the case of a runoff election, for the period ending five days before the deadline to return runoff ballots, as determined by the relevant board, a statement shall be filed no later than two days before the deadline to return runoff ballots.

(d) All candidates being voted upon, their controlled committees, and committees primarily formed to support or oppose a candidate being voted upon in that election shall file the statements specified in subdivisions (b) and (c) by guaranteed overnight delivery service or by personal delivery.

Added Stats 2010 ch 633 § 6 (SB 1007), effective January 1, 2011.

Note—Stats 2010 ch 633 provides:

SEC. 13. The Legislature finds and declares that this bill furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

§ 84215. Filing; Copies

All candidates and elected officers and their controlled committees, except as provided in subdivisions (d) and (e), shall file one copy of the campaign statements required by Section 84200 with the elections official of the county in which the candidate or elected official is domiciled, as defined in subdivision (b) of Section 349 of the Elections Code. In addition, campaign statements shall be filed at the following places:

(a) Statewide elected officers, including members of the State Board of Equalization; Members of the Legislature; Supreme Court justices, court of appeal justices, and superior court judges; candidates for those offices and their controlled committees; committees formed or existing primarily to support or oppose these candidates, elected officers, justices and judges, or statewide measures, or the qualification of state ballot measures; and all state general purpose committees and filers not specified in subdivisions (b) to (e), inclusive, shall file a campaign statement by online or electronic means, as specified in Section 84605, and shall file the original and one copy of the campaign statement in paper format with the Secretary of State.

(b) Elected officers in jurisdictions other than legislative districts, State Board of Equalization districts, or appellate court districts that contain parts of two or more counties, candidates for these offices, their controlled committees, and committees formed or existing primarily to support or oppose candidates or local measures to be voted upon in one of these jurisdictions shall file the original and one copy with the elections official of the county with the largest number of registered voters in the jurisdiction.

(c) County elected officers, candidates for these offices, their controlled committees, committees formed or existing primarily to support or oppose candidates or local measures to be voted upon in any number of jurisdictions within one county, other than those specified in subdivision (d), and county

general purpose committees shall file the original and one copy with the elections official of the county.

(d) City elected officers, candidates for city office, their controlled committees, committees formed or existing primarily to support or oppose candidates or local measures to be voted upon in one city, and city general purpose committees shall file the original and one copy with the clerk of the city and are not required to file with the local elections official of the county in which they are domiciled.

(e) Elected members of the Board of Administration of the Public Employees' Retirement System, elected members of the Teachers' Retirement Board, candidates for these offices, their controlled committees, and committees formed or existing primarily to support or oppose these candidates or elected members shall file the original and one copy with the Secretary of State, and a copy shall be filed at the relevant board's office in Sacramento. These elected officers, candidates, and committees need not file with the elections official of the county in which they are domiciled.

(f) Notwithstanding any other provision of this section, a committee, candidate, or elected officer is not required to file more than the original and one copy, or one copy, of a campaign statement with any one county elections official or city clerk or with the Secretary of State.

(g) If a committee is required to file campaign statements required by Section 84200 or 84200.5 in places designated in subdivisions (a) to (d), inclusive, it shall continue to file these statements in those places, in addition to any other places required by this title, until the end of the calendar year.

Added Stats 1980 ch 289 § 35.5. Amended Stats 1982 ch 1069 § 2; Stats 1985 ch 1456 § 27; Stats 1986 ch 490 § 1; Stats 1990 ch 581 § 4 (SB 284); Stats 2001 ch 241 § 2 (SB 34), effective Sepember 4, 2001; Stats 2002 ch 784 § 509 (SB 1316); Stats 2007 ch 54 § 1 (AB 473), effective January 1, 2008; Stats 2010 ch 18 § 3 (AB 1181), ch 633 § 8 (SB 1007), effective January 1, 2011.

Former Sections: Former § 84215, similar to present § 84205, was added Stats 1978 ch 1408 § 2, effective October 1, 1978, and repealed Stats 1980 ch 289 § 35.4.

Amendments

1982 Amendment: Amended subd (a) by adding **(1)** "or existing"; **(2)** "or oppose"; and **(3)** "or statewide measures".

1985 Amendment: In addition to making technical changes, **(1)** amended subd (a) by adding **(a)** "Supreme Court Justices," both times it appears; and **(b)** "general purpose" after "state"; **(2)** substituting "these jurisdictions" for "such jurisdiction" in subd (c); **(3)** substituted "county general purpose committees" for "committees formed or existing primarily to support or oppose candidates or measures in any number of jurisdictions within one county, other than those specified in subdivision (e)," in subd (d); **(4)** substituted "city general purpose committees" for "committees formed or existing primarily to support or oppose candidates or measures in one city" in subd (e); and **(5)** added "or 84200.5" in subd (g).

1986 Amendment: (1) Substituted "local measures to be voted upon" for "measures" after "candidates or" in subd (c); **(2)** added ", committees formed or existing primarily to support or oppose candidates or local measures to be voted upon in any number of jurisdictions within one county, other than those specified in subdivision (e)," in subd (d); and **(3)** added ", committees formed or existing primarily to support or oppose candidates or local measures to be voted upon in one city," in subd (e).

1990 Amendment: In addition to making technical changes, **(1)** added "or the qualifications of state ballot measures," after "measures" in the first sentence of the first paragraph and in the introductory clause of subd (a); and **(2)** substituted "(b) to (e), inclusive" for "(b) through (e) below" in the introductory clause of subd (a).

2001 Amendment: (1) Substituted "qualification" for "qualifications" in the first sentence of the introductory clause; **(2)** amended subd (a) by **(a)** substituting "officers and" for "officers,"; **(b)** adding "other than the Board of Equalization"; and **(c)** substituting "qualification" for "qualifications"; **(3)** amended subd (c) by **(a)** adding the comma after "districts"; and **(b)** substituting "that contain" for "which contain"; **(4)** substituted "these offices" for "such offices" in subd (d); and **(5)** amended subd (f) by **(a)** substituting "a committee" for "no committee"; and **(b)** substituting "is not required" for "shall be required".

2002 Amendment: Deleted "municipal court judges," after "elected officers," in subd (d).

2007 Amendment: (1) Amended the first paragraph by **(a)** substituting "elected officers and their controlled committees" for ", elected officers, committees, and proponents of state ballot measures or the qualification of state ballot measures," in the first sentence; **(b)** substituting "one copy" for "two copies" after "shall file"; and **(c)** substituting "elections official of the county in which the candidate or elected official is domiciled, as defined in subdivision (b) of Section 349 of the Elections Code" for "clerk of the county in which they are domiciled. A committee is domiciled at the address listed on its campaign statement unless it is domiciled outside California in which case its domicile shall be deemed to be Los Angeles County for the purpose of this section"; **(2)** substituted "One copy" for "Two copies" in subds (a)(2) and (a)(3); **(3)** amended subd (b)(2) by substituting **(a)** "One copy" for "Two copies"; and **(b)** "elections official" for "clerk"; **(4)** substituted "elections official" for "clerk" after "copy with the" in subds (c),(d) and after "need ot file with the" in subd (e); and **(5)** amended subd (f) by **(a)** substituting "one copy," for "two copies," after "one copy, or"; and **(b)** adding "elections official" after "any one county".

2010 Amendment: (1) Substituted "subdivisions (d) and (e)" for "subdivision (d)" in the first sentence of the introductory paragraph; **(2)** added subd (e); **(3)** redesignated former subds (e) and (f) to be subds (f) and (g); and **(4)** substituted "any other provision of this section" for "the above" in subd (f). (As amended Stats 2010 ch 633, compared to the section as it read prior to 2010. This section was also amended by an earlier chapter, ch 18. See Gov C § 9605.)

Editor's Notes—For legislative findings and declarations, see the 1990 note following Gov C § 84200.

Note—Stats 2007 ch 54 provides:

SEC. 2. The Legislature finds and declares that this bill furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

Stats 2010 ch 633 provides:

SEC. 13. The Legislature finds and declares that this bill furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

Law Revision Commission Comments:

2002—

Subdivision (d) of Section 84215 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

§ 84225. Applicability of title; Adoption of regulations

The provisions of this title apply to candidates for election to the Board of Administration of the Public Employees' Retirement System or the Teachers' Retirement Board, and to committees formed or existing primarily to support or oppose those candidates. The Commission may adopt regulations to tailor the reporting and disclosure requirements for these candidates and committees consistent with the purposes and provisions of this title.

Added Stats 2010 ch 633 § 10 (SB 1007), effective January 1, 2011.

Former Sections: Former § 84225, relating to the filing of campaign statements by candidates for board seats, was added Stats 1998 ch 923 § 10, amended Stats 2010 ch 18 § 5 (AB 1181), and repealed Stats 2010 ch 633 § 9.

§ 85204. "Election cycle"

"Election cycle," for purposes of Sections 85309 and 85500, means the period of time commencing 90 days prior to an election and ending on the date of the election. For purposes of the Board of Administration of the Public Employees' Retirement System and the Teachers' Retirement Board, "the date of the election" is the deadline to return ballots.

Added Stats 2000 ch 102 § 20 (SB 1223), effective July 7, 2000, approved by voters at the November 7, 2000, general election (Prop 34), effective November 8, 2000, operative January 1, 2001. Amended Stats 2010 ch 633 § 11 (SB 1007), effective January 1, 2011.

Former Sections: Former § 85204, defining "two-year period", was adopted by voters, Prop 208 § 3, effective November 6, 1996, operative January 1, 1997, and repealed Stats 2000 ch 102 § 19, effective July 7, 2000, approved by voters at the November 7, 2000, general election (Prop 34), effective November 8, 2000, operative January 1, 2001.

Former § 85204 was adopted by voters, Prop 68 § 1, effective June 8, 1988, operative January 1, 1987, and held inoperative November 1, 1990, by decision of the California Supreme Court.

Editor's Notes—Proposition 68 was held inoperative in its entirety by the California Supreme Court in Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission (1990) 51 Cal.3d 744. See Notes of Decisions Under Proposition 68 following Article 2.

For findings and declarations, operative date and applicability of act, severability, and election, see the 2000 Note following Gov C § 82016.

Amendments

2010 Amendment: Added **(1)** the comma after "Election cycle" in the first sentence; and **(2)** the second sentence.

Note—Stats 2010 ch 633 provides:

SEC. 13. The Legislature finds and declares that this bill furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

§ 86206. Payment of fees for contractual services provided by placement agent

Nothing in this article prohibits the payment of fees for contractual services provided to an investment manager by a placement agent, as defined in Section 82047.3, who is registered with the Securities and Exchange Commission and regulated by the Financial Industry Regulatory Authority, except as provided in subdivision (f) of Section 86205.

Added Stats 2010 ch 668 § 8 (AB 1743), effective January 1, 2011.

§ 87314. Appendix of public officials who manage public investments

(a) A board, commission, or agency of a public pension or retirement system shall attach to its Conflict of Interest Code an appendix entitled "Agency Positions that Manage Public Investments for Purposes of Section 87200 of the Government Code." The appendix shall list each position with the board, commission, or agency for which an individual occupying the position is required to file a Statement of Economic Interests as a public official who manages public investments within the meaning of Section 87200. The board, commission, or agency shall post the appendix on its Internet Web site in a manner that makes it easily identifiable and accessible by persons who view that Web site.

(b) (1) For purposes of this section, "public official who manages public investments" includes a salaried or unsalaried member of a committee, board, commission, or other entity that exists as, or within, a governmental agency and that possesses decisionmaking authority.

(2) A committee, board, commission, or other entity possesses decisionmaking authority for purposes of this section if any of the following apply:

(A) The entity may make a final governmental decision.

(B) The entity may compel a governmental decision or prevent a governmental decision, either by virtue of possessing exclusive power to initiate the decision or by having veto authority that may not be overridden.

(C) The entity makes substantive recommendations that are, and over an extended period of time have been, regularly approved, without significant amendment or modification, by another public official or governmental agency.

(3) A committee, board, commission, or other entity does not possess decisionmaking authority for purposes of this section if it is formed for the sole purpose of researching a subject and preparing a report or recommendation for submission to another governmental entity that has final decisionmaking authority.

Added Stats 2010 ch 702 § 1 (SB 1271), effective January 1, 2011.

Note—Stats 2010 ch 702 provides:

SEC. 3. The Legislature finds and declares that this bill furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code.

§ 87408. Representation, appearance or communication with influential purpose

(a) A member of the Board of Administration of the Public Employees' Retirement System, an individual in a position designated in subdivision (a) or (e) of Section 20098, or an information technology or health benefits manager with a career executive assignment designation with the Public Employees' Retirement System, for a period of four years after leaving that office or position, shall not, for compensation, act as an agent or attorney for, or otherwise represent, any other person, except the state, by making a formal or informal appearance before, or an oral or written communication to, the Public Employees' Retirement System, or an officer or employee thereof, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing an action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

(b) A member of the Teachers' Retirement Board, an individual in a position designated in subdivision (a) or (d) of Section 22212.5 of the Education Code, or an information technology manager with a career executive assignment designation with the State Teachers' Retirement System, for a period of four years after leaving that office or position, shall not, for compensation, act as an agent or attorney for, or otherwise represent, any other person, except the state, by making a formal or informal appearance before, or an oral or written communication to, the State Teachers' Retirement System, or an officer or employee thereof, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing an action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

Added Stats 2011 ch 551 § 1 (AB 873), effective January 1, 2012.

§ 87409. Aiding, advising, consulting, or assisting a business entity in obtaining award or negotiating a contract

(a) A member of the Board of Administration of the Public Employees' Retirement System, an individual in a position designated in subdivision (a) or (e) of Section 20098, or an information technology or health benefits manager with a career executive assignment designation with the Public Employees' Retirement System, for a period of two years after leaving that office or position, shall not, for compensation, aid, advise, consult with, or assist a business entity in obtaining the award of, or in negotiating, a contract or contract amendment with the Public Employees' Retirement System.

(b) A member of the Teachers' Retirement Board, an individual in a position designated in subdivision (a) or (d) of Section 22212.5 of the Education Code, or an information technology manager with a career executive assignment designation with the State Teachers' Retirement System, for a period of two years after leaving that office or position, shall not, for compensation, aid, advise, consult with, or assist a business entity in obtaining the award of, or in negotiating, a contract or contract amendment with the State Teachers' Retirement System.

(c) For purposes of this section, "business entity" has the same meaning as set forth in Section 82005, and includes a parent or subsidiary of a business entity.

Added Stats 2011 ch 551 § 2 (AB 873), effective January 1, 2012.

§ 87410. Acceptance of compensation for providing services as a placement agent in connection with investments or other business

(a) A member of the Board of Administration of the Public Employees' Retirement System or an individual in a position designated in subdivision (a) or (e) of Section 20098, for a period of 10 years after leaving that office or position, shall not accept compensation for providing services as a placement agent in connection with investments or other business of the Public Employees' Retirement System or the State Teachers' Retirement System.

(b) A member of the Teachers' Retirement Board or an individual in a position designated in subdivision (a) or (d) of Section 22212.5 of the Education Code, for a period of 10 years after leaving that office or position, shall not accept compensation for providing services as a placement agent in connection with investments or other business of the State Teachers' Retirement System or the Public Employees' Retirement System.

Added Stats 2011 ch 551 § 3 (AB 873), effective January 1, 2012.

EXTRACTS FROM THE PENAL CODE

§ 2054. Establishing and maintaining classes for inmates by Department of Corrections

The Director of Corrections may establish and maintain classes for inmates by utilizing personnel of the Department of Corrections, or by entering into an agreement with the governing board of a school district or private school or the governing boards of school districts under which the district shall maintain classes for such inmates. The governing board of a school district or private school may enter into such an agreement regardless of whether the institution or facility at which the classes are to be established and maintained is within or without the boundaries of the school district.

Any agreement entered into between the Director of Corrections and a school district or private school pursuant to this section may require the Department of Corrections to reimburse the school district or private school for the cost to the district or private school of maintaining such classes. "Cost" as used herein includes contributions required of any school district to the State Teachers' Retirement System, but such cost shall not include an amount in excess of the amount expended by the district for salaries of the teachers for such classes, increased by one–fifth. Salaries of such teachers for the purposes of this section shall not exceed the salaries as set by the governing board for teachers in other classes for adults maintained by the district, or private schools.

Attendance or average daily attendance in classes established pursuant to this section or in classes in trade and industrial education or vocational training for adult inmates of institutions or facilities under the jurisdiction of the Department of Corrections shall not be reported to the State Department of Education for apportionment and no apportionment from the State School Fund shall be made on account of average daily attendance in such classes.

No school district or private school shall provide for the academic education of adult inmates of state institutions or facilities under the jurisdiction of the Department of Corrections except in accordance with this section.

The Legislature hereby declares that for each fiscal year funds for the support of the academic education program for inmates of the institutions or facilities under the jurisdiction of the Department of Corrections shall be provided, upon appropriation by the Legislature, to the Department of Corrections at the rate of forty dollars ($40) multiplied by the total number of inmates which the Department of Corrections estimates will be in such institutions or facilities on December 31st of the fiscal year, except as provided in Section 2054.1.

Added by Stats 1955 ch 1944 § 4. Amended by Stats 1957 ch 2245 § 1, effective July 15, 1957; Stats 1974 ch 1436 § 2, operative July 1, 1975; Stats 1976 ch 303 § 1, effective June 30, 1976, operative July 1, 1976.

Former Sections: Former Pen C § 2054, relating to prison finances and accounting, was added Stats 1941 ch 106 § 15 p 1087 and repealed Stats 3d Ex Sess 1944 ch 2 § 45 p 29.

Amendments

1957 Amendment: (1) Deleted the former first paragraph which read: "In enacting this section, it is the intent of the Legislature to continue to provide for the academic education of adult inmates of state institutions and facilities under the jurisdiction of the Department of Corrections."; **(2)** deleted "such" after "classes for" in the first sentence of the first paragraph; **(3)** substituted "may" for "shall" after "section" in the first sentence of the second paragraph; **(4)** substituted the second sentence of the second paragraph for "but such cost shall not exceed the amount expended by the district for salaries of the teachers for such classes, increased by one–tenth"; **(5)** amended the fifth paragraph by **(a)** substituting "1957–58" for "1955–56"; **(b)** substituting "forty dollars ($40)" for "thirty–three dollars ($33)"; and **(c)** adding "except as provided in Section 2054.1"; and **(6)** deleted the former last paragraph which read: "This section applies only to the program of academic education for inmates."

1974 Amendment: (1) Added “and Section 2079.5” in the fourth paragraph; and **(2)** deleted “, commencing with the 1957–58 Fiscal Year,” after “each fiscal year” in the fifth paragraph

1976 Amendment: Deleted “and Section 2079.5” at the end of the fourth paragraph.

EXTRACTS FROM THE PROBATE CODE

§ 13100. Collection or transfer of personal property without probate (Payment of death benefit to beneficiary)

Excluding the property described in Section 13050, if the gross value of the decedent's real and personal property in this state does not exceed one hundred fifty thousand dollars ($150,000) and if 40 days have elapsed since the death of the decedent, the successor of the decedent may, without procuring letters of administration or awaiting probate of the will, do any of the following with respect to one or more particular items of property:

(a) Collect any particular item of property that is money due the decedent.

(b) Receive any particular item of property that is tangible personal property of the decedent.

(c) Have any particular item of property that is evidence of a debt, obligation, interest, right, security, or chose in action belonging to the decedent transferred, whether or not secured by a lien on real property.

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991. Amended Stats 1996 ch 86 § 4 (AB 2146), ch 862 § 34 (AB 2751); Stats 2011 ch 117 § 4 (AB 1305), effective January 1, 2012.

Former Sections: Former § 13100, similar to the present section, was added Stats 1986 ch 783 § 24, operative July 1, 1987, and repealed Stats 1990 ch 79 § 13, operative July 1, 1991.

Historical Derivation: (a) Former Prob C § 630, as amended Stats 1931 ch 1089 § 1, Stats 1933 ch 939 § 1, Stats 1935 ch 809 § 1, Stats 1937 ch 181 § 1, Stats 1939 ch 820 § 1, Stats 1945 ch 203 § 1, Stats 1959 ch 195 § 1, Stats 1961 ch 1972 § 1, Stats 1967 ch 602 § 1, ch 719 § 2, Stats 1970 ch 97 § 1, Stats 1972 ch 555 § 1, Stats 1974 ch 602 § 1, Stats 1976 ch 128 § 1, Stats 1979 ch 730 § 101, ch 731 § 13, ch 731 § 13.1, Stats 1980 ch 955 § 13.11, ch 1149 § 42, Stats 1982 ch 520 § 5, Stats 1984 ch 451 § 9, Stats 1985 ch 982 § 15.

(b) Former Prob C § 630.5.

(c) Former Prob C § 13100, as added Stats 1986 ch 783 § 24.

(d) Former CCP § 1454, as added Stats 1907 ch 264 § 1, amended Stats 1915 ch 363 § 1, Stats 1923 ch 270 § 1.

(e) Former CCP § 1454a, as added Stats 1929 ch 569 § 1.

(f) Former CCP § 1454a, as added Stats 1927 ch 134 § 1.

(g) Stats 1873–74 ch 112, as amended Stats 1895 ch 27.

Amendments

1996 Amendment: Substituted "one hundred thousand dollars ($100,000)" for "sixty thousand dollars ($60,000)" in the introductory clause. (As amended Stats 1996 ch 862, compared to the section as it read prior to 1996. This section was also amended by an earlier chapter, ch 86. See Gov C § 9605.)

2011 Amendment: Substituted "one hundred fifty thousand dollars ($150,000)" for "one hundred thousand dollars ($100,000)" in the introductory clause.

EXTRACTS FROM THE PUBLIC CONTRACT CODE

DIVISION 2.
GENERAL PROVISIONS

PART 1.
ADMINISTRATIVE PROVISIONS

CHAPTER 2.7.
IRAN CONTRACTING ACT OF 2010

§ 2200. Citation of chapter (Operative term contingent)

This chapter shall be known and may be cited as the Iran Contracting Act of 2010.

Added Stats 2010 ch 573 § 1 (AB 1650), effective January 1, 2011.

Note—Stats 2010 ch 573 provides:
SEC. 2. Section 1 of this act shall become inoperative upon the date that federal law ceases to authorize the states to adopt and enforce the contracting prohibitions of the type provided for in that section.

§ 2201. Legislative findings and declarations (Operative term contingent)

The Legislature hereby finds and declares all of the following:

(a) In imposing United States sanctions on Iran, Congress and the President have determined that the illicit nuclear activities of the Government of Iran, combined with its development of unconventional weapons and ballistic missiles, and its support of international terrorism, represent a serious threat to the security of the United States, Israel, and other United States allies in Europe, the Middle East, and around the world.

(b) On September 9, 2009, it was reported that American intelligence agencies have concluded that Iran has already created enough nuclear fuel to develop a nuclear weapon, and United States Ambassador to the International Atomic Energy Agency Glyn Davies declared that Iran had achieved "possible breakout capacity."

(c) On September 21, 2009, Iran sent a letter to the International Atomic Energy Agency acknowledging that it is considering a previously undeclared "new pilot fuel enrichment plan."

(d) On Sept. 25, 2009, President Barack H. Obama, joined by Prime Minister Gordon Brown of Britain and President Nicolas Sarkozy of France, stated that the secret plant "represents a direct challenge to the basic foundation of the nonproliferation regime" and "deepens a growing concern that Iran is refusing to live up to those international responsibilities, including specifically revealing all nuclear-related activities. As the international community knows, this is not the first time that Iran has concealed information about its nuclear program."

(e) The International Atomic Energy Agency has repeatedly called attention to Iran's unlawful nuclear activities, and, as a result, the United Nations Security Council has adopted a range of sanctions designed to encourage the Government of Iran to cease those activities and comply with its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons (commonly known as the "Nuclear Non-Proliferation Treaty").

(f) On July 1, 2010, President Barack Obama signed into law H.R. 2194, the "Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010" (Public Law 111-195), which expressly authorizes states and local governments to prevent investment in, including prohibiting entry into or renewing contracts with, companies operating in Iran's energy sector with investments that have the re-

sult of directly or indirectly supporting the efforts of the Government of Iran to achieve nuclear weapons capability.

(g) On October 7, 2008, then-Senator Obama stated, "Iran right now imports gasoline, even though it's an oil producer, because its oil infrastructure has broken down. If we can prevent them from importing the gasoline that they need and the refined petroleum products, that starts changing their cost-benefit analysis. That starts putting the squeeze on them."

(h) The serious and urgent nature of the threat from Iran demands that states, local governments, educational institutions, and private institutions work together with the federal government and American allies to do everything possible diplomatically, politically, and economically to prevent Iran from acquiring a nuclear weapons capability.

(i) There are moral and reputational reasons for this state and local governments to not engage in business with foreign companies that have business activities benefiting foreign states, such as Iran, that commit egregious violations of human rights, proliferate nuclear weapons capabilities, and support terrorism.

(j) It is the responsibility of the state to decide how, where, and by whom its financial resources should be invested. It also is the prerogative of the state to not invest in, or do business with, companies whose investments with Iran place those companies at risk from the impact of economic sanctions imposed upon the Government of Iran for sponsoring terrorism, committing egregious violations of human rights, and engaging in illicit nuclear weapons development.

(k) The human rights situation in Iran has steadily deteriorated in 2009, as punctuated by transparently fraudulent elections and the brutal repression and murder, arbitrary arrests, and show trials of peaceful dissidents.

(l) During the postelection protests in June 2009, the Iranian government imposed widespread and unjustifiable restrictions on telecommunications services, denying the citizens of Iran their rights and liberties to free speech.

(m) On October 14, 2007, Governor Arnold Schwarzenegger stated his intention to support "efforts to further prevent terrorism" when signing Assembly Bill 221, which prohibits the state's pension funds from investing in companies with active business in Iran.

(n) This state currently honors contracts with foreign companies that may be at financial risk due to business ties with foreign states, such as Iran, that are involved in the proliferation of weapons of mass destruction, commit human rights violations, and support terrorism.

(o) The concerns of the State of California regarding Iran are strictly the result of the actions of the Government of Iran.

(p) The people of the State of California declare all of the following:

(1) We have feelings of friendship for the people of Iran.

(2) We regret that developments in recent decades have created impediments to that friendship.

(3) We hold the people of Iran, their culture, and their ancient and rich history in the highest esteem.

(q) In order to effectively address the need for the governments of this state to respond to the policies of Iran in a uniform fashion, prohibiting contracts with persons engaged in investment activities in the energy sector of Iran must be accomplished on a statewide basis, and, therefore, the subject is a matter of statewide concern rather than a municipal affair.

(r) It is the intent of the Legislature to implement the authority granted under Section 202 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Public Law 111-195).

Added Stats 2010 ch 573 § 1 (AB 1650), effective January 1, 2011.

Editor's Notes—For inoperative date, see Note under Pub Con C § 2200.

§ 2202. Definitions (Operative term contingent)

As used in this chapter, the following definitions apply:

(a) "Awarding body" means a department, board, agency, authority, or officer, agent, or other authorized representative of the public entity awarding a contract for goods or services.

(b) "Energy sector" of Iran means activities to develop petroleum or natural gas resources or nuclear power in Iran.

(c) "Financial institution" means the term as used in Section 14 of the Iran Sanctions Act of 1996 (Public Law 104-172; 50 U.S.C. 1701 note).

(d) "Iran" includes the Government of Iran and any agency or instrumentality of Iran.

(e) "Person" means any of the following:

(1) A natural person, corporation, company, limited liability company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group.

(2) Any governmental entity or instrumentality of a government, including a multilateral development institution, as defined in Section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3)).

(3) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraph (1) or (2).

Added Stats 2010 ch 573 § 1 (AB 1650), effective January 1, 2011.

Editor's Notes—For inoperative date, see Note under Pub Con C § 2200.

§ 2202.5. Engagement in investment activities in Iran (Operative term contingent)

For purposes of this chapter, a person engages in investment activities in Iran if any of the following is true:

(a) The person provides goods or services of twenty million dollars ($20,000,000) or more in the energy sector of Iran, including a person that provides oil or liquefied natural gas tankers, or products used to construct or maintain pipelines used to transport oil or liquefied natural gas, for the energy sector of Iran.

(b) The person is a financial institution that extends twenty million dollars ($20,000,000) or more in credit to another person, for 45 days or more, if that person will use the credit to provide goods or services in the energy sector in Iran and is identified on a list created pursuant to subdivision (b) of Section 2203 as a person engaging in investment activities in Iran as described in subdivision (a).

Added Stats 2010 ch 573 § 1 (AB 1650), effective January 1, 2011.

Editor's Notes—For inoperative date, see Note under Pub Con C § 2200.

§ 2203. Ineligibility to bid due to engaging in investment activities with Iran; List of ineligible persons; Exceptions (Operative term contingent)

(a) (1) A person that, at the time of bid or proposal for a new contract or renewal of an existing contract, is identified on a list created pursuant to subdivision (b) as a person engaging in investment activities in Iran as described in subdivision (a) of Section 2202.5, is ineligible to, and shall not, bid on, submit a proposal for, or enter into or renew, a contract with a public entity for goods or services of one million dollars ($1,000,000) or more.

(2) A person that, at the time of bid or proposal for a new contract or renewal of an existing contract, engages in investment activities in Iran as described in subdivision (b) of Section 2202.5, is ineligible to, and shall not, bid on, submit a proposal for, or enter into or renew, a contract with a public entity for goods or services of one million dollars ($1,000,000) or more.

(b) (1) By June 1, 2011, the Department of General Services shall, using credible information available to the public, develop, or contract to develop, a list of persons it determines engage in investment activities in Iran as described in subdivision (a) of Section 2202.5.

(2) The Department of General Services shall update the list every 180 days.

(3) Before finalizing an initial list pursuant to paragraph (1) or an updated list pursuant to paragraph (2), the Department of General Services shall do all of the following before a person is included on the list:

(A) Provide 90 days' written notice of its intent to include the person on the list. The notice shall inform the person that inclusion on the list would make the person ineligible to bid on, submit a proposal for, or enter into or renew, a contract for goods or services of one million dollars ($1,000,000) or more with a public entity. The notice shall specify that the person, if it ceases its engagement in investment activities in Iran as described in subdivision (a) of Section 2202.5, may become eligible for a future contract, or contract renewal, for goods or services of one million dollars ($1,000,000) or more with a public entity upon removal from the list.

(B) The Department of General Services shall provide a person with an opportunity to comment in writing to the Department of General Services that it is not engaged in investment activities in Iran. If the person demonstrates to the Department of General Services that the person is not engaged in investment activities in Iran as described in subdivision (a) of Section 2202.5, the person shall not be included on the list, and shall be eligible to enter into or renew a contract for goods or services of one million dollars ($1,000,000) or more with a public entity, unless the person is otherwise ineligible to bid on a contract as described in paragraph (3) of subdivision (a) of Section 2205.

(4) The Department of General Services shall make every effort to avoid erroneously including a person on the list.

(5) The Department of General Services may assess a fee upon persons that use this list to comply with the provisions of this act, in order to pay for the necessary, actual costs of creating and maintaining this list. The Department of General Services shall provide the list free of charge to any public entity and to the Legislature, upon request.

(6) A person that has a contract with CalPERS or CalSTRS, or both, shall not be deemed a person that engages in investment activities in Iran on the basis of those investments with CalPERS or CalSTRS.

(c) Notwithstanding subdivision (a), a public entity may permit a person engaged in investment activities in Iran, on a case-by-case basis, to be eligible for, or to bid on, submit a proposal for, or enter into or renew, a contract for goods or services of one million dollars ($1,000,000) or more with a public entity if either of the following are true:

(1) All of the following occur:

(A) The investment activities in Iran were made before July 1, 2010.

(B) The investment activities in Iran have not been expanded or renewed after July 1, 2010.

(C) The awarding body determines that it is in the best interest of the state or local public entity to contract with the person. For purposes of state contracts for goods or services of one million dollars ($1,000,000) or more, "awarding body" means the Department of General Services. For purposes of local contracts for goods or services of one million dollars ($1,000,000) or more, "awarding body" means the representative of the local public entity awarding the contract, as described in subdivision (a) of Section 2202.

(D) The person has adopted, publicized, and is implementing a formal plan to cease the investment activities in Iran and to refrain from engaging in any new investments in Iran.

(2) One of the following occurs:

(A) For a contract for goods or services of one million dollars ($1,000,000) or more with a local public entity, the local public entity makes a public finding that, absent such an exemption, the local public entity would be unable to obtain the goods or services for which the contract is offered.

(B) For a contract for goods or services of one million dollars ($1,000,000) or more with a state agency, other than the office of a state constitutional officer, the Governor makes a public finding that absent such an exemption, the state agency would be unable to obtain the goods or services for which the contract is offered.

(C) For a contract for goods or services of one million dollars ($1,000,000) or more with an office of a state constitutional officer, if the state constitutional officer makes a public finding that, absent

such an exemption, his or her office would be unable to obtain the goods or services for which the contract is offered.

(d) Notwithstanding subdivision (a), a public entity shall permit a financial institution described in subdivision (b) of Section 2202.5 to be eligible for, or to bid on, submit a proposal for, or enter into or renew, a contract for goods or services of one million dollars ($1,000,000) or more with a public entity if the person using the credit to provide goods or services in the energy sector of Iran is a person permitted to submit a bid or proposal to the public entity pursuant to subdivision (c).

(e) The prohibition described in paragraph (1) of subdivision (a) applies on and after June 1, 2011. The prohibition described in paragraph (2) of subdivision (a) applies on and after July 1, 2011.

Added Stats 2010 ch 573 § 1 (AB 1650), effective January 1, 2011. Amended Stats 2011 ch 296 § 246 (AB 1023), effective January 1, 2012.

Editor's Notes—For inoperative date, see Note under Pub Con C § 2200.

Amendments

2011 Amendment: Substituted "an" for "on" after "paragraph (1) or" in the introductory clause of subd (b)(3).

§ 2204. Certification requirement; Applicability (Operative term contingent)

(a) A public entity shall require a person that submits a bid or proposal to, or otherwise proposes to enter into or renew a contract with, a public entity with respect to a contract for goods or services of one million dollars ($1,000,000) or more to certify, at the time the bid is submitted or the contract is renewed, that the person is not identified on a list created pursuant to subdivision (b) of Section 2203 as a person engaging in investment activities in Iran described in subdivision (a) of Section 2202.5, or as a person described in subdivision (b) of Section 2202.5, as applicable. A state agency shall submit the certification information to the Department of General Services.

(b) A public entity shall not require a person that submits a bid or proposal to, or otherwise proposes to enter into a contract with, the public entity with respect to a contract for goods or services of one million dollars ($1,000,000) or more to certify that the person is not identified on a list created pursuant to subdivision (b) of Section 2203 as a person engaging in investment activities in Iran described in subdivision (a) of Section 2202.5, or as a person described in subdivision (b) of Section 2202.5, as applicable, if the person has been permitted to submit a bid or proposal to the public entity pursuant to subdivision (c) or (d) of Section 2203.

(c) (1) Subject to paragraph (2), the certification requirement described in subdivision (a) applies on and after June 1, 2011.

(2) A person that is a financial institution shall not be required to certify as provided in subdivision (a) until July 1, 2011. For any subsequent list created pursuant to subdivision (b) of Section 2203, a person that is a financial institution shall not be required to certify with respect to that subsequent list until 30 days after that list becomes available, but shall certify with respect to the immediately prior list for those 30 days.

Added Stats 2010 ch 573 § 1 (AB 1650), effective January 1, 2011.

Editor's Notes—For inoperative date, see Note under Pub Con C § 2200.

§ 2205. Violations; Report to Attorney General (Operative term contingent)

(a) If the local public entity, or the Department of General Services in the case of state contracts, determines, using credible information available to the public and after providing 90 days written notice and an opportunity to comment in writing for the person to demonstrate that it is not engaged in

investment activities in Iran, that the person has submitted a false certification under Section 2204, and the person fails to demonstrate to the local public entity or the Department of General Services that the person has ceased its engagement in the investment activities in Iran within 90 days after the determination of a false certification, the following shall apply:

(1) Pursuant to an action under subdivision (b), a civil penalty in an amount that is equal to the greater of two hundred fifty thousand dollars ($250,000) or twice the amount of the contract for which the false certification was made. Only one civil penalty may be imposed with respect to one or more certifications made to any public entity that are false as a result of a particular investment.

(2) Termination of an existing contract with the awarding body at the option of the awarding body or the Department of General Services.

(3) Ineligibility to bid on a contract for a period of three years from the date of the determination that the person submitted the false certification.

(b) The local public entity, or the Department of General Services in the case of state contracts, shall report to the Attorney General the name of the person that the local public entity, or the Department of General Services in the case of state contracts, determines has submitted a false certification under Section 2204, together with its information as to the false certification, and the Attorney General shall determine whether to bring a civil action against the person to collect the penalty described in paragraph (1) of subdivision (a). The awarding body of a local public entity may also report to the city attorney, county counsel, or district attorney the name of the person that the awarding body determines has submitted a false certification under Section 2204, together with its information as to the false certification, and the city attorney, county counsel, or district attorney may determine whether to bring a civil action against the person to collect the penalty described in paragraph (1) of subdivision (a). If it is determined in that action that the person submitted a false certification, the person shall pay all reasonable costs and fees incurred in a civil action, including costs incurred by the awarding body for investigations that led to the finding of the false certification and all reasonable costs and fees incurred by the Attorney General, city attorney, county counsel, or district attorney. Only one civil action against the person to collect the penalty described in paragraph (1) of subdivision (a) may be brought for a false certification on a contract.

(c) A civil action to collect the penalties described in paragraph (1) of subdivision (a) must commence within three years from the date the certification is made.

(d) An unsuccessful bidder, or any other person other than the awarding body, shall have no right to protest the award of a contract or contract renewal on the basis of a false certification.

(e) This act does not create, nor authorize, a private right of action or enforcement of the penalties provided for in this act.

Added Stats 2010 ch 573 § 1 (AB 1650), effective January 1, 2011.

Editor's Notes—For inoperative date, see Note under Pub Con C § 2200.

§ 2206. Preemption (Operative term contingent)

This act shall occupy the field with regard to all public contracts for goods or services with a person engaged in investment activities in Iran and shall preempt any law, ordinance, rule, or regulation of any local public entity involving public contracts for goods or services with a person engaged in investment activities in Iran.

Added Stats 2010 ch 573 § 1 (AB 1650), effective January 1, 2011.

Editor's Notes—For inoperative date, see Note under Pub Con C § 2200.

§ 2207. Written notice of description of chapter to U.S. Attorney General (Operative term contingent)

The Legislature shall submit to the Attorney General of the United States a written notice describing this chapter within 30 days after the effective date of this act.

Added Stats 2010 ch 573 § 1 (AB 1650), effective January 1, 2011.

Editor's Notes—For inoperative date, see Note under Pub Con C § 2200.

§ 2208. Severability (Operative term contingent)

(a) If any one or more provisions, sections, subdivisions, sentences, clauses, phrases, or words of this act or the application thereof to any person or circumstance is found to be invalid, illegal, unenforceable, or unconstitutional, the same is hereby declared to be severable and the balance of this act shall remain effective and functional notwithstanding such invalidity, illegality, unenforceability, or unconstitutionality.

(b) The Legislature hereby declares that it would have passed this act, and each provision, section, subdivision, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, sections, subdivisions, sentences, clauses, phrases, or words are declared invalid, illegal, unenforceable, or unconstitutional.

Added Stats 2010 ch 573 § 1 (AB 1650), effective January 1, 2011.

Editor's Notes—For inoperative date, see Note under Pub Con C § 2200.

EXTRACTS FROM THE PUBLIC RESOURCES CODE

§ 6217.5. Deposit of funds in State Treasury; Crediting Teachers' Retirement Fund

Except for the revenues distributed pursuant to Section 3826, all net revenues, moneys, and remittances from the use of school lands and lieu lands shall be deposited in the State Treasury to the credit of the Teachers' Retirement Fund and shall be expended pursuant to Section 24412 of the Education Code.

Added Stats 1968 ch 981 § 4.1. Amended Stats 1983 ch 1213 § 2; Stats 1984 ch 1070 § 2, effective September 12, 1984, ch 879 § 1; Stats 2012 ch 864 § 20 (AB 2663), effective January 1, 2013.

Amendments

1983 Amendment: (1) Added "Commencing on July 1, 1984,"; and **(2)** substituted "Teachers' Retirement Fund and shall be expended pursuant to Section 24702 of the Education Code" for "General Fund".

1984 Amendment: (1) Substituted "Except for the revenues distributed pursuant to Section 3826" for "Commencing on July 1, 1984" at the beginning of the section; and **(2)** deleted "sale or" after "from the". (As amended by Stats 1984, ch 879, compared to the section as it read prior to 1984. This section was also amended by another chapter, ch 1070 §§ 2, 3. See Gov C § 9605.)

2012 Amendment: Substituted "Section 24412" for "Section 24702".

§ 6475. Citation of chapter

This chapter shall be known and may be cited as the "State Teachers' Retirement Lands Act."

Added by Stats 1983 ch 1213 § 3.

Former Sections: Former § 6475, relating to small craft harbors, was added Stats 1955 ch 1850 § 1 and repealed Stats 1957 ch 2362 § 4.

§ 6477. Reports required by commission

The State Lands Commission shall report quarterly to the Teachers' Retirement Board and annually to the Legislature and the Governor on the following:

(a) The management of school and lieu lands.

(b) Waivers, suspensions, reductions, alterations, or amendments made by the commission pursuant to Section 6916, together with the reasons therefor.

(c) The commission shall file a report with the Legislature annually on all waivers, suspensions, reductions, alterations, or amendments made by the commission pursuant to this section, together with the reasons therefor.

Added by Stats 1983 ch 1213 § 3. Amended by Stats 2001 ch 745 § 179 (SB 1191), effective October 12, 2001.

Former Sections: Former § 6477, relating to small craft harbors, was added Stats 1955 ch 1850 § 1 and repealed Stats 1957 ch 2362 § 4.

Amendments

2001 Amendment: Substituted the section for the former section which read: "The State Lands Commission shall report quarterly to the Teachers' Retirement Board and annually to the Legislature and the Governor on the management of school and lieu lands.

§ 7301. Lands authorized to be sold; Payment

The unsold portions of the 16th and 36th sections of school lands, the unsold portions of the 500,000 acres granted to the state for school purposes, and the unsold portions of the listed lands selected of the United States in lieu of the 16th and 36th sections and losses to the school grant, may be sold by the commission under rules and regulations prescribed, and at a price fixed, by the commission.

Added by Stats 1943 ch 609 § 1. Amended by Stats 1943 ch 759 § 1; Stats 1947 ch 887 § 4; Stats 1986 ch 622 § 4.

Historical Derivation: Stats 1915 ch 389 § 1 p 605, as amended Stats 1919 ch 207 § 1 p 306, Stats 1929 ch 595 § 1 p 1003, Stats 1931 ch 672 § 1 p 1409, Stats 1933 ch 386 § 1 p 980.

Amendments

1947 Amendment: Deleted "to citizens of the United States, or to a municipal corporation, public corporation, quasi public corporation, or to the State Highway Commission, State Park Commission, or other State bodies authorized to purchase and hold land, or to the United States or an agency thereof" after "may be sold" in the first sentence.

1986 Amendment: (1) Deleted "which are not suitable for cultivation" after "school grant,"; **(2)** substituted ", and at a price fixed, by the commission" for "by it and at a price fixed by it" at the end of the section; and **(3)** deleted the former second sentence which read: "Payment shall be made in cash to the commission at Sacramento."

Notes of Decisions

1. In General

No valid selection could be made of land granted to state for school purposes until after land selected had been surveyed by proper officers of United States. Hastings v. Jackson (1873) 46 Cal 234, 1873 Cal LEXIS 164.

Whether or not land is suitable for cultivation is question of fact. Albert v. Hobler (1896) 111 Cal 398, 43 P 1104, 1896 Cal LEXIS 595.

2. Construction, Interpretation, and Application

Application to purchase portion of thirty-sixth section was valid, if it appeared that at time it was made township and other lines had been established, so as to clearly show that lands sought to be purchased were included in such section; and if applicant in his affidavit stated that there was no legal claim to land other than his own, and that land was not occupied by any bona fide settler. Rogers v. Shannon (1877) 52 Cal 99, 1877 Cal LEXIS 58.

Fact that school land is in most places heavily covered with timber and brush, that it will not, when cleared, produce ordinary agricultural crops in average quantities, and that it is more suitable for timber than for agriculture, does not render it unsuitable for cultivation. Jacobs v. Walker (1891) 90 Cal 43, 27 P 48, 1891 Cal LEXIS 880.

Where school land applied for is not suitable for cultivation, first applicant in point of time is entitled to purchase it from state, without being actual settler thereon. Albert v. Hobler (1896) 111 Cal 398, 43 P 1104, 1896 Cal LEXIS 595.

3. Necessity for Survey

The sixteenth and thirty-sixth sections could not be disposed of under former Stats 1863 p 591 until after they had been surveyed by the United States; the state had no title to nor could it vest any title in a purchaser from it of the sixteenth and thirty-sixth sections until after they had been so surveyed. Middleton v. Low (1866) 30 Cal 596, 1866 Cal LEXIS 141.

4. Land Subject to Location

Neither Act of 1858 as to location of seminary land, nor Act of Congress donating it, allowed mineral land to be located. Burdge v. Smith (1859) 14 Cal 380, 1859 Cal LEXIS 301.

Location of state school land warrant on unsurveyed public land was void. Smith v. Athern (1868) 34 Cal 506, 1868 Cal LEXIS 14.

Location of school land warrant issued under former statute, on unsurveyed lands of United States, was void and conferred no right whatever on locator. Hastings v. Devlin (1870) 40 Cal 358, 1870 Cal LEXIS 205.

Location of school land warrants, issued by state, prior to survey of land on which they were located by United States, was void. Collins v. Bartlett (1872) 44 Cal 371, 1872 Cal LEXIS 215.

Under former statute relating to mineral lands, it was duty of surveyor-general to withhold from sale school lands claimed to contain valuable mineral deposits, until their character in that respect had been judicially determined. Favot v. Kingsbury (1929, Cal App) 98 Cal App 284, 276 P 1083, 1929 Cal App LEXIS 7.

5. Grants of Public Lands

There was nothing in former statutes which prohibited sale of sixteenth or thirty-sixth section to one who had contracted to convey to another part of land. Thompson v. Hancock (1875) 51 Cal 110, 1875 Cal LEXIS 280.

Mere compliance of applicants to purchase school lands with requirements of law relating to making and filing of applications therefor, secures to them nothing more than privilege of becoming exclusive purchasers of lands applied for in event that state does not withdraw them from sale before contract of purchase is completed by approval of application and payment of first instalment of purchase price. Ayers v. Kingsbury (1914, Cal App) 25 Cal App 183, 143 P 85, 1914 Cal App LEXIS 156.

Where person who entered into agreement with state for purchase of school land, violated stipulation and contract for payment of interest in advance, state had same right that individual would have possessed to rescind agreement. Aikins v. Kingsbury (1915) 170 Cal 674, 151 P 145, 1915 Cal LEXIS 449, aff'd (1918) 247 US 484, 38 S Ct 558, 62 L Ed 1226, 1918 US LEXIS 1870.

On sale to state of school lands for nonpayment of taxes followed by deed to state therefor, state has right, as absolute owner of lands, to dictate terms on which they may be repurchased by original or new purchaser, or conditions on which owners or purchasers or their assigns may be restored to their original state or title. Curtin v. Kingsbury (1916, Cal App) 31 Cal App 57, 159 P 830, 1916 Cal App LEXIS 344.

6. Warrants or Certificates

When state issues her land warrant and receives sum of money required to be paid therefor, she thereby sells amount of land specified in warrant out of 500,000 acres granted by Act of Congress, and authorizes holder, as her agent, to locate same on any vacant lands belonging to United States subject to such location. Bludworth v. Lake (1867) 33 Cal 255, 1867 Cal LEXIS 145.

Where school land warrants are located on lands belonging to state not subject to such location, state is not estopped from asserting title to such lands by fact that purchase money for warrants was paid into state treasury, and has never been refunded, or offered to be refunded. Farish v. Coon (1870) 40 Cal 33, 1870 Cal LEXIS 148.

One who claimed portion of thirty-sixth section under certificate of purchase from state did not acquire title as against subsequent holder under certificate of homestead entry issued by United States, where it appeared that east half of section, which included land in controversy, had not been fully surveyed and marked out when state certificate of purchase was issued, though section had been partially surveyed by United States. Bullock v. Rouse (1889) 81 Cal 590, 22 P 919, 1889 Cal LEXIS 1059.

Purchasers of school land warrants issued and sold under former statutes acquired under such purchase vested right to amount of land specified in warrants. Rosenberg v. Bump (1919, Cal App) 43 Cal App 376, 185 P 218, 1919 Cal App LEXIS 751.

7. Patents

Where land was located under state school land warrant, and patent was issued after all proceedings required by law had been taken, patent was record of judgment of state, by its officers duly appointed for that purpose, that land embraced within patent was not mineral land within meaning of former statute providing for issue of patents for school lands located with state land warrants. Ah Yew v. Choate (1864) 24 Cal 562, 1864 Cal LEXIS 236.

Person who, with state land warrant, located and under provisions of former act, for disposal of land granted to state for school purposes, but whose action was void because made before land was surveyed by United States, bore no such relation to land as to enable him to attack patent made by state for same land to person who made subsequent location, after survey. Hastings v. Jackson (1873) 46 Cal 234, 1873 Cal LEXIS 164.

When purchase of part of land granted to state for school purposes was initiated by gold coin payment, before certificate of purchase was issued, purchase could not be completed by surrender of school land warrants, and patent issued on such final payment was without lawful authority. People ex rel. Wallen v. Morris (1888) 77 Cal 204, 19 P 378, 1888 Cal LEXIS 664.

Though patent was issued on final payment of school warrants, where such payment was made and accepted in good faith without fraud, state could not set aside patent without restoring warrants paid under erroneous view of law, and holder of certificate of purchase was entitled to conclude purchase by gold coin payment, in absence of preventing statute. People ex rel. Wallen v. Morris (1888) 77 Cal 204, 19 P 378, 1888 Cal LEXIS 664.

Where applicant to purchase school land under government survey, showing that it contained 642.24 acres, truly set forth that he applied for no state land exceeding that number of acres, and payment was made in good faith in full therefor, his successors were entitled to patent therefor under rule of approximation applied in land department. Barbree v. Kingsbury (1911, Cal App) 17 Cal App 178, 119 P 107, 1911 Cal App LEXIS 103.

8. Actions; Relief and Review

Where, pending appeal to Commissioner of General Land Office, from decision in United States Land Register, in contest over right to acquire school land, third person, with full knowledge of appeal's pendency and rights of first applicant, procures issuance to himself of certificate of purchase under same statute, he will be deemed to hold certificate in trust for former applicant in whose favor appeal is decided, and may be compelled by bill in equity to transfer it to him upon being reimbursed his expenses. Dolhequy v. Tabor (1863) 22 Cal 279, 22 Cal 280, 1863 Cal LEXIS 47.

Complaint to cancel patent for tract of land issued by state to defendant, which merely averred that relator was seised and possessed of land, and that his title was derived from state under and by virtue of location of school warrant made under and in accordance with provisions of act of legislature, that said location was duly and properly made, and in all respects according to provisions of said act, did not state facts sufficient to constitute cause of action. People ex rel. Hastings v. Jackson (1864) 24 Cal 630, 1864 Cal LEXIS 241.

In action of ejectment on state patent for school land, of which it appeared patentees had never been in possession, and on which defendant subsequently to issue of patent had settled, questions, whether land was or was not public land within meaning of former statutes granting school lands or school indemnity lands to state, or whether survey was with or without authority of law, were questions which it was duty of land officers to determine, and if they made mistake in their judgment, their action was erroneous, and not mere nullity, and patent could, therefore, not be attacked. O'Connor v. Frasher (1880) 56 Cal 499, 1880 Cal LEXIS 442, aff'd (1885) 115 US 102, 5 S Ct 1141, 29 L Ed 311, 1885 US LEXIS 1822.

Parties in possession of lands granted to state for school purposes, which was known to be mineral land prior to act granting such land to state, and who were holding it as mining claims under locations recently made could attack patent of land from state to another party, in action of ejectment. Hermocilla v. Hubbell (1891) 89 Cal 5, 26 P 611, 1891 Cal LEXIS 756.

Applicant for purchase of school lands acquires no right in land which can be enforced in courts if statement in his affidavit for purchase, that there was no adverse occupation of land, is found to be untrue. Jacobs v. Walker (1891) 90 Cal 43, 27 P 48, 1891 Cal LEXIS 880.

9. Mandamus

Mandamus did not lie to compel surveyor-general to file applications to purchase from state as school lands certain sixteenth and thirty-sixth sections, though at time applications were presented lands were open for sale, if subsequently to such presentation and prior to expiration of time for approval of applications by surveyor-general, state by legislative enactment withdrew lands from sale and expressly prohibited surveyor-general from receiving or filing any applications to purchase them. Ayers v. Kingsbury (1914, Cal App) 25 Cal App 183, 143 P 85, 1914 Cal App LEXIS 156.

In mandamus proceeding to compel transfer of lieu lands to petitioner after he allegedly purchased them with script, it was error to admit over objection testimony as to departmental practice of state with respect to sale of lieu lands or of script to be used for purchase of such lands after statutes had been enacted permitting sale of

such land on appraisal basis. McKee v. State (1959, Cal App 3d Dist) 172 Cal App 2d 560, 342 P2d 951, 1959 Cal App LEXIS 1992.

In mandamus proceeding to compel state to convey certain lieu lands to petitioner, court's finding that he applied for purchase of land direct rather than purchased script to be applied as payment was supported by evidence that, among other things, application for purchase of lieu lands plainly stated in capital letters that he was making minimum deposit on land pending appraisal, that letter from lands division acknowledging his deposit made same statement, and that petitioner did not advance his claim that he was entitled to surrender script in full payment of lieu lands until long after he had received notice that appraisal was about to be made. McKee v. State (1959, Cal App 3d Dist) 172 Cal App 2d 560, 342 P2d 951, 1959 Cal App LEXIS 1992.

§ 7303. Exchange of public lands; Sale of lands acquired

The commission may, in the best interest of the state, exchange any public lands for lands of the United States of equal area or equal value, and the lands acquired in the exchange may then be sold in the manner and for cash as provided by this article.

Added by Stats 1943 ch 609 § 1. Amended by Stats 1943 ch 759 § 2; Stats 1986 ch 622 § 6.

Historical Derivation: Stats 1915 ch 389 § 2 p 606, as amended Stats 1919 ch 207 § 1 p 306, Stats 1929 ch 595 § 1 p 1003, Stats 1931 ch 672 § 2 p 1410.

Amendments

1986 Amendment: Substituted the section for the former section which read: "Whenever the commission deems it to the advantage of the State so to do, it may pursuant to law exchange any public lands in place reserved from sale for lands of the United States of equal area or equal value, and the lands so acquired in exchange may be thereafter sold in the manner and for cash as provided by this article."

Notes of Decisions

The taking of appropriate steps by the state in the various federal land offices to exchange school land for other equivalent public land, pursuant to former Pol C §§ 3398–3409, did not constitute a dedication of such lands to a "public use" so that such land could not be condemned under the power of eminent domain. Deseret Water, Oil & Irrigation Co. v. State (1914) 167 Cal 147, 138 P 981, 1914 Cal LEXIS 435.

§ 7303.5. Exchange for other purposes

Whenever the commission finds that it is in the best interests of the state for the acquisition of open space or for the purposes of consolidating, assembling, or managing parcels of land for the purposes authorized by this division, the commission may exchange school lands under its jurisdiction for lands owned by any state agency, political subdivision, or person, partnership, company, or corporation, or by the United States or any federal agency; provided, that the lands acquired pursuant to such exchange have equal or greater value than the lands conveyed.

Such acquired lands shall have the same status as to administration, control, and disposition as the lands conveyed.

The state may release the mineral rights in the lands conveyed, as provided in Section 6401, if it receives the mineral rights in the lands acquired.

Added by Stats 1981 ch 908 § 4.

§ 7304. Use of lands as bases for indemnity scrip

Nothing in this article affects the right of the commission to use as bases for indemnity scrip any lands embraced within the exterior boundaries of a National reservation and not otherwise disposed of under this article.

Added by Stats 1943 ch 609 § 1. Amended by Stats 1943 ch 759 § 3.

Historical Derivation: Stats 1915 ch 389 § 2 p 606, as amended Stats 1919 ch 207 § 1 p 306, Stats 1929 ch 595 § 1 p 1003, Stats 1931 ch 672 § 2 p 1410.

§ 7305. Right to patent

When payment has been made for land sold under this article, the purchaser shall be entitled to a patent.

Added by Stats 1943 ch 609 § 1.

Historical Derivation: Stats 1915 ch 389 § 3 p 606, as amended Stats 1919 ch 207 § 1 p 306, Stats 1929 ch 595 § 1 p 1003, Stats 1931 ch 672 § 3 p 1410.

Notes of Decisions

If patent is void on its face, it may be assailed at any time and in all cases, for it is itself record evidence of matter which renders it a nullity. Doll v. Meador (1860) 16 Cal 295, 1860 Cal LEXIS 223.

Patent is record of state that land was subject to location under grant of United States, and has been located, through her officers in pursuance of terms of donation, and as against parties who have no higher right than that which arises from mere occupation, it imports absolute verity. Doll v. Meador (1860) 16 Cal 295, 1860 Cal LEXIS 223.

§ 7306. Sale of timber separately from land

The commission may sell timber separately from the land. Timber sold separately shall be removed in accordance with the Z'Berg–Nejedly Forest Practice Act of 1973 (Chapter 8 (commencing with Section 4511) of Part 2 of Division 4).

Added by Stats 1986 ch 622 § 7.

Former Sections: Former § 7306 was added Stats 1943 ch 609 § 1 and amended and renumbered § 6210.3 by Stats 1943 ch 759 § 4.

§ 7401. "Permanent reservation" and "temporary reservation"

As used in this article, "permanent reservation" applies only to a National reservation established by proclamation of the President of the United States.

"Temporary reservation" applies to any withdrawal of public lands from entry, for any purpose, and lands within the exterior boundaries of any such withdrawal, where the withdrawal has not become a permanent reservation by proclamation of the President of the United States.

Added by Stats 1943 ch 609 § 1.

Historical Derivation: Former Pol C § 3408a, as added Stats 1909 ch 398 § 6 p 682.

§ 8700. Citation of division

This division shall be known and may be cited as the School Land Bank Act.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8700, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

Former § 8700, similar to present Pub Res C § 5090.01, was added Stats 1980 ch 846 § 1 and repealed Stats 1982 ch 994 § 12.

Former § 8700, relating to public recreation, was added Stats 1957 ch 2318, amended Stats 1959 ch 1808, and repealed Stats 1967 ch 1179.

§ 8701. Legislative findings and declarations

The Legislature finds and declares as follows:

(a) Past policies of the state have resulted in significant depletion of the inventory of lands granted by the federal government to provide fiscal support for the public school system.

(b) It is essential that all remaining school lands and attendant interests be managed and enhanced to provide an economic base for support of the public school system.

(c) The commission shall plan and implement all transactions, including exchanges, sales, and acquisitions which would facilitate the management of school land interests for revenue generating purposes.

(d) The state, through the commission, shall take all action necessary to fully develop school lands, indemnity interests, and attendant mineral interests into a permanent and productive resource base.

(e) It is in the best interest of the state that school lands be managed as a revenue source and it is the intent of the Legislature that fair market value be a primary criterion in determining if proposed uses or dispositions of land should be approved.

(f) The consolidation of school land parcels into contiguous holdings is essential to sound and effective management and the power to acquire lands by exchange or purchase is elemental to the consolidation process.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8701, relating to definitions, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

Former § 8701, similar to present Pub Res C § 5090.30, was added Stats 1980 ch 846 § 1 and repealed Stats 1982 ch 994 § 12.

Former § 8701, relating to public recreation, was added Stats 1957 ch 2318, amended Stats 1959 ch 1808, and repealed Stats 1967 ch 1179.

§ 8702. Definitions

Unless the context otherwise requires, the definitions in this section govern the construction of this division.

(a) "Commission" means the State Lands Commission.

(b) "Fund" means the School Land Bank Fund.

(c) "School land" means land or interests in land granted to the state by an Act of Congress March 3, 1853 (Ch. 145, 10 Stat. 244), for the specific purpose of providing support for the public schools.

(d) "Trustee" means the State Lands Commission acting in its role as trustee for the School Land Bank Fund.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8702, relating to legislative findings and declarations, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

Former § 8702, similar to present Pub Res C § 5090.02, was added Stats 1980 ch 846 § 1 and repealed Stats 1982 ch 994 § 12.

§ 8703. Acquisitions; Eminent domain

Acquisitions may be made by negotiated agreement with, or purchase from, the owners of the outstanding interests. Nothing in this division confers any authority to exercise the power of eminent domain for the purposes of this division, although that power is statutorily vested in the commission.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8703, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

Former § 8703, defining "office", was added Stats 1980 ch 846 § 1 and repealed Stats 1982 ch 994 § 12.

Former § 8703, relating to public recreation, was added Stats 1957 ch 2318 and repealed Stats 1967 ch 1179.

§ 8704. Acquisition of mineral and other subsurface rights

The trustee shall make all reasonable attempts to acquire the mineral and other subsurface rights in any acquisition pursuant to this division. If the trustee is unable to acquire the mineral and other subsurface rights, the trustee may purchase real property upon the trustee expressly finding that the benefits to be derived from the acquisition are substantial and that acquisition of the property without the subsurface rights is in the best interests of the state for the purposes set forth in this division.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8704, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

Former § 8704, similar to present Pub Res C § 5090.06, was added Stats 1980 ch 846 § 1 and repealed Stats 1982 ch 994 § 12.

Former § 8704, relating to public recreation, was added Stats 1959 ch 1808 and repealed Stats 1967 ch 1179.

§ 8705. Jurisdiction and authority to administer fund and interest in real property

The trustee has the exclusive jurisdiction and authority to administer the fund and the interest in real property acquired pursuant to this division, including the selection, acquisition, and conveyance of real property by the trustee as provided in this division.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8705, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

Former § 8705, similar to present Pub Res C § 5090.07, was added Stats 1980 ch 846 § 1 and repealed Stats 1982 ch 994 § 12.

§ 8706. Holding of land by state in sovereign capacity

The state, in its sovereign capacity, shall accept any conveyance, and the land shall thereafter be held by the state as land of the legal character of school lands subject to the school land trust under the jurisdiction of the commission pursuant to Division 6 (commencing with Section 6001).

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8706, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

Former § 8706, similar to present Pub Res C §§ 5090.60, 5090.61, was added Stats 1980 ch 846 § 1 and repealed Stats 1982 ch 994 § 12.

§ 8707. Commission's acceptance of conveyances

The commission shall accept the conveyances on the part of the state and shall authorize their acknowledgment and recordation.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8707, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

Former § 8707, similar to present Pub Res C § 5090.51, was added Stats 1980 ch 846 § 1 and repealed Stats 1982 ch 994 § 12.

§ 8708. Deposit of money in Pooled Money Investment Fund

Until expended for acquisitions in accordance with this division, moneys in the fund shall be deposited in the Pooled Money Investment Fund and the interest deposited in the fund.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8708, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

§ 8709. Acquisition costs; Maximum amount

In addition to the purchase price to be paid, the costs and expenses attributable to the acquisition may be payable from the fund, provided that those costs shall not exceed 5 percent of the expended funds.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8709, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

§ 8709.5. Payment for management and remediation efforts

Expenses attributable to management and remediation efforts on state school lands are payable from the fund.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8709.5, similar to the present section, was added Stats 2006 ch 77 § 52, effective July 18, 2006, and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

§ 8710. Exemption of actions from specified statutes

An action under this chapter is not subject to the California Environmental Quality Act (Division 13 (commencing with Section 21000)), the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code), or the Property Acquisition Law (Part 11 (commencing with Section 15850) of Division 3 of Title 2 of the Government Code).

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8710, similar to the present section, was added Stats 1984 ch 879 § 4, amended Stats 2006 ch 538 § 574, effective January 1, 2007, and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

§ 8711. School Land Bank Fund; School Land Bank Trustee

There is in the State Treasury the School Land Bank Fund, which is hereby created. Notwithstanding Section 13340 of the Government Code, all moneys in the fund are appropriated to the commission for expenditure, without regard to fiscal years, for the purposes of this division. When performing the powers and duties set forth in this division, the commission shall be known as the School Land Bank Trustee.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8711, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

§ 8712. Trustee's authority to acquire real property or interest therein

The trustee may acquire real property or any interest in real property with the objective of facilitating management of school lands for the purpose of generating revenue.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8712, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

§ 8713. Open meetings

The trustee shall act only at an open, scheduled public meeting, subject to all provisions of Division 6 (commencing with Section 6001) relating to meetings of the commission. The trustee may combine its meeting with the meetings of the commission.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8713, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

§ 8715. Nonexclusivity of provisions

The provisions of this division are not intended as exclusive, and shall not restrict the commission in otherwise meeting any other responsibilities and jurisdiction the commission presently has by law.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8715, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

§ 8716. Authority of trustee to accept gifts of real property or money

The trustee may accept gifts of real property or money for the purposes of this division.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

Former Sections: Former Pub Res C § 8716, similar to the present section, was added Stats 1984 ch 879 § 4 and repealed Stats 2011 ch 485 § 1, effective January 1, 2012.

§ 8720. Legislative findings and declarations

The Legislature finds and declares all of the following:

(a) The high cost of energy is taking a financial toll on California's residents and economy, as well as making the state more dependent on foreign oil.

(b) California is home to abundant renewable energy resources, such as solar, wind, geothermal, and biomass.

(c) The State Lands Commission manages on behalf of the State Teachers' Retirement Fund (STRS) hundreds of thousands of acres of school lands, a great deal of which have significant potential for siting large-scale renewable energy projects.

(d) The State Lands Commission has a duty pursuant to the School Land Bank Act (Chapter 1 (commencing with Section 8700)) to take all action necessary to fully develop school lands into a permanent and productive resource base for the benefit of STRS.

(e) A significant amount of school lands are not producing revenue from large-scale renewable energy projects because they are isolated, landlocked parcels, the majority of which are remote desert lands. The consolidation of school land parcels into contiguous holdings would facilitate the sound and effective management of these lands for large-scale renewable energy projects.

(f) On October 16, 2008, the State Lands Commission adopted a resolution supporting the environmentally responsible development of school lands for renewable energy-related projects.

(g) If school lands are leased for large-scale renewable energy projects, the state will benefit in the form of reduced carbon emissions, a cleaner and healthier environment, affordable energy, stronger national security, new jobs, and more funding for STRS.

(h) It is the policy of the state to promote the advancement, development, assessment, and installation of large-scale renewable energy projects on school lands. Any consolidation and development of school lands for renewable energy should be done with assurances that the state's unique and sensitive environment will be protected.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

§ 8721. "California desert"

For the purposes of this chapter, "California desert" means the California Desert Conservation Area as described in Section 1781 of Title 43 of the United States Code.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

§ 8722. Memorandum of agreement; School land consolidation efforts; Report

(a) The commission shall enter into a memorandum of agreement by April 1, 2012, with the United States Secretary of the Interior to facilitate land exchanges that consolidate school land parcels into contiguous holdings that are suitable for large-scale renewable energy-related projects. The memorandum of agreement shall be tailored, to the extent feasible, to prioritize land exchanges that are best suited for large-scale renewable energy project development, including for the purposes of mitigation of the impacts of that development.

(b) After the memorandum of agreement is entered into, the commission shall make best efforts to consolidate all school land parcels in the California desert into contiguous holdings for large-scale renewable energy-related projects.

(c) The commission shall report to the Legislature by January 1 of each year on the status of the memorandum of agreement and school land consolidation efforts in the California desert.

(d) The requirements of this section are contingent on the cooperation of the United States Secretary of the Interior.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

§ 8723. Submission of land exchange proposal; Priority; Considerations; Report; Costs and expenses; Final approval

(a) Within 240 days of the execution of a memorandum of agreement pursuant to Section 8722, the commission shall prepare and submit to the United States Secretary of the Interior a proposal for land exchanges that consolidate school land parcels in the California desert into contiguous holdings that are suitable for large-scale renewable energy-related projects. In developing the proposal, the commission shall give priority to land exchanges that will facilitate the development of large-scale renewable energy projects.

(b) The commission's proposal shall be based on an acre-for-acre exchange with the United States. If the United States is not authorized to enter into such an agreement, the commission may propose an exchange based on equivalent appraised values.

(c) Notwithstanding subdivision (b), the commission may withhold a school land parcel from an exchange proposal or request additional consideration from the United States Secretary of the Interior if the commission reasonably believes, based on existing and reliable information, that an acre-for-acre exchange would not provide the state with compensation that is equal to or greater than the fair market value of the school land parcel. For the purposes of this subdivision, the commission shall consider the potential renewable energy value of a parcel the commission would receive in the exchange.

(d) In preparing the land exchange proposal, the commission shall consult with the Department of Fish and Game to identify areas in the California desert that would be consistent with the proposed or adopted provisions of the Desert Renewable Energy Conservation Plan and are either of the following:

(1) Suitable for renewable energy projects because the identified areas do not support habitat or habitat corridor values for species listed as threatened, endangered, or candidate species pursuant to the California Endangered Species Act (Chapter 1.5 (commencing with Section 2050) of Division 3 of the Fish and Game Code) or the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.), that, in the judgment of the Department of Fish and Game, are sufficient to warrant consideration of their designation as a mitigation or conservation area for these species.

(2) Suitable as potential mitigation areas to mitigate the impacts that renewable energy-related projects may have on the environment.

(e) The commission's costs and expenses attributable to the land exchange process may be payable from the fund. Notwithstanding Section 6217.5, a portion of the revenues generated from renewable energy leases pursuant to this chapter shall be made available to the commission, upon appropriation by the Legislature, to cover the commission's costs attributable to the land exchange process.

(f) The commission may consider counter land exchange proposals from the United States Secretary of the Interior and make additional proposals to the extent that the additional proposals achieve the goals set forth in this chapter.

(g) Final approval of a land exchange proposed pursuant to this chapter shall be made by the commission at a properly noticed commission meeting.

Added Stats 2011 ch 485 § 2 (AB 982), effective January 1, 2012.

EXTRACTS FROM THE UNITED STATES CODE

TITLE 26. INTERNAL REVENUE CODE

§ 401. Qualified pension, profit-sharing, and stock bonus plans *(only subdivision (a) included)*

(a) Requirements for qualification. A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

(1) if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions under section 404(a)(3)(B) [26 USCS § 404(a)(3)(B)] (relating to deduction for contributions to profit-sharing and stock bonus plans), or by a charitable remainder trust pursuant to a qualified gratuitous transfer (as defined in section 664(g)(1) [26 USCS § 664(g)(1)]), for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries (but this paragraph shall not be construed, in the case of a multiemployer plan, to prohibit the return of a contribution within 6 months after the plan administrator determines that the contribution was made by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) [26 USCS § 401(a)] or the trust which is part of such plan is exempt from taxation under section 501(a) [26 USCS § 501(a)], or the return of any withdrawal liability payment determined to be an overpayment within 6 months of such determination);

(3) if the plan of which such trust is a part satisfies the requirements of section 410 [26 USCS § 410] (relating to minimum participation standards); and

(4) if the contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees (within the meaning of section 414(q) [26 USCS § 414(q)]). For purposes of this paragraph, there shall be excluded from consideration employees described in section 410(b)(3)(A) and (C) [26 USCS § 410(b)(3)(A) and (C)].

(5) Special rules relating to nondiscrimination requirements.

(A) Salaried or clerical employees. A classification shall not be considered discriminatory within the meaning of paragraph (4) or section 410(b)(2)(A)(i) [26 USCS § 410(b)(2)(A)(i)] merely because it is limited to salaried or clerical employees.

(B) Contributions and benefits may bear uniform relationship to compensation. A plan shall not be considered discriminatory within the meaning of paragraph (4) merely because the contributions or benefits of, or on behalf of, the employees under the plan bear a uniform relationship to the compensation (within the meaning of section 414(s) [26 USCS § 414(s)]) of such employees.

(C) Certain disparity permitted. A plan shall not be considered discriminatory within the meaning of paragraph (4) merely because the contributions or benefits of, or on behalf of, the employees under the plan favor highly compensated employees (as defined in section 414(q) [26 USCS § 414(q)]) in the manner permitted under subsection (l).

(D) Integrated defined benefit plan.

(i) In general. A defined benefit plan shall not be considered discriminatory within the meaning of paragraph (4) merely because the plan provides that the employer-derived accrued retirement benefit for any participant under the plan may not exceed the excess (if any) of—

(I) the participant's final pay with the employer, over

(II) the employer-derived retirement benefit created under Federal law attributable to service by the participant with the employer.

For purposes of this clause, the employer-derived retirement benefit created under Federal law shall be treated as accruing ratably over 35 years.

(ii) Final pay. For purposes of this subparagraph, the participant's final pay is the compensation (as defined in section 414(q)(4) [26 USCS § 414(q)(4)]) paid to the participant by the employer for any year—

(I) which ends during the 5-year period ending with the year in which the participant separated from service for the employer, and

(II) for which the participant's total compensation from the employer was highest.

(E) 2 or more plans treated as single plan. For purposes of determining whether 2 or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan—

(i) Contributions. If the amount of contributions on behalf of the employees allowed as a deduction under section 404 [26 USCS § 404] for the taxable year with respect to such plans, taken together, bears a uniform relationship to the compensation (within the meaning of section 414(s) [26 USCS § 414(a)]) of such employees, the plans shall not be considered discriminatory merely because the rights of employees to, or derived from, the employer contributions under the separate plans do not become nonforfeitable at the same rate.

(ii) Benefits. If the employees' rights to benefits under the separate plans do not become nonforfeitable at the same rate, but the levels of benefits provided by the separate plans satisfy the requirements of regulations prescribed by the Secretary to take account of the differences in such rates, the plans shall not be considered discriminatory merely because of the difference in such rates.

(F) Social security retirement age. For purposes of testing for discrimination under paragraph (4)—

(i) the social security retirement age (as defined in section 415(b)(8) [26 USCS § 415(b)(8)]) shall be treated as a uniform retirement age, and

(ii) subsidized early retirement benefits and joint and survivor annuities shall not be treated as being unavailable to employees on the same terms merely because such benefits or annuities are based in whole or in part on an employee's social security retirement age (as so defined).

(G) Governmental plans. Paragraphs (3) and (4) shall not apply to a governmental plan (within the meaning of section 414(d) [26 USCS § 414(d)]).

(6) A plan shall be considered as meeting the requirements of paragraph (3) during the whole of any taxable year of the plan if on one day in each quarter it satisfied such requirements.

(7) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part satisfies the requirements of section 411 [26 USCS § 411] (relating to minimum vesting standards).

(8) A trust forming part of a defined benefit plan shall not constitute a qualified trust under this section unless the plan provides that forfeitures must not be applied to increase the benefits any employee would otherwise receive under the plan.

(9) Required distributions.

(A) In general. A trust shall not constitute a qualified trust under this subsection 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, in accordance with regulations, 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).

(B) Required distribution where employee dies before entire interest is distributed.

(i) Where distributions have begun under subparagraph (A)(ii). A trust shall not constitute a qualified trust under this section unless the plan provides that if—

(I) the distribution of the employee's interest has begun in accordance with subparagraph (A)(ii), and

(II) the employee dies before his entire interest has been distributed to him,

the remaining portion of such interest will be distributed at least as rapidly as under the method of distributions being used under subparagraph (A)(ii) as of the date of his death.

(ii) 5-year rule for other cases. A trust shall not constitute a qualified trust under this section unless the plan provides that, if an employee dies before the distribution of the employee's interest has begun in accordance with subparagraph (A)(ii), the entire interest of the employee will be distributed within 5 years after the death of such employee.

(iii) Exception to 5-year rule for certain amounts payable over life of beneficiary. If—

(I) any portion of the employee's interest is payable to (or for the benefit of) a designated beneficiary,

(II) such portion will be distributed (in accordance with regulations) over the life of such designated beneficiary (or over a period not extending beyond the life expectancy of such beneficiary), and

(III) such distributions begin not later than 1 year after the date of the employee's death or such later date as the Secretary may by regulations prescribe,

for purposes of clause (ii), the portion referred to in subclause (I) shall be treated as distributed on the date on which such distributions begin.

(iv) Special rule for surviving spouse of employee. If the designated beneficiary referred to in clause (iii)(I) is the surviving spouse of the employee—

(I) the date on which the distributions are required to begin under clause (iii)(III) shall not be earlier than the date on which the employee would have attained age 70½, and

(II) if the surviving spouse dies before the distributions to such spouse begin, this subparagraph shall be applied as if the surviving spouse were the employee.

(C) Required beginning date. For purposes of this paragraph—

(i) In general. The term "required beginning date" means April 1 of the calendar year following the later of—

(I) the calendar year in which the employee attains age 70½, or

(II) the calendar year in which the employee retires.

(ii) Exception. Subclause (II) of clause (i) shall not apply—

(I) except as provided in section 409(d) [26 USCS § 409(d)], in the case of an employee who is a 5-percent owner (as defined in section 416 [26 USCS § 416]) with respect to the plan year ending in the calendar year in which the employee attains age 70½, or

(II) for purposes of section 408 (a)(6) or (b)(3) [26 USCS § 408(a)(6) or (b)(3)].

(iii) Actuarial adjustment. In the case of an employee to whom clause (i)(II) applies who retires in a calendar year after the calendar year in which the employee attains age 70½, the employee's accrued benefit shall be actuarially increased to take into account the period after age 70½ in which the employee was not receiving any benefits under the plan.

(iv) Exception for governmental and church plans. Clauses (ii) and (iii) shall not apply in the case of a governmental plan or church plan. For purposes of this clause, the term "church plan" means a plan maintained by a church for church employees, and the term "church" means any church (as defined in section 3121(w)(3)(A) [26 USCS § 3121(w)(3)(A)]) or qualified church-controlled organization (as defined in section 3121(w)(3)(B) [26 USCS § 3121(w)(3)(B)]).

(D) Life expectancy. For purposes of this paragraph, the life expectancy of an employee and the employee's spouse (other than in the case of a life annuity) may be redetermined but not more frequently than annually.

(E) Designated beneficiary. For purposes of this paragraph, the term "designated beneficiary" means any individual designated as a beneficiary by the employee.

(F) Treatment of payments to children. Under regulations prescribed by the Secretary, for purposes of this paragraph, any amount paid to a child shall be treated as if it had been paid to the surviving spouse if such amount will become payable to the surviving spouse upon such child reaching majority (or other designated event permitted under regulations).

(G) Treatment of incidental death benefit distributions. For purposes of this title, any distribution required under the incidental death benefit requirements of this subsection shall be treated as a distribution required under this paragraph.

(H) Temporary waiver of minimum required distribution.

(i) In general. The requirements of this paragraph shall not apply for calendar year 2009 to—

(I) a defined contribution plan which is described in this subsection or in section 403(a) or 403(b) [26 USCS § 403(a) or 403(b)],

(II) a defined contribution plan which is an eligible deferred compensation plan described in section 457(b) [26 USCS § 457(b)] but only if such plan is maintained by an employer described in section 457(e)(1)(A) [26 USCS § 457(e)(1)(A)], or

(III) an individual retirement plan.

(ii) Special rules regarding waiver period. For purposes of this paragraph—

(I) the required beginning date with respect to any individual shall be determined without regard to this subparagraph for purposes of applying this paragraph for calendar years after 2009, and

(II) if clause (ii) of subparagraph (B) applies, the 5-year period described in such clause shall be determined without regard to calendar year 2009.

(10) Other requirements.

(A) Plans benefiting owner-employees. In the case of any plan which provides contributions or benefits for employees some or all of whom are owner-employees (as defined in subsection (c)(3)), a trust forming part of such plan shall constitute a qualified trust under this section only if the requirements of subsection (d) are also met.

(B) Top-heavy plans.

(i) In general. In the case of any top-heavy plan, a trust forming part of such plan shall constitute a qualified trust under this section only if the requirements of section 416 [26 USCS § 416] are met.

(ii) Plans which may become top-heavy. Except to the extent provided in regulations, a trust forming part of a plan (whether or not a top-heavy plan) shall constitute a qualified trust under this section only if such plan contains provisions—

(I) which will take effect if such plan becomes a top-heavy plan, and

(II) which meet the requirements of section 416 [26 USCS § 416].

(iii) Exemption for governmental plans. This subparagraph shall not apply to any governmental plan.

(11) Requirement of joint and survivor annuity and preretirement survivor annuity.

(A) In general. In the case of any plan to which this paragraph applies, except as provided in section 417 [26 USCS § 417], a trust forming part of such plan shall not constitute a qualified trust under this section unless—

(i) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant is provided in the form of a qualified joint and survivor annuity, and

(ii) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity is provided to the surviving spouse of such participant.

(B) Plans to which paragraph applies. This paragraph shall apply to—

(i) any defined benefit plan,

(ii) any defined contribution plan which is subject to the funding standards of section 412 [26 USCS § 412], and

(iii) any participant under any other defined contribution plan unless—

(I) such plan provides that the participant's nonforfeitable accrued benefit (reduced by any security interest held by the plan by reason of a loan outstanding to such participant) is payable in full, on the death of the participant, to the participant's surviving spouse (or, if there is no surviving spouse or the surviving spouse consents in the manner required under section 417(a)(2) [26 USCS § 417(a)(2)], to a designated beneficiary),

(II) such participant does not elect a payment of benefits in the form of a life annuity, and

(III) with respect to such participant, such plan is not a direct or indirect transferee (in a transfer after December 31, 1984) of a plan which is described in clause (i) or (ii) or to which this clause applied with respect to the participant.

Clause (iii)(III) shall apply only with respect to the transferred assets (and income therefrom) if the plan separately accounts for such assets and any income therefrom.

(C) Exception for certain ESOP benefits.

(i) In general. In the case of—

(I) a tax credit employee stock ownership plan (as defined in section 409(a) [26 USCS § 409(a)]), or

(II) an employee stock ownership plan (as defined in section 4975(e)(7) [26 USCS § 4975(e)(7)]),

subparagraph (A) shall not apply to that portion of the employee's accrued benefit to which the requirements of section 409(h) [26 USCS § 409(h)] apply.

(ii) Nonforfeitable benefit must be paid in full, etc. In the case of any participant, clause (i) shall apply only if the requirements of subclauses (I), (II), and (III) of subparagraph (B)(iii) are met with respect to such participant.

(D) Special rule where participant and spouse married less than 1 year. A plan shall not be treated as failing to meet the requirements of subparagraphs (B)(iii) or (C) merely because the plan provides that benefits will not be payable to the surviving spouse of the participant unless the participant and such spouse had been married throughout the 1-year period ending on the earlier of the participant's annuity starting date or the date of the participant's death.

(E) Exception for plans described in section 404(c) [26 USCS § 404(c)]. This paragraph shall not apply to a plan which the Secretary has determined is a plan described in section 404(c) [26 USCS § 404(c)] (or a continuation thereof) in which participation is substantially limited to individuals who, before January 1, 1976, ceased employment covered by the plan.

(F) Cross reference. For—

(i) provisions under which participants may elect to waive the requirements of this paragraph, and

(ii) other definitions and special rules for purposes of this paragraph, see section 417 [26 USCS § 417].

(12) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that in the case of any merger or consolidation with, or transfer of assets or liabilities to, any other plan after September 2, 1974, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence does not apply to any multiemployer plan with respect to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1301 et seq.] applies.

(13) Assignment and alienation.

(A) In general. A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 [26 USCS § 4975] (relating to tax on prohibited transactions) by reason of section 4975(d)(1) [26 USCS § 4975(d)(1)]. This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

(B) Special rules for domestic relations orders. Subparagraph (A) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

(C) Special rule for certain judgments and settlements. Subparagraph (A) shall not apply to any offset of a participant's benefits provided under a plan against an amount that the participant is ordered or required to pay to the plan if—

(i) the order or requirement to pay arises—

(I) under a judgment of conviction for a crime involving such plan,

(II) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1101 et seq.], or

(III) pursuant to a settlement agreement between the Secretary of Labor and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of such subtitle [29 USCS §§ 1101 et seq.] by a fiduciary or any other person,

(ii) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(iii) in a case in which the survivor annuity requirements of section 401(a)(11) [26 USCS § 401(a)(11)] apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made—

(I) either such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan (or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 417(a)(2)(B) [26 USCS § 417(a)(2)(B)]), or an election to waive the right of the spouse to either a qualified joint and survivor annuity or a qualified preretirement survivor annuity is in effect in accordance with the requirements of section 417(a) [26 USCS § 417(a)],

(II) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of such subtitle [29 USCS §§ 1101 et seq.], or

(III) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity under a qualified joint and survivor annuity provided pursuant to section 401(a)(11)(A)(i) [26 USCS § 401(a)(11)(A)(i)] and under a qualified preretirement survivor annuity provided pursuant to section 401(a)(11)(A)(ii) [26 USCS § 401(a)(11)(A)(ii)], determined in accordance with subparagraph (D).

A plan shall not be treated as failing to meet the requirements of this subsection, subsection (k), section 403(b) [26 USCS § 403(b)], or section 409(d) [26 USCS § 409(d)] solely by reason of an offset described in this subparagraph.

(D) Survivor annuity.

(i) In general. The survivor annuity described in subparagraph (C)(iii)(III) shall be determined as if—

(I) the participant terminated employment on the date of the offset,

(II) there was no offset,

(III) the plan permitted commencement of benefits only on or after normal retirement age,

(IV) the plan provided only the minimum-required qualified joint and survivor annuity, and

(V) the amount of the qualified preretirement survivor annuity under the plan is equal to the amount of the survivor annuity payable under the minimum-required qualified joint and survivor annuity.

(ii) Definition. For purposes of this subparagraph, the term "minimum-required qualified joint and survivor annuity" means the qualified joint and survivor annuity which is the actuarial equivalent of the participant's accrued benefit (within the meaning of section 411(a)(7) [26 USCS § 411(a)(7)]) and

under which the survivor annuity is 50 percent of the amount of the annuity which is payable during the joint lives of the participant and the spouse.

(14) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, unless the participant otherwise elects, the payment of benefits under the plan to the participant will begin not later than the 60th day after the latest of the close of the plan year in which—

(A) the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(B) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

(C) the participant terminates his service with the employer.

In the case of a plan which provides for the payment of an early retirement benefit, a trust forming a part of such plan shall not constitute a qualified trust under this section unless a participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially, reduced under regulations prescribed by the Secretary.

(15) a trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part—

(A) in the case of a participant or beneficiary who is receiving benefits under such plan, or

(B) in the case of a participant who is separated from the service and who has nonforfeitable rights to benefits,

such benefits are not decreased by reason of any increase in the benefit levels payable under title II of the Social Security Act [42 USCS §§ 401 et seq.] or any increase in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first receipt of such benefits or the date of such separation, as the case may be.

(16) A trust shall not constitute a qualified trust under this section if the plan of which such trust is a part provides for benefits or contributions which exceed the limitations of section 415 [26 USCS § 415].

(17) Compensation limit.

(A) In general. A trust shall not constitute a qualified trust under this section unless, under the plan of which such trust is a part, the annual compensation of each employee taken into account under the plan for any year does not exceed $ 200,000.

(B) Cost-of-living adjustment. The Secretary shall adjust annually the $ 200,000 amount in subparagraph (A) for increases in the cost-of-living at the same time and in the same manner as adjustments under section 415(d) [26 USCS § 415(d)]; except that the base period shall be the calendar quarter beginning July 1, 2001, and any increase which is not a multiple of $ 5,000 shall be rounded to the next lowest multiple of $ 5,000.

(18) [Repealed.]

(19) A trust shall not constitute a qualified trust under this section if under the plan of which such trust is a part any part of a participant's accrued benefit derived from employer contributions (whether or not otherwise nonforfeitable), is forfeitable solely because of withdrawal by such participant of any amount attributable to the benefit derived from contributions made by such participant. The preceding sentence shall not apply to the accrued benefit of any participant unless, at the time of such withdrawal, such participant has a nonforfeitable right to at least 50 percent of such accrued benefit (as determined under section 411 [26 USCS § 411]). The first sentence of this paragraph shall not apply to the extent that an accrued benefit is permitted to be forfeited in accordance with section 411(a)(3)(D)(iii) [26 USCS § 411(a)(3)(D)(iii)] (relating to proportional forfeitures of benefits accrued before September 2, 1974, in the event of withdrawal of certain mandatory contributions).

(20) A trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust under this section merely because the pension plan of which such trust is a part makes 1 or more distributions within 1 taxable year to a distributee on account of a termination of the plan of which the trust is a part, or in the case of a profit-sharing or stock bonus plan, a complete discontinuance of contributions under such plan. This paragraph shall not apply to a defined benefit plan unless the employer maintaining such plan files a notice with the Pension Benefit Guaranty Corporation (at the time and in the manner prescribed by the Pension Benefit Guaranty Corporation) notifying the Corporation of such payment or distribution and the Corporation has approved such payment or distribution or, within 90 days after the date on which such notice was filed, has failed to disapprove such payment or distribution. For purposes of this paragraph, rules similar to the rules of section 402(a)(6)(B) [26 USCS § 402(a)(6)(B)] (as in effect before its repeal by section 521 of the Unemployment Compensation Amendments of 1992) shall apply.

(21) [Repealed.]

(22) If a defined contribution plan (other than a profit-sharing plan)—

(A) is established by an employer whose stock is not readily tradable on an established market, and

(B) after acquiring securities of the employer, more than 10 percent of the total assets of the plan are securities of the employer,

any trust forming part of such plan shall not constitute a qualified trust under this section unless the plan meets the requirements of subsection (e) of section 409 [26 USCS § 409]. The requirements of subsection (e) of section 409 [26 USCS § 409] shall not apply to any employees of an employer who are participants in any defined contribution plan established and maintained by such employer if the stock of such employer is not readily tradable on an established market and the trade or business of such employer consists of publishing on a regular basis a newspaper for general circulation. For purposes of the preceding sentence, subsections (b), (c), (m), and (o) of section 414 [26 USCS § 414] shall not apply except for determining whether stock of the employer is not readily tradable on an established market.

(23) A stock bonus plan shall not be treated as meeting the requirements of this section unless such plan meets the requirements of subsections (h) and (o) of section 409 [26 USCS § 409], except that in applying section 409(h) [26 USCS § 409(h)] for purposes of this paragraph, the term "employer securities" shall include any securities of the employer held by the plan.

(24) Any group trust which otherwise meets the requirements of this section shall not be treated as not meeting such requirements on account of the participation or inclusion in such trust of the moneys of any plan or governmental unit described in section 818(a)(6) [26 USCS § 818(a)(6)].

(25) Requirement that actuarial assumptions be specified. A defined benefit plan shall not be treated as providing definitely determinable benefits unless, whenever the amount of any benefit is to be determined on the basis of actuarial assumptions, such assumptions are specified in the plan in a way which precludes employer discretion.

(26) Additional participation requirements.

(A) In general. In the case of a trust which is a part of a defined benefit plan, such trust shall not constitute a qualified trust under this subsection unless on each day of the plan year such trust benefits at least the lesser of—

(i) 50 employees of the employer, or

(ii) the greater of—

(I) 40 percent of all employees of the employer, or

(II) 2 employees (or if there is only 1 employee, such employee).

(B) Treatment of excludable employees.

(i) In general. A plan may exclude from consideration under this paragraph employees described in paragraphs (3) and (4)(A) of section 410(b) [26 USCS § 410(b)].

(ii) Separate application for certain excludable employees. If employees described in section 410(b)(4)(B) [26 USCS § 410(b)(4)(B)] are covered under a plan which meets the requirements of

subparagraph (A) separately with respect to such employees, such employees may be excluded from consideration in determining whether any plan of the employer meets such requirements if—

(I) the benefits for such employees are provided under the same plan as benefits for other employees,

(II) the benefits provided to such employees are not greater than comparable benefits provided to other employees under the plan, and

(III) no highly compensated employee (within the meaning of section 414(q) [26 USCS § 414(q)]) is included in the group of such employees for more than 1 year.

(C) Special rule for collective bargaining units. Except to the extent provided in regulations, a plan covering only employees described in section 410(b)(3)(A) [26 USCS § 410(b)(3)(A)] may exclude from consideration any employees who are not included in the unit or units in which the covered employees are included.

(D) Paragraph not to apply to multiemployer plans. Except to the extent provided in regulations, this paragraph shall not apply to employees in a multiemployer plan (within the meaning of section 414(f) [26 USCS § 414(f)]) who are covered by collective bargaining agreements.

(E) Special rule for certain dispositions or acquisitions. Rules similar to the rules of section 410(b)(6)(C) [26 USCS § 410(b)(6)(C)] shall apply for purposes of this paragraph.

(F) Separate lines of business. At the election of the employer and with the consent of the Secretary, this paragraph may be applied separately with respect to each separate line of business of the employer. For purposes of this paragraph, the term "separate line of business" has the meaning given such term by section 414(r) [26 USCS § 414(r)] (without regard to paragraph (2)(A) or (7) thereof).

(G) Exception for governmental plans. This paragraph shall not apply to a governmental plan (within the meaning of section 414(d) [26 USCS § 414(d)]).

(H) Regulations. The Secretary may by regulation provide that any separate benefit structure, any separate trust, or any other separate arrangement is to be treated as a separate plan for purposes of applying this paragraph.

(27) Determinations as to profit-sharing plans.

(A) Contributions need not be based on profits. The determination of whether the plan under which any contributions are made is a profit-sharing plan shall be made without regard to current or accumulated profits of the employer and without regard to whether the employer is a tax-exempt organization.

(B) Plan must designate type. In the case of a plan which is intended to be a money purchase pension plan or a profit-sharing plan, a trust forming part of such plan shall not constitute a qualified trust under this subsection unless the plan designates such intent at such time and in such manner as the Secretary may prescribe.

(28) Additional requirements relating to employee stock ownership plans.

(A) In general. In the case of a trust which is part of an employee stock ownership plan (within the meaning of section 4975(e)(7) [26 USCS § 4975(e)(7)]) or a plan which meets the requirements of section 409(a) [26 USCS § 409(a)], such trust shall not constitute a qualified trust under this section unless such plan meets the requirements of subparagraphs (B) and (C).

(B) Diversification of investments.

(i) In general. A plan meets the requirements of this subparagraph if each qualified participant in the plan may elect within 90 days after the close of each plan year in the qualified election period to direct the plan as to the investment of at least 25 percent of the participant's account in the plan (to the extent such portion exceeds the amount to which a prior election under this subparagraph applies). In the case of the election year in which the participant can make his last election, the preceding sentence shall be applied by substituting "50 percent" for "25 percent".

(ii) Method of meeting requirements. A plan shall be treated as meeting the requirements of clause (i) if—

(I) the portion of the participant's account covered by the election under clause (i) is distributed within 90 days after the period during which the election may be made, or

(II) the plan offers at least 3 investment options (not inconsistent with regulations prescribed by the Secretary) to each participant making an election under clause (i) and within 90 days after the period during which the election may be made, the plan invests the portion of the participant's account covered by the election in accordance with such election.

(iii) Qualified participant. For purposes of this subparagraph, the term "qualified participant" means any employee who has completed at least 10 years of participation under the plan and has attained age 55.

(iv) Qualified election period. For purposes of this subparagraph, the term "qualified election period" means the 6-plan-year period beginning with the later of—

(I) the 1st plan year in which the individual first became a qualified participant, or

(II) the 1st plan year beginning after December 31, 1986.

For purposes of the preceding sentence, an employer may elect to treat an individual first becoming a qualified participant in the 1st plan year beginning in 1987 as having become a participant in the 1st plan year beginning in 1988.

(v) Exception. This subparagraph shall not apply to an applicable defined contribution plan (as defined in paragraph (35)(E)).

(C) Use of independent appraiser. A plan meets the requirements of this subparagraph if all valuations of employer securities which are not readily tradable on an established securities market with respect to activities carried on by the plan are by an independent appraiser. For purposes of the preceding sentence, the term "independent appraiser" means any appraiser meeting requirements similar to the requirements of the regulations prescribed under section 170(a)(1) [26 USCS § 170(a)(1)].

(29) Benefit limitations. In the case of a defined benefit plan (other than a multiemployer plan) to which the requirements of section 412 [26 USCS § 412] apply, the trust of which the plan is a part shall not constitute a qualified trust under this subsection unless the plan meets the requirements of section 436 [26 USCS § 436].

(30) Limitations on elective deferrals. In the case of a trust which is part of a plan under which elective deferrals (within the meaning of section 402(g)(3) [26 USCS § 402(g)(3)]) may be made with respect to any individual during a calendar year, such trust shall not constitute a qualified trust under this subsection unless the plan provides that the amount of such deferrals under such plan and all other plans, contracts, or arrangements of an employer maintaining such plan may not exceed the amount of the limitation in effect under section 402(g)(1)(A) [26 USCS § 402(g)(1)(A)] for taxable years beginning in such calendar year.

(31) Direct transfer of eligible rollover distributions.

(A) In general. A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if the distributee of any eligible rollover distribution—

(i) elects to have such distribution paid directly to an eligible retirement plan, and

(ii) specifies the eligible requirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe),

such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

(B) Certain mandatory distributions.

(i) In general. In case of a trust which is part of an eligible plan, such trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if—

(I) a distribution described in clause (ii) in excess of $ 1,000 is made, and

(II) the distributee does not make an election under subparagraph (A) and does not elect to receive the distribution directly,

the plan administrator shall make such transfer to an individual retirement plan of a designated trustee or issuer and shall notify the distributee in writing (either separately or as part of the notice under section 402(f) [26 USCS § 402(f)]) that the distribution may be transferred to another individual retirement plan.

(ii) Eligible plan. For purposes of clause (i), the term "eligible plan" means a plan which provides that any nonforfeitable accrued benefit for which the present value (as determined under section 411(a)(11) [26 USCS § 411(a)(11)]) does not exceed $ 5,000 shall be immediately distributed to the participant.

(C) Limitation. Subparagraphs (A) and (B) shall apply only to the extent that the eligible rollover distribution would be includible in gross income if not transferred as provided in subparagraph (A) (determined without regard to sections 402(c), 403(a)(4), 403(b)(8), and 457(e)(16) [26 USCS §§ 402(c), 403(a)(4), 403(b)(8), and 457(e)(16)]). The preceding sentence shall not apply to such distribution if the plan to which such distribution is transferred—

(i) is a qualified trust which is part of a plan which is a defined contribution plan and agrees to separately account for amounts so transferred, including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible, or

(ii) is an eligible retirement plan described in clause (i) or (ii) of section 402(c)(8)(B) [26 USCS § 402(c)(8)(B)].

(D) Eligible rollover distribution. For purposes of this paragraph, the term "eligible rollover distribution" has the meaning given such term by section 402(f)(2)(A) [26 USCS § 402(f)(2)(A)].

(E) Eligible retirement plan. For purposes of this paragraph, the term "eligible retirement plan" has the meaning given such term by section 402(c)(8)(B) [26 USCS § 402(c)(8)(B)], except that a qualified trust shall be considered an eligible retirement plan only if it is a defined contribution plan, the terms of which permit the acceptance of rollover distributions.

(32) Treatment of failure to make certain payments if plan has liquidity shortfall.

(A) In general. A trust forming part of a pension plan to which [section] section 430(j)(4) [26 USCS § 430(j)(4)] applies shall not be treated as failing to constitute a qualified trust under this section merely because such plan ceases to make any payment described in subparagraph (B) during any period that such plan has a liquidity shortfall (as defined in [section] section 430(j)(4) [26 USCS § 430(j)(4)]).

(B) Payments described. A payment is described in this subparagraph if such payment is—

(i) any payment, in excess of the monthly amount paid under a single life annuity (plus any social security supplements described in the last sentence of section 411(a)(9) [26 USCS § 411(a)(9)]), to a participant or beneficiary whose annuity starting date (as defined in section 417(f)(2) [26 USCS § 417(f)(2)]) occurs during the period referred to in subparagraph (A),

(ii) any payment for the purchase of an irrevocable commitment from an insurer to pay benefits, and

(iii) any other payment specified by the Secretary by regulations.

(C) Period of shortfall. For purposes of this paragraph, a plan has a liquidity shortfall during the period that there is an underpayment of an installment under section 430(j)(3) [26 USCS § 430(j)(3)] by reason of section 430(j)(4)(A) [26 USCS § 430(j)(4)(A)] thereof.

(33) Prohibition on benefit increases while sponsor is in bankruptcy.

(A) In general. A trust which is part of a plan to which this paragraph applies shall not constitute a qualified trust under this section if an amendment to such plan is adopted while the employer is a debtor in a case under title 11, United States Code, or similar Federal or State law, if such amendment increases liabilities of the plan by reason of—

(i) any increase in benefits,

(ii) any change in the accrual of benefits, or

(iii) any change in the rate at which benefits become nonforfeitable under the plan,

with respect to employees of the debtor, and such amendment is effective prior to the effective date of such employer's plan of reorganization.

(B) Exceptions. This paragraph shall not apply to any plan amendment if—

(i) the plan, were such amendment to take effect, would have a funding target attainment percentage (as defined in section 430(d)(2)) [26 USCS § 430(d)(2)]) of 100 percent or more,

(ii) the Secretary determines that such amendment is reasonable and provides for only de minimis increases in the liabilities of the plan with respect to employees of the debtor,

(iii) such amendment only repeals an amendment described in section 412(d)(2) [26 USCS § 412(d)(2)], or

(iv) such amendment is required as a condition of qualification under this part [26 USCS §§ 401 et seq.].

(C) Plans to which this paragraph applies. This paragraph shall apply only to plans (other than multiemployer plans) covered under section 4021 of the Employee Retirement Income Security Act of 1974 [29 USCS § 1321].

(D) Employer. For purposes of this paragraph, the term "employer" means the employer referred to in section 412(b)(1) [26 USCS § 412(b)(1)], without regard to section 412(b)(2) [26 USCS § 412(b)(2)].

(34) Benefits of missing participants on plan termination. In the case of a plan covered by title IV of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1301 et seq.], a trust forming part of such plan shall not be treated as failing to constitute a qualified trust under this section merely because the pension plan of which such trust is a part, upon its termination, transfers benefits of missing participants to the Pension Benefit Guaranty Corporation in accordance with section 4050 of such Act [29 USCS § 1350].

(35) Diversification requirements for certain defined contribution plans.

(A) In general. A trust which is part of an applicable defined contribution plan shall not be treated as a qualified trust unless the plan meets the diversification requirements of subparagraphs (B), (C), and (D).

(B) Employee contributions and elective deferrals invested in employer securities. In the case of the portion of an applicable individual's account attributable to employee contributions and elective deferrals which is invested in employer securities, a plan meets the requirements of this subparagraph if the applicable individual may elect to direct the plan to divest any such securities and to reinvest an equivalent amount in other investment options meeting the requirements of subparagraph (D).

(C) Employer contributions invested in employer securities. In the case of the portion of the account attributable to employer contributions other than elective deferrals which is invested in employer securities, a plan meets the requirements of this subparagraph if each applicable individual who—

(i) is a participant who has completed at least 3 years of service, or

(ii) is a beneficiary of a participant described in clause (i) or of a deceased participant,

may elect to direct the plan to divest any such securities and to reinvest an equivalent amount in other investment options meeting the requirements of subparagraph (D).

(D) Investment options.

(i) In general. The requirements of this subparagraph are met if the plan offers not less than 3 investment options, other than employer securities, to which an applicable individual may direct the proceeds from the divestment of employer securities pursuant to this paragraph, each of which is diversified and has materially different risk and return characteristics.

(ii) Treatment of certain restrictions and conditions.

(I) Time for making investment choices. A plan shall not be treated as failing to meet the requirements of this subparagraph merely because the plan limits the time for divestment and reinvestment to periodic, reasonable opportunities occurring no less frequently than quarterly.

(II) Certain restrictions and conditions not allowed. Except as provided in regulations, a plan shall not meet the requirements of this subparagraph if the plan imposes restrictions or conditions with respect to the investment of employer securities which are not imposed on the investment of other assets of the plan. This subclause shall not apply to any restrictions or conditions imposed by reason of the application of securities laws.

(E) Applicable defined contribution plan. For purposes of this paragraph—

(i) In general. The term "applicable defined contribution plan" means any defined contribution plan which holds any publicly traded employer securities.

(ii) Exception for certain ESOPs. Such term does not include an employee stock ownership plan if—

(I) there are no contributions to such plan (or earnings thereunder) which are held within such plan and are subject to subsection (k) or (m), and

(II) such plan is a separate plan for purposes of section 414(l) [26 USCS § 414(l)] with respect to any other defined benefit plan or defined contribution plan maintained by the same employer or employers.

(iii) Exception for one participant plans. Such term does not include a one-participant retirement plan.

(iv) One-participant retirement plan. For purposes of clause (iii), the term "one-participant retirement plan" means a retirement plan that on the first day of the plan year—

(I) covered only one individual (or the individual and the individual's spouse) and the individual (or the individual and the individual's spouse) owned 100 percent of the plan sponsor (whether or not incorporated), or

(II) covered only one or more partners (or partners and their spouses) in the plan sponsor.

(F) Certain plans treated as holding publicly traded employer securities.

(i) In general. Except as provided in regulations or in clause (ii), a plan holding employer securities which are not publicly traded employer securities shall be treated as holding publicly traded employer securities if any employer corporation, or any member of a controlled group of corporations which includes such employer corporation, has issued a class of stock which is a publicly traded employer security.

(ii) Exception for certain controlled groups with publicly traded securities. Clause (i) shall not apply to a plan if—

(I) no employer corporation, or parent corporation of an employer corporation, has issued any publicly traded employer security, and

(II) no employer corporation, or parent corporation of an employer corporation, has issued any special class of stock which grants particular rights to, or bears particular risks for, the holder or issuer with respect to any corporation described in clause (i) which has issued any publicly traded employer security.

(iii) Definitions. For purposes of this subparagraph, the term—

(I) "controlled group of corporations" has the meaning given such term by section 1563(a) [26 USCS § 1563(a)], except that "50 percent" shall be substituted for "80 percent" each place it appears,

(II) "employer corporation" means a corporation which is an employer maintaining the plan, and

(III) "parent corporation" has the meaning given such term by section 424(e) [26 USCS § 424(e)].

(G) Other definitions. For purposes of this paragraph—

(i) Applicable individual. The term "applicable individual" means—

(I) any participant in the plan, and

(II) any beneficiary who has an account under the plan with respect to which the beneficiary is entitled to exercise the rights of a participant.

(ii) Elective deferral. The term "elective deferral" means an employer contribution described in section 402(g)(3)(A) [26 USCS § 402(g)(3)(A)].

(iii) Employer security. The term "employer security" has the meaning given such term by section 407(d)(1) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1107(d)(1)].

(iv) Employee stock ownership plan. The term "employee stock ownership plan" has the meaning given such term by section 4975(e)(7) [26 USCS § 4975(e)(7)].

(v) Publicly traded employer securities. The term "publicly traded employer securities" means employer securities which are readily tradable on an established securities market.

(vi) Year of service. The term "year of service" has the meaning given such term by section 411(a)(5) [26 USCS § 411(a)(5)].

(H) Transition rule for securities attributable to employer contributions.

(i) Rules phased in over 3 years.

(I) In general. In the case of the portion of an account to which subparagraph (C) applies and which consists of employer securities acquired in a plan year beginning before January 1, 2007, subparagraph (C) shall only apply to the applicable percentage of such securities. This subparagraph shall be applied separately with respect to each class of securities.

(II) Exception for certain participants aged 55 or over. Subclause (I) shall not apply to an applicable individual who is a participant who has attained age 55 and completed at least 3 years of service before the first plan year beginning after December 31, 2005.

(ii) Applicable percentage. For purposes of clause (i), the applicable percentage shall be determined as follows:

Plan year to which subparagraph (C) applies:	The applicable percentage is:
1st	33
2nd	66
3d and following	100.

(36) Distributions during working retirement. A trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust under this section solely because the plan provides that a distribution may be made from such trust to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

(37) Death benefits under USERRA-qualified active military service. A trust shall not constitute a qualified trust unless the plan provides that, in the case of a participant who dies while performing qualified military service (as defined in section 414(u) [26 USCS § 414(u)]), the survivors of the participant are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) provided under the plan had the participant resumed and then terminated employment on account of death.

Paragraphs (11), (12), (13), (14), (15), (19), and (20) shall apply only in the case of a plan to which section 411 [26 USCS § 411] (relating to minimum vesting standards) applies without regard to subsection (e)(2) of such section.

(Aug. 16, 1954, ch 736, 68A Stat. 134; Oct. 10, 1962, P.L. 87-792, § 2, 76 Stat. 809; Oct. 23, 1962, P.L. 87-863, § 2(a), 76 Stat. 1141; Feb. 26, 1964, P.L. 88-272, Title II, § 219(a), 78 Stat. 57; July 30, 1965, P.L. 89-97, Title I, § 106(d)(4), 79 Stat. 337; Nov. 13, 1966, P.L. 89-809, Title II, §§ 204(b)(1), (c), 205(a), 80 Stat. 1577, 1578; Jan. 12, 1971, P.L. 91-691, § 1(a), 84 Stat. 2074; Sept. 2, 1974, P.L. 93-406, Title II, §§ 1012(b), 1016(a)(2), 1021, 1022(a)-(d), (f), 1023, 2001(c)-(e)(4), (h)(1), 2004(a)(1), 88 Stat. 913, 929, 935, 938-940, 943, 952-955, 957, 979; April 15, 1976, P.L. 94-267, § 1(c)(1), (2), 90 Stat. 367; Oct. 4, 1976, P.L. 94-455, Title VIII, § 803(b)(2), Title XV, § 1505(b), Title XIX, §§ 1901(a)(56), 1906(b)(13)(A), 90 Stat. 1584, 1738, 1773, 1834; Nov. 6, 1978, P.L. 95-600, Title I, §§ 135(a), 141(f)(3), 143(a), 152(e), 92 Stat. 2785, 2795, 2796, 2799; April 1, 1980, P.L. 96-222, Title I, § 101(a)(7)(L)(i)(V), (9), (14)(E)(iii), 94 Stat. 199, 201, 205; Sept. 26, 1980, P.L. 96-364, Title II, § 208(a), (e), Title IV, § 410(b), 94 Stat. 1289, 1290, 1308; Dec. 28, 1980, P.L. 96-605, Title II, §§ 221(a), 225(b)(1), (2), 94 Stat. 3528, 3529; Aug. 13, 1981, P.L. 97-34, Title III, §§ 312(b)(1), (c)(2)-(4), (e)(2), 314(a)(1), 335, 338(a), 95 Stat. 283-286, 297, 298; Sept. 3, 1982, P.L. 97-248, Title II, §§ 237(a), (b), (e)(1), 238(b), (d)(1), (2), 240(b), 242(a), 249(a), 254(a), 96 Stat. 511-513, 520, 521, 527, 533; Jan. 12, 1983, P.L. 97-448, Title I, § 103(c)(10)(A), (d)(2), (g)(2)(A), Title III, § 306(a)(12), 96 Stat. 2377-2379, 2405; April 20, 1983, P.L. 98-21, Title I, § 124(c)(4)(A), 97 Stat. 91; July 18, 1984, P.L. 98-369, Div A, Title II, § 211(b)(5), Title IV, §§ 474(r)(13), 491(e)(4), (5), Title V, §§ 521(a), 524(d)(1), 527(a), (b), 528(b), Title VII, § 713(c)(2)(A), (d)(3), 98 Stat. 754, 842, 853, 865, 872, 875-877, 957, 958; Aug. 23, 1984, P.L. 98-397, Title II, §§ 203(a), 204(a), Title III, § 301(b), 98

Stat. 1440, 1445, 1451; Oct. 22, 1986, P.L. 99-514, Title XI, §§ 1106(d)(1), 1111(a), (b), 1112(b), (d)(1), 1114(b)(7), 1116(a)-(e), 1117(a), 1119(a), 1121(b), 1136(a), 1143(a), 1145(a), 1171(b)(5), 1174(c)(2)(A), 1175(a)(1), 1176(a), Title XVIII, §§ 1848(b), 1852(a)(4)(A), (6), (b)(8), (g), (h)(1), 1879(g)(1), (2), 1898(b)(2)(A), (3)(A), (7)(A), (13)(A), (14)(A), (c)(3), 1899A(10), 100 Stat. 2435, 2439, 2444, 2445, 2451, 2454-2456, 2459, 2463, 2465, 2485, 2490, 2513, 2518, 2519, 2857, 2865-2869, 2906, 2907, 2945, 2948, 2950, 2953, 2958; Dec. 22, 1987, P.L. 100-203, Title IX, § 9341(a), 101 Stat. 1330-369; Nov. 10, 1988, P.L. 100-647, Title I, §§ 1011(c)(7)(A), (d)(4), (e)(3), (g)(1)-(3), (h)(3), (k)(1)(A), (B), (2)-(7), (9), (l)(1)-(5)(A), (6), (7), 1011A(j), (l), 1011B(j)(1), (2), (6), (k)(1), (2), Title VI, §§ 6053(a), 6055(a), 6071(a), (b), 102 Stat. 3458-3460, 3463, 3464, 3468-3470, 3483, 3492, 3493, 3696, 3697, 3705; Nov. 8, 1989, P.L. 101-140, Title II, § 203(a)(5), 103 Stat. 830; Dec. 19, 1989, P.L. 101-239, Title VII, §§ 7311(a), 7811(g)(1), (h)(3), 7816(l), 7881(i)(1)(A), (4)(A), 103 Stat. 2354, 2409, 2421, 2442; Nov. 5, 1990, P.L. 101-508, Title XII, § 12011(b), 104 Stat. 1388-571; July 3, 1992, P.L. 102-318, Title V, §§ 521(b)(5)-(8), 522(a)(1), 106 Stat. 310, 313; Aug. 10, 1993, P.L. 103-66, Title XIII, § 13212(a), 107 Stat. 471; Dec. 8, 1994, P.L. 103-465, Title VII, §§ 732(a), 751(a)(9)(C), 766(b), 776(d), 108 Stat. 5004, 5021, 5037, 5048; Aug. 20, 1996, P.L. 104-188, Title I, §§ 1401(b)(5), (6), 1404(a), 1422(a), (b), 1426(a), 1431(b)(2), (c)(1)(B), 1432(a), (b), 1433(a)-(e), 1441(a), 1443(a), (b), 1445(a), 1459(a), (b), 1704(a), (t)(67), 110 Stat. 1789, 1791, 1800, 1801, 1803-1809, 1811, 1820, 1878, 1890; Aug. 5, 1997, P.L. 105-34, Title XV, §§ 1502(b), 1505(a)(1), (2), (b), 1525(a), 1530(c)(1), Title XVI, § 1601(d)(2)(A), (B), (D), (3), 111 Stat. 1059, 1063, 1072, 1078, 1088, 1089; Dec. 21, 2000, P.L. 106-554, § 1(a)(7) (Title III, § 316(c)), 114 Stat. 2763, 2763A-644; June 7, 2001, P.L. 107-16, Title VI, §§ 611(c), (f)(3), (g)(1), 641(e)(3), 643(b), 646(a)(1), 657(a), 666(a), 115 Stat. 97, 99, 120, 122, 126, 135, 143; March 9, 2002, P.L. 107-147, Title IV, Subtitle B, § 411(o)(2), (q)(1), 116 Stat. 48, 51; Oct. 4, 2004, P.L. 108-311, Title IV, § 407(b), 118 Stat. 1190; Aug. 17, 2006, P.L. 109-280, Title I, Subtitle B, § 114(a), Title VIII, Subtitle C, § 827(b)(1), Subtitle F, § 861(a), (b), Title IX, §§ 901(a)(1), (2)(A), 902(a), (b), (d)(2)(C), (D), (e)(3)(B), 905(b), 120 Stat. 853, 1000, 1020, 1026, 1033, 1038, 1050; June 17, 2008, P.L. 110-245, Title I, § 104(a), 122 Stat. 1626; Dec. 23, 2008, P. L. 110-458, Title I, Subtitle A, §§ 101(d)(2)(A)-(C), 109(a)-(b)(2), Title II, § 201(a), 122 Stat. 5099, 5111, 5116; March 30, 2010, P. L. 111-152, Title I, Subtitle A, § 1004(d)(5), 124 Stat. 1036.)

Notes of Decisions
[includes references to all subdivisions of § 401]

I. IN GENERAL

1. Generally

Summary judgment in favor of company was affirmed because payments made by company under employee stock ownership plan (ESOP) were dividends pursuant to 26 USCS § 404(k) because employees' trust, not participants, owned stock when it was redeemed because ESOP qualified as 26 USCS § 401(a) profit sharing plan, and under 26 USCS § 318 stock owned by § 401(a) employees' trust was not considered owned by its beneficiaries; therefore, payments qualified as dividends under 26 USCS § 316(a). Boise Cascade Corp. v United States (2003, CA9 Idaho) 329 F3d 751, 2003 CDOS 4205, 30 EBC 1581, 2003-1 USTC P 50472, 91 AFTR 2d 2280.

Under 29 USCS § 1144(a), part of Employee Retirement Income Security Act of 1974 (ERISA), 29 USCS § 1001 et seq., ERISA did not preempt unrelated business taxable income (UBIT) system set forth in Cal. Rev. & Tax. Code §§ 17651, 17631, and 23731 because UBIT system had neither connection to nor reference to employee benefit plan; UBIT system did not relate to employee benefit plan because (1) Cal. Rev. & Tax. Code § 17651, statute mandating tax on UBIT, was law of general applicability, (2) UBIT laws did not force trust fiduciaries to act in certain manner, (3) Cal. Rev. & Tax. Code § 17651 did not single out or specifically refer to ERISA plans, (4) reference to 26 USCS § 401(a) in Cal. Rev. & Tax. Code § 17631, statute that exempted organizations from taxation, did not establish that Cal. Rev. & Tax. Code § 17651 referred to ERISA plans, and (5) fact that ERISA plans comprised large percentage of UBIT base was insufficient to satisfy "reference to" prong of preemption analysis. Hattem v Schwarzenegger (2006, CA2 NY) 449 F3d 423.

District court erred in ruling that debtor's Keogh plan had to be maintained under Employee Retirement Income Security Act for debtor to claim exemption under Fla. Stat. § 222.21(2)(a)(1) because § 222.21(2)(a)(1)

required only that profit-sharing plan qualify under § 401(a) of Internal Revenue Code, not that plan comply with Employee Retirement Income Security Act. Baker v Tardif (In re Baker) (2009, CA11 Fla) 590 F.3d 1261, 48 EBC 1543, CCH Bankr L Rptr ¶ 81654, 22 FLW Fed C 333

Contrary to position of surviving spouse, funds in individual retirement account (IRA) established by decedent were not subject to automatic surviving spouse requirements under 26 USCS § 401(a)(11); in arguing that § 401(a)(11) applied, surviving spouse relied on fractured reading of 26 USCS § 408(a)(6)-statute governing IRAs-and omitted regulatory authority of Secretary of Treasury, who had not imposed on IRAs any automatic surviving spouse rights. Nor was 26 USCS § 401(a)(11) applicable to IRAs of its own accord, since IRA at issue did not have required employer sponsorship; thus, there was no basis for imposing on IRA automatic survivor annuity requirements of § 401(a)(11) and overriding beneficiary designations rightfully made by decedent in establishing account. Charles Schwab & Co. v Debickero (2010, CA9 Ariz) 593 F.3d 916, 48 EBC 1705, 2010-1 USTC ¶ 50180, 105 AFTR 2d 692

Because 18 USCS § 3613(a)'s language authorizing plaintiff United States to enforce garnishment order "notwithstanding any other Federal law" sufficiently overrode I.R.C. § 401(a)(13) on pension benefits being inalienable, and § 3613(a)(1) did not exempt state-run pension plans, United States could garnish defendants' pension benefits to satisfy criminal restitution order; Congress exempted certain retirement plans from garnishment under § 3613(a)(1), but not state-run pension plans, and § 3613(c) underscored Congress' directive that restitution orders should be satisfied just as tax liabilities were, and pension benefits could be levied to collect taxes. United States v DeCay (2010, CA5 La) 620 F.3d 534, 49 EBC 2530

Participant, trustee, and fiduciary in pension plan argued that California's unrelated business taxable income (UBTI), Cal. Rev. & Tax Code § 17651, tax both referenced and had impermissible connection with plans covered by Employee Retirement Income Security Act (ERISA), 29 USCS § 1001 et seq.; but California's UBTI tax's sole connection to ERISA-covered plans derived from fact that tax was levied on "every trust" and applied in case of any trust which was exempt under Cal. Rev. & Tax Code § 17631, which incorporated I.R.C. § 401(a) as its definition of tax-exempt organizations; this did not convert tax into one which acted exclusively upon ERISA plans in violation of 29 USCS § 1144. Hattem v Schwarzenegger (2005, SD NY) 35 EBC 1540.

Debtor's interest in 401(k) plan was not excluded from his bankruptcy estate, pursuant to 11 USCS § 541(c)(2), because plan documents made clear that no trustee existed, thus, funds were not held in trust within meaning of 11 USCS § 541(c)(2); separation between funds and debtor's employer and plan administrator was achieved solely by way of group insurance annuity contract, and 26 USCS § 401(f), which operates for federal income tax purposes only, did not transform group insurance contract that employer purchased to fund plan into trust for purposes of 11 USCS § 541(c)(2). Cardiello v Seaton (In re Seaton) (2006, BC WD Pa) 346 BR 389.

New Jersey exemption statute, N.J. Stat. Ann. § 25:2-1(b), could not exempt taxpayer's retirement account established under 26 USCS § 401(k) from federal tax lien because exemptions were limited to those specifically granted by 26 USCS § 6334(c), which did not include retirement accounts; furthermore, Treas. Reg. § 301.6334-1(c) provided that state law could not exempt property from levy. Iannone v Comm'r (2004) 122 TC 287.

Self-employed taxpayer was not entitled to claimed deduction for contributions to simplified employee pension plan (SEP) pursuant to 26 USCS §§ 401(c)(4) and 408(k)(7) where he failed to submit any substantiation of amount claimed. Karkour v Comm'r (2010) TC Memo 2010-124, 99 CCH TCM 1521.

No one method will prevent prohibited discrimination, but each case must be considered on its own merits to determine whether facts and method provided are enough to prevent prohibited discrimination. Rev Rul 68-302 (1968) 1968-1 CB 163.

Exclusive benefit rule of 26 USCS § 401(a) is violated when sponsorship of qualified retirement plan is transferred from employer to unrelated taxpayer and such transfer is not in connection with transfer of business assets, operations or employees from employer to unrelated taxpayer. Rev Rul 2008-45 (2008) 2008-34 IRB 403.

Unpublished Opinions

Unpublished: District court properly dismissed claims against federal defendants for lack of subject matter jurisdiction where: (1) Internal Revenue Service (IRS) did not find prohibited transaction within meaning of 26 USCS § 503(b), but only violation of 26 USCS § 401(a)(2); (2) violation of § 401(a)(2) did not automatically constitute prohibited transaction; (3) tax code contained no mandatory language circumscribing IRS's discretion in enforcing exclusive benefit rule; and (4) because § 401(a)(2) was drawn so that court would have no meaningful standard against which to judge agency's exercise of discretion, Administrative Procedure Act provided no cause of action for members of various retirement funds to challenge federal defendants' actions and did not

waive federal government's sovereign immunity. Borrelli v Sec'y of Treasury (2005, CA2 NY) 155 Fed Appx 556, 96 AFTR 2d 7199.

2. Purpose

Purpose of predecessor to 26 USCS § 401 was to insure that profit-sharing plans were operated for welfare of employees in general and to prevent trust device from being used for benefit of shareholders, officers or high-paid employees, and to make it impossible for any part of corpus or income to be used for purposes other than exclusive benefit of employees; such purpose is to be liberally implemented. McClintock-Trunkey Co. v Commissioner (1954, CA9) 217 F2d 329, 55-1 USTC P 9110, 46 AFTR 1160.

26 USCS § 401 was adopted to prevent pension plans from being used as method of tax avoidance by deferring income for highly-paid employees and to prevent pension plans from being used to provide retirement benefits for highly-paid employees rather than for employees in general. United States v Hall (1968, CA8 ND) 398 F2d 383, 68-2 USTC P 9460, 22 AFTR 2d 5098; Barlow v Marriott Corp. (1971, DC Md) 328 F Supp 624, 71-2 USTC P 9741, 28 AFTR 2d 5873; Container Service Co. v United States (1972, SD Ohio) 345 F Supp 235, 72-2 USTC P 9565, 29 AFTR 2d 1213, affd (1973, CA6 Ohio) 478 F2d 770, 73-1 USTC P 9423, 31 AFTR 2d 1254.

Unpublished Opinions

Unpublished: Debtor's claimed exemption of thrift savings plan account appeared to be valid under terms of 26 USCS § 7701(j)(1), if not under D.C. Code § 15-501(a)(9) as qualified under 26 USCS § 401, or 11 USCS § 522(b)(3)(C) and 26 USCS § 501(a). 2007 Bankr. LEXIS 3529.

3. Private right of action

Public Law 94-236 which guaranteed that parties to agreement pursuant to which board of education agreed to acquire New York City serial bonds and to exchange bonds held by retirement system for long term Municipal Assistance Corporation bonds could not be considered to violate 26 USCS §§ 401 or 503 as result of such purchases did not provide private right of action against United States or federal officials by beneficiary of municipal pension fund. Kirshner v United States (1978, CA2 NY) 603 F2d 234, CCH Fed Secur L Rep P 96617, CCH Fed Secur L Rep P 96936, cert den (1979) 442 US 909, 61 L Ed 2d 274, 99 S Ct 2821 and cert den (1979) 444 US 995, 62 L Ed 2d 426, 100 S Ct 531 and (criticized in Weisman v Oliver Rose Sec. (1987, DC Conn) 1987 US Dist LEXIS 16788) and (criticized in Rocco v Painewebber, Inc. (1989, DC Conn) 1989 US Dist LEXIS 19060) and (ovrld as stated in Maldonado v Dominguez (1998, CA1 Puerto Rico) 137 F3d 1, CCH Fed Secur L Rep P 90159, 40 FR Serv 3d 134).

Former employees, participants in savings plan under 26 USCS § 401(k) and 29 USCS § 1002(34), had standing to seek money damages on behalf of savings plan for alleged breach of fiduciary duty under 29 USCS §§ 1109(a), 1132(a)(2), part of Employee Retirement Income Security Act, 29 USCS § 1001 et seq., notwithstanding fact that alleged fiduciary violations affected only subset of plan participants who invested in company stock fund. In re Schering-Plough Corp. ERISA Litig. (2005, CA3 NJ) 420 F3d 231, 35 EBC 1801, amd (2005, CA3) 2005 US App LEXIS 19826.

There could be no remedy, express or implied, for failure of employer to establish, or once having established, to continue any given profit-sharing plan under 26 USCS § 401(a)(4) prior to enactment of ERISA. Barlow v Marriott Corp. (1971, DC Md) 328 F Supp 624, 71-2 USTC P 9741, 28 AFTR 2d 5873.

26 USCS § 401 provides no substantive right for collection of profit-sharing benefits. Cowan v Keystone Employee Profit Sharing Fund (1978, DC Mass) 449 F Supp 235, affd (1978, CA1 Mass) 586 F2d 888, 1 EBC 1184.

Defendants motion to dismiss plaintiff's ninth and tenth causes of action pursuant to Fed. R. Civ. P. 12(b)(6) was granted; ninth cause of action, which alleged violation of 26 USCS § 401(a)(4), and applicable regulation, 26 C.F.R. § 1.401(a)(4), which prohibited discrimination in contributions or benefits, lacked merit where it was determined that there was no private right of action for alleged violation, and tenth causes of action had to be dismissed because it was wholly derivative of ninth cause of action. Suozzo v Bergreen (2002, SD NY) 30 EBC 1249, 91 AFTR 2d 845.

Where plaintiff former employers sued defendants, their former employer and retirement plan, arguing that amending early retirement benefit package to replace monthly payments with lump-sum payment violated Employee Retirement Income Security Act, claim that amendment violated Internal Revenue Code's anti-

discrimination provisions of I.R.C. § 401 failed; employees lacked standing to bring such claim because no private cause of action arose under § 401. Hall v AMTRAK (2008, DC Dist Col) 559 F Supp 2d 38, 44 EBC 1855.

I.R.C. § 401(a)(25) did not create cause of action under Employee Retirement Income Security Act (ERISA), 29 USCS §§ 1001 et seq.; because, unlike other provisions of Internal Revenue Code, definitely determinable requirement is found only in Internal Revenue Code, and is not expressly incorporated into ERISA, it should not be read into that statute. Bilello v JPMorgan Chase Ret. Plan (2009, SD NY) 46 EBC 2027.

4. Master or prototype plan

Prototype plan was not acceptable where reference must be made to separate self-employment plan to ascertain if requirements for qualification are present in both plans; requirements for qualification where incidental insurance benefits are provided by two or more employer plans do not encompass master or prototype plans. Rev Rul 70-28 (1970) 1970-1 CB 86, amplified (1971) 1971-1 CB 115.

Prototype plan is not acceptable if it is necessary to refer to other documents to establish that incidental death benefit or other requirements of Code are not met. Rev Rul 71-25 (1971) 1971-1 CB 115.

Exemption of master trust from taxation was not adversely affected where master pension plan and trust were adopted by several employers, but coverage under one employer's plan became insufficient to retain exemption and thereby resulted in loss of exemption for that plan, and where as soon as was administratively feasible (here within 30 days) after loss of qualification, trustee of master plan transferred all of funds held under disqualified plan to separate unrelated trust. Rev Rul 71-461 (1971) 1971-2 CB 227.

Regardless of whether master or prototype plan is of corporate or self-employed type, required conforming amendment can be made by individual employer (in which case employer's plan would cease to be master or prototype plan) or by sponsor of plan on behalf of all adopting employers; where master or prototype plan has been adopted by several employers with taxable years beginning on different dates, adopting employers will be protected if conforming amendment by sponsor is made within one year after publication of revenue ruling. Nonbank trustee may be sponsoring organization of master or prototype plan. Rev Proc 84-83 (1984) 1984-2 CB 781, superseded (1989) 1989-1 CB 780, mod (1990) 1990-1 CB 499, mod (1993) 1993-1 CB 538, mod (1993) 1993-2 CB 536, 93 TNT 201-13 and superseded (1994) 1994-1 IRB 10, 94 TNT 4-6, 94 TNT 5-5, superseded (1995) 1995-1 CB 313, 95 TNT 4-17, superseded (1996) 1996-1 CB 385, 96 TNT 5-20, amd, mod (1996) 1996-1 CB 696, mod, amplified (2003) 2003-29 IRB 86 and superseded (2000) 2000-6 IRB 553, mod (2001) 2001-49 IRB 552 and mod (2003) 2003-38 IRB 1 and superseded, mod (2005) 2005-10 IRB 1 and mod (1992) 1992-1 CB 870 and mod (1993) 1993-1 CB 474 and mod (1993) 1993-1 CB 479 and mod (1994) 1994-1 CB 566, 93 TNT 264-2, mod (1995) 1995-1 CB 508, 94 TNT 255-3 and mod (1999) 1999-16 IRB 5, mod (2000) 2000-26 IRB 1272, mod (2001) 2001-1 IRB 194, superseded (2002) 2002-1 IRB 203, mod (2002) 2002-19 IRB 911, amplified (2003) 2003-50 IRB 1 and mod (2002) 2002-24 IRB 1176, mod (2002) 2003-2 IRB 1 and superseded (2003) 2003-1 IRB 191, superseded (2004) 2004-1 IRB 197, mod (2004) 2004-7 IRB 1 and superseded (2005) 2005-1 IRB 200.

Where plaintiff former employers sued defendants, their former employer and retirement plan, arguing that amending early retirement benefit package to replace monthly payments with lump-sum payment violated Employee Retirement Income Security Act, claim that amendment violated Internal Revenue Code's anti-discrimination provisions of I.R.C. § 401 failed; employees lacked standing to bring such claim because no private cause of action arose under § 401. Hall v AMTRAK (2008, DC Dist Col) 559 F Supp 2d 38, 44 EBC 1855

I.R.C. § 401(a)(25) did not create cause of action under Employee Retirement Income Security Act (ERISA), 29 USCS §§ 1001 et seq.; because, unlike other provisions of Internal Revenue Code, definitely determinable requirement is found only in Internal Revenue Code, and is not expressly incorporated into ERISA, it should not be read into that statute. Bilello v JPMorgan Chase Ret. Plan (2009, SD NY) 46 EBC 2027

5. Opinion letters

Commissioner of Internal Revenue did not abuse discretion in retroactively applying determination that taxpayer's profit-sharing plan was not entitled to qualified status under 26 USCS § 401(a) where plan was instituted in 1960 following receipt of IRS determination letter, on December 28, 1973, taxpayer retroactively to May 1, 1973 amended plan's eligibility criteria, and in 1974, IRS informed taxpayer that it was revoking, retroactively effective to May 1, 1971, its prior determination that plan, as it stood before 1973 amendment by taxpayer, was qualified, since neither taxpayer's reliance nor good faith require Commissioner to make ruling prospective only; Commissioner did not limit his own power to determine retroactive effect where applicable revenue ruling af-

fecting qualification of plan was issued prior to beginning of taxpayer's taxable year ending April 30, 1971, and taxpayer was therefore required to amend its plan during taxable year to comply with ruling. Wisconsin Nipple & Fabricating Corp. v Commissioner (1978, CA7) 581 F2d 1235, 1 EBC 1169, 78-2 USTC P 9606, 42 AFTR 2d 5525.

Plan is not invalid and did not need Internal Revenue Service approval prior to being put into operation as opposed to Treasury contention that since plan had not been filed and approved by Internal Revenue Service there was no plan. Sherman Constr. Corp. v United States (1973, ED Va) 358 F Supp 446, 73-1 USTC P 9258, 31 AFTR 2d 1000.

Internal Revenue Service did not abuse discretion in retroactively revoking determination that retirement plan was qualified where material fact was omitted in application for qualification. Oakton Distributors, Inc. v Commissioner (1979) 73 TC 182.

Employer who adopts standardized form defined benefit plan may rely on opinion letters to sponsoring organization with respect to plan only if employer's standardized defined benefit plan is in compliance with participation requirements of § 401(a)(26); where employer adopts nonstandardized form plan, employer must obtain favorable determination letter in order to have reliance; employer who adopted prototype plan which received favorable opinion letter under Rev Proc 84-23 may continue to rely on that letter if sponsoring organization submits replacement plan by October 31, 1989, and employer adopts approved replacement plan by end of remedial amendment period under § 401(b) or last day of 12 month beginning after favorable opinion letter is issued, whichever is later. Rev Proc 89-9 (1989) 1989-1 CB 780, mod (1990) 1990-1 CB 499, mod (1993) 1993-1 CB 538, mod (1993) 1993-2 CB 536, 93 TNT 201-13 and superseded (1994) 1994-1 IRB 10, 94 TNT 4-6, 94 TNT 5-5, superseded (1995) 1995-1 CB 313, 95 TNT 4-17, superseded (1996) 1996-1 CB 385, 96 TNT 5-20, amd, mod (1996) 1996-1 CB 696, mod, amplified (2003) 2003-29 IRB 86 and superseded (2000) 2000-6 IRB 553, mod (2001) 2001-49 IRB 552 and mod (2003) 2003-38 IRB 1 and superseded, mod (2005) 2005-10 IRB 1 and mod (1992) 1992-1 CB 870 and mod (1993) 1993-1 CB 474 and mod (1993) 1993-1 CB 479 and mod (1994) 1994-1 CB 566, 93 TNT 264-2, mod (1995) 1995-1 CB 508, 94 TNT 255-3 and mod (1999) 1999-16 IRB 5, mod (2000) 2000-26 IRB 1272, mod (2001) 2001-1 IRB 194, superseded (2002) 2002-1 IRB 203, mod (2002) 2002-19 IRB 911, amplified (2003) 2003-50 IRB 1 and mod (2002) 2002-24 IRB 1176, mod (2002) 2003-2 IRB 1 and superseded (2003) 2003-1 IRB 191, superseded (2004) 2004-1 IRB 197, mod (2004) 2004-7 IRB 1 and superseded (2005) 2005-1 IRB 200.

Opinion letters as to certain types of master and prototype contribution plans will not be issued with respect to: (1) plan submitted by sponsor other than trade or professional association, bank, insurance company, or regulated investment company; (2) plan approved prior to September 19, 1975; (3) money purchase pension plan (including target benefit plan) that excludes employees from participation on basis of maximum age; (4) plan providing for effect of one year break in service for participation or vesting purposes; (5) plan (including target benefit plan) under which prohibited discrimination is to be tested by reference to benefits rather than contributions; (6) plan permitting return of employer contributions for any reason other than plan's failure to qualify or because of excess remaining after termination; (7) plan providing for forfeitures in event of withdrawals of employee contributions or increments; (8) plan permitting forfeiture of employee's accrued benefit for cause; or (9) plan permitting forfeiture of terminated employee's nonvested interest prior break in service; nor will IRS express opinions relating to provisions on qualified joint and survivor annuities, mergers, consolidations, restrictions on assignment of plan benefits (26 USCS § 401(a)(11), (12), (13)), or on limitation on benefits and contributions (26 USCS § 415). Rev Proc 75-42 (1975) 1975-2 CB 575, superseded (1975) 1975-2 CB 592, superseded (1980) 1980-1 CB 681, superseded (1984) 1984-1 CB 457, superseded (1989) 1989-1 CB 780, mod (1990) 1990-1 CB 499, mod (1993) 1993-1 CB 538, mod (1993) 1993-2 CB 536, 93 TNT 201-13 and superseded (1994) 1994-1 IRB 10, 94 TNT 4-6, 94 TNT 5-5, superseded (1995) 1995-1 CB 313, 95 TNT 4-17, superseded (1996) 1996-1 CB 385, 96 TNT 5-20, amd, mod (1996) 1996-1 CB 696, mod, amplified (2003) 2003-29 IRB 86 and superseded (2000) 2000-6 IRB 553, mod (2001) 2001-49 IRB 552 and mod (2003) 2003-38 IRB 1 and superseded, mod (2005) 2005-10 IRB 1 and mod (1992) 1992-1 CB 870 and mod (1993) 1993-1 CB 474 and mod (1993) 1993-1 CB 479 and mod (1994) 1994-1 CB 566, 93 TNT 264-2, mod (1995) 1995-1 CB 508, 94 TNT 255-3 and mod (1999) 1999-16 IRB 5, mod (2000) 2000-26 IRB 1272, mod (2001) 2001-1 IRB 194, superseded (2002) 2002-1 IRB 203, mod (2002) 2002-19 IRB 911, amplified (2003) 2003-50 IRB 1 and mod (2002) 2002-24 IRB 1176, mod (2002) 2003-2 IRB 1 and superseded (2003) 2003-1 IRB 191, superseded (2004) 2004-1 IRB 197, mod (2004) 2004-7 IRB 1 and superseded (2005) 2005-1 IRB 200.

6. Multiemployer plans

Pension plan adopted for benefit of employees of union was not for exclusive benefit of employees or beneficiaries where plan was not adopted by any other employer and several participants in plan were not employees of union. Rev Rul 69-493 (1969) 1969-2 CB 88.

Any reasonable method of allocating costs is acceptable if consistently used where separate computations of costs are not feasible and allocation of costs in proportion to participating payrolls is not reasonable under all circumstances where 2 or more employers maintain joint pension or annuity plan. Rev Rul 69-525 (1969) 1969-2 CB 102.

7. Parent and subsidiary corporations

Parent and subsidiary can have common profit-sharing plan; parent-subsidiary commonly-trusteed profit-sharing plan did not violate anti-diversion rule even though it was possible that part of contribution made by one corporation would be allocated to other; there was no diversion of trust assets since, once employers' contributions were allocated to employees' individual accounts, they could not be reallocated to other employees' accounts. Rev Rul 69-35 (1969) 1969-1 CB 117.

8. Interrelationship of plans

Retired employee who worked for employer's English affiliate until he was transferred to its U.S. affiliate was properly granted judgment and attorney's fees in his ERISA action against defendants, employer and its retirement plan, because (1) exclusion of "qualified defined benefit plan" in retirement plan of employer's U.S. affiliate did not apply to retirement plan of employer's English affiliate as "qualified" plan meant U.S. plan under 26 USCS §§ 401(a)(5)(D)(i), 1060(e)(2)(A)(ii) and 26 CFR § 1.401-4(c)(7)(ii); (2) defendants laid no foundation for comparing English plan to U.S. "qualified defined benefit plan"; (3) U.S. plan restricted "employees" to citizens or residents of U.S., and employee was neither when he was working for English affiliate; (4) 1997 amendment to plan did not apply to employee; (5) provisions of ERISA plan had to be in writing under 29 U.S.C. § 1102(a)(1), so employer's common practice as to offset for foreign plans did not modify U.S. plan; and (6) defendants' rejection of employee's claim was not substantially justified, so district court committed no error in awarding employee his reasonable attorneys' fees and costs under 29 USCS § 1132(g). Bandak v Eli Lilly & Co. Ret. Plan (2009, CA7 Ind) 587 F.3d 798, 48 EBC 1001.

Transferring funds from non-exempt employees' welfare fund to employees' trust forming part of pension plan will not, of itself, disqualify plan and trust. Rev Rul 68-223 (1968) 1968-1 CB 154.

Employer who has in effect single qualified annuity contracts for exclusive benefit of both salaried and wage-earning employees will not affect plan's qualified status by transferring actuarial excess funds from contract covering wage-earning employees to similar contract covering salaried employees. Rev Rul 68-242 (1968) 1968-1 CB 156.

Parent-subsidiary commonly-trusteed profit-sharing plan did not violate anti-diversion rule even though it was possible that part of contribution made by one corporation would be allocated to other; there was no diversion of trust assets since, once employers' contributions were allocated to employees' individual accounts, they could not be reallocated to other employees' accounts. Rev Rul 69-35 (1969) 1969-1 CB 117.

Employee who has vested right under profit-sharing plan may, if plan so provides, authorize transfer of all or part of his interest to make up deficiency in employer's contribution under pension or annuity plan; qualification of profit-sharing plan in such case is not affected by amendment to permit funds to be transferred to pension plan; however, any funds so transferred will be includible in employee's gross income to same extent as if such funds had been distributed directly to employee and will be treated as employee contributions under pension plan. Rev Rul 69-295 (1969) 1969-1 CB 117.

Employer's obligation to provide pension benefits was determinable where contributions made under profit-sharing plan during period that both profit-sharing plan and pension plans were maintained, and trust earnings credited during that period, did not reduce or otherwise affect employer's liability to make contributions under pension plan, and since amount of reduction in pension benefit was known when pension plan went into effect; each plan will therefore qualify. Rev Rul 70-578 (1970) 1970-2 CB 86.

Transfer of funds from one qualified trust to another qualified trust, even though first was established by partnership and second was established by partnership's corporate successor, did not result in distribution; funds transferred to second trust from first trust were subject, under second plan, to same restrictions they would have had if they had remained in first trust. Rev Rul 71-541 (1971) 1971-2 CB 209.

Corporation that contributes to union-negotiated pension plan covering only union employees may also set up second pension plan for executives and other non-union employees; taken together both plans constitute one qualified plan, where there is no apparent reason to foresee that eventual benefits would be likely to discriminate in favor of executive employees. Rev Rul 72-304 (1972) 1972-1 CB 112, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Plan does not satisfy nondiscrimination requirements of 26 USCS § 401(a) where it consists of profit-sharing plan for salaried employees calling for contributions of 15 percent of salary and benefits of 3 percent of salary and pension plan for hourly employees calling for contributions of 3 percent of salary and benefits of 1.33 percent of salary. Rev Rul 81-5 (1981) 1981-1 CB 171, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

9. Integration with social security

While as general legal proposition, "integration" of private plan with social security can "save" plan that would not otherwise qualify by saving both features of plan that seem to discriminate by excluding those employees earning less than social security base wage, "integration" will not save plan that otherwise discriminates in favor of prohibited group of employees. Cornell-Young Co. v United States (1972, CA5 Ga) 469 F2d 1318, 73-1 USTC P 9107, 31 AFTR 2d 372.

If excess plan of either fixed benefit or unit credit type that does not provide for payment of any disability benefits involving integration prior to normal retirement age, and if amount of such plan benefit does not exceed maximum normal retirement benefit that would be permitted if employee's service had continued to his normal retirement date, plan disability benefit will be considered properly integrated provided that disability benefit is payable only after normal retirement age in accordance with eligibility conditions set forth in Rev Rul 62-152, 1962-2 CB 126, amplified by Rev Rul 65-107, 1965-1 CB 173. Rev Rul 68-315 (1968) 1968-1 CB 160.

Test for discrimination "within or without the plan" does not apply to plan which qualifies without being integrated with governmental program such as Social Security Act; therefore, qualified unintegrated plan which met percentage test of predecessor to 26 USCS § 410 did not need to provide comparable benefits for employees excluded from test. Rev Rul 68-301 (1968) 1968-1 CB 161.

Applicable integration limit for unit-benefit plan expressed as rate for each year of participation can be increased by 1/15 of rate of employee contributions if (1) benefits under plan are based on "average annual compensation" and (2) plan does not use life insurance contracts to provide part of benefits. Rev Rul 68-369 (1968) 1968-2 CB 172, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Integrated plan means plan which is not considered discriminatory because of differences in proportionate benefits provided under plan which favor more highly paid employees because differences are considered offset by social security benefits attributable to employer's social security contributions. Rev Rul 69-4 (1969) 1969-1 CB 118, amplified (1969) 1969-2 CB 92 and amplified (1969) 1969-2 CB 94 and amplified (1969) 1969-2 CB 94 and amplified (1970) 1970-1 CB 94 and amplified (1970) 1970-2 CB 87 and amplified (1970) 1970-2 CB 88 and obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Private pension annuity, profit-sharing or stock bonus plan may be integrated with social security by excluding from coverage employees whose compensation does not exceed applicable integration level; employee's "compensation" for purposes of integration test may be defined as amount of compensation that would be subject to social security tax without dollar limitation; "compensation" may also be defined as compensation inclusive or exclusive of bonuses, commissions or overtime pay, or as basic compensation, or as regular rate of compensation, provided whatever definition is used does not discriminate in favor of highly compensated employees. Rev Rul 69-503 (1969) 1969-2 CB 94.

Plan was not integrated where benefit rate applicable to portion of average annual compensation in excess of $ 3,000 but not in excess of $ 4,800 exceeded 16 2/3 % (i.e., $ 500 divided by $ 3,000), since rates of benefit did not meet requirements of either basic limitation of 30% or alternative limitation. Rev Rul 69-586 (1969) 1969-2 CB 94.

"Integration level", for employee whose normal retirement age is over 65, may be determined from Table I or Table II of § 3.02 of Rev Rul 69-4 by subtracting 65 from year in which employee reaches normal retirement age. Rev Rul 70-42 (1970) 1970-1 CB 94.

Offset plan is integrated if it satisfies Rev Rul 61-147 or if offset to any employee's benefit does not exceed 7/8 of retirement annuity (other than any supplemental annuity) for which employee is immediately eligible under Railroad Retirement Act as in effect in 1968 or at time offset is first applied. Rev Rul 70-149 (1970) 1970-1 CB 95, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Unit benefit excess plan which provides that benefits will vary after retirement with fluctuations of specified cost-of-living index, regardless of whether actual compensation or average annual compensation formula is used initially to determine benefits, is integrated; similar conclusion is applicable in case of offset or a flat-benefit excess type of benefit plan. Rev Rul 70-448 (1970) 1970-2 CB 87.

If plan satisfies requirements of Revenue Rulings except that, in case of death before retirement, it provides benefit to employee's spouse of straight life annuity in amount equal to employee's accrued benefit (without regard to age or sex of employee's spouse), such plan is integrated if benefits or offset to benefits does not exceed 7/9 of limitation which would be applicable if plan did not provide such benefits. Rev Rul 70-610 (1970) 1970-2 CB 88.

Plan, which provided that if before reaching age 65 employee became disabled as defined in plan and if employee was eligible for and received benefits under Social Security from date of his disability continuously until age 65, then employee would receive benefit under plan beginning at age 65 and payable for life thereafter equal to benefit that would have been payable if he had remained in service with employer with no change in compensation after becoming disabled and before reaching age 65, was "integrated" where rules were uniformly and consistently applicable to all employees in similar circumstances and no integrated disability benefits were payable before age 65. Rev Rul 72-492 (1972) 1972-2 CB 222.

Under plan which allows employee to retire before age 62 and provides for payments of larger monthly pension before he starts to receive tax-free Social Security benefits and smaller pension after he commences to receive such benefits, no part of larger amount received prior to age 62 constitutes tax-free Social Security benefits but represent taxable distributions from qualified plan. Rev Rul 74-143 (1974) 1974-1 CB 100.

For purposes of determining compensation and integrated plan, each increase in taxable wage base designated for 1978 through 1981 will be considered to be enacted as of January 1 in calendar year for which base applies; for purposes of determining offset in any integrated plan, each increase in taxable wage base designated for 1978 through 1981 will be considered to be enacted as of first day of calendar year for which such taxable wage base applies; thus covered compensation and offset for any participant who separates from service in 1978 shall be determined without regard to any increases in taxable wage base above $ 17,700 taxable wage base in 1971. Rev Rul 78-92 (1978) 1978-1 CB 118.

Employee benefit plans of two employers related in manner described in 26 USCS § 414(b) or (c) that separately are fully integrated with social security and that may cover some of same employees do not satisfy integration rule of 26 USCS § 401(a)(5) and may violate §§ 401(a)(4) and 410(b). Rev Rul 79-236 (1979) 1979-2 CB 160, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Benefits provided under pension plan will not fail to be definitely determinable merely because plan provides that pension benefits shall be suspended for any period of time during which primary insurance benefits under Social Security Act are discontinued because of employment after retirement date. Rev Rul 80-122 (1980) 1980-1 CB 84.

10. Validity of trust

Trusts were not employee trusts under predecessor to 26 USCS § 401 where company had approximately 350 employees in taxable year, never adopted written program or definite plan under which its employees generally might secure retirement or pension benefits, and only benefits it provided for trust it did set up were for 2 stockholders who were principal officers of the company. Hubbell v Commissioner (1945, CA6) 150 F2d 516, 45-2 USTC P 9355, 34 AFTR 42, 161 ALR 764.

Corporation formed for exclusive purpose of holding funds paid by employer for sole benefit of employees in profit and stock-sharing plan was "trust" under predecessor to 26 USCS § 401. Tavannes Watch Co. v Commissioner (1949, CA2) 176 F2d 211, 49-2 USTC P 9338, 38 AFTR 286.

Employer was exempt under predecessor to 26 USCS § 401 where he created irrevocable trust by deposit of $ 1,000,000 in one single payment for benefit of employees even though plan did not call for current donations in future. Lincoln Electric Co. Employees' Profit-Sharing Trust v Commissioner (1951, CA6) 190 F2d 326, 51-2 USTC P 9371, 40 AFTR 1018.

Employer plan is retroactively disqualified because of its inadvertent inclusion of employer's president and 50% owner who was too old to be covered; injury to employees as result of invalidity is factor to be considered in disqualifying plan. Time Oil Co. v Commissioner (1958, CA9) 258 F2d 237, 58-2 USTC P 9769, 2 AFTR 2d 5513.

Strict deference to IRS rulings for determining whether trust is operated for exclusive benefit of employees is not required; requirement that plan be operated for exclusive benefit of employees should not be interpreted lit-

erally since requirement does not preclude, in every case, investment in business which is controlled by same management or shareholders as employer contribution, but it does make such transactions particularly suspect. Central Motor Co. v United States (1978, CA10 NM) 583 F2d 470, 78-2 USTC P 9608, 42 AFTR 2d 5581.

Under 26 USCS § 401(a)(2), it makes no difference that profit-sharing plan under which employer made contributions to trust fund could be amended or terminated as long as trust itself is held inviolate and irrevocable. Wallace v United States (1968, ED Ark) 294 F Supp 1225, 68-2 USTC P 9669, 22 AFTR 2d 5880.

Contributions to profit sharing plan for 1964-1965 are allowed where retirement plan funded by annuity contract issued by insurance company created in 1935 under law that did not require trustee received favorable Internal Revenue Service ruling in 1945, and in 1964, taxpayer created profit-sharing plan, again funded by annuity contract, which it thought was extension of previously approved plan, notwithstanding taxpayer neglected to formally create trust because execution of annuity contract created de facto trust with enforceable fiduciary obligations between insurance company, taxpayer and taxpayer's employees sufficient to indicate necessary intent on taxpayer's part to create trust. Trenton Times Corp. v United States (1973, DC NJ) 361 F Supp 222, 73-2 USTC P 9639, 32 AFTR 2d 5586.

Under "qualified trust" provisions in 26 USCS § 401(f), arrangement can be "trust" for tax purposes even if it does not otherwise meet definition of trust under applicable law; specifically, under § 401(f)(2), certain custodial accounts and annuity contracts are to be treated as qualified trusts, but only for purposes of Internal Revenue Code, even though they are not trusts under other law. Rhiel v OhioHealth Corp. (In re Hunter) (2008, BC SD Ohio) 380 BR 753.

Trust funds were not used for exclusive benefit of employees where trust made unsecured loans (totaling about 84% of its assets) to corporation and its shareholders, failed to pay benefits to survivors of employees who died, and reallocated vested benefits of terminated employees to remaining participants, which was contrary to plan and discriminatory. Ma-Tran Corp. v Commissioner (1978) 70 TC 158.

Trust providing for employee contributions up to 10% of their wages plus matching employer contributions, and also providing for mandatory lump sum cash distributions to participating employees on retirement or other separation from service, does not qualify as either profit-sharing, pension, or stock bonus trust. Rev Rul 62-195 (1962) 1962-2 CB 125.

It is not necessary for trust instrument to include specific provision barring diversion of corpus or income for purposes other than exclusive benefit of employees or their beneficiaries; trust instrument providing that funds received were to be held for exclusive benefit of employees or their beneficiaries, and that corporation could amend trust provided amendment did not have effect of revesting any part of trust in employer or diverting any part of trust to purposes other than exclusive benefit of participants or their beneficiaries definitely and affirmatively prevented diversion. Rev Rul 73-446 (1973) 1973-2 CB 132.

Defined benefit pension plan will not fail to qualify under 26 USCS § 401(a) merely because it provides for normal retirement age of less than 65; however, retirement benefits commencing prior to age 55 may not exceed limitation provided in 26 USCS § 415(b)(1)(A) as adjusted pursuant to § 415(b)(2)(C). Rev Rul 78-120 (1978) 1978-1 CB 117.

11. Validity of plan

Summary judgment in favor of employer with regard to employee's claim that employer's retirement plan violated Employee Retirement Income Security Act of 1974 (ERISA), 29 USCS §§ 1001 et seq., because it excluded hourly employees was affirmed because employer could limit plan participation to certain groups or classifications of employees, as long as that limitation was not based upon age or length of service, 29 USCS § 1052(a)(4), 26 USCS §§ 410(a), 401(a)(5); therefore, there was no contrary directive and court was required to enforce plan as written. Bauer v Summit Bancorp (2003, CA3 NJ) 325 F3d 155, 30 EBC 1225.

In case in which defendant appealed his conviction for violating 18 USCS § 664, he unsuccessfully challenged district court's exclusion of his expert's testimony; district court correctly concluded that expert's testimony, to extent it dealt with whether plan had ceased to be tax qualified or otherwise failed to comply with Internal Revenue Code (Code), was irrelevant to issue of whether plan was subject to any provision of Title I of Employee Retirement Income Security Act of 1974 (ERISA), 29 USCS §§ 1001 et seq., and, to extent that expert planned to testify that plan was no longer ERISA-qualified due to being out of compliance with Code requirements, that testimony was legally incorrect under Baker and Sewell decisions. United States v Wofford (2009, CA5 Tex) 560 F.3d 341, 46 EBC 1180.

I.R.C. § 401 sets forth basic prerequisites to enjoy preferential tax treatment Code provides for retirement plans; thus, Employee Retirement Income Security Act of 1974 (ERISA), 29 USCS §§ 1001-1461, plan that fails

to comply with § 401(a)(25) would, for all practical purposes, fail altogether. Thompson v Ret. Plan for Emples. of S.C. Johnson & Son, Inc. (2011, CA7 Wis) 651 F.3d 600, reh den, reh, en banc, den (2011, CA7 Wis) 2011 US App LEXIS 16612

Cash Balance Plan amendment was consistent with ERISA because use of closing market price on designated day of each of five years was consistent with § 3(1) of ERISA that "adequate consideration" for purposes of security for which there was generally recognized market was price of security prevailing on national securities exchange, which was registered under § 6 of Securities Exchange Act of 1934; moreover, although inflated value of defendant company's stock had effect of severely reducing ERISA plan participants and beneficiaries' pension benefits, Internal Revenue Code did not require that defined benefit be fixed, but only that it be determinable according to criteria specified in advance that did not permit plan to play favorites. Tittle v Enron Corp. (In re Enron Corp. Sec. Derivative & ERISA Litig.) (2003, SD Tex) 284 F Supp 2d 511, 31 EBC 2281.

Deferred retirement option plan (DROP) retirement benefits from Baltimore City Fire and Police Employees' Retirement System were adjudged pension payments within meaning of Qualified Domestic Relations Orders (QDROs) entered in two retirees' divorces thereby entitling their former spouses to portion of DROP payments; in declaratory judgment action brought by two retirees against their former spouses, Retirement System, city's mayor, and its council, reviewing court affirmed decision of Board of Trustees of Retirement System that former spouses were entitled to portion of DROP payments because plain language of QDROs in each case unambiguously made scope of pension benefits coextensive with scope of benefits offered by Retirement System, which treated DROP benefits as pension benefits under I.R.C. 401(a). Dennis v Fire & Police Emples. Ret. Sys. (2006, Md) 890 A2d 737.

Bankruptcy debtor's pension plan was not exempt under Fla. Stat. § 222.21(2)(a)(1) since debtor was only participant in plan, and thus plan was not tax-exempt under 26 USCS § 401(a) as plan for exclusive benefit of employees of employer. In re Baker (2009, BC MD Fla) 401 BR 500.

Corporation was not entitled to deduction for any contributions made under its profit-sharing plan because its plan discriminated in favor of its sole stockholder, who was highly compensated employee as defined in 26 USCS § 414(q); further, plan did not constitute "qualified profit-sharing plan" under 26 USCS § 401(a); any contributions that corporation made under that plan and claimed as deductions for years at issue and that were disallowed by court had to be included in sole stockholder's income as constructive dividends for her taxable years in which corporation made those contributions. DKD Enters. v Comm'r (2011) TC Memo 2011-29, 101 CCH TCM 1121

Plan does not qualify under 26 USCS § 401(a) where plan participants have right to acquire, hold, and dispose of amount attributable to their account balances in plan. Rev Rul 89-52 (1989) 1989-1 CB 110.

Profit-sharing plan did not qualify until communicated to employees although plan had been reduced to writing and approved by employer in earlier year. Rev Rul 72-509 (1972) 1972-2 CB 221.

Plan does not qualify where it provides that employees who do not meet specific eligibility requirements set out in the plan may nevertheless be eligible to participate if they satisfy "alternate eligibility requirements as approved by the trustees", since definite provisions are not set forth in pension arrangement defining what alternative requirements may be approved by trustee. Rev Rul 74-466 (1974) 1974-2 CB 131.

Union-negotiated pension plan for hourly paid employees that provides for fixed rate of contributions and definite benefit formula that does not involve employer discretion is permanent program within meaning of Regulation § 1.401-1(b)(2) even though collective bargaining agreement is renegotiated after 5 years; plan also meets requirement that benefits be definitely determinable and that deduction limitations and minimum funding be based upon cost of those benefits. Rev Proc 83-83 (1983) 1983-2 CB 598.

Multiple employer defined benefit plan must credit employees for all years of service whether or not employer makes required contributions to plan; plan that does not credit all years of service does not provide definitely determinable benefits as required by regulation § 1.401-1(b)(1)(i) and does not satisfy minimum participation and vesting standards of 26 USCS §§ 410 and 411. Rev Rul 85-130 (1985) 1985-2 CB 137.

Taxpayer's employee stock ownership plan (ESOP) was not qualified under I.R.C. §§ 401(a) and 501(a) because ESOP was not timely amended to include provisions required by I.R.C. §§ 402(c)(4)(C), 414(n)(2)(C), (q), and (u), and 415(c)(3), did not follow vesting schedule required by I.R.C. § 411(a)(2)(B), and failed to use independent appraiser to appraise employer securities as required by I.R.C. § 401(a)(28)(C). Hollen v Comm'r (2011) 50 EBC 1777, TC Memo 2011-2, 101 CCH TCM 1004

12. Failure of new plan to qualify

In case of new plans, provision permitting reversion to employer of entire assets of plan, on failure of plan to qualify initially, will continue to be allowed. Rev Rul 77-200 (1977) 1977-1 CB 98, superseded (1991) 1991-1 CB 57.

13. Credit for service with former employer

Corporation's retirement plan is not qualified employee benefit plan because it gives former proprietor credit for services rendered as self-employed person rather than as true employee. Rev Rul 69-36 (1969) 1969-1 CB 128.

Method of reallocating forfeitures to participating employees of corporate affiliates is acceptable, and does not affect continued qualification of profit-sharing plan where corporation and each of its ten subsidiaries adopted same plan, plan's contribution formula requires contribution of 20% of consolidated net profits, employers' contributions are made by employers that have profits and are allocated on basis of each employer's share of total gross receipts, and plan also provides for graduated vesting of participants' interests and for reallocation of forfeitures arising from termination of employee's employment under same formula employers' contributions are allocated. Rev Rul 71-148 (1971) 1971-1 CB 117.

Plan does not qualify where corporation, successor to partnership, provided in its profit-sharing plan for certain credits based upon past service (including service by partners with 10% or less interest) with employer or predecessor business, since partners are not employees and therefore no partners of predecessor partnership can qualify for benefits based on their partnership interest. Rev Rul 71-502 (1971) 1971-2 CB 199.

14. Life insurance and death benefits protection

Plan providing for incidental life insurance protection and annuity benefits is not discriminatory because contributions made for annuity benefits for uninsurable participant are equal to contributions made for combined insurance and annuity benefits for insurable participant. Rev Rul 68-245 (1968) 1968-1 CB 160, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Death benefits permitted by Rev Rul 67-426 may be provided by purchase of life insurance or otherwise; if life insurance is purchased, benefit is considered to be payment on death; although cost of life insurance protection is currently taxable as distribution, it is not prohibited benefit provided before retirement or separation from service. Rev Rul 68-299 (1968) 1968-1 CB 157, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Life insurance protection purchased under qualified plan is considered paid first from employer contributions and trust income, and is includible in employee's gross income unless plan provides that employees' contribution is applied first; application of participants' contributions first to cost of life insurance element will not generally be considered as discriminatory. Rev Rul 68-390 (1968) 1968-2 CB 175.

Employee's election of extended term life insurance option, available under retirement income contract purchased for him by exempt organization, will cause accumulated policy reserve to be included in his gross income in taxable year option is elected. Rev Rul 68-648 (1968) 1968-2 CB 49.

Plan qualifies if any or all voluntary employee contributions may, at direction of contributing employee, be used to purchase additional life insurance. Rev Rul 69-408 (1969) 1969-2 CB 58.

Pension plan that permits participant to invest portion of his account in life insurance contracts on life of anyone in whom he has insurable interest, and which further provides that in case of death of insured proceeds of contract will be allocated to participant's account and paid to him when his other plan benefits become payable, does not qualify, because provision for investments in life insurance contracts is not one that provides incidental death benefits through means of insurance on life of employee as contemplated by Regs. § 1.401-1(b)(1)(i). Rev Rul 69-523 (1969) 1969-2 CB 90.

Employee's profit-sharing plan remains qualified after amendment to discontinue employer contributions even though amendment allows employees to keep in force life insurance contracts on their lives. Rev Rul 70-369 (1970) 1970-2 CB 84.

Table showing what percentages of retirement benefits will be regarded as "incidental" where employee must have attained various ages in order for his spouse to be entitled to death benefit does not apply in any case where spouse's benefit is not directly proportional to accrued benefit or anticipated normal retirement benefit, as case may be, or where facts otherwise differ materially from facts given for plan, e.g. where there is significant limitation on years of actual service which may be credited for purpose of computing spouse's benefit. Rev Rul 70-611 (1970) 1970-2 CB 89, mod (1985) 1985-1 CB 132.

Life insurance contract is property other than money; thus, sole proprietor who made contribution to trust of life insurance contract issued, in prior year, on his life engaged in prohibited transaction. Rev Rul 71-546 (1971) 1971-2 CB 239.

Plan that provides pre-retirement death benefit for each participant equal to amount of pension benefit funded for that participant as of date of his death does not qualify, since pension plan must provide "definitely determinable" retirement benefits; pre-retirement death benefits here depend on amount of pension benefits funded as of date of each participant's death and therefore do not meet "definitely determinable" requirement. Rev Rul 72-97 (1972) 1972-1 CB 106.

Designating variable percentage of contributions to purchase life insurance was discriminatory where money purchase plan required purchase of life insurance protection with 49 percent of amount contributed for each employee each year and employees over age 35, all of whom were in fact officers, could specify that less than 49 percent of their share was to be used to buy life insurance protection which gave officers greater investment flexibility with respect to their funds than other employees. Rev Rul 73-383 (1973) 1973-2 CB 137, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Death benefits under trusteed pension plan funded by ordinary life insurance contracts plus auxiliary fund are "incidental" within meaning of Regs. § 1.401-1(b)(1)(i) where death benefit is approximately equal to death benefit provided under typical level premium retirement income contract with face amount of 100 times anticipated monthly retirement benefit; but death benefit equal to sum of proceeds of ordinary life insurance contracts plus amount of employee's account in auxiliary fund would exceed death benefit under typical level premium retirement income contract with face amount of 100 times anticipated monthly benefit, and would not be "incidental" within meaning of regulation. Rev Rul 68-453 (1968) 1968-2 CB 163, clarified, mod (1974) 1974-2 CB 126.

Cost of decreasing amount whole life insurance policy used to provide insurance benefits under qualified profit-sharing or defined contribution plan is considered incidental and plan is qualified if aggregate premiums of each participant never exceed 25 percent of fund allocated to participant's account. Rev Rul 76-353 (1976) 1976-2 CB 112.

Plan established by employer providing employees only such benefits as are afforded through purchase of ordinary life insurance contracts which are converted to life annuities at normal retirement date does not constitute pension plan within meaning of 26 USCS § 401(a). Rev Rul 81-162 (1981) 1981-1 CB 169.

Supplemental shutdown benefits that are layoff or severance type benefits may not be provided within qualified pension plan; shutdown benefits may be offered by qualified plan if benefits are payable to laid off employees in amounts that would commence before social security benefits become payable, do not exceed social security benefits, and terminate upon receipt of social security benefits; shutdown benefits that continue beyond normal retirement age are retirement benefits that may be offered under qualified plan. GCM 39869 (April 6, 1992).

15. Medical benefits

Diversion of amounts from pension plan account to § 401(h) account violates requirements for separate accounting of § 401(h) assets, and violates exclusive benefit rule of § 401(a)(2), and may permit reversion of amounts to employer thus subjecting him to excise tax under § 4980; subordination test is not intended to limit ability of fully funded pension plans to provide post-retirement benefits through § 401(h) accounts while permitting such arrangements in case of inadequately funded plans. GCM 39785 (March 24, 1989).

Debtors were not permitted to claim that interpreting "benefits" under Mont. Code Ann. § 25-13-608(1)(f) to include stock proceeds at issue would have been consistent with exemptions such as those in 11 USCS § 522(d)(10)(E); agreement, guarantee, and promissory note contained no direction or indication that monthly payments one debtor received from sale of stock, which then paid for debtor's end-of-life medical care and medications, were intended as benefits that qualified under specific sections of 26 USCS §§ 401(a), 403(a), (b), 408, and federal exemptions, which in any event, did not apply in opt-out state like Montana, provided no support for debtors' claim that exemption they claimed was reasonable. In re Archer (2006) 2006 MT 82, 332 Mont 1, 136 P3d 563.

16. Loans made under plan

Section 224 of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 captioned "Protection of Retirement Savings in Bankruptcy," also suggests that loans secured by 401(k) plans are "secured debts" because it amends 11 USCS § 523 to except from discharge certain debts owed to plan established under 26 USCS

§ 401; thus, 401(k) loan is certainly debt, and nondischargeable debt at that; that it is secured debt is equally clear because unsecured loans from 401(k) plans to plan participants are prohibited by ERISA; only loans that are adequately secured are permitted under 29 USCS §§ 1106, 1108. In re Thompson (2006, BC ND Ohio) 350 BR 770.

Funds distributed by pre-petition check to debtor as loan from her 26 USCS § 401(k) retirement plan did not retain its exempt status under specific language of Ind. Code § 34-55-10-2(c)(6). In re Miller (2010, BC ND Ind) 435 BR 561.

Pension plan trust funded by insurance policies was disqualified where trust borrowed from insurance company loan value of policy on majority stockholder's life, trust then lent fund to majority stockholder at same interest rate, majority stockholder provided collateral for his loan from trust, and he then lent these funds, plus other funds, to corporation at higher interest rate; loan to trustees of value of policy and subsequent loan to majority stockholder were diversion of trust assets for purpose other than exclusive benefit of employees and their beneficiaries. Feroleto Steel Co. v Commissioner (1977) 69 TC 97.

Loans to employer will not disqualify trust where loans are real, secured, and pass unrelated-parties arm's length test, especially where employer is financially healthy and suspect loans are made to permit trust to earn reasonably assured interest income. Bing Management Co. v Commissioner (1977) TC Memo 1977-403, RIA TC Memo P 77403, 36 CCH TCM 1633.

Secured loan to plan participant at unreasonably low interest rate constitutes assignment or alienation of benefits of participant, and accordingly results in plan disqualification even though individual's account is security for a loan, loan is available to all participants on equal loan basis, and is not available to highly compensated employees in amount greater than amount available to other employees. Rev Rul 89-14 (1989) 1989-1 CB 111.

Plan which provides that any loan made by trust must be adequately secured, bear reasonable rate of interest, and be repaid within specified period of time, even if it may exceed employee-participant's vested interest, does not jeopardize plan's exempt status, provided that "exclusive benefit of employees" requirement is otherwise met in all respects. Rev Rul 67-288 (1967) 1967-2 CB 151.

Pension plan funded by individual insurance and annuity contracts that permits trustee to borrow against loan value of any such contract in event trust funds are insufficient to pay premiums on any contract does not qualify since it may allow remaining interests of highly compensated employees to be proportionately greater than those of other employees. Rev Rul 71-329 (1971) 1971-2 CB 204.

Money purchase pension plan which permits loans to participants and provides that any unpaid loan balance after two years be deducted from participant's account does not qualify as exempt; only security for such loan would be vested portion of participant's account, and plan, in effect permits distributions of employer contributions or increments thereon prior to severance of employment or termination of plan. Rev Rul 71-437 (1971) 1971-2 CB 185.

Master plan entered into prohibited transaction by making unsecured loan of trust funds to one of adopting employers, since its immediate transfer of funds held for debtor-employer into separate unrelated fund could not prevent denial of master trust's exemption; divestiture of trust funds after loan was made did not alter fact that transaction entered into was prohibited transaction. Rev Rul 71-479 (1971) 1971-2 CB 238.

Profit-sharing plan did not qualify for exemption where its related trust made unsecured demand loan of substantially all trust assets to corporation with same major shareholder as employer corporation and additional loan was made each year approximately equal to trust's contributions and earnings for preceding year and, although reasonable interest was paid, none of loans—oldest of which was 10-years old—were repaid. Rev Rul 73-282 (1973) 1973-2 CB 123.

Employees' trust loan of substantially all its assets to employer in return for employer's demand promissory note at reasonable rate of interest secured by mortgage on real estate worth twice amount of loan disqualified plan, where substantial number of employees were expected to retire within next few years but employer did not have present financial ability to redeem note, since loan failed to meet requirements that plan maintain sufficient liquidity to permit distribution in accordance with its terms, that safeguards and diversity which prudent investor would adhere to be present, and that investment be for exclusive benefit of employees. Rev Rul 73-380 (1973) 1973-2 CB 124.

17. "Compensation"

Reimbursement is not compensation but dividend where there is no plan, or where plan is not for employees and corporation reimburses officer-shareholders for their medical expenses, unless it is shown that officer-

shareholders were inadequately compensated for past services. Seidel v Commissioner (1971) TC Memo 1971-238, RIA TC Memo P 71238, 30 CCH TCM 1021.

"Includible compensation" does not include amount included in employee's gross income as current cost of incidental life insurance provided in retirement income contract purchased for employee by exempt organization employer. Rev Rul 68-304 (1968) 1968-1 CB 179.

Minister's housing allowance, although excludable from income under 26 USCS § 107, is treated as compensation for purposes of 26 USCS § 401(a). Rev Rul 73-258 (1973) 1973-1 CB 194.

Tax-exempt meals and lodging furnished by employer may be included in base on which benefits are computed even though value of meals and lodgings is excluded from employee's gross income because they were furnished to employee for convenience of employer. Rev Rul 73-381 (1973) 1973-2 CB 125.

It is permissible to allocate profit-sharing contributions on basis of each employee's regular salary and bonus for year without taking commissions and overtime pay into consideration since contributions allocated on basis of less than total compensation are not necessarily discriminatory; where rank and file employees received 65 percent of their total compensation in form of salary and bonus, while employees who were officers, shareholders, supervisors, or highly compensated, received only 55 percent as salary and bonus, under facts, allocation actually favored rather than discriminated against rank and file employees. Rev Rul 73-449 (1973) 1973-2 CB 138, superseded (1981) 1981-1 CB 175, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

18. Custodial account

Custodial account may be set up to handle H.R. 10 retirement plan; but if custodial account is disqualified in later year, it ceases to exist and its funds are treated as taxable to participants; unlike disqualified trust, disqualified custodial account cannot regain its qualified status in later year. Rev Rul 71-153 (1971) 1971-1 CB 127.

19. Amendment of plan

Because retirement plan was underfunded, lump-sum distribution would have violated 26 USCS § 401(a), but plan was intended to comply with § 401(a) at all times; thus, both before and after amendment, it could not have paid out lump-sum payment that plaintiff, highly-compensated employee, wanted; thus, defendant plan administrator's interpretation of plan such that lump-sum benefit was not available to plaintiff prior to plan amendment was well-reasoned and not arbitrary and capricious. Wetzler v Ill. CPA Soc'y & Found. Ret. Income Plan (2009, CA7 Ill) 586 F.3d 1053, 47 EBC 2857.

Even though non-contributory feature of plan could be amended only by written instrument, taxpayers who were principal stockholders, controlling director, managing officers, trustees of pension fund, beneficiaries of annuities involved under plan are allowed to do orally what would otherwise require corporate resolution and written amendment. Kappel v United States (1974, WD Pa) 369 F Supp 267, 74-1 USTC P 9419, 34 AFTR 2d 5025.

Plan that discriminates in favor of prohibited group is not subject to retroactive cure by amendment when such amendment fails to meet time requirements of 26 USCS § 401 and when discrimination favoring prohibited group results from operation of plan rather than from disqualifying provision on face of plan. Orthopaedic Associates, P. C. v United States (1980, ED Tenn) 487 F Supp 868, 80-1 USTC P 9256, 45 AFTR 2d 1138.

Plan amendment was retroactive to years before Sept. 2, 1974 date of enactment of Pension Reform Act where employer acted with due diligence to secure Treasury determination, and where provisions Treasury objected to never took effect, as retroactive amendment procedure is not limited to rulings requested after Sept. 2, 1974, nor to rulings requests then pending. Aero Rental v Commissioner (1975) 64 TC 331.

Plan amendment is not retroactive where employer did not act with due diligence to qualify stock bonus, pension, profit-sharing or annuity plan, even though provisions to which IRS objected never took effect. Jack R. Mendenhall Corp. v Commissioner (1977) 68 TC 676.

Refusal to allow retroactive amendment of plan more than 3 years after remedial amendment period expired is proper where no specific request for extension of period was filed and no hardship other than that which ordinarily flows from loss of qualified status for plans was cited as justifying extension; Congress did not intend that request for determination that plan amendment is qualified to be occasion for extension of remedial amendment period for unrelated provision in original plan. Oakton Distributors, Inc. v Commissioner (1979) 73 TC 182.

IRS discretion to extend remedial amendment period is subject to judicial review; employers seeking retroactive effect for amendments must show that no circumstances have arisen which call into question objectionable provisions of plan and exercise of reasonable diligence in attempting to obtain favorable determination letter

from IRS; delay of between 3 and one-half and 5 and one-half years before seeking determination letter is not exercise of reasonable diligence; it is not relevant that plan may have operated in conformity with statutory requirements during years when it did not seek IRS determination. Stark Truss Co. v Commissioner (1991) TC Memo 1991-329, RIA TC Memo P 91329, 62 CCH TCM 169.

Employees' profit-sharing plan that qualified for many years, but did not qualify in 1970 on account of failing to meet coverage and eligibility tests, did qualify in 1971 since plan was amended by employer and requirements of 26 USCS § 401 were met in that year; there was no discrimination in contribution as benefits in 1971 since contribution made in 1970 were reallocated to all participants in accordance with amendments to plan. Rev Rul 73-78 (1973) 1973-1 CB 194.

Since large number of lower-paid employees were nearer to retirement than 4 highly-paid employees who were not already entitled to maximum plan benefit, discrimination in favor of highly-paid employees was unlikely in event of plan termination, either before or after four highly-paid employees retired. Rev Rul 74-397 (1974) 1974-2 CB 134, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Indirect as well as direct changes in plan provisions that reduce participant's nonforfeitable percentage are prohibited; indirect change is any change that affects computation of nonforfeitable percentage, such as counting or crediting of hours of service, years of service, breaks in service, etc., for purposes of determining participant's nonforfeitable percentage. Rev Rul 76-378 (1976) 1976-2 CB 112.

No advance ruling will be made on amendments to qualified employee benefit plans and trusts solely to permit employer contributions made in certain situations to revert to employer; amendments made solely to include these reversion provisions will not affect previous qualification of plan. Rev Rul 77-200 (1977) 1977-1 CB 98, superseded (1991) 1991-1 CB 57.

In determining period during which employee plan may be amended retroactively in case of employers required to file annual information returns under 26 USCS § 6033, terms "return" and "income tax return" used in 26 USCS § 401 mean annual information return of employer and as to employers not required to file information returns, terms mean annual return/report filed pursuant to 26 USCS § 6058. Rev Rul 79-227 (1979) 1979-2 CB 185.

Amendment to qualified plan solely to increase or eliminate mandatory retirement age provision does not by itself adversely affect qualification under 26 USCS § 401; however, amendment could interact with other provisions to result in discrimination under 26 USCS § 401(a)(4), failure to satisfy vesting or accrued benefit requirements under 26 USCS § 411, or in exceeding limitations under 26 USCS § 415. Rev Rul 81-210 (1981) 1981-2 CB 89.

If amendment to H.R. 10 plan only conforms plan to requirement that owner-employees cannot withdraw voluntary contributions, amended plan should not be submitted to Treasury for reconsideration; previously issued favorable determination, opinion, and ruling letters will continue to apply to plan as amended; in regard to submissions for approval already filed, approval is not necessary and no new determination, opinion, or ruling letters will be issued by Treasury after Oct. 24, 1972. Rev Proc 72-49 (1972) 1972-2 CB 829.

Plan amendment to apply increased compensation limits under § 611(c) of EGTRRA to all former employees (or all former employees who retain accrued benefits under plan) that is effective as of first plan year beginning after 12/31/01 satisfies nondiscrimination rules of 26 USCS § 401(a)(4) and minimum coverage requirements of 26 USCS § 410(b). Rev Rul 2003-11 (2003) 2003-3 IRB 285.

20. Forfeiture

Offsets in pension benefits for worker's compensation awards are lawful under ERISA, and state laws forbidding such offsets are preempted. Alessi v Raybestos-Manhattan, Inc. (1981) 451 US 504, 68 L Ed 2d 402, 101 S Ct 1895, 2 EBC 1297, 81-1 USTC P 9427, 47 AFTR 2d 1513.

Contributions by employer to pension trust are not taxable to taxpayer, where violation by taxpayer of provisions of contract as amended would result in forfeiture of taxpayer's interest in contributions made by employer under trust agreement. Doty v United States (1963, CA6 Mich) 323 F2d 649, 63-2 USTC P 9761, 12 AFTR 2d 5769.

In choosing only to limit increased social security offsets rather than bar them entirely in 26 USCS § 401(a)(15), Congress gave its implicit approval to practice of permitting offsets against pension plan benefits; since § 401 was enacted at same time as 29 USCS § 1053(a) requirement that pension benefits be nonforfeitable, offset of social security benefits implicitly approved in former section was not simultaneously rendered illegal by latter section's requirement of nonforfeitability. Buczynski v General Motors Corp. (1980, CA3 NJ) 616 F2d

1238, 2 EBC 1076, 80-1 USTC P 9290, 45 AFTR 2d 864, affd (1981) 451 US 504, 68 L Ed 2d 402, 101 S Ct 1895, 2 EBC 1297, 81-1 USTC P 9427, 47 AFTR 2d 1513.

Forfeiture provision does not disqualify plan, if provision is reasonable and distinctly specified in plan. Rev Rul 70-317 (1970) 1970-1 CB 92, obsoleted (1991) 1991-1 CB 281.

Profit-sharing plan provision for annual contributions, out of employer's profits, of 15% of total compensation of participants, reduced by total amount of forfeitures arising from participants' termination of service during year did not disqualify plan. Rev Rul 71-313 (1971) 1971-2 CB 203.

Contributions are taxable if on completion of stated period of service, employee's rights to accumulated contributions to nonqualified pension or retirement plan deducted from his pay, which, because of their forfeitability, were not includible in gross income nor subject to withholding, are no longer subject to substantial risk of forfeiture. Rev Rul 72-94 (1972) 1972-1 CB 23.

Profit-sharing plan does not fail to qualify under 26 USCS § 401 merely because it provides for allocation of forfeitures arising from termination of service among remaining participants on basis of their account balances. Rev Rul 81-10 (1981) 1981-1 CB 172.

Use of forfeitures first to reduce administrative expenses and then to reduce employer contributions will not be considered inconsistent with requirement of § 1.401-7(a) of regulations. Rev Rul 84-156 (1984) 1984-2 CB 97.

Plan will not fail to satisfy minimum vesting standards of 26 USCS § 411(a)(2) merely because it provides that vested benefits in excess of those required to be nonforfeitable may be forfeited by employee discharged for cause, but plan may violate 26 USCS § 401(a)(4) if reduction results in discrimination prohibited by that section. Rev Rul 85-31 (1985) 1985-1 CB 153.

21. Termination of plan

Dividends were not taxable to director where under stock distribution plan, corporation issued to director certain shares of its stock, to be held by its treasurer until paid for, and agreed to credit dividends and other credits to purchase price, and did, during year 1931, credit dividends thereto, but, before end of that year, plan was abandoned as illegal and void. Penn v Robertson (1940, CA4 NC) 115 F2d 167, 40-2 USTC P 9707, 25 AFTR 940.

Distribution was taxable as annuity where distribution of funds to taxpayer was not on account of his separation from service of his employer but was solely because of termination of pension trust plan itself, since because of complete liquidation of trust fund, funds so received by taxpayer could not be treated as long-term capital gain. Jacob v Donnelly (1967, CA5 La) 374 F2d 503, 67-1 USTC P 9320, 19 AFTR 2d 1075.

Although trust agreement failed to specifically state what would happen to trust funds upon voluntary termination, plan still qualified since agreement provided that no amendment or change could be made which would permit use of funds except for exclusive benefit of employees or their beneficiaries, and incorporated by reference 26 USCS § 401(a) which conclusively establishes that it would have been violation of contract for plaintiff, at any time, to divert trust funds to its own use. Community Services, Inc. v United States (1970) 191 Ct Cl 76, 422 F2d 1353, 70-1 USTC P 9286, 25 AFTR 2d 946.

Employer can recover, after termination of pension plan, residual assets that result from actuarial error; employer is foreclosed only from recovering surpluses which arise from prohibited amendments, such as changes in benefit provisions or eligibility requirements. Pollock v Castrovinci (1979, SD NY) 476 F Supp 606, 1 EBC 2091, 80-1 USTC P 9424, 45 AFTR 2d 1281, affd without op (1980, CA2 NY) 622 F2d 575.

Significant percentage of employees was not excluded from thrift plan, and there was consequently no partial termination, where 2.5 percent of participating employees (415 employees) were excluded due to closing of refinery. Ehm v Phillips Petroleum Co. (1984, DC Kan) 583 F Supp 1113, 5 EBC 1857.

Qualified plan under which benefit accruals have ceased is not terminated if assets of plan remain in plan's related trust rather than being distributed as soon as administratively feasible (Rev Rul 69-157 clarified and Rev Rul 79-237 modified). Rev Rul 89-87 (1989) 1989-2 CB 81.

Plan that has not distributed all assets as soon as administratively feasible is ongoing plan; plan is not terminated, after adoption of amendment to terminate plan, if assets are not distributed as soon as administratively feasible but are held in trust to make distributions when employees become entitled to payments under terms of plan as they existed when terminating amendment was adopted. Rev Rul 89-87 (1989) 1989-2 CB 81.

Since curtailment of plan applied only to stockholders and highly compensated employees, its modification did not adversely affect its status as plan for benefit of employees in general. Rev Rul 69-24 (1969) 1969-1 CB 110.

Plan may continue although employer goes out of existence; a plan is not considered terminated in fact where, except for failure to make further contributions, plan continues in effect until all assets of trust have been distributed to participants in accordance with terms of plan; thus, trust under such continued plan retains its qualified status (assuming discontinuance and distributions did not discriminate in favor of officers, shareholders, etc.). Rev Rul 69-157 (1969) 1969-1 CB 115.

Pension plan only for rank-and-file employees did not fail to qualify because of provision which provided that on termination or complete discontinuance of employer contributions, funds held under plan would be used (1) to continue benefits to retired employees, (2) to provide retirement benefits for employees who had met requirements but had not yet retired, (3) to provide accrued benefits for employees over 60 and so on down to younger age groups until funds were fully exhausted. Rev Rul 71-314 (1971) 1971-2 CB 208.

Amendment to qualified profit-sharing plan which eliminated nonsalaried employees from participation in future employer contributions resulted in partial termination; amendment, required by union contract 5 years after plan was established, resulted in 120 of plan's 170 participants being made ineligible to participate in future employer contributions; amendment properly provided that amounts credited to employee's accounts would continue to vest as long as they remain in service of the employer. Rev Rul 72-439 (1972) 1972-2 CB 223.

Failure of corporation to make full amount of profit-sharing contribution required under approved employee benefit plan formula because of government wage freeze does not result in partial termination. Rev Rul 73-147 (1973) 1973-1 CB 191.

Relocation of business 100 miles away from old site resulting in 12 out of 15 employees refusing to move caused partial termination of plan. Rev Rul 73-284 (1973) 1973-2 CB 139.

Pension plan does not qualify where it provides that employer shall have right to terminate plan by giving formal written notice to trustee, with accrued rights of employees being nonforfeitable upon such formal termination, but where plan is silent with respect to employees' rights in event of termination or complete discontinuance of contributions in absence of formal, written notice; to qualify, plan must provide for employee rights to be nonforfeitable upon termination. Rev Rul 73-450 (1973) 1973-2 CB 140.

Failure of employer to make contributions to profit sharing plan for 5 consecutive years solely due to absence of current or accumulated earnings or profits is not complete discontinuance of contributions within meaning of 26 USCS § 411(d)(3) in situation in which employer is required to resume contributions as soon as it does have profits. Rev Rul 80-146 (1980) 1980-1 CB 90.

Pension plan fails to qualify under 26 USCS § 401(a) where it contains restrictions on amount of employer contributions that may be used for benefit of 25 highest paid employees in event of early planned termination as required by § 1.401-4(c)(2) of regulations but requires plan administrator to comply with such restrictions only when employer gives notice that restrictions have or will become operative. Rev Rul 81-34 (1981) 1981-1 CB 173, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

In proposed termination of qualified defined benefit plan, plan will not satisfy 26 USCS § 411(d)(6), as amended by Retirement Equity Act of 1984, unless early retirement subsidy is provided for participants who satisfy pretermination subsidy requirements after termination of plan. Rev Rul 85-6 (1985) 1985-1 CB 133.

Unpublished Opinions

Unpublished: Expenses incurred by bankruptcy trustee in terminating 401(k) plan, which included compensation of firm that was hired to assist in termination, were payable from assets of plan; payment of expenses was proper under terms of plan, under 29 USCS §§ 1103(c)(1), 1108(c), and 1104(a)(1)(A)(ii), part of Employee Retirement Income Security Act, and under common law of trusts. Lisanti v Lubetkin (2007, DC NJ) 2007 US Dist LEXIS 50026.

22. Revocation of qualification

In case in which debtor listed pension plan as exempt property under Tex. Prop. Code Ann. § 42.0021 and district court affirmed bankruptcy court's determination that plan was not qualified under 26 USCS § 401(a) because debtor had used plan to pay personal bills, debtor's argument failed that, under Youngblood decision, bankruptcy court was required to defer to Internal Revenue Service's (IRS) finding that plan was qualified; present case was distinguishable from Youngblood decision because IRS in Youngblood decision had considered misconduct at issue and decided not to disqualify plan; in present case, IRS had not audited plan or ruled wheth-

er debtor's abuse of plan assets warranted disqualification. Plunk v Yaquinto (In re Plunk) (2007, CA5 Tex) 481 F3d 302, 40 EBC 1168, CCH Bankr L Rptr P 80884, 99 AFTR 2d 1431.

In case in which debtor argued that, under Youngblood decision, bankruptcy court was required to defer to Internal Revenue Service's (IRS) determination that his pension plan was qualified plan pursuant to 26 USCS § 401(a), when disqualifying events occur after IRS had last determined that plan was qualified, court may, under Tex. Prop. Code Ann. § 42.0021, determine that plan was no longer qualified based on those events. Plunk v Yaquinto (In re Plunk) (2007, CA5 Tex) 481 F3d 302, 40 EBC 1168, CCH Bankr L Rptr P 80884, 99 AFTR 2d 1431.

Plan declared qualified by Commissioner at its inception may lose its qualification if it is administered or operated in way that violates fundamental purpose of 26 USCS § 401; before disallowing employer's deduction with respect to plan once approved, there must be finding that variations from plan somehow prejudiced benefits to be received by beneficiaries and improved or increased indirect benefits to employer. Central Motor Co. v United States (1976, DC NM) 454 F Supp 54, 76-1 USTC P 9245, 37 AFTR 2d 1001, affd in part and set aside in part on other grounds, cause remanded, in part (1978, CA10 NM) 583 F2d 470, 78-2 USTC P 9608, 42 AFTR 2d 5581.

Court lacked jurisdiction to review claim by members of city pension plans that IRS improperly failed to disqualify tax-exempt status of pension funds after finding that transfers from funds violated 26 USCS § 401(a)(2); Administrative Procedure Act did not waive immunity, as decision was committed to agency discretion, and there was no mandamus jurisdiction because there was no clear, non-discretionary duty to issue requested determination letter. Borrelli v Sec'y of Treasury (2004, SD NY) 343 F Supp 2d 249.

Bankruptcy court denied Chapter 7 trustee's motion for order requiring debtor to turn over funds that were in pension plan he created after he started his own business; plan that was qualified plan under Employee Retirement Income Security Act of 1974, 29 USCS §§ 1001 et seq., and even assuming that plan was no longer "tax qualified" under I.R.C. § 401(a) because debtor used proceeds to pay personal living expenses and business expenses, it was not part of his bankruptcy estate under 11 USCS § 541 and was exempt from creditors' claims. In re Hemmer (2011, BC SD Ind) CCH Bankr L Rptr ¶ 81920, 2011-1 USTC ¶ 50153, 107 AFTR 2d 578.

Taxpayer's profit sharing plan was properly revoked in 1974 retroactive to 1972 where there was significant change in facts since plan was first approved, and taxpayer should have been on notice that plan no longer qualified pursuant to published ruling in 1969. Wisconsin Nipple & Fabricating Corp. v Commissioner (1976) 67 TC 490, affd (1978, CA7) 581 F2d 1235, 1 EBC 1169, 78-2 USTC P 9606, 42 AFTR 2d 5525.

Change in business circumstances beyond employer's control resulting in discriminatory coverage favoring owners of corporation can retroactively disqualify employee plan. Pulver Roofing Co. v Commissioner (1978) 70 TC 1001, 1 EBC 1981.

IRS has authority to retroactively disqualify plan from date of plan's inception where plan provides benefits to participants in excess of § 415(c)(1) limitations. Buzzetta Constr. Corp. v Commissioner (1989) 92 TC 641, amd (1989, TC) 10 EBC 2145.

Plan which is disqualified as result of excess allocations to account of plan participant remains disqualified until remedial action is taken to correct violation; disqualification is not limited to years of excess allocations. Martin Fireproofing Profit-Sharing Plan & Trust v Commissioner (1989) 92 TC 1173, 10 EBC 2686.

Plan trustee's manipulation, mismanagement and misuse of plan assets to make imprudent and improper loans and investments, including loans to trustee and participants, constitute proper grounds for disqualification of plan. Ada Orthopedic, Inc. v Commissioner (1994) TC Memo 1994-606, RIA TC Memo P 94606, 68 CCH TCM 1392, 94 TNT 243-4.

Retroactive disqualification of profit-sharing and pension plans for failure to timely comply with DEFRA and REA amendments is not abuse of IRS discretion where previous qualification letters reserved judgment on DEFRA and REA compliance and plans did not qualify for retroactive amendment since sponsor did not exercise reasonable diligence in attempting to maintain qualified status. Ronald R. Pawlak, P.C. v Commissioner (1995) TC Memo 1995-7, RIA TC Memo P 95007, 69 CCH TCM 1603, 95 TNT 7-17.

Where pension plan is not qualified due to failure to meet participation requirements, but is not terminated in accordance with ERISA requirements, employer's sole shareholder, who is participant in plan, must include in income for years prior to termination of plan vested accrued benefits. Gant v Commissioner (1998) TC Memo 1998-440, RIA TC Memo P 98440.

Internal Revenue Commissioner properly revoked tax-exempt status of what had been qualified profit-sharing plan under I.R.C. § 401(a) for 2001 and subsequent years because plan provisions were not amended to conform to new statutory requirements and, regardless of whether changes would have had effect on operation of plan,

compliance was required; period of limitations prescribed by I.R.C. § 6501(a) did not limit Commissioner's broad authority to revoke retroactively favorable determination letter as period of limitations prescribed by § 6501(a) is applicable neither to proceedings under I.R.C. § 7476 nor to determinations regarding continued qualification of retirement plans under § 401(a), as they do not involve imposition of any tax. Christy & Swan Profit Sharing Plan v Comm'r (2011) TC Memo 2011-62, 101 CCH TCM 1279

IRS does not abuse its discretion by retroactively revoking favorable determination for defined contribution plan where taxpayer fails to amend plan to reflect changes in law within remedial time for amendment. Basch Engineering, Inc. v Commissioner (1990) 12 EBC 1414, TC Memo 1990-212, RIA TC Memo P 90212, 59 CCH TCM 482.

23. Enforcement of employees' rights

Although plan must qualify as to both its provisions and operations, enforcement of employee's rights under qualified pension plan is not within Treasury's jurisdiction, but Treasury will consider any failure to make distributions in accordance with terms of plan in determining whether plan continues to be qualified. Rev Rul 70-315 (1970) 1970-1 CB 91.

II. EMPLOYEE ELIGIBILITY

24. Employment relationship

Freelance software contractors engaged by software company for special projects, who are required to enter into independent contractor agreements but who work with employees and have same supervisors, perform identical functions, and work during same core hours, are employees and, as such, are required to be included as participants within § 401(k) and stock purchase plans. Vizcaino v Microsoft Corp. (1996, CA9 Wash) 97 F3d 1187, 96 CDOS 7370, 96 Daily Journal DAR 12105, 20 EBC 1873, CCH Unemployment Ins Rep P 15588B, 96-2 USTC P 50533, 78 AFTR 2d 6690.

Freelance computer software programmers and analysts who supplement full time staff and are integrated on work teams, sharing same supervisors, functions and core work hours, cannot be excluded from employee benefit plans simply because freelancers signed independent contractor agreements and were paid through accounts payable department, rather than through payroll. Vizcaino v Microsoft Corp. (1997, CA9 Wash) 120 F3d 1006, 97 CDOS 5847, 97 Daily Journal DAR 9429, 21 EBC 1273, 97-2 USTC P 50572, 80 AFTR 2d 5594, cert den (1998) 522 US 1098, 139 L Ed 2d 884, 118 S Ct 899 and on remand, remanded (1998, WD Wash) 21 EBC 2820, 98-1 USTC P 50240, 82 AFTR 2d 6569.

In determining whether temporary employees provided by employment agency are common law employees of entity for which services are provided, courts consider as determinative the factors of recruitment, training, duration, right to assign additional work, and control over relationship between worker and agency. Vizcaino v United States Dist. Court (1999, CA9 Wash) 173 F3d 713, 99 CDOS 3474, 99 Daily Journal DAR 4627, 23 EBC 1209, 99-1 USTC P 50531, 43 FR Serv 3d 1355, amd, reh den (1999, CA9) 184 F3d 1070, 99 CDOS 4990, 99 Daily Journal DAR 6503 and cert den (2000) 528 US 1105, 145 L Ed 2d 713, 120 S Ct 844, 23 EBC 2624.

In action challenging tax deficiency pursuant to 26 USCS § 7442, where taxpayer actively participated, as defined in 26 USCS § 219(g)(5)(A)(iii), in plan established by state or political subdivision for its employees, taxpayer was not entitled to tax deduction for his contribution to his individual retirement account and finding that he had tax deficiency was affirmed; alternatively, taxpayer was not entitled to IRA deduction because he was active participant in plan described in 26 USCS § 401(a), which included trust exempt from tax under 26 USCS § 501(a). Neumeister v Comm'r (2001, CA6) 3 Fed Appx 454, 2001-1 USTC P 50235, 87 AFTR 2d 819.

Musicians operating on "cooperative" basis are independent contractors where each member provides his own costumes and instrument, offers ideas concerning new musical arrangements, and has voice in deciding what music to play, whom to hire and fire, when rehearsals are to be held, and what engagements to accept. In re Hamlin (1974, DC Kan) 74-2 USTC P 9578.

Claimant's ERISA claim for pension benefits was dismissed because claimant's argument (which asserted that former employer's obligation to pay top hat benefits was triggered when his salary rose above 26 USCS § 401(a)(17) limitation at subsequent employer) was not reasonable. Eastman Kodak Co. v Bayer Corp. (2008, SD NY) 576 F Supp 2d 548.

Common-law factors used to distinguish employee from independent contractor are applicable to determine existence of employment relationship, and fundamental test is whether person for whom work is performed has right to control activities of individuals whose status is in question, not only as to results, but also as to means

and methods to be used for accomplishing result; workers who are "leased" are not employees of leasing company where leasing company exercises minimal control, and accordingly leasing company's plan is not for exclusive benefit of employees and is therefore not qualified. Professional & Executive Leasing v Commissioner (1987) 89 TC 225, 8 EBC 2153, affd (1988, CA9) 862 F2d 751, 10 EBC 1627, 88-2 USTC P 9622, 63 AFTR 2d 427.

Plan does not satisfy requirement that it be for exclusive benefit of employees where employee leasing company's plan covers professionals who are leased as employees to entities which they control; in determining employment status, common law factors are used to distinguish employee from independent contractor, and fundamental test is whether person for whom work is performed has right to control activities of individuals whose status is at issue; workers are not employees of employee leasing company that "leases" them to service recipients where leasing company exercises minimal control over workers, has no investment in work facilities, and has no right to discharge workers except as provided in employment contract which, in context of workers' equity interests in service recipients, was illusory. Professional & Executive Leasing v Commissioner (1987) 89 TC 225, 8 EBC 2153, affd (1988, CA9) 862 F2d 751, 10 EBC 1627, 88-2 USTC P 9622, 63 AFTR 2d 427.

Taxpayer, who was re-employed annuitant of Veteran's Administration, could not claim self-employed status because neither federal retirement deductions nor Social Security taxes were withheld from his salary, since reason items were not withheld was that he was re-employed annuitant. Vesey v Commissioner (1974) TC Memo 1974-163, RIA TC Memo P 74163, 33 CCH TCM 697.

Retired partner who is receiving liquidating payments from partnership and who starts new business is not self-employed for purposes of establishing qualified retirement plan for new business until retired partner receives last distribution. Kellough v Commissioner (1995) 19 EBC 1880, TC Memo 1995-282, RIA TC Memo P 95282, 69 CCH TCM 2998, 95 TNT 122-36.

Independent contractors incorrectly included within qualified plan are not subject to current tax on vested benefits. Lozon v Commissioner (1997) CCH Unemployment Ins Rep P 15838B.2, CCH Unemployment Ins Rep P 16001B.2, TC Memo 1997-250, RIA TC Memo P 97250, 73 CCH TCM 2914.

Employees could not be excluded from consideration, in determining whether plan qualified, by merely transferring them to nominal employ of unrelated corporation which contracted to provide original employer with same services that employees had been performing. Rev Rul 68-303 (1968) 1968-1 CB 165.

Deferred payment is immediately taxable to physician where nonprofit corporation insures medical expenses of its subscribers in accordance with list of specified allowances which it will pay to participating physicians, with insured patient compensating his own participating physician by assigning right to collect specified allowance from insurer corporation, with physicians not being employees of corporation, and where corporation proposes to defer payment of portion of allowance due to participating physician until retirement, since right to payment arises out of services to insured patient, not to corporation. Rev Rul 69-50 (1969) 1969-1 CB 140, amplified (1977) 1977-2 CB 172.

Employer is any person or organization for whom individual "performs or performed" any services as employee; accordingly, commissions paid by company to former customers for submitting names of prospective customers to whom merchandise is sold do not constitute wages subject to withholding, since services were not rendered as employees. Rev Rul 69-452 (1969) 1969-2 CB 181.

Pension arrangement was between corporation and individual physicians where non-profit corporation contracted with partnership of physicians to render medical services to participating employees whereby corporation established unfunded retirement plan under which it contracted to pay individual physician's pension upon retirement without any obligation to make payments prior to retirement; partnership does not realize any income and physicians will realize income when future payments are made under plan. Rev Rul 69-474 (1969) 1969-2 CB 105.

Arrangement did not constitute employer-employee relationship, where contract between employer and taxpayer provided for part-time consulting and advisory services for 5 years after retirement, no formal schedule of duties, no established work schedule, no right of supervision by employer, taxpayer could be absent at any time without consent, minimum compensation in any event, and taxpayer could not engage in competitive business; therefore, lump sum distribution from qualified pension trust qualifies for long-term capital gains treatment. Rev Rul 69-647 (1969) 1969-2 CB 100.

Plan which allows former employees to earn additional pension credits after employment ceases does not qualify; pension plan for members of state legislature which provided that after 8 years of participation, legislator could gain additional service credits by continuing to contribute to plan even though he was no longer in legislature did not qualify because Regulations § 1.401-1(b)(4), which permits qualified plan to cover former em-

ployees, does not contemplate additional credit for periods after termination of employee's service. Rev Rul 73-238 (1973) 1973-1 CB 193.

Plan set up by United States citizen employed in United States by foreign government could not qualify because although his income was subject to self-employment tax, he was not self-employed individual since he was common law employee and not employer within meaning of 26 USCS § 401(c) and could not participate in qualified plan established on his own behalf under tax law prior to 1974. Rev Rul 73-384 (1973) 1973-2 CB 141.

Determination of whether 2 nurses employed and paid by 2 professional medical service are employed full-time is not based on amount of services rendered to each corporation since services rendered to each may vary from day to day and such variation does not permit classifying nurses as part-time employees; characteristics of employee do not change when efforts of such employee are shared by more than one employer. Rev Rul 73-447 (1973) 1973-2 CB 135.

State official who was compensated solely on fee basis and had social security coverage under State-Federal agreement could not be covered by self-employed plan under tax law prior to 1974. Rev Rul 74-225 (1974) 1974-1 CB 101.

Yacht and ship salesmen are independent contractors where they are free to solicit prospective buyers and listings at their own discretion, are not restricted to specific territory, are not required to work any regular hours, or at any specified time, are not required to attend scheduled sales meetings, are paid on commission basis and pay all their own expenses. Rev Rul 74-389 (1974) 1974-2 CB 330.

Plan that provides that employee is to be considered full-time employee if his customary employment is for more than 20 hours a week and for more than 5 months in calendar year cannot exclude full time employees who work for less than 5 months during calendar year because they were hired October 1 and thus worked only 4 months during year since their employment contract required them to customarily work more than 5 months in year. Rev Rul 74-418 (1974) 1974-2 CB 133, mod (1993) 1993-2 CB 125, 93 TNT 24-6.

Members of fishing boat crew of fewer than 10 individuals who are common-law employees but perform their services under conditions referred to in 26 USCS § 3121(b)(20) are employees for purposes of determining whether employee's pension, annuity, profit sharing, or stock bonus plan is qualified under 26 USCS § 401. Rev Rul 79-101 (1979) 1979-1 CB 156.

Plan qualifies under 26 USCS § 401(a) even though it denies participation to employees who do not authorize salary withholding or take physical examination to determine eligibility for life insurance, so long as provisions do not result in discrimination and are applied in nondiscriminatory manner. Rev Rul 80-47 (1980) 1980-1 CB 83.

Change in employment status as result of sale by employer of its assets to successor occurs even though less that 85 per cent of assets of employer are sold, and consequently there has not been sale of substantially all of assets under § 401(k)(10); separation from service occurs where employer sells significant portion of business to successor and as part of transaction seller terminates employment and buyer hires former employees in same or similar positions. Rev. Rul. 2000-27 (2000) 2000-21 IRB 1016.

25. Minimum service requirements

Prior to ERISA, plan covering owner-employers had to benefit employees with 3 years of service whose customary employment has been for more than 20 hours per week and for more than 5 months per year; in figuring customary employment it was immaterial whether average of employee's working time was more or less than 20 hours per week; proper test was whether he customarily worked more than 20 hours per week. Rev Rul 68-532 (1968) 1968-2 CB 181.

Prior to ERISA, profit-sharing plan under which employees with 3 years of continuous services were eligible to participate could not be amended to provide that employee who completed 6 months of service could make voluntary contributions to plan in same manner as plan participants. Rev Rul 68-651 (1968) 1968-2 CB 167.

Prior to ERISA, self-employed retirement plan could not be amended to require that all future employees must have 2 years service before they were eligible to participate in plan, which originally provided for immediate participation of owner-employees; longer waiting period for employees hired after amendment violated rule in regulations that in no case could plan require waiting period for employees which was longer than that required for owner-employees. Rev Rul 69-66 (1969) 1969-1 CB 128.

Prior to ERISA, plan covering owner-employee could require completion of 36 consecutive months of service with employer as prerequisite to coverage under plan, because (1) seasonal employees could never come under plan, and (2) full-time employee who was initially employed between January and August 1 of any particular year would not become covered at end of third year after employment. Rev Rul 69-173 (1969) 1969-1 CB 129.

Employees who meet minimum service requirements of plan must be included "irrespective of amount, if any, of their compensation"; plan which benefited only one employee out of 3 with qualifying service, and total of 10, did not satisfy percentage requirements. Rev Rul 70-2 (1970) 1970-1 CB 93, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Prior to ERISA, plan which provided that in order to share in employer's contribution for particular year employee must have completed at least 3 years of service on effective date, or on any anniversary date of plan, did not qualify because employee who completed 3 years of service during year on date later than starting or anniversary date of plan could not benefit thereunder until next plan year, and thus, plan did not benefit each employee having period of employment of 3 years or more. Rev Rul 70-492 (1970) 1970-2 CB 92.

Since, at time plan was established, plan participants did not have years of service required of future employees after later amendment to plan, plan did not qualify on ground that it contained provision for different requirements for present and future employees. Rev Rul 70-659 (1970) 1970-2 CB 90, mod (1993) 1993-2 CB 125, 93 TNT 24-6.

Prior to ERISA, pension plan with no service requirements could be amended to require that all new employees must have specified number of years of service for participation, without disqualifying plan as discriminatory; plan continued to qualify after amendment because restrictions on benefits for certain employees with less than 5 years of service, in effect, required them to have 5 years of service and prevented discrimination. Rev Rul 71-539 (1971) 1971-2 CB 199, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Prior to ERISA, plan providing coverage for all salaried employees with 3 years of service did not fail to qualify when copies of plan were given to all salaried employees, even though excluded hourly-paid employees were not informed of plan's adoption or provisions because employees to whom plan must be communicated are all those in classification, or classifications, that are or could become participants under plan. Rev Rul 73-78 (1973) 1973-1 CB 190.

Prior to ERISA, plan that excluded from percentage test all employees with less than 60 months of continuous service was disqualified where one employee worked only 10 months per year for over 5 years and was thus excluded; minimum period required by plan was not 5 years, as allowed by Internal Revenue Code because "employee who works only 10 months a year will never become eligible for participation" due to 2-month breaks in continuity. Rev Rul 73-265 (1973) 1973-1 CB 195, mod (1993) 1993-2 CB 125, 93 TNT 24-6.

Prior to ERISA, permitting entry into plan by new employees or newly eligible employees only on subsequent anniversary date was not discriminatory where one year after it was incorporated, corporation established pension plan for all full-time salaried employees who had at least one year of service as of date plan was established and ineligible employees and new employees would not be covered under first entry date as of which they met one year requirement; plan would not result in prohibited discrimination in operation in future years if new employees were added to work force. Rev Rul 73-382 (1973) 1973-2 CB 134.

26. Leave and reentry provisions

Plan is disqualified if it provides benefits to participants who become ineligible to participate before termination of employment, or termination of plan. Rev Rul 74-254 (1974) 1974-1 CB 91.

Defined benefit plan that does not contain any provisions to prevent duplication of benefits for rehired participants does not fail to qualify under 26 USCS § 401(a) merely because it provides benefits for some participants that duplicate benefits already provided for those participants under same plan. Rev Rul 80-349 (1980) 1980-2 CB 132.

27. Retirement age provisions

Profit sharing plan is not disqualified merely because it provides for normal retirement age of less than 65 years and for distribution of benefits at time of lesser age, whether or not participant retires at that time. Rev Rul 80-276 (1980) 1980-2 CB 131.

28. Vesting provisions

Inequalities in vesting in employees' pension plan are discriminatory, even if contributions are comparable, if they operate, alone or with eligibility requirements, to effectively exclude so many employees from practical benefits of plan that its value to employee group as whole is illusory. United States v Hall (1968, CA8 ND) 398 F2d 383, 68-2 USTC P 9460, 22 AFTR 2d 5098.

Employee 401(k) benefit's plan was deemed amended by reduction in force, which indirectly divested previously vested employees, including plaintiff engineer who had more than three but less than five years of service; therefore, it was impermissible change of vested rights that was prohibited by 29 USCS § 1053(c)(1)(B). Zhu v Fujitsu Group 401(k) Plan (2005, ND Cal) 34 EBC 2221.

Former District of Columbia employee's claim for pension benefits failed because he did not meet five-year vesting requirement outlined in former D.C. Mun. Regs. tit. 6, § 2602.3 where employee worked for District for three and one-half years, and employee could not be allowed more advantageous pension terms, as District's pension fund was designed to comply with 26 USCS §§ 401(a), 411(a)(2)(A)(ii), 501(a), which required five-year vesting period. Winder v District of Columbia (2008, DC Dist Col) 555 F Supp 2d 103.

Amendment to pre-ERISA pension plan was discriminatory in providing for continued vesting of employees who became partners based on their years of service, but did not permit other employees who separated from employer similar increase in vesting. Rev Rul 69-477 (1969) 1969-2 CB 87.

Pension plan which granted immediate vesting to participants on date of plan's inception but deferred vesting until retirement for subsequent participants was disqualified where there was constant turn-over of rank-and-file employees both before and after date of plan's inception. Rev Rul 71-150 (1971) 1971-1 CB 123.

Whether particular vesting provision meets requirements of 26 USCS § 401(a) depends on facts of each particular case. Rev Rul 71-151 (1971) 1971-1 CB 123.

Pre-ERISA pension plan that covered employees with 3 years of service, provided for partial vesting after 5 years, and covered corporation's 3 officer-shareholders and 2 low-paid clerical employees was nondiscriminatory in operation, where low-paid employees remained with corporation for entire 5 years that plan was in operation, and during those years, only one other employee was hired, and he was discharged after 6 months of service. Rev Rul 73-299 (1973) 1973-2 CB 137.

Despite vesting differences which only affected benefits, if contribution provisions of pre-ERISA plan were comparable, plan qualified, so long as forfeitures did not reduce employer's rate of contributions. Rev Rul 74-165 (1974) 1974-1 CB 96, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Method of adjusting value of benefits to reflect differences in vesting is to adjust, for any participant in given plan, value of benefits provided under plan by value of vesting provided under plan applicable to given participant. Rev Rul 74-166 (1974) 1974-1 CB 97.

29. Corporations; corporation's attorney

Amendment to I.R.C. § 1361(c) allows certain organizations (particularly employee stock ownership plans) described in I.R.C. § 401(a) to own shares in S corporation. I.R.C. § 1361(c)(6). United States v Stover (2010, WD Mo) 731 F Supp 2d 887, 106 AFTR 2d 5735.

Corporation's plan is not disqualified as not exclusively for benefit of employees if it permits participation of attorney who does legal work for corporation as employee and who also practices law as self-employed individual; contributions or benefits are to be based only on amount he receives as employee of corporation. Rev Rul 69-569 (1969) 1969-2 CB 91.

Attorney was not employee eligible for participation in qualified plan where he did legal work for corporation but was not subject to its direction and control in carrying out any of his legal activities. Rev Rul 70-29 (1970) 1970-1 CB 86.

30. Close corporation

S corporation's passthrough income cannot be treated as net income from self-employment for purposes of calculating deduction of contributions to Keogh retirement plan. Durando v United States (1995, CA9 Ariz) 70 F3d 548, 95 CDOS 8757, 95 Daily Journal DAR 15187, 19 EBC 2191, 95-2 USTC P 50615, 76 AFTR 2d 5644, 76 AFTR 2d 7464, 95 TNT 227-50.

Pension plan in which close corporation required all compensation to be paid into plan with no current compensation at all for employees did not qualify, since, under plan, current compensation of participants was not substantial in relation to total compensation. Rev Rul 69-230 (1969) 1969-1 CB 116.

31. Professional corporation

Pension plan, otherwise qualified, will not be disqualified merely because professional corporation has only one employee. Rev Rul 72-4 (1972) 1972-1 CB 105.

32. Migratory or seasonal workers

Sole proprietor's pre-ERISA retirement plan could not require completion of 36 consecutive months of service with employer as prerequisite to coverage under plan because seasonal employees could never come under such plan. Rev Rul 69-173 (1969) 1969-1 CB 129.

Plan covering migratory workers might qualify by providing for earlier vesting, or by excluding employees who do not have minimum period of service. Rev Rul 71-263 (1971) 1971-1 CB 125, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

33. Partnerships

Law firm partners who self-classified as self-employed individuals under Internal Revenue Code pursuant to I.R.C. § 401(c)(1) thereby became subject to limitation on deductions for pension contributions in I.R.C. § 404(a)(8)(C) and were not permitted to deduct, in year subsequent to that in which subject contribution was made, amounts exceeding that limitation either as pension contributions per I.R.C. § 404(a)(1)(A) or as business expenses per I.R.C. § 162, I.R.C. § 212, or I.R.C. § 172, because § 404 occupied field and supplanted all other provisions with respect to such deductions. Dupont v United States (2009, DC Hawaii) 663 F Supp 2d 961.

Provision in corporate plan adopted by partnership limiting coverage to those with one year service in partnership prior to incorporation does not discriminate, since qualification for coverage is not dependent upon whether service was as partner or employee. Farley Funeral Home, Inc. v Commissioner (1974) 62 TC 150, acq in result.

Common control test under ERISA is exclusive test for employee attribution; Congress intended this to be straightforward, objective test for determining whether employees of affiliated entities should be treated as employees of single employer; where one man professional corporation entered 50/50 partnership with another doctor for medical practice and partnership was not part of controlled group, employees of partnership did not have to be covered by corporation pension plan. Garland v Commissioner (1979) 73 TC 5, 1 EBC 1614.

Fact that partnership's 12 eligible participants include 5 relatives of partners, is no reason to prevent their participation in plan. Rev Rul 69-144 (1969) 1969-1 CB 115.

Plan does not qualify where actuarial computations indicate that annual contributions provided for in partnership pension plan will be insufficient to fund retirement benefits provided for in plan if separate accounts are established for each partner, and required retirement benefits can be satisfied only by paying them out of total aggregate amount of investments in common fund, since plan does not conform to requirement that separate account be established for each partner. Rev Rul 69-628 (1969) 1969-2 CB 97.

Plan does not qualify where partnership composed of both owner-employees and other self-employed individuals who were not owner-employees (10% or less partners) set up profit-sharing plan whereby each partner, whether or not owner-employee, would designate amount of his annual contribution limited to lesser of 10% of net earnings or $ 2,500, since it had no definite formula for determining contributions to be made by employer on behalf of 10% or less partners. Rev Rul 70-127 (1970) 1970-1 CB 105.

Partner cannot participate as employee in qualified employee plan no matter how his partnership interest is defined; plan did not qualify where it included "special partners" defined in partnership agreement as limited partners with employee functions, since special partners were intended to have dual status of employees and partners, and to receive compensation with respect to their services performed as employees while also receiving share of partnership profits with respect to their investment in partnership. Rev Rul 70-411 (1970) 1970-2 CB 91.

Qualification of plan covering all common-law employees of partnership which provides for graduated vesting on scale of 10% per year for each year of service by each participant is not adversely affected by amendment which extends coverage to partners who do not own more than 10% of either capital interest or profit interest of partnership, since all participants are treated alike under amended plan and there is no discrimination in favor of "employees" who have partnership interest. Rev Rul 71-223 (1971) 1971-1 CB 117.

Annuity and bond purchase plan established by partnership may be treated as one plan for purposes of determining whether requirements of 26 USCS § 401(d)(3) are met. Rev Rul 81-134 (1981) 1981-1 CB 177.

34. Sole proprietorships

There is no prohibition under 26 USCS § 401 whereby employer cannot be considered employee; past services of owner-employer may be considered in eligibility requirements so long as other employees are similarly considered; contribution to profit-sharing plan of incorporated sole proprietor of construction company is there-

fore allowed. Sherman Constr. Corp. v United States (1973, ED Va) 358 F Supp 446, 73-1 USTC P 9258, 31 AFTR 2d 1000.

Contributions of owner-employee can be made only with respect to earned income of owner-employee which is derived from business for which plan is established; accordingly, where self-employed professional individual, who is also member of professional partnership, establishes qualified pension plan for his sole proprietorship, only earnings stemming from proprietorship may be used as basis for determining contributions. Rev Rul 68-176 (1968) 1968-1 CB 168.

Sole proprietor's spouse, who is bona fide employee of proprietorship with more than 3 years of service, must be included in retirement plan that provides benefits for owner-employee and all common law employees. Rev Rul 79-377 (1979) 1979-2 CB 162.

III. DISCRIMINATION IN FAVOR OF OFFICERS

35. Generally

Trust established by corporation which purchased annuity policies for benefit of officer-stockholders only was not exempt from income taxes under predecessor to 26 USCS § 401. Hubbell v Commissioner (1945, CA6) 150 F2d 516, 45-2 USTC P 9355, 34 AFTR 42, 161 ALR 764.

Fact that application formula under profit-sharing plan did not produce discrimination in favor of one of 4 officers and highly paid employees was not sufficient to save plan from consequences of substantial discrimination in favor of other 3. Auner v United States (1971, CA7 Ill) 440 F2d 516, 71-1 USTC P 9246, 27 AFTR 2d 796.

Purported employee pension plan adopted by corporation without prior informal approval of IRS failed to conform to requirements of 26 USCS § 401, where, during period of operation of plan, company employed between 104 and 163 persons and maximum number of employees ever covered by plan was 12, all but one of whom were corporate officers or supervisory personnel. Cornell-Young Co. v United States (1972, CA5 Ga) 469 F2d 1318, 73-1 USTC P 9107, 31 AFTR 2d 372.

Taxpayer's pension plan is not discriminatory where only evidence of discrimination in favor of prohibited group is single disproportionate forfeiture allocation in 1969; taxpayer instituted plan to reduce rank and file turnover and plan was not inherently discriminatory but only discriminatory in actual practice in 1969 and although turnover remained problem even after plan was instituted, allocation formula did not result in consistent pattern of discrimination permanently insuring prohibited group preferential treatment over rank and file employees. Sol Walker & Co. v United States (1980) 225 Ct Cl 215, 636 F2d 298, 80-2 USTC P 9744, 46 AFTR 2d 5910.

Plan qualifies where contribution formula assures that no contribution on behalf of any other participant may ever be used for benefit of owner-employee and limitation on contribution for owner-employee and nonforfeitability of contribution precludes any discrimination, even though owner-employee is older than other employees. Rev Rul 69-253 (1969) 1969-1 CB 129.

Profit-sharing plan which includes self-employed participants and their employees cannot let only self-employed participants elect to allocate their contributions to different funds under plan; if employees are not given same election, plan is discriminatory and will not qualify. Rev Rul 70-370 (1970) 1970-2 CB 84, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

"Salaried only" plan which covers company's 2 shareholder-employees, to exclusion of 4 other employees, each of whom earns $ 18,000 on hourly basis, which is substantially more than $ 12,000 earned by one shareholder and slightly less than $ 20,000 earned by other shareholder, discriminates in favor of shareholder group as against nonstockholder employees. Rev Rul 74-141 (1974) 1974-1 CB 93, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Pension plan that meets coverage requirements of 26 USCS § 410(b)(1)(A) for taxable year is not discriminatory within meaning of 26 USCS § 401(a)(4) merely because it fails to provide benefits for ineligible employees. Rev Rul 79-348 (1979) 1979-2 CB 161, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Plan provision permitting continued crediting of service to employees on leave of absence which is granted pursuant to established leave policy applied in uniform and nondiscriminatory manner will not prevent plan from qualifying under 26 USCS § 401(a). Rev Rul 81-106 (1981) 1981-1 CB 169.

Inclusion of elective contributions under qualified cash or deferred arrangement as compensation in defined benefit pension plan does not render pension plan discriminatory within meaning of 26 USCS § 401(a)(4); exclusion of elective contributions does not render plan discriminatory. Rev Rul 83-89 (1983) 1983-1 CB 88.

Inclusion or exclusion of elective contributions under tax sheltered annuity described in 26 USCS § 403(b), as compensation in money purchase pension plan, does not cause pension plan to be discriminatory within meaning of 26 USCS § 401(a)(4); however, inclusion of nonelective contributions may cause plan to be discriminatory. Rev Rul 84-74 (1984) 1984-1 CB 118.

Defined benefit offset plan that uses estimated wages for an employee in determining that employee's old-age insurance benefit provided under Social Security Act fails to satisfy nondiscrimination requirements of 26 USCS §§ 401(a)(4) and 401(a)(5) and minimum vesting requirements of 26 USCS § 411 unless certain conditions are satisfied. Rev Rul 84-45 (1984) 1984-1 CB 115.

For distributions commencing in plan years prior to effective date of non-discrimination regulations under § 1.401-4(c), plan may be amended to provide either such regulations or those under Treas. Reg. § 1.401(a)(4)-5(b) will apply to particular groups of employees so long as amendment does not discriminate against non-highly compensated employees whose benefits are restricted. Rev Rul 92-76 (1992) 1992-2 CB 76.

36. Determining status

Only those employees whose principle duties consist in supervising work of other employees are in group in whose favor discrimination is prohibited under profit-sharing plan. Rev Rul 70-384 (1970) 1970-2 CB 87, mod (1993) 1993-2 CB 125, 93 TNT 24-6.

Employee given title of assistant secretary-treasurer merely to qualify employee to sign checks in absence of superior officers and to affix and attest to corporate seal when necessary who actually performs these duties only on few occasions and otherwise has no voice in management or administration of corporation is not officer for purpose of 26 USCS §§ 401 and 410. Rev Rul 80-314 (1980) 1980-2 CB 152.

Employee benefit plan which limits participation to class of employees who are not entitled to overtime pay under Fair Labor Standards Act of 1938, as amended, does not automatically satisfy nondiscrimination requirements of 26 USCS § 401(a)(4). Rev Rul 81-42 (1981) 1981-1 CB 216, mod (1993) 1993-2 CB 125, 93 TNT 24-6.

37. Inadvertent accounting errors

Treasury may disqualify retroactively plan covering sole stockholder-employee and 5 other employees, even though discrimination in favor of stockholder employee was due to inadvertent and innocent mistake, and employer offered to retroactively correct it. Myron v United States (1977, CA9 Cal) 550 F2d 1145, 77-1 USTC P 9242, 39 AFTR 2d 840.

Inadvertent operational error by accountant which omits contribution to plan on behalf of only eligible employee benefits only 67 percent of eligible recipients, rather than required 70 percent, and thereby discriminates, in operation, in favor of shareholders. Ludden v Commissioner (1980, CA9) 620 F2d 700, 2 EBC 2329, 80-1 USTC P 9188, 45 AFTR 2d 1068.

Plan set up to cover all full-time employees and operated by mistake so as to benefit only corporate president is disqualified because discriminatory in operation. Myron v United States (1974, CD Cal) 382 F Supp 590, 74-2 USTC P 9681, 34 AFTR 2d 5798, affd (1977, CA9 Cal) 550 F2d 1145, 77-1 USTC P 9242, 39 AFTR 2d 840.

38. Alternative benefits

Plan discriminated where all of taxpayer's employees were eligible for coverage under plan, but only single highly compensated employee chose to participate, while all employees who received low level of compensation chose to receive current cash bonus in lieu of coverage. Harwood Associates, Inc. v Commissioner (1974) 63 TC 255, 1 EBC 1135.

Professional corporation's stock bonus plan fails to qualify where plan beneficiaries who are not licensed professionals cannot receive employer securities but receive cash or other assets instead. Ralph Gano Miller (Corp.) v Commissioner (1981) 76 TC 433.

Restrictions on plan participant's ability to elect lump sum payment option may in some circumstances be discriminatory within meaning of 26 USCS § 401(a). Rev Rul 85-59 (1985) 1985-1 CB 135, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Duplicate benefits for highly compensated employees obtained where employer first divided existing plan into 2 plans, one for highly compensated employees and one for other employees, froze benefit accrual for plan for highly compensated employees, then later amended plan for non-highly compensated employees to permit high-

ly compensated employees to participate violate nondiscrimination rules. Rev. Rul. 99-51 (1999) 1999-50 IRB 652.

39. Nonparticipation by choice

Company retirement plan under which 9 out of 23 eligible employees were highly paid satisfies nondiscrimination requirements of 26 USCS § 401 where only 2 of 23 eligible employees actually elected to participate and only one of those 2 participants was highly paid; while § 401 provides that plan shall not set up classification of employees that discriminates in favor of prohibited group, it does not require that plan include fair cross-section of employees eligible to participate; participation of one of highly paid employees did not tip coverage scales in favor of prohibited group and although participants in plan did not constitute fair cross-section of company's employees that is not sufficient ground for disqualifying plan where no discrimination in favor of prohibited group resulted. Federal Land Bank Asso. v Commissioner (1980) 74 TC 1106, 2 EBC 2385.

Voluntary employee nonparticipation may result in making otherwise qualified pension plan discriminatory in operation due to lack of enough rank and file coverage; where professional corporation's plan covered only 2 dentist shareholders and all eligible employees voluntarily waived participation, dentists must include in gross income their respective vested allocable portions of corporation's contributions to plan for taxable year in question. Olmo v Commissioner (1979) TC Memo 1979-286, RIA TC Memo P 79286, 38 CCH TCM 1112.

40. Collective bargaining agreement

Plan for "salaried only" group, which was heavily weighted with highly paid, supervisory employees as result of union's pressing for higher wages rather than pension plan, did not qualify. Loevsky v Commissioner (1973, CA3) 471 F2d 1178, 73-1 USTC P 9153, 31 AFTR 2d 476, cert den (1973) 412 US 919, 37 L Ed 2d 145, 93 S Ct 2733.

Fact that excluded employees were members of union and could not be covered without collective bargaining did not alter fact that plan was discriminatory since if plan in operation discriminates in favor of officer-stockholders it will not qualify whether discrimination results from intentional conduct on part of taxpayer or from extraneous factors over which taxpayer has no control. Container Service Co. v United States (1973, CA6 Ohio) 478 F2d 770, 73-1 USTC P 9423, 31 AFTR 2d 1254.

Corporation's contributions to profit-sharing retirement plan, covering only its salaried employees, which in operation discriminates in favor of employees who are officer-shareholders, supervisors and are highly compensated, are not deductible, even though it is small corporation, there are 5 employees covered and remaining 15 employees are members of union covered by collective bargaining agreement and cannot, unilaterally, be included in plan. Container Service Co. v United States (1972, SD Ohio) 345 F Supp 235, 72-2 USTC P 9565, 29 AFTR 2d 1213, affd (1973, CA6 Ohio) 478 F2d 770, 73-1 USTC P 9423, 31 AFTR 2d 1254.

Profit-sharing plan making 2 sole shareholders only participants met requirements of 26 USCS § 401(a)(3) when read in conjunction with preexisting pension plan established under union agreement for taxpayer's 5 or 6 union employees, but failed to qualify under § 401(a)(4) since it discriminated in favor of officer-shareholders whose contributions were 15% of compensation, compared to 3% of employees' compensation. Loper Sheet Metal, Inc. v Commissioner (1969) 53 TC 385.

In case of union-negotiated plan adopted both by industry employees and by bargaining union where all union employees were covered including corporate officers who were among 25 highest paid with anticipated annual pensions exceeding $ 1,500, possibility of discrimination existed and restrictions on distributions must be incorporated in plan. Rev Rul 71-438 (1971) 1971-2 CB 205, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Corporation that contributes to union-negotiated pension plan covering only union employees may also set up second pension plan for executives and other non-union employees; taken together both plans constitute one qualified plan, where there are no apparent reasons to foresee that eventual benefits would be likely to discriminate in favor of executive employees. Rev Rul 72-304 (1972) 1972-1 CB 112, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

41. Self-employment tax reduction

Integrated defined contribution plan under which employer's maximum contribution on behalf of owner-employee is not reduced by self-employment tax fails to meet requirements of 26 USCS § 401(d). Rev Rul 81-139 (1981) 1981-1 CB 177, obsoleted (1991) 1991-1 CB 281.

42. Changes in operation

Fact that plan was nondiscriminatory in operation during its earlier years did not immunize it against subsequent determination that in later years, because of changes in nature of employer's operations, plan began to discriminate; where rank-and-file participation in plan fell off because of decline in particular branch of employer's business (other branches being manned by excluded union personnel), disqualification was retroactive to all open plan years. Pulver Roofing Co. v Commissioner (1978) 70 TC 1001, 1 EBC 1981.

"Doctrine of unforeseen circumstances," which may excuse plan discrimination when events which caused situation are unforeseeable, did not protect plan where business change was semi-permanent one which left company's president and sole shareholder as only plan participant for more than 4 years. Gross Distributing Co. v Commissioner (1982) 3 EBC 1507, TC Memo 1982-264, RIA TC Memo P 82264, 43 CCH TCM 1357, affd (1983, CA6) 710 F2d 249, 83-2 USTC P 9440, 52 AFTR 2d 5280.

Duplicate benefits for highly compensated employees obtained where employer first divided existing plan into 2 plans, one for highly compensated employees and one for other employees, froze benefit accrual for plan for highly compensated employees, then later amended plan for non-highly compensated employees to permit highly compensated employees to participate violate nondiscrimination rules. Rev. Rul. 99-51 (1999) 1999-50 IRB 652.

43. Independent contractors

If individuals who perform services for corporation are independent contractors, rather than employees, then plan covering stockholder-employees is non-discriminatory, since in that case they would be only employees; thus, where 8 window washers employed by corporation engaged in business of cleaning and washing windows are independent contractors, plan covering 2 stockholder-employees is upheld. Jim's Window Service, Inc. v Commissioner (1974) TC Memo 1974-115, RIA TC Memo P 74115, 33 CCH TCM 563.

44. Single employer rule

Rule that all employees of all corporations which are members of controlled group must be treated as employed by single employer is not limited to situations where plan was created or manipulated for purpose of discrimination in favor of highly compensated employees; thus, where as result of combining employees in this fashion virtually all of employees were highly compensated, plan of one of companies involved, which otherwise would have qualified, does not. Fujinon Optical, Inc. v Commissioner (1981) 76 TC 499, 2 EBC 1145.

Employer who has in effect single qualified plan, funded through several group annuity contracts for exclusive benefit of both salaried and wage-earning employees, will not affect plan's qualified status by transferring actuarial excess of funds from contract covering wage-earning employees to similar contract covering salaried employees. Rev Rul 68-242 (1968) 1968-1 CB 156.

Several plans considered as unit will satisfy nondiscrimination test of 26 USCS § 401(a)(4) and 26 USCS § 410(b) as to amount of benefits or contributions if either normalized employer-provided benefits or both actual employer contributions and adjusted employer contributions do not constitute greater percentage of non-deferred compensation for prohibited group employees than for rank and file employees. Rev Rul 81-202 (1981) 1981-2 CB 93, mod (1983) 1983-2 CB 70 and obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

45. Disproportionate contributions

Contributions by employer to pension trusts established for hourly employees and executive employees were exempt, though contributions to executive employees' fund were greatly in excess of contributions to hourly employees' fund, where contributions were equalized after amendment of predecessor to 26 USCS § 401 prohibiting discrimination. H. S. D. Co. v Kavanagh (1951, CA6 Mich) 191 F2d 831, 51-1 USTC P 9358, 41 AFTR 147.

Inclusion of shareholder-employees' share of corporation's net profits which amounted to dividends and were thus not uniformly and consistently available to all plan participants in stockholders' salary for profit-sharing plan purposes resulted in disproportionate allocation of contributions to stockholders which prevents plan from qualifying under 26 USCS § 401(a)(4). Rev Rul 71-26 (1971) 1971-1 CB 120, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Payments made by employer to qualified plan which are made to restore some or all of plan's losses due to action, or failure to act, under circumstances which create a reasonable risk of liability for breach of fiduciary

obligations are not restorative payments and are not treated a contributions for purposes of nondiscrimination rules, rules for qualified matching contributions, § 415 limits on amount of contribution and excise tax imposed by § 4972 on nondeductible contributions. Rev Rul 2002- 45 (2002) 2002-2 CB 116, 2002-29 IRB 116.

46. Dependent upon length of service

Profit-sharing plan which, by taking into account number of years of past service, resulted in overweighing contributions or benefits for officers or shareholders as compared to other employees, and did so beyond extent of differences in pay, is discriminatory. Bernard McMenamy, Contractor, Inc. v Commissioner (1971, CA8) 442 F2d 359, 71-1 USTC P 9385, 27 AFTR 2d 1307.

Past services of owner-employer may be considered in eligibility requirements so long as other employees are similarly considered. Sherman Constr. Corp. v United States (1973, ED Va) 358 F Supp 446, 73-1 USTC P 9258, 31 AFTR 2d 1000.

Profit sharing plan encompassing 2 corporations is disqualified, where distributions of forfeitures gave president and sole stockholder and president of other corporation higher percentage of current compensation than other employees, as it was allocation formula taking into account length of service, thereby causing disproportionately higher amount to be allocated to officers, shareholders on highly compensated employees. Quality Brands, Inc. v Commissioner (1976) 67 TC 167.

Employee's retirement plan which grants owner-employee credit for his past service as partner will not qualify unless it grants similar credit for common-law employees. Rev Rul 69-409 (1969) 1969-2 CB 98.

Pension with different requirements for present and future employees was not discriminatory, since at time plan was established all employees who were officers, shareholders or highly compensated were over 30 years of age and had at least 5 years of service; plan did not discriminate in favor of employees who were officers, shareholders, etc., since these employees met requirements of new employees. Rev Rul 70-75 (1970) 1970-1 CB 94.

Pre-ERISA plan provision which provided for past-service credit rendered after attainment of specified age or completion of minimum service was not discriminatory classification for benefits if applied to original as well as subsequent participants. Rev Rul 70-77 (1970) 1970-1 CB 103, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Qualified plan may provide for increased employer contributions based on length of service, but if only top executives qualify for higher contribution rate based on length of service because of rapid rank-and-file employee turnover, plan may then be disqualified as discriminatory in practice; plan did not qualify because 15% contribution for officer-employee as against only 7% for others showed that plan's contribution formula discriminated in operation in favor of officer-employee. Rev rul 72-303 (1972) 1972-1 CB 110.

Pension plan providing benefits based only on past service and covering 2 officer-shareholders and 6 rank and file participants discriminates in favor of officer-shareholders within meaning of 26 USCS § 401(a)(4) where officer-shareholders have more credited service and are older than rank and file participants. Rev Rul 81-248 (1981) 1981-2 CB 91, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Profit-sharing plan containing year of service factor in its allocation formula may or may not satisfy requirements of 26 USCS § 401(a)(4) and regulation § 1.401-4 depending on whether contributions actually allocated to participants in various compensation ranges are nondiscriminatory. Rev Rul 84-155 (1984) 1984-2 CB 95, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

47. Dependent upon ownership rights

Corporation's profit sharing plan failed to qualify in pre-ERISA year because shareholder-employee benefits were keyed to sum of their salaries plus their shares of corporation's taxable income, but other employees' benefits were based on salaries alone. Robertson v Commissioner (1974) 61 TC 727.

Qualification of pre-ERISA plan covering all common-law employees of partnership which provided for graduated vesting on scale of 10% per year for each year of service by each participant was not adversely affected by amendment which extended coverage to partners who did not own more than 10% of either capital interest or profit interest of partnership where all participants were treated alike under amended plan and there was no discrimination in favor of "employees" who had partnership interest. Rev Rul 71-223 (1971) 1971-1 CB 117.

Profit sharing plan does not qualify where contributions were allocated almost entirely to accounts of shareholder-employees, substantially in proportion to their ownership-interests in corporation, whose trust assets were invested in real property leased to corporation for rentals greatly in excess of the going rental paid for similar

property in arms-length transactions, since plan amounted to subterfuge for distribution of profits to shareholders. Rev Rul 74-341 (1974) 1974-2 CB 128.

Partnership's plan benefiting common law employees and self-employed individuals that provides for annual contributions equal to 15 percent of net earnings of common law employees and owner-employees and 10 percent of net earnings of partners who are not owner-employees fails to qualify under 26 USCS § 401. Rev Rul 81-67 (1981) 1981-1 CB 175.

48. Dependent upon earnings

Combination of profit-sharing plan for highly compensated employees and pension plan for union employees was disqualified as single plan where it discriminated in favor of highly compensated employees. Liberty Machine Works, Inc. v Commissioner (1974) 62 TC 621, affd (1975, CA8) 518 F2d 554, 75-2 USTC P 9613, 36 AFTR 2d 5441.

Prior to ERISA, pension plan did not need to include specific provisions to prohibit discrimination where plan provided for (1) employer contributions of 5% of total compensation for each participant after 2 years of employment, (2) at age 65 and actual retirement, participant was entitled to such benefits as could be provided with accumulated contributions and increments in his account, and (3) all participants were treated alike with no employee obtaining disproportionate benefit because of age or method of funding. Rev Rul 69-415 (1969) 1969-2 CB 96, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Funding officer's pension with 90% of contributions was proper where corporation with only 2 employees set up pension plan covering both 60-year old sole stockholder-employee and other 52-year old employee which provided for (1) pension equal to 60% of career average compensation of each participant, with all benefits fully vested when accrued and (2) established normal retirement age as later of participant's 65th birthday or day on which he had 10 years of coverage resulting in 90% of contributions going to fund owner's pension; benefits were nondiscriminatory because they were geared to identical percentages of compensation for each employee and total of owner's compensation plus contributions allocated to funding his pension did not exceed reasonable compensation. Rev Rul 74-142 (1974) 1974-1 CB 95, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Profit-sharing plan providing for allocation of employer contribution based on regular salary and bonuses but not on commissions and overtime is not discriminatory where in practice it favors rank-and-file employees over only covered employee who is officer, shareholder, or highly compensated employee. Rev Rul 81-74 (1981) 1981-1 CB 175, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Money purchase pension plan covering officer-shareholder and rank-and-file employee is discriminatory if employer contributions are based on higher of current salary or salary for first year of employment and result in disproportionate contributions for benefit of officer-shareholder. Rev Rul 85-34 (1985) 1985-1 CB 134, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

49. Dependent upon age

"Salaried only" plan which excluded 44 hourly-paid employees and covered only 4 of 7 salaried employees is discriminatory where plan only applied to salaried employees with at least one year of service and who were at least 25 years old, and 3 of 4 covered employees were in prohibited categories. Babst Services, Inc. v Commissioner (1976) 67 TC 131.

Designating variable percentage of contributions to purchase life insurance was discriminatory where plan required purchase of life insurance protection with 49 percent of amount contributed for each employee each year and employees over age 35, all of whom were in fact officers, could specify that less than 49 percent of their share was to be used to buy life insurance protection which gave officers greater investment flexibility with respect to their funds than other employees and resulted in disqualifying discrimination. Rev Rul 73-383 (1973) 1973-2 CB 137, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

There is no discrimination where pension plan provides for normal retirement age of 65 but permits participant to postpone retirement if no further contributions are made by employer for participant after he reaches normal retirement age; however, participant's benefits are adjusted to reflect income or losses of trust until actual retirement; where corporation has 2 employees, one of whom has reached age 65 but continues working, and as result of such continued employment, he will benefit from trust's earnings and will be entitled to receive greater benefit upon actual retirement than he would have received if he retired at age 65 and received immediate distribution, coverage requirements are satisfied since employee continues to benefit under plan. Rev Rul 73-448 (1973) 1973-2 CB 136.

Plan was disqualified where corporation, which established trusteed pension plan for benefit of full-time salaried employees who were under age of 55 on plan's effective date or on any subsequent anniversary date on which they were first eligible to participate, contrary to terms of plan made contributions on behalf of non-qualified officer-shareholder who was over age 55 on plan's effective date, but did not contribute on behalf of 4 rank and file salaried employees who were over age 55 on that date. Rev Rul 74-342 (1974) 1974-2 CB 133.

50. Social security differential

Mandatory employee contribution plan offered to all employees that operates to deny participation to lower paid employees or to deprive lower paid employees of benefits at least as high as benefits provided for higher paid employees in proportion to compensation, after considering differentials permitted under requirements for integration with social security, is discrimination within meaning of 26 USCS §§ 401 and 410. Rev Rul 80-307 (1980) 1980-2 CB 136, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

51. Discriminatory vesting

Pension plan is discriminatory where all employees are covered by identical plans but vesting provisions operate to preclude all but partners from practical benefits. United States v Hall (1968, CA8 ND) 398 F2d 383, 68-2 USTC P 9460, 22 AFTR 2d 5098.

Profit-sharing plan with years-of-service factor actually discriminated against rather than for higher-paid employees where each participant in plan was credited with 1 unit for each $ 100 of compensation, disregarding compensation over $ 25,000, and with 1 unit for each year of continuous employment after plan's effective date, forfeitures were allocated on similar basis, and vesting was at rate of 5 percent per year for each year of participation in plan; forfeitures actually allocated to officer-stockholder group were $ 84 less than would have been allocated to them had service factor been eliminated from allocation formula and percentage of "low-pay" employees vested was greater than percentage of high-pay employees vested, and, when allocated forfeitures were compared with compensation of both higher-paid and low-paid employees, plan benefits worked out to about 5 percent of compensation for each group. Gold Seal Products Co. v United States (1973, ND Ala) 73-2 USTC P 9747, 32 AFTR 2d 6014.

52. Adjusting benefits

Pension plan intended to qualify will not be considered discriminatory because it has provisions for adjusting retirement benefits when compensation is increased, with limitations applicable to all persons that are participants in plan. Rev Rul 69-251 (1969) 1969-1 CB 127, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Duplicate benefits for highly compensated employees obtained where employer first divided existing plan into 2 plans, one for highly compensated employees and one for other employees, froze benefit accrual for plan for highly compensated employees, then later amended plan for non-highly compensated employees to permit highly compensated employees to participate violate nondiscrimination rules. Rev. Rul. 99-51 (1999) 1999-50 IRB 652.

53. Deferred compensation

Inclusion of voluntarily deferred amounts in computing benefits under pension plan may result in discrimination prohibited by 26 USCS § 401(a)(4) only if proportion of compensation deferred by rank-and-file employees participating is less than that of highly paid employees. Rev Rul 80-359 (1980) 1980-2 CB 136, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

54. Part-time employees

Profit-sharing plan set up for 4 stockholder-employees plus 1 supervisor, thereby excluding 10 full-time employees who were members of union which supervised work of seasonal or part-time help and whose salaries were higher than 3 of 5 employees covered by plan, did not meet percentage test and also failed nondiscriminatory classification test because for this purpose seasonal and part-time employees may not be disregarded; fact that certain supervisors are also excluded from plan does not mitigate discrimination that exists in favor of other members of group. Rev Rul 72-283 (1972) 1972-1 CB 311.

IV. FUNDING OF PLAN

55. Computation of contribution

Taxpayer may contribute in excess of 5% of net profits where taxpayer's profit-sharing and benefit plan provided that taxpayer might contribute amount from its net profits of not less than 5% thereof, or in any amount in excess of that percentage not in excess of 15% of total compensation of participants, and later amended plan so as to provide for contributions of 5% of net profits, but not more than 15% of total compensation. McClintock-Trunkey Co. v Commissioner (1954, CA9) 217 F2d 329, 55-1 USTC P 9110, 46 AFTR 1160.

Benefits plan administrator had not violated Employee Retirement Income Security Act of 1974, 29 USCS §§ 1001 et seq., or 26 USCS § 401(a)(25), nor abused its discretion in its method of calculation of lump sum payments made under plan that could have been contributed to 26 USCS § 401(k) plan. Erven v Blandin Paper Co. (2005, DC Minn) 35 EBC 1301.

Change in definition of compensation to include bonuses discriminated in favor of 2 highly compensated officer-shareholders since they were only plan participants receiving bonuses. Epstein v Commissioner (1978) 70 TC 439.

For purposes of profit-sharing contributions, term "profits" does not include unrealized appreciation in property owned by partnership, and accordingly taxpayer-partner cannot deduct as contribution to plan amount representing unrealized appreciation where partnership lacks current or accumulated earnings and profits as defined under generally accepted accounting principals or under provisions of profit-sharing plan. Robertson v Commissioner (1990) TC Memo 1990-275, RIA TC Memo P 90275, 59 CCH TCM 781.

Profit-sharing plan that includes self-employed individuals does not have definite formula for contributions if plan permits employer to vary, at his discretion, percentage of profits to be contributed from year to year. Rev Rul 68-115 (1968) 1968-1 CB 166.

Contribution for shared employee is based only on portion of compensation paid by employer who sets up plan. Rev Rul 68-391 (1968) 1968-2 CB 180.

Employees' pension plan that provides for employer contributions of fixed percentage of total compensation will not fail to qualify merely because contributions are allocated to employees' accounts on basis of their service as well as contributions; contributions are fixed without being geared to profits. Rev Rul 68-592 (1968) 1968-2 CB 166.

Contributions to plan of exempt organization may be based on current compensation and amounts paid by employer toward purchase of nonforfeitable annuities; such nonforfeitable contributions under annuity purchase arrangements, although not received immediately by employee, are nevertheless compensation; plan shall not be considered discriminatory merely because contributions or benefits bear uniform relationship to total compensation, and does not fail to qualify because of basis used in determining contributions. Rev Rul 69-296 (1969) 1969-1 CB 127, mod (1984) 1984-1 CB 118.

Plan which provides that employer's contributions for each participant are to be specified percentage of his compensation regardless of profits is not profit-sharing plan even though plan requires contributions to be paid out of employer's profits when available. Rev Rul 70-182 (1970) 1970-1 CB 88.

Plan that provides that until entire past service cost of plan is liquidated, employer is to contribute additional amount (over normal cost of plan for year), of not less than two percent nor more than ten percent of such cost as of date plan was established, meets statutory requirements of 26 USCS § 401. Rev Rul 70-184 (1970) 1970-1 CB 105, obsoleted (1991) 1991-1 CB 281.

Plan does not fail to meet nondiscriminatory requirements because contributions are allocated on basis of compensation where compensation excludes tips, where tips are not paid over by waiter to employer, are not paid by patron to employer as service charge, or are not accounted for by employee to employer (as opposed to merely being reported). Rev Rul 71-28 (1971) 1971-1 CB 121, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Plan still qualified where corporation's qualified profit-sharing plan required annual contribution of 10% of profits up to 15% of total compensation but low profits for 1969, 1970, and 1971 resulted in less than 5% of total compensation being contributed, and during 1972 profits returned to normal, since corporation contributed less than 5% because of Pay Board limitations. Rev Rul 73-147 (1973) 1973-1 CB 191.

Plan is disqualified where money purchase pension plan provided for employer contribution equal to 10 percent of each participating employee's current annual compensation but Board of Directors could limit amount of employer contributions on behalf of any employee who owned more than 10 percent of employee's stock, since it means contributions to stockholder-employees are not fixed. Rev Rul 73-379 (1973) 1973-2 CB 124.

Plan for benefit of members of local police department funded solely by department's share of state tax on insurance premiums which is required to be distributed to local police pension plan, does not qualify since state's tax collections will vary from year to year and contribution will accordingly vary so that benefits to be derived from such contributions are not definitely determinable; plan would qualify if city specified rate of contributions it would make, even if it relied primarily on its share of state tax to fund plan. Rev Rul 73-412 (1973) 1973-2 CB 125.

Profit-sharing plan which requires each employee to contribute 2% of his compensation each month with voluntary contribution of additional 1%, 2% or 3% both of which contributions employer matches, but with additional provision that employee may withdraw all or any part of his contributions at any time without affecting employer contributions and earnings allocated to his account does not qualify because, by allowing immediate withdrawal of employee contributions to which employer contribution is geared, arrangement "could be expected to result in manipulation of allocation" and not provide definite predetermined formula required for allocating contributions among plan participants. Rev Rul 74-55 (1974) 1974-1 CB 89.

Profit-sharing plan which allows employee to withdraw his own contributions plus earnings thereon at any time, with provision that if he does so before his employment terminates, he forfeits employer contributions plus increments earned thereon, qualifies because there is substantial limitation on employee's right of withdrawal that can reasonably be expected to bar manipulation of allocation; profit-sharing plan which allows employee to withdraw his own contributions at any time at cost of having his right to make future contributions suspended for 6 months, and for which period no employee or employer contributions can ever be made, plan qualifies because it, too, imposes substantial limitation on right of withdrawal. Rev Rul 74-56 (1974) 1974-1 CB 90.

Pension plan established to replace qualified fixed benefit plan which holds surplus funds transferred from terminated plan in suspense account maintained without provision for allocation and distribution does not qualify under 26 USCS § 401(a) since if suspense accounts are maintained, provision must be made for ascertaining respective shares of participants in such accounts and such shares are to be included in distributions. Rev Rul 74-340 (1974) 1974-2 CB 128.

Pension plan qualifies where it provides for (1) annual pension benefit equal to 50% of aggregate amount of each participant's contributions, (2) each participant must contribute to plan at rate of 2% of annual earnings, and, in his discretion, may contribute additional 1 or 2% of such earnings, (3) participant may elect to change the rate of his voluntary contributions only once per year, and (4) may also elect to discontinue all his contributions to plan, but in that event he would not be eligible to again participate for one year, since benefits on behalf of each participant are determined in accordance with stipulated formula that is not subject to discretion of employer. Rev Rul 74-385 (1974) 1974-2 CB 130.

Although formula for determining contributions is not required, if one has been established but is not adhered to in particular year, deduction nevertheless may be allowed; where formula called for annual contributions of lesser of 10 percent of profits or 15 percent of total compensation, and it became apparent that no profits would be earned, shortly before end of year board of directors of corporation approved contribution of 5 percent of total compensation, which was paid out of accumulated earnings before end of the year, under circumstances no written amendment or notification was required, nor was it necessary to incur prior liability, since authorized contribution was paid to profit sharing trust in year for which deduction was claimed. Rev Rul 74-468 (1974) 1974-2 CB 140.

Profit-sharing plan providing for contributions of 20 percent of compensation for group of employees consisting of officers, shareholders, and others who are highly compensated and 10 percent of compensation for second group consisting of all other participating employees is discriminatory within provisions of 26 USCS § 401(a)(4). Rev Rul 81-48 (1981) 1981-1 CB 174, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Word "profits" in retirement provision of corporation's contract with its employees to effect that no pension or gratuity shall be paid except out of profits and that no pension or gratuity or claim shall be charge upon or against or payable out of any capital assets of company, referred, under predecessor to 26 USCS § 401, to net income derived from company's operations over given period computed by including within items of expense properly to be deducted from current receipts, fair allowance for depreciation of capital assets. Gearns v Commercial Cable Co. (1944) 293 NY 105, 56 NE2d 67, 153 ALR 813, reh den (1944) 293 NY 755, 56 NE2d 749.

56. Correction of error

Plan must be disqualified where due to innocent mistake, sole non-stockholder employee's account received no allocation even though corporation offered to correct error by reallocating its contributions, where no correc-

tion was actually made. Ludden v Commissioner (1977) 68 TC 826, 1 EBC 1787, affd (1980, CA9) 620 F2d 700, 2 EBC 2329, 80-1 USTC P 9188, 45 AFTR 2d 1068.

Corporation could not cure discriminatory operation of plan retroactively by reallocating all contributions plus interest to correct error by which employees were omitted from coverage for 2 years. Forsyth Emergency Services, P.A. v Commissioner (1977) 68 TC 881.

57. Excess contributions

Taxpayer may contribute in excess of 5% of net profits where taxpayer's profit-sharing and benefit plan provided that taxpayer might contribute amount from its net profits of not less than 5% thereof, or in any amount in excess of that percentage not in excess of 15% of total compensation of participants, and later amended plan so as to provide for contributions of 5% of net profits, but not more than 15% of total compensation. McClintock-Trunkey Co. v Commissioner (1954, CA9) 217 F2d 329, 55-1 USTC P 9110, 46 AFTR 1160.

Contribution of employer during one year was not excessive merely because future events showed that sound pension fund could have been established with lesser contribution. Philadelphia Suburban Transp. Co. v Smith (1952, ED Pa) 105 F Supp 650, 42 AFTR 388.

Extra premium added to cost of insurance contract by reason of substandard health condition of owner-employee is not included in determining whether contribution to qualified plan is excess contribution. Rev Rul 68-56 (1968) 1968-1 CB 169.

Contribution by partnership for owner-employee who entered Armed Forces and, as result, had no earned income from self-employment for taxable year in question, were not excess contributions as long as 3-year averaging provisions were satisfied and plan provided continued coverage for all participants while they were serving in Armed Forces. Rev Rul 69-38 (1969) 1969-1 CB 131.

Although excess employer contributions made on behalf of owner-employees may be treated as repaid to him if adequate adjustment is made to his account, no such treatment is accorded to any employer contribution made on behalf of common-law employees; therefore, such contribution cannot be later characterized as excess contributions for owner-employees, in order to secure return of these amounts, without violating requirement that such contribution must be nonforfeitable at time of contribution into fund. Rev Rul 69-524 (1969) 1969-2 CB 98.

"Net amount of excess contribution" not willfully made cannot be reduced by loss in value of no-load mutual fund shares purchased; loss in market value of securities purchased with excess contribution is not loading charge or other administrative charge within meaning of Regs. § 1.401-13(d)(4); excess contribution must be repaid or plan will be disqualified as to owner-employee. Rev Rul 69-571 (1969) 1969-2 CB 99.

Employee's profit-sharing plan, set up in addition to, and after establishment of, qualified pension plan, cannot qualify if aggregate employee contributions to plans are allowed to exceed 10% of compensation. Rev Rul 69-627 (1969) 1969-2 CB 92.

Plan did not qualify where partnership composed of both owner-employees and other self-employed individuals who were not owner-employees (10% or less partners) set up profit-sharing plan whereby each partner, whether or not owner-employee, would designate amount of his annual contribution limited to lesser of 10% of net earnings or $ 2,500, since it had no definite formula for determining contributions to be made by employer on behalf of 10% or less partners. Rev Rul 70-127 (1970) 1970-1 CB 105.

Earned income does not include amount excludable from gross income by U.S. citizen who is bona fide resident of foreign country within meaning of 26 USCS § 911. Rev Rul 70-491 (1970) 1970-2 CB 92.

10% figure used in Rev Rul 69-217 applies to voluntary contributions only; thus pension plan may still qualify even though participants are allowed to make voluntary contributions of up to 10% of their annual compensation in addition to required employee contribution. Rev Rul 70-658 (1970) 1970-2 CB 86.

Plan does not qualify where employee can select joint and survivor annuity measured by lives of employee and beneficiary other than his surviving spouse since such beneficiary may be significantly younger in age than employee, and there is no assurance that present value of benefits receivable by employee will exceed allowable percentage of value of total benefits. Rev Rul 74-325 (1974) 1974-2 CB 127.

Defined benefit pension plan, under which participant receives any balance in participant's individual account resulting from excess earnings derived from trust assets, in addition to benefit specified in plan, does not qualify under 26 USCS § 401(a). Rev Rul 78-403 (1978) 1978-2 CB 153.

Employee benefit plan does not fail to qualify under 26 USCS § 401(a) merely because it permits total voluntary employee contributions equal to 10 percent of employee's compensation for all years since employee became plan participant. Rev Rul 80-350 (1980) 1980-2 CB 133, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Employee benefit plan does not fail to qualify under 26 USCS § 401(a) merely because it permits voluntary employee contributions of 10 percent of employee's compensation in addition to employee's mandatory contributions as defined in 26 USCS § 411(c)(2)(C). Rev Rul 81-234 (1981) 1981-2 CB 89.

Integrated pension plan will not automatically fail to qualify under § 401(a) because all compensation received by each employee from employers who jointly maintain plan is considered as total compensation for purposes of determining excess contributions and plan benefits. Rev Rul 86-51 (1986) 1986-1 CB 205, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

58. Funding requirements

Amortization of plan's past service liability is based both on funded and unfunded portion of plan's past service liability, not merely unfunded portion; where past service liability of plan at time of merger is $ 15.6 million but, due to experience gains, only $ 12.3 million is unfunded, employer may compute limit of its allowable deduction based on amortizing $ 15.6 million over 10-year period. AMP, Inc. v United States (1987, CA3 Pa) 820 F2d 612, 8 EBC 2103, 87-1 USTC P 9352, 60 AFTR 2d 5143.

Funding by level annual premium method, which resulted in more rapid funding than if aggregate method were used, was proper. Philadelphia Suburban Transp. Co. v Smith (1952, ED Pa) 105 F Supp 650, 42 AFTR 388.

Lump-sum payment was taxable as ordinary income because early retirement plan was not qualified as "funded" under 26 USCS § 401 where taxpayer received two monthly payments of $ 270 followed by lump-sum payment of $ 12,291 less applicable payroll and withholding taxes under early retirement plan established in accordance with collective bargaining agreement between union and employers' association, which latter association collected necessary funds from various employers and paid them over to trust which thereafter distributed benefits to employees. Trebotich v Commissioner (1971) 57 TC 326, affd (1974, CA9) 492 F2d 1018, 74-1 USTC P 9275, 33 AFTR 2d 819.

Death benefits under pension plan of any type will be considered "incidental", and not disqualifying, if either (1) less than 50% of employer contribution credited to each participant's account is used to buy ordinary life insurance policies on participant's life, even if total death benefit consists of both face amount of policies, and amount credited to participant's account at time of death (Reg § 1.401-1(b)(1)(ii)) or (2) such death benefits would be considered incidental under Rev Rul 68-453, 1968-2 CB 163, (which declares that if total death benefit were equal to sum of proceeds of ordinary life insurance policies plus participant's auxiliary fund account, total death benefit would not be "incidental"), and total death benefit before normal retirement date is equal to greater of (a) proceeds of ordinary life insurance policies providing death benefit of 100 times anticipated monthly normal retirement benefit, or (b) sum of (i) reserve under ordinary life insurance policies plus (ii) participant's account in auxiliary fund. Rev Rul 74-307 (1974) 1974-2 CB 126.

All qualified plans must provide funding; plan is not qualified if it provides for direct payments by employer to his employee. Rev Rul 71-91 (1971) 1971-1 CB 116.

Employer's plan must meet coverage requirements on at least one day in each quarter. Rev Rul 71-192 (1971) 1971-1 CB 119, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Defined benefit pension plan, specifying actuarial method and assumptions that should be used for purposes of determining amount of employer contributions to plan, does not fail to satisfy requirements of 26 USCS § 401(a). Rev Rul 78-48 (1978) 1978-1 CB 115.

Defined contribution pension plan established by employer is qualified plan under 26 USCS § 401 even though only contributions are those made by employees. Rev Rul 80-306 (1980) 1980-2 CB 131.

Provision to fund plan by offsetting contributions under profit-sharing plan by contributions made to money purchase pension plan does not prevent either plan from qualifying under 26 USCS § 401(a). Rev Rul 81-201 (1981) 1981-2 CB 88.

Unpublished Opinions

Unpublished: Taxpayers' flexible premium retirement annuity (FPRA) did not meet definition of pension or profit sharing plan to qualify for tax-free rollover under I.R.C. § 401(a) because such plan had to be created by employer for benefit of his employees and challenged FPRA did not measure benefits by reference to taxpayers' years of employment or compensation. Sadberry v Comm'r (2005, CA5 Tex) 153 Fed Appx 336, 2005-2 USTC P 50644, 96 AFTR 2d 7119.

59. Investments

Tax exemption granted under 26 USCS § 401 allows income derived from investment (not involving funds borrowed for acquisition) to be exempted from income taxes; thus, tax exempt status of organization is not nullified by tax on debt financed income. Elliot Knitwear Profit Sharing Plan v Commissioner (1980, CA3) 614 F2d 347, 2 EBC 2330, 80-1 USTC P 9176, 45 AFTR 2d 639 (criticized in Henry E. & Nancy Horton Bartels Trust ex rel. University of New Haven v United States (2000, CA2 Conn) 209 F3d 147, 2000-1 USTC P 50363, 85 AFTR 2d 1352).

If plan is employee stock ownership fund (ESOP), plan fiduciaries start with presumption that their decision to remain invested in employer securities was reasonable; in other words, plan administrator's decision to remain invested in employer securities presumptively is not breach of fiduciary duty; plaintiff may overcome this presumption of reasonableness by showing that prudent fiduciary acting under similar circumstances would have made different investment decision. Dudenhoeffer v Fifth Third Bancorp (2010, SD Ohio) 757 F Supp 2d 753, 50 EBC 1353.

Stock bonus plan can qualify even though obligatory investments in employer stock do not produce fair return. Rev Rul 69-65 (1969) 1969-1 CB 114.

Sale of securities at profit benefits seller, but if purchase price is not in excess of fair market value of securities at time of sale and applicable investment requisites have been met, investment is consistent with exclusive-benefit-of-employees requirement; District Director, however, must be notified of investment of trust funds in stock and securities of employer so that determination may be made whether trust serves any purpose other than plan for exclusive benefit of employees. Rev Rul 69-494 (1969) 1969-2 CB 88.

Bank may name its trust officer as trustee if it does not violate state law and is not prohibited by its charter or by-laws; it may invest funds of trust in employer securities providing it meets all Code requirements dealing with investment in employer securities. Rev Rul 69-535 (1969) 1969-2 CB 90.

Exempt status of employee's pension and profit-sharing trust is not adversely affected by purchase of mortgage pool certificates issued by savings and loan associations. Rev Rul 70-544 (1970) 1970-2 CB 6, mod (1974) 1974-1 CB 147; Rev Rul 70-545 (1970) 1970-2 CB 7, mod (1974) 1974-1 CB 147.

While provisions for investing in corporate-employer stock was not in itself prohibited discrimination, nevertheless, operation of plan was discriminatory where right to have funds invested in stock of employer corporation benefited only officer-employees. Rev Rul 71-93 (1971) 1971-1 CB 122, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

All qualified profit-sharing, stock bonus and money purchase pension plans must provide for annual valuation of investments held by trust on specified inventory date, but fully insured profit-sharing plan may qualify even though it does not contain specific provision for annual valuation of trust assets if all trust assets are immediately invested in individual annuity or retirement income contracts of which reserve value is known at all times and any increase in that value from prior years is automatically allocated for benefit of each participant; annual valuation requirement is satisfied even though there is no specific language in plan requiring annual valuation. Rev Rul 73-435 (1973) 1973-2 CB 126.

Trusteed money purchase plan containing no specific language requiring periodic valuation of trust assets but under which all contributions were immediately invested in specified regulated investment company's stock, full and partial shares purchased on each employee's behalf were credited to his account, and dividends from such stock were reinvested in same stock which was also credited to his account, met requirements for valuation and qualified notwithstanding absence of specific language in plan requiring periodic valuation; since each participant's account is credited with number of shares purchased on his behalf rather than dollar value of such stock, each participant's interest in trust fund will be accurately reflected at all times regardless of market fluctuations, and furthermore, although value of stock held for participants may not be known at all times, their respective shares are ascertainable for purposes of making distributions under plan. Rev Rul 73-554 (1973) 1973-2 CB 130.

Trust language which permits trustee to consider nonfinancial employment-related factors, such as continuing job security for participants, conditions of employment, employment opportunities, and prospects for future benefits, constitute purposes that go beyond satisfying plan liabilities, and violate exclusive benefit rule. GCM 39870 (April 7, 1992).

Pension plan is not qualified because it is not for exclusive benefit of employees where plan principally invests in unsecured loans to employer, and continued to make such loans even though previous loans remained unpaid. Private Letter Ruling 9713002.

60. Interest credited to employee's account

Rate at which interest is credited to employees' accounts is lowest rate at which interest (if any) is, under terms of plan, payable in event of refund of employee contributions for any reason. Rev Rul 70-149 (1970) 1970-1 CB 95, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

61. Reserve or suspense fund

Pension plan that allowed employer to temporarily suspend contributions to auxiliary fund out of which disability and early retirement benefits were to be made in whole or in part did not qualify; since employer was not required to maintain auxiliary fund at particular level or to make contributions at any particular time such benefits were not definitely determinable as required by Regs. § 1.401-1(b)(1)(c). Rev Rul 69-427 (1969) 1969-2 CB 87.

Pension trust reserve account to cover future pension costs in event employer cannot meet his contribution liability in later years may disqualify employee benefit plan; Congress did not intend to extend tax advantages of qualified plan to unlimited contribution to reserve on which income would be exempt where (1) reserve is significant part of trust assets, and (2) most of reserve would probably revert to employer if plan was terminated; disqualification was retroactive. Rev Rul 70-421 (1970) 1970-2 CB 85.

If suspense accounts are maintained under profit-sharing plan, provision must be made for ascertaining respective shares of participants in such accounts, and such shares must be included in distributions made under plan. Rev Rul 71-149 (1971) 1971-1 CB 118.

62. Salary deductions

Amounts deducted from salary of employee in internal revenue service as contributions to service and retirement fund were taxable as income, and were not to be treated as contributions by employer to nontaxable fund. Megibow v Commissioner (1955, CA3) 218 F2d 687, 55-1 USTC P 9133, 46 AFTR 1553.

Amount paid into profit sharing plan was taxable as income where employer's profit-sharing plan provided that by giving prior direction in each year to employer to do so, whole of each employee's share of annual profit-sharing contribution would be paid into profit-sharing plan for account of such employee but that if he failed to give such prior written notice to employer only 40% of his share of annual profit-sharing contribution would be paid into plan and remaining 60% would be paid in cash to employee, and taxpayer timely directed that for year in question 60% be paid into plan. Hicks v United States (1962, WD Va) 205 F Supp 343, 62-2 USTC P 9544, 9 AFTR 2d 1819, affd (1963, CA4 Va) 314 F2d 180, 63-1 USTC P 9312, 11 AFTR 2d 972.

Congress, in drafting 11 USCS § 707(b), did not provide for deduction, from current monthly income, of qualified 26 USCS § 401(k) retirement plan loan repayments in Chapter 7 means test calculation under category of other expenses on official bankruptcy form B22A; the debtor's plan was presumed to be abusive. In re Whitaker (2007, BC ND Ohio) 58 CBC2d 667.

Pension plan in which close corporation required all compensation to be paid into plan with no current compensation at all for employees did not qualify, since, under plan, current compensation of participants was not substantial in relation to total compensation. Rev Rul 69-230 (1969) 1969-1 CB 116.

Contribution is excluded from faculty member's income where state statute requires contribution of specified percentage of compensation of state college employees toward retirement, and permits such contributions by means of salary reduction agreements. Rev Rul 70-582 (1970) 1970-2 CB 95.

Portion of United States Government employee's compensation that is withheld and contributed to United States Civil Service Retirement and Disability Fund is contribution by him to such fund and is includible in his gross income in same taxable year in which it would have been included if it had been paid to him directly. Rev Rul 72-250 (1972) 1972-1 CB 22.

401(k) plan may provide for automatic contribution by employee in absence of affirmative salary reduction election where plan permits employees to affirmatively elect out of automatic salary reduction contributions and instead take such amounts as cash compensation and employees are provided with notices explaining right to elect out of automatic salary reduction contributions. Rev. Rul. 98-30 (1998) 1998-25 IRB 8, amplified, superseded (2000) 2000-7 IRB 617.

Automatic compensation reduction program can qualify as elective contribution to cash or deferred arrangement if employees are given notice of automatic enrollment and can opt out. Rev. Rul. 2000-8 (2000) 2000-7 IRB 617.

63. Reversion to employer

"Benefit expectations" must be paid before any assets revert to employer on termination of defined benefit plan. Blessitt v Retirement Plan for Employees of Dixie Engine Co. (1987, CA11 Ga) 817 F2d 1528, 8 EBC 1929, vacated, reh gr, en banc (1988, CA11 Ga) 836 F2d 1571, 9 EBC 1567, different results reached on reh, en banc (1988, CA11 Ga) 848 F2d 1164, 9 EBC 2265.

Section 403(c)(2) of ERISA, which allows reversions to employer when contribution is made under mistake of fact, contribution is made to multi-employer plan under mistake of law or fact, or contribution is conditioned on plan's qualification and plan fails to qualify, does not violate exclusive benefit rule. Calfee, Halter, & Griswold v Commissioner (1987) 88 TC 641, 8 EBC 1329.

Plan containing provision that contributions "may" be refunded to employer to extent that contributions are disallowed as income tax deduction does not meet requirements of Rev Rul 77-200 because it does not condition contributions on deductibility but merely allows reversion; where plan language itself does not explicitly condition contribution on deductibility, reversion requests will be denied unless documentation, such as copy of board resolution, is provided to IRS which explicitly conditions contribution upon its deductibility. Private Letter Ruling 9025054.

Determination of which liabilities must be satisfied before reversion can occur is controlled by § 401(a)(2), not ERISA; "benefit expectations" are not liabilities which must be satisfied before plan assets revert to employer on termination of defined benefit plan unless there is specific plain language providing for such treatment. GCM 39665 (September 25, 1987).

Possibility of reversion of surplus funds to employer will not disqualify annuity plan under which, if amounts accumulated are more than sufficient to purchase all retirement annuities with respect to service prior to discontinuance of contributions under plan, surplus will be returned to employer after discontinuance. Rev Rul 71-297 (1971) 1971-2 CB 213.

Employer contributions to stock bonus, pension, or profit-sharing plan may be returned to employer if made by mistake of fact or if contributions were conditioned on deductibility and deduction is disallowed; earnings attributable to excess contribution may not be returned to employer, but losses sustained must reduce amounts so returned; if withdrawal of excess contribution causes balance of individual account of any participant to be reduced to less than balance would have been absent mistake amount to be returned must be limited to avoid such reduction; generally, reversions will be permitted if original contribution is attributable to good faith mistake of fact, or good faith mistake in determining deductibility of contribution, and reversion under such circumstances will not be treated as forfeiture in violation of 26 USCS § 411(a). Rev Rul 77-200 (1977) 1977-1 CB 98, superseded (1991) 1991-1 CB 57.

If contributions are conditioned upon their deductibility, reversion to employer does not disqualify client if amount involved is returned within one year of date of denial of qualification. Rev Rul 91-4 (1991) 1991-1 CB 57.

64. Suspension of contributions

Suspension of contributions did not cause discontinuance of pre-ERISA plan if benefits were not affected; therefore, if plan required contribution in first year before it came into existence, it would not be possible for discontinuance of contributions to occur until second year; plan qualified under 26 USCS § 401(a) during its first year and could be properly amended until end of second year. Rev Rul 68-137 (1968) 1968-1 CB 164, revoked (1989) 1989-1 CB 116.

Money purchase pension plan did not qualify where it provided that contributions could be suspended for one or more years and contained no provision for making up such contributions or earnings thereon; Treasury regulations require, in case of money purchase pension plan, that contributions must be fixed without being geared to profits and under above plan contributions were not fixed since no provision was made for making up contributions or income thereon during suspension period. Rev Rul 72-556 (1972) 1972-2 CB 221.

Multiple employer defined benefit plan must credit employees for all years of service whether or not employer makes required contributions to plan; plan that does not credit all years of service does not provide definitely determinable benefits as required by regulation § 1.401-1(b)(1)(i) and does not satisfy minimum participation and vesting standards of 26 USCS §§ 410 and 411. Rev Rul 85-130 (1985) 1985-2 CB 137.

65. Interplan transfers

Custodian bank's error in mailing taxpayer check for proceeds from liquidation of initial funding medium did not amount to premature withdrawal from first plan where taxpayer intended to, and did, switch plans; bank's action was both contrary to custodial agreement which prohibited distributions before age 59 1/2 and to taxpayer's written instructions to send proceeds to new investment fund, and when taxpayer received check, he immediately endorsed it over and mailed it to new fund; also effective date of new plan was designated as execution date of agreements so that there was in fact continuity of coverage. Doing v Commissioner (1972) 58 TC 115, acq in result.

Transfer of annuity contract from trust, forming part of qualified pension plan covering owner-employee, to bank custodian of second qualified pension plan covering same individual, did not result in amounts being distributed or made available to owner-employee before age 59 1/2 or disability and thus was not premature distribution. Rev Rul 68-160 (1968) 1968-1 CB 167.

Transferring funds from non-exempt employees' welfare fund to employees' trust forming part of pension plan will not, of itself, disqualify plan and trust. Rev Rul 68-223 (1968) 1968-1 CB 154.

There was premature distribution subject to tax and penalty, where self-employed individual who was switching his investment from one "Keogh" or H.R. 10 plan to another received annuity funds from first plan without any conditions or limitations before he was disabled or 59 1/2 years of age, even though he voluntarily reinvested proceeds in another qualified "Keogh" plan since there was no legal obligation to reinvest proceeds. Rev Rul 69-254 (1969) 1969-1 CB 129.

Employee who has vested right under profit-sharing plan may, if plan provides, authorize transfer of all or part of his interest to make up deficiency in employer's contribution under pension or annuity plan; qualification of profit-sharing plan in such case is not affected by amendment to permit funds to be transferred to pension plan; however, any funds so transferred will be includible in employee's gross income to same extent as if such funds had been distributed directly to employee and will be treated as employee contributions under pension plan. Rev Rul 69-295 (1969) 1969-1 CB 117.

Tax exemption of master trust was not affected where master pension plan and trust were adopted by several employers, but coverage under employer's plan became insufficient to retain exemption and thereby resulted in loss of exemption for plan, and where as soon as was administratively feasible (here within 30 days) after loss of qualification, trustee of master plan transferred all funds held under disqualified plan to separate unrelated trust. Rev Rul 71-461 (1971) 1971-2 CB 227.

Master trust entered into prohibited transaction by making unsecured loan to one of adopting employers, and its immediate transfer of funds held for debtor-employer into separate unrelated fund could not prevent denial of master trust fund's exemption from taxation, since divestiture of trust funds after loan was made did not alter fact that trustee entered into prohibited transaction. Rev Rul 71-479 (1971) 1971-2 CB 238.

Corporation which establishes profit-sharing plan similar to plan operated by predecessor partnership can transfer funds to that plan, as long as funds transferred on behalf of owner-employee remain subject to same restrictions they would have had if they had remained in trust established by partnership. Rev Rul 71-541 (1971) 1971-2 CB 209.

No funds were received or made available to participants and no premature distribution resulted where partners who were owner-employees exchanged their partnership's qualified pension plan annuity contracts for new contracts in name of trustee of successor corporation's profit-sharing plan. Rev Rul 73-259 (1973) 1973-1 CB 199.

Arrangement of partnership incorporation which eliminates need to bar distributions from corporate fund on behalf of former owner-employees before age 59 and 1/2 is to continue partnership trust until all funds are distributed according to its terms, in which case, new corporate fund need not place any limits on distributions to former owner-employees, and corporate fund can then buy partnership fund's assets for their value. Rev Rul 73-503 (1973) 1973-2 CB 142.

Taxpayer employing both union and nonunion employees with qualified pension plan for each, Plan A and Plan B, may not amend Plan A to permit transfer of funds from A to B without disqualifying Plan A because there would then be unlawful diversion of funds of Plan A to employer prior to its termination under Regulations § 1.401-2(a) which provide that there must be no diversion other than for benefit of "such employees or their beneficiaries, meaning employees under specific trust involved;" permitting transfer of funds from Plan A to Plan B would be allowing employer to recover part of funds prior to termination of trust under Plan A. Rev Rul 73-534 (1973) 1973-2 CB 132.

Upon termination of qualified profit-sharing plan that meets requirements of 26 USCS § 401, participating owner-employee, who is under 59 1/2 and not disabled, may rollover his funds tax-free from qualified plan into IRA that meets requirements of 26 USCS § 408. Rev Rul 78-404 (1978) 1978-2 CB 156.

Profit-sharing plan may accept rollover contributions from new employees who have not satisfied minimum service eligibility requirements. Rev Rul 96-48 (1996) 1996-2 CB 31.

V. PAYMENT UNDER PLAN

66. Computation of benefits

In pension plan qualifying under 26 USCS § 401, providing that when plan ceased to be fully funded maximum pension benefits would be recomputed using formula including date of initiation of plan, and making no reference to date of retirement as possible variable in this equation, benefits in event of early termination of "qualified" status are to be redetermined in terms of number of years elapsing between plan's initiation and termination date, rather than between initiation date and pensioner's retirement date. De Bardeleben v Cummings (1972, CA5 Ala) 453 F2d 320.

It is impermissible for cash balance plan to compute distributions made as lump sum payments using interest rate lower than minimum rate guaranteed by plan since use of lower rate made payment of portion of interest conditional on form of distribution. Esden v Bank of Boston (2000, CA2 Vt) 229 F3d 154, 24 EBC 2761, 2000-2 USTC P 50738, 86 AFTR 2d 6095, cert dismd (2001) 531 US 1061, 148 L Ed 2d 652, 121 S Ct 674.

Even if deadline for plans to amend present-value calculations to switch from using Pension Benefit Guaranty Corporation to using 30-year Treasury rate applied to employer, employer's plan amendment changing its interest rate calculation for pension plan lump-sum payments to retirees was not cutback prohibited by 26 USCS § 411(d)(6); in this case, Commissioner had extended deadline in Rev. Proc. 99-23, 1999-16 I.R.B. 5, which met 26 USCS § 401(b) and Treas. Reg. § 1.401(b)-1 requirements for extending deadline, and employer had amended its plan to adopt Treasury rate before extended deadline. Stepnowski v Comm'r (2006, CA3) 456 F3d 320, 38 EBC 1718.

Pension plan's use of 6.75 percent discount rate to actuarially reduce deferred vested retirement benefits did not amount to prohibited forfeiture of benefits under § 203(a) of Employee Retirement Income Security Act of 1974, 29 USCS § 1053(a), because (1) 29 USCS § 1056(a), 26 USCS § 401(a)(14), and regulations prescribed by Secretary of Treasury did not specify range of discount rates that qualified as reasonable; (2) 6.75 percent discount rate was below both estimated rate of return and actual rate of return earned by assets of plan; (3) at time it was applied, discount rate was more favorable to participants that thirty-year interest rate on government securities would have been; and (4) neither former version of 26 USCS § 417(e)(3)(A)(ii)(II) nor any regulations required use of rate on thirty-year Treasury securities to determine actuarial equivalent of deferred vested retirement benefit. McCarthy v Dun & Bradstreet Corp. (2007, CA2 Conn) 482 F3d 184, 40 EBC 1554.

Judgment on pleadings was entered in favor of Pension Benefit Guaranty Corporation (PBGC), government agency administering relevant plan's termination under Title IV of Employee Retirement Income Security Act of 1974, because PBGC's calculation of participant's benefit was based on terms of document plans; "compensation" was clearly defined as amount actually paid that was subject to tax, and although "offset plan" was not defined in plan documents, it was clearly defined in 26 USCS § 401(1)(4)(D) as plan under which employee's pension benefit was reduced by that employee's Social Security benefit. McCree v Pension Benefit Guar. Corp. (2004, DC Mass) 34 EBC 2739.

While benefits under qualified plan can be offset by benefits payable under workmen's compensation law or occupational diseases law, benefits cannot be offset by disability damages recovered by employee in common-law action against employer. Rev Rul 68-243 (1968) 1968-1 CB 157, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Where total amount in employee's account is not actually distributed to him within one taxable year because it is at first erroneously computed as lesser amount than employee is actually entitled to, and where, when account is rechecked in later year and error is discovered, additional amount to which employee is entitled is distributed to him in that later year. Rev Rul 69-190 (1969) 1969-1 CB 131.

Benefits cannot exceed actuarial value determined at time of early retirement or severance of maximum benefits otherwise determined; requirement will be satisfied if benefits on early retirement do not exceed benefits computed solely on basis of one of following: (1) maximum benefit otherwise determined is reduced by 1/15 for each of first five years and 1/30 for each of next five years by which starting date of annuity precedes age 65 for men or age 60 for women, and reduced actuarially for each additional year thereafter; (2) in case of plan funded

solely by typical individual level premium annuity insurance contracts, benefits provided by reserve. Rev Rul 70-149 (1970) 1970-1 CB 95, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Plan must contain requirement that benefits will be calculated from effective date of participation. Rev Rul 71-327 (1971) 1971-2 CB 185.

Plan does not fail to qualify merely because benefits payable on termination of service before normal retirement are based on cash surrender value of contracts purchased on employee's life, if plan specifies type of contract and method of funding to be used in providing benefits of all participants under plan, and provisions result in uniform cash surrender values with respect to all participants under similar circumstances and do not discriminate in favor of officers, shareholders, etc. Rev Rul 71-328 (1971) 1971-2 CB 203.

Plan does not qualify where settlement option elected had to result in receipt by participant, his spouse as survivor, or both, of at least 50% of anticipated total distribution, and balance to others, since employee might receive only nominal distribution with more than 50% distributed to his surviving spouse and another person. Rev Rul 74-359 (1974) 1974-2 CB 129.

Defined contribution plan does not qualify where trust earnings are allocated to participants, and valuation of trust investments are made at infrequent or irregular intervals or different valuation methods are used for different participants; however, plan provision allowing interim valuation at trustee's discretion in addition to constant annual valuation will not disqualify plan, provided use of interim valuations does not result in prohibited discrimination. Rev Rul 80-155 (1980) 1980-1 CB 84.

Benefits under pension plan are discriminatory within meaning of 26 USCS § 401(a)(4) where disability benefits are reduced by benefits paid under separate nonqualified disability insurance arrangement that provides benefits equal to 75 percent of employee's compensation but limited to $ 5000 monthly. Rev Rul 81-33 (1981) 1981-1 CB 173.

Qualified employees' pension plan may provide past service benefits based on average compensation for 3-year period immediately following establishment of plan. Rev Rul 81-49 (1981) 1981-1 CB 174, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Objective of city's pension plan would be defeated, and tax status of retirement plan would be imperiled, if Board or courts had to apply general purpose provision of city code to use discretion in calculating disability retirement benefits for individuals such as former city employee based on hardship rather than specific provision dictating that those benefits be reduced by any amount received as workers' compensation award; under 26 USCS § 401(a), pension plans had to provide "definitely determinable benefits" to obtain special tax treatment rather than case-by-case determination that hardship approach would require. Robinson v City of Wichita Emples. Ret. Bd. of Trs. (2010, Kan) 241 P3d 15.

67. Commencement of distribution

Qualified plan must provide for commencement of distribution of employee's interest no later than actual retirement after attainment of normal retirement age, slated age, or occurrence of specified event, and completion of service and other reasonable and uniform requirements. Rev Rul 66-11 (1966) 1966-1 CB 71.

Profit-sharing plan that permits distributions to retired employee and his beneficiaries concurrently does not qualify; incidental benefits may be paid to beneficiary after employee's death but not prior to his death. Rev Rul 74-360 (1974) 1974-2 CB 130.

Beneficiary of non-spousal IRA cannot extend time for beginning required distributions under IRA where written provisions of trust agreement provides that option to select alternative distribution schedule must be made prior to end of year following decedent's death, and beneficiary did not know of his designation and beneficiary, and could not exercise option, prior to that time. Private Letter Ruling 9812034.

Following death of owner of IRA who had been receiving minimum distributions based upon single life expectancy using annual recalculation method, designated IRA beneficiaries are permitted to take distributions over life expectancy of oldest remaining beneficiary, notwithstanding that under § 401(a)(9)(B)(i), post-death distributions are to be made at least as rapidly as under method being used at date of death. Private Letter Ruling 199951053.

It was Congress's intent to apply provisions of Omnibus Budget Reconciliation Act—which added 26 USCS § 3231(e)(9)—retroactively to prevent taxpayers like railroad from obtaining funds of tax paid with respect to 26 USCS § 401(k) contributions made prior to January 1, 1990. Atchison, Topeka & Santa Fe Ry. Co. v United States (2004) 61 Fed Cl 501, 2004-2 USTC P 50371, 94 AFTR 2d 5446.

68. Early withdrawal

Early distribution from IRC § 401(k) account, which was qualified retirement plan, was not from individual retirement account under IRC § 408 or IRC § 7701(a)(37) and, thus, did not qualify for exception to 10-percent additional tax under IRC § 72(t)(2)(E) for higher education expenses, even if it were used for higher education expenses. Uscinski v Comm'r (2005) TC Memo 2005-124, 89 CCH TCM 1337.

Plan is not qualified where participants have right to acquire, hold or dispose of amounts attributable to their voluntary contributions to plan; while qualified trust may permit participant to elect how amounts attributable to his balance will be invested, allowing participant to have right to acquire, hold, and dispose of amounts at will would effectively eliminate trust agreement. Rev Rul 89-52 (1989) 1989-1 CB 110.

Plan may qualify even if it provides that voluntary payments can be withdrawn prior to termination or retirement. Rev Rul 60-323 (1960) 1960-2 CB 148.

Plan can qualify even if it permits advance withdrawals of voluntary contributions plus any increment actually earned on those contributions. Rev Rul 69-277 (1969) 1969-1 CB 116.

Profit sharing plan which allows participating employee to withdraw any part of his employer's contribution 18 months after contributed, without regard to any other conditions, does not qualify. Rev Rul 71-295 (1971) 1971-2 CB 184.

Plan providing that contribution for year, made after end of year, but within period prescribed in 26 USCS § 404(a)(6), would be deemed credited on December 31 of such year for purpose of election to withdraw employer contributions, did not meet "fixed number of years" requirement because, even though contribution was deemed to have been made on last day of preceding taxable year, this did not change date on which contribution was actually made or period accumulated under trust. Rev Rul 73-553 (1973) 1973-2 CB 130.

Plan may permit trustee to transfer prior withdrawable voluntary employee contributions to make up deficiency in employee's required contributions for any year. Rev Rul 73-581 (1973) 1973-2 CB 131.

Profit-sharing plan which requires each employee to contribute 2% of his compensation each month with voluntary contribution of additional 1%, 2% or 3% both of which contributions employer matches, but with additional provision that employee may withdraw all or any part of his contributions at any time without affecting employer contributions and earnings allocated to his account does not qualify because, by allowing immediate withdrawal of employee contributions to which employer contribution is geared, arrangement "could be expected to result in manipulation of allocation" and not provide definite predetermined formula required for allocating contributions among plan participants. Rev Rul 74-55 (1974) 1974-1 CB 89.

Profit-sharing plan which allows employee to withdraw his contributions plus earnings thereon at any time, with provision that if he does so before his employment terminates, he forfeits employer contributions plus increments earned thereon, qualifies because there is substantial limitation on employee's right of withdrawal that can reasonably be expected to bar manipulation of allocation; profit-sharing plan which allows employee to withdraw his contributions at any time at cost of having his right to make future contributions suspended for 6 months, and for which period no employee or employer contributions can ever be made, qualifies because it imposes substantial limitation on right of withdrawal. Rev Rul 74-56 (1974) 1974-1 CB 90.

Plan may not permit withdrawal of funds by participant prior to termination of employment if such withdrawals will exceed participant's voluntary contributions plus any increments actually earned on contributions; thus, employer-funded money purchase plan that permits withdrawals from participant's account prior to retirement to meet family educational expenses without providing for such limitation does not qualify. Rev Rul 74-417 (1974) 1974-2 CB 131.

69. Premature payout

Premature distribution bars participation in any qualified plan, not only in plan from which it was received; single practitioner attorney who established retirement plan in 1966 and joined law partnership in 1969 at which time he received distribution of entire interest in former retirement plan is barred from participating in partnership plan. Ziegler v Commissioner (1978) 70 TC 139.

Transfer of annuity contract, from trust forming part of qualified pension plan covering owner-employee to bank custodian of second qualified plan covering same individual, did not result in amounts being distributed or made available to owner-employee before age 59 1/2 or disability and thus was not premature distribution. Rev Rul 68-160 (1968) 1968-1 CB 167.

There was premature distribution subject to tax and penalty, where self-employed individual who was switching his investment from one "Keogh" plan to another received annuity funds from first plan without any condi-

tions or limitations before he was disabled or 59 1/2 years of age, even though he voluntarily reinvested proceeds in another qualified "Keogh" plan since there was no legal obligation to reinvest proceeds. Rev Rul 69-254 (1969) 1969-1 CB 129.

Insured "Keogh" plan must bar premature payout despite contrary state law. Rev Rul 69-313 (1969) 1969-1 CB 130.

Although restricted plan benefits may be supplemented, plan that contains required limitations as to 25 highest paid employees does not qualify where it further provides that limitations shall not restrict payment of any benefit provided for under plan, one of which is option on part of employee to elect lump-sum cash distribution, without providing security for repayment of any such distribution, should repayment become necessary. Rev Rul 72-577 (1972) 1972-2 CB 222, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

No funds were received or made available to participants and no premature distribution resulted where partners who were owner-employees exchanged their partnership's qualified pension plan annuity contracts for new contracts in name of trustee of successor corporation's profit-sharing plan. Rev Rul 73-259 (1973) 1973-1 CB 199.

Distributions permitted before normal retirement or termination of employment or of plan may disqualify pension plan. Rev Rul 74-254 (1974) 1974-1 CB 91.

Premature distribution to owner-employee does not affect qualification of employee benefit plan that remains in effect with respect to all other participants. Rev Rul 81-113 (1981) 1981-1 CB 176.

70. Hardship payment

Plan providing for hardship payments where employer could show hardship by means of "positive evidence" qualified where plan defined "hardship" as "circumstances of sufficient severity that a participant is confronted by present or impending financial ruin or his family is clearly endangered by present or impending want or privation." Rev Rul 71-224 (1971) 1971-1 CB 124.

71. Stock bonus plan distributions

In order for stock bonus plan to qualify, distributions must be entirely in stock of employer corporation, except for value of fractional shares; stock bonus plan which permits distributions to be made in form of annuity contracts in lieu of employer corporation stock does not qualify. Rev Rul 71-256 (1971) 1971-1 CB 118.

72. Alternative compensation arrangements

Judgment in favor of claimant on his claim brought under 29 USCS § 1132 was affirmed because claimant had same type of possession and control of funds once transferred into individual retirement account pursuant to trustee-to-trustee transfer that he would have had were funds left with employer; therefore, he did not "receive" funds for purposes of offset under disability plan. Blankenship v Liberty Life Assur. Co. (2007, CA9 Cal) 486 F3d 620, 40 EBC 2239.

No part of lump sum payment received in lieu of retirement upon officer's discharge from service qualified for capital gains treatment as lump sum distribution from employees' trust or pension plan under 26 USCS §§ 401 and 402. Swofford v Commissioner (1967) 49 TC 128.

Under arrangement set up for executive who received delayed payouts from qualified profit-sharing plan, to extent that participant's share can be retained by profit-sharing trust after he first becomes eligible for distribution, retained portion will continue to accumulate income and capital gain free of tax until distributed to him, and participant can be given right to direct investment of trust funds in his account; if he should die, remaining portion in trust, including any income and capital accumulated tax-free after distribution began, can be passed on by him in way that also avoids estate tax. Brooks v Commissioner (1968) 50 TC 585, acq.

If life annuity is offered to participant in profit-sharing plan then joint survivor annuity must be normal form of payment rather than just option. BBS Associates, Inc. v Commissioner (1980) 74 TC 1118, 2 EBC 2413, affd without op (1981, CA3) 661 F2d 913, 2 EBC 2422.

Trusteed pension plan which provides that amounts available to participant at normal retirement age may be invested, if employee so elects, until employee's actual retirement date, meets requirement that benefits be "definitely determinable." Rev Rul 71-24 (1971) 1971-1 CB 114.

Post retirement pay-out arrangement did not meet "incidental" requirement under 50 percent test where participant could elect settlement option providing for payment to him of unlimited number of monthly installments of at least $ 100 each starting at age 65, and in event of his death, to his beneficiary until his entire trust interest

was exhausted; such mode of settlement did not assure that present value of benefits that each participant was likely to receive during his lifetime would exceed 50 percent of funds accumulated for his benefit at time of retirement. Rev Rul 73-445 (1973) 1973-2 CB 127.

Defined benefit plan which provides optional forms of retirement benefits which are, according to provisions of plan, "actuarially equivalent" to normal benefit must specify actuarial assumptions used to compute amounts of such optional benefits. Rev Rul 79-90 (1979) 1979-1 CB 155.

Corporation's qualified profit sharing plan is considered to include qualified cash or deferred arrangement within meaning of 26 USCS § 401(k)(2) where such plan requires each employee to make irrevocable election, prior to end of year, to take employee's share of current year's profits in cash, on deferred basis, or half cash and half deferred, and plan was amended, effective for 1980, so that deferred employer contributions were held in accounts subject to restrictions on distributions and forfeitability required by § 401, but amounts attributable to contributions made for plan years beginning before 1980 are maintained in separate accounts not subject to such restrictions. Rev Rul 80-16 (1980) 1980-1 CB 82.

73. Impact on unemployment benefits

After defendant was convicted under 18 USCS § 1956(h) for money laundering conspiracy, court held that defendant's pension plan account, assigned to defendant's wife in divorce, was not subject to criminal forfeiture under 18 USCS § 982 because IRC § 408(k), 29 USCS § 1056(d)(1), (3), IRC § 401(a)(13), and Treas. Reg. § 1.401(a)-13(b)(1) protected pension plan account; defendant's simplified employee pension (SEP) account was subject to forfeiture because Employee Retirement Income Security Act of 1974's anti-alienation provisions did not apply to SEP account; further, because divorce decree was entered after indictment and after prior protective order that specified that SEP account was subject to forfeiture, and as division of marital property under TCA § 36-4-121 did not determine property ownership, wife, who petitioned court under 21 USCS § 853(n), took her interest subject to forfeiture. United States v Norton (2002, WD Va) 29 EBC 1255, subsequent app (2003, CA4 Va) 64 Fed Appx 411, post-conviction relief den (2004, CA4 Va) 102 Fed Appx 820.

In presence of state law providing that unemployment benefits are reduced to extent that recipient receives other payments, profit-sharing distributions upon termination of participant's service may result in reduction of amounts employer contributes to state unemployment; profit-sharing plan does not fail to qualify under these circumstances in spite of indirect benefit to employer. Rev Rul 71-391 (1971) 1971-2 CB 186.

Benefits provided under qualified employee pension plan may not be offset by unemployment compensation benefits. Rev Rul 78-178 (1978) 1978-1 CB 117.

74. Anti-assignment provisions

Expansive notion of estate property under 11 USCS § 541(a) does not by implication repeal anti-assignment provisions of ERISA plans mandated by 29 USCS § 1056(d)(1) and 26 USCS § 401(a)(13), because 11 USCS § 541(a)(2) specifically provides for exclusion of such ERISA plans from estate property. McLean v Central States, Southeast & Southwest Areas Pension Fund (1985, CA4 SC) 762 F2d 1204, 13 BCD 367, 12 CBC2d 1431, 7 EBC 1440, CCH Bankr L Rptr P 70578.

There is no irreconcilable conflict between transfer restrictions of requirements of property under 29 USCS § 1056(d)(1) and 26 USCS § 401(a)(13) and later enacted Bankruptcy Reform Act definition of estate property that expressly excludes property subject to such restrictions; nor is there irreconcilable conflict between effects of anti-assignment provisions of those statutes in excluding pension interests from estate property under 11 USCS § 541(c)(2) and authority conferred by 11 USCS § 1325(b) to issue pay orders affecting future income of debtors. McLean v Central States, Southeast & Southwest Areas Pension Fund (1985, CA4 SC) 762 F2d 1204, 13 BCD 367, 12 CBC2d 1431, 7 EBC 1440, CCH Bankr L Rptr P 70578.

ERISA does not protect qualified plans from garnishment by IRS. United States v Sawaf (1996, CA6 Mich) 74 F3d 119, 19 EBC 2489, 96-1 USTC P 50063, 77 AFTR 2d 520, 1996 FED App 31P, reh den (1996, CA6) 1996 US App LEXIS 6222.

Anti-alienation clause included pursuant to 26 USCS § 401(a)(13)(A) in debtor's pension plan, qualified under Employee Retirement Income Security Act of 1974, 26 USCS § 401 et seq., 29 USCS § 1001 et seq., made debtor's interest in plan unreachable by creditors before debtor was entitled to withdraw from plan; hence, debtor's interest in plan was not part of bankruptcy estate and IRS's tax liens were not entitled to secured status in debtor's bankruptcy proceedings. IRS v Snyder (2003, CA9 Cal) 343 F3d 1171, 2003 CDOS 8443, 2003 Daily

Journal DAR 10466, 42 BCD 2, 50 CBC2d 1584, 31 EBC 1236, CCH Bankr L Rptr P 78915, 2003-2 USTC P 50664, 92 AFTR 2d 6090.

Although district court did not abuse its discretion in including bank embezzlement victim's investigative costs as part of its restitution order under 18 USCS § 3663A(b)(1), (4), or in ordering defendant to use funds from her individual retirement account (IRA) to make lump-sum partial restitution payment, remand was required because Seventh Circuit could not determine whether district court's restitution order was appropriate and reasonable where district court failed to make sufficient factual findings regarding bank's investigative costs: (1) bank's investigation-related costs were not merely consequential damages, as defendant claimed, and were explicitly allowed to be included in restitution award under § 3663A(b)(4), but only if government showed that they were reasonable and incurred in investigating or prosecuting defendant's embezzlement crime; (2) district court erred by failing to make any specific findings with regard to bank's actual investigative costs and by simply adopting, without substantive discussion, lower investigative cost figure than one set out in defendant's presentence investigation report; (3) district court could consider defendant's IRA as source of funds to pay restitution to bank because 18 USCS § 3664(m)(1)(A)(ii) authorized government to enforce restitution orders and 18 USCS § 3613(a) provided that it could enforce judgment against all property or rights to property of fined person, notwithstanding any other federal law, including 26 USCS § 401(a)(13)(A), which otherwise protected IRAs from alienation; and (4) pursuant to 18 USCS § 3572(d)(i), district court clearly and properly recognized defendant's limited means when it ordered her to pay over most, but not all, of her IRA account as immediate lump sum partial payment and set up schedule of nominal additional restitution payments that defendant would make after she was released from prison. United States v Hosking (2009, CA7 Wis) 567 F.3d 329.

Anti-alienation provision of 26 USCS § 401(a)(13)(A) does not apply to prevent district courts from ordering defendants to use funds from their individual retirement accounts (IRA) to make restitution payments because (1) pursuant to 18 USCS § 3663A of Mandatory Victims Restitution Act (MVRA), defendants convicted of fraud and deceit crimes are required to make restitution to their victims; (2) § 3663A(d) provides that restitution order is to be issued and enforced in accordance with 18 USCS § 3664; (3) § 3664(m)(1)(A)(ii) states that restitution orders may be enforced by all available and reasonable means, and 18 USCS § 3613(a) states that government can enforce judgments imposing fines against property or rights to property of person fined, notwithstanding any other federal law; (4) § 3613 treats restitution order under MVRA like tax liability, which means that any property IRS can reach to satisfy tax lien is property that sentencing court can reach in restitution order; and (5) MVRA creates exception to 26 USCS § 401(a)(13)(A) anti-alienation provision because IRS can levy upon tax debtor's IRA if debtor has right to withdraw money from, or liquidate, account. United States v Hosking (2009, CA7 Wis) 567 F.3d 329.

Rule that benefits under plan may be assigned or alienated voluntarily up to 10 percent of participant's benefits is not applicable to attempted alienation for assignments resulting from garnishment; thus, requirement that employee benefit plans include restrictions on assignment in alienation supersedes any state law permitting assignment of such benefits. General Motors Corp. v Townsend (1976, ED Mich) 468 F Supp 466, 1 EBC 1581.

Employee Retirement Income Security Act of 1974 was meant to prescribe legal remedies for deficiencies existing in private pension plan systems, primarily relating to prior abuses in plan vesting, funding, termination and fiduciary conduct; rather than intending to undermine family law rights of dependent spouses and children, legislature was concerned that employees and their beneficiaries be protected by ERISA; anti-assignment or alienation sections were included only to protect person and those dependent upon him from claims of creditors, not to insulate breadwinner from valid support claims to spouse and offspring, and thus family support decrees were not intended to be within scope of anti-alienation provisions. Cartledge v Miller (1978, SD NY) 457 F Supp 1146.

Intent of Congress in enacting Employee Retirement Income Security Act was to protect employees and their families from bargaining away benefit provided by employee benefit plans qualified under ERISA; intent would be furthered by allowing execution of state court support orders on employee benefits. Senco of Florida, Inc. v Clark (1979, MD Fla) 473 F Supp 902.

Restrictions against assignment and alienation required in qualified ERISA pension plans by 26 USCS § 401, enabling them to receive preferential tax treatment under 26 USCS § 401(a)(13), do not, in and of themselves, bring plan under 11 USCS § 541(c)(2) so as to exclude automatically debtor's interest from estate; court must look beyond ERISA requirements and consider overall nature of plan, including its other characteristics, particularly extent of dominion and control which debtor has over plan's assets, and plan is excluded from estate only if it is enforceable under state law as spendthrift trust. In re Crenshaw (1985, ND Ala) 51 BR 554, CCH Bankr L Rptr P 71009.

Post-nuptial marital agreement which purported to divide interests in pension and profit-sharing plan without benefit of QDRO is indirect assignment contrary to provisions of § 401(a)(13). Merchant v Kelly, Haglund, Garnsey & Kahn (1995, DC Colo) 874 F Supp 300, 96-1 USTC P 50070, 76 AFTR 2d 7906, 95 TNT 244-16.

18 USCS § 3613(c) makes clear that order to pay restitution is functional equivalent of, and is to be treated precisely as tax liability; therefore, under Internal Revenue Code Regulations, such tax liability is exception to anti-alienation provision of 26 USCS § 401(a)(13)(A). United States v Tyson (2003, ED Mich) 242 F Supp 2d 469, 94 AFTR 2d 5042, accepted, in part, rejected, in part (2003, ED Mich) 265 F Supp 2d 788.

Since 18 USCS § 3613 was statutory exception to anti-alienation provision of Employee Retirement Income Security Act found at 29 USCS § 1056(d)(4) as well as corresponding provision of Internal Revenue Code found at 26 USCS § 401(13)(A), government was entitled to writ of garnishment against individual's interest in retirement trust fund in order to satisfy criminal restitution order. United States v Tyson (2003, ED Mich) 242 F Supp 2d 469, 94 AFTR 2d 5042, accepted, in part, rejected, in part (2003, ED Mich) 265 F Supp 2d 788.

Where issue before magistrate was whether government could garnish defendant's interest in retirement trust pursuant to Federal Debt Collections Procedures Act (FDCPA), 18 USCS § 3613, notwithstanding anti-alienation provision of Employee Retirement Income Security Act's (ERISA), 29 USCS § 1056(d)(1), and anti-alienation provision in Internal Revenue Code, 26 USCS § 401(a)(13), magistrate held that FDCPA was exception to anti-alienation provision of ERISA, entitling government to writ of garnishment against defendant's interest in trust; on review, trust's objections to magistrate's findings were overruled and magistrate's recommendation was adopted. United States v Tyson (2003, ED Mich) 265 F Supp 2d 788.

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Employer and qualified retirement plans determined that plan participant's widow was his surviving spouse and distributed benefits from plans qualified under I.R.C. § 401(a) to her, and court found no abuse of discretion in payment of qualified plan benefits to widow; therefore, widow was beneficiary of those accounts and employer and plans correctly interpreted provisions of qualified plans addressing survivor's benefits and did not abuse their discretion by paying participant's qualified plan benefits to widow instead of to plaintiffs. Boulet v Fluor Corp. (2005, SD Tex) 36 EBC 2143.

Because 18 USCS § 3613 made clear that restitution orders in favor of U.S. were to be treated like tax liabilities, it appeared that, like delinquent taxpayers, criminal defendants owing restitution to Government could not protect their pension benefits from being used to satisfy their monetary obligation to Government; consequently, neither Employment Retirement Income Security Act's anti-alienation provision, 29 USCS § 1056 (d)(1), nor anti-alienation provision in 26 USCS § 401(a)(13), provided bar to garnishment of defendant's qualified pension plan. United States v Lazorwitz (2005, ED NC) 411 F Supp 2d 634.

Bankruptcy court committed reversible error when it denied Chapter 7 trustee's objection to 11 USCS § 541(c)(2) exemption claimed by two joint Chapter 7 debtors, with regard to funds held in two pensions owned by one debtor: (1) pensions were in form of annuities under I.R.C. §§ 403(b), 401(a); (2) only trusts were subject to exclusion from bankruptcy estate under 11 USCS § 541(c)(2); and (3) as parties agreed, for purposes of appeal, that pensions were not trusts, none of pension funds qualified for exemption under § 541(c)(2), regardless of whether or not pension plans contained anti-assignment or anti-alienation provisions. Skiba v Plonski (2006, WD Pa) 40 EBC 1759.

Court granted government's application for writ of continuing garnishment where: (1) general anti-alienation protection accorded tax-qualified retirement plans under 29 USCS § 1056(d)(1) and 26 USCS § 401(a)(13) did not insulate such plans from execution for unpaid criminal fines and restitution, and future possibility of survivor annuity election did not make defendant's retirement plan exempt from levy for purposes of restitution under 18 USCS § 3613; (2) court rejected defendant's claim that retirement plan was not ripe for garnishment because it was not fully vested where since tax-qualified retirement plans were not exempt from levy for restitution, fact that plan was not vested has no bearing on whether it was exempt, and Federal Debt Collection Procedures Act, 28 USCS §§ 3001 et seq., allowed government to garnish future interest, vested or contingent, under 28 USCS §§ 3002(12) and 3205; and (3) 401(k) Savings Plan could be garnished without consideration of tax liabilities or penalties where 18 USCS § 3613 allowed government to enforce restitution in accordance with practices and

procedures for enforcement of civil judgment under federal law or state law, and court had not found any law that prohibited garnishment of 401(k) plans or that limited amount garnished based on penalties or tax liabilities. United States v Dixon (2007, DC Kan) 99 AFTR 2d 766.

Anti-alienation provision under Employee Retirement Income Security Act, 29 USCS § 1056(d)(1), precluded criminal or civil forfeiture of funds that had been seized from retirement accounts, regardless of whether retirement plans had been operated in conformity with tax-qualification requirements under 26 USCS § 401(a). United States v Jewell (2008, ED Ark) 538 F Supp 2d 1087, 101 AFTR 2d 1164.

Bankruptcy Code implicitly amends 26 USCS § 401(a)(13) ERISA anti-assignment provisions to permit court order under 11 USCS § 1325(b) directing payment of benefits directly to trustee. In re Wood (1982, BC ED Tenn) 23 BR 552, 9 BCD 935, 7 CBC2d 594.

Order by bankruptcy court directing pension plan to pay over debtor's interest in ERISA plan to Chapter 7 trustee does not disqualify plan from receiving favorable tax treatment pursuant to Internal Revenue Code § 401(a)(13). In re Di Piazza (1983, BC ND Ill) 29 BR 916, 10 BCD 618, 8 CBC2d 654, CCH Bankr L Rptr P 69226.

Payment of assets in profit sharing plan to bankruptcy estate in compliance with Bankruptcy Court order does not violate plan provision prohibiting alienation of plan benefits since payment is treated as distribution to employee, followed by payment to trustee in bankruptcy. In re Comp (1991, BC MD Pa) 134 BR 544, 25 CBC2d 300.

Qualification under I.R.C. § 401(a) is not prerequisite for enforcement of anti-alienation provision in plan subject to title I of Employee Retirement Income Security Act of 1974, 29 USCS § 1001 et seq. In re Handel (2003, BC SD NY) 301 BR 421, 31 EBC 2537.

Adding requirement that plan subject to prohibition of alienation under Employee Retirement Income Security Act of 1974, 29 USCS § 1056, also must be tax-qualified under I.R.C. § 401(a) before it is excluded from estate would violate plain language of 11 USCS § 541(c)(2); where Chapter 7 debtor claimed that his interest in profit sharing plan was not property of his estate, even though debtor's control over his interest likely violated I.R.C. § 401(a), interest was not estate property. In re Handel (2003, BC SD NY) 301 BR 421, 31 EBC 2537.

Bankruptcy court sustained U.S. Trustee's objection to exemption of debtor's qualified profit sharing retirement plan where debtor had repeatedly violated anti-alienation provisions governing plan. In re Blais (2004, BC SD Fla) 17 FLW Fed B 143.

Creditor pension fund's actions in setting off its payment obligations to debtor plan participant against debtor's pre-petition obligation for delinquent contributions in his role as employer without first obtaining relief from automatic stay, violated prohibitions against alienation of pension benefits under 26 USCS § 401(a)(13)(C) and of 29 USCS § 1056(d)(4). Radcliffe v Int'l Painters & Allied Trades Indus. Pension Fund (In re Radcliffe) (2007, BC ND Ind) 41 EBC 1282, judgment entered, costs/fees proceeding, relief from stay denied (2007, BC ND Ind) 2007 Bankr LEXIS 2441.

Right of setoff asserted by creditor was clearly "assignment" and "alienation" within 26 CFR § 1.401(a)-13(b), and it was clear intent of both 26 USCS § 401(a)(13)(C) and of 29 USCS § 1056(d)(4) to limit ability of Employee Retirement Income Security Act qualified plan to reduce benefits to beneficiary of that plan only to specific circumstances delineated in those statutes. Radcliffe v Int'l Painters & Allied Trades Ind. Pension Fund (In re Radcliffe) (2007, BC ND Ind) 372 BR 401.

There is no restriction in either 26 USCS § 401(a)(13) or 29 USCS § 1056(d)(4) to solely third party creditors; language of both statutes applies to "any offset" of participant's benefits. Radcliffe v Int'l Painters & Allied Trades Ind. Pension Fund (In re Radcliffe) (2007, BC ND Ind) 372 BR 401.

Corporate president's waiver of right to receive benefits from wholly-owned corporation's qualified plan constitutes taxable distribution from plan where plan was terminated, rank and file employees were paid their benefits, and benefits payable to president were contributed to corporation; waiver was equivalent to prohibited assignment or alienation of benefits. Gallade v Commissioner (1996) 106 TC 355, 20 EBC 1225.

Loan to qualified plan participant that is secured by participant's accrued nonforfeitable benefit constitutes assignment or alienation in violation of 26 USCS § 401(a)(13) if loan is made at unreasonable interest rate. Rev Rul 89-14 (1989) 1989-1 CB 111.

Employer's proposed distribution of vested benefits in qualified plan to employee's bankruptcy trustee, at time when employee is not qualified for distribution of plan benefits, violates plan's anti-alienation provisions; nonalienation provisions provide no exception for assignment of plan participant's right to pension in bankruptcy case. Private Letter Ruling 8951067; Private Letter Ruling 9011037.

Provision in pension plan permitting retired employee to authorize trustee to deduct and pay union dues from his monthly pension benefit will not cause plan to fail to qualify. Rev Rul 68-159 (1968) 1968-1 CB 153.

Plan will not lose its qualification under 26 USCS § 401 solely because plan trustee complies with court order requiring distribution of benefits of participant in pay status to participant's spouse or children in order to meet participant's alimony or support obligations. Rev Rul 80-27 (1980) 1980-1 CB 85, obsoleted (1991) 1991-1 CB 281.

Anti-alienation provision of 26 USCS § 401 is designed to advance important public policy of insuring that employee's accrued benefits are actually available for retirement purposes; Congress did not intend to protect pensioner from state court decree directing trustees of pension plan to pay over certain amount of its pension to satisfy family support obligations. Ward v Ward (1978) 164 NJ Super 354, 396 A2d 365, 1 EBC 1360.

Attachment of pension benefit due husband for support of wife did not violate 26 USCS § 401 nonalienation clause since purpose of exemption clause is to prevent dissipation of one's pension so that he can support his family or himself, and to prevent attachment where purpose is to discharge same obligation that exemption clause was created to protect, would be injustice. Commonwealth ex rel. Magrini v Magrini (1979) 263 Pa Super 366, 398 A2d 179.

Where plan participant receives check as hardship withdrawal, and check is made payable to debtor and sent to office of bankruptcy trustee, anti-alienation provisions are not violated because debtor had to separately agree to endorse check over to bankruptcy trustee. Private Letter Ruling 91009051.

§ 402. Taxability of beneficiary of employees' trust

(a) Taxability of beneficiary of exempt trust. Except as otherwise provided in this section, any amount actually distributed to any distributee by any employees' trust described in section 401(a) [26 USCS § 401(a)] which is exempt from tax under section 501(a) [26 USCS § 501(a)] shall be taxable to the distributee, in the taxable year of the distributee in which distributed, under section 72 [26 USCS § 72] (relating to annuities).

(b) Taxability of beneficiary of nonexempt trust.

(1) Contributions. Contributions to an employees' trust made by an employer during a taxable year of the employer which ends with or within a taxable year of the trust for which the trust is not exempt from tax under section 501(a) [26 USCS § 501(a)] shall be included in the gross income of the employee in accordance with section 83 [26 USCS § 83] (relating to property transferred in connection with performance of services), except that the value of the employee's interest in the trust shall be substituted for the fair market value of the property for purposes of applying such section.

(2) Distributions. The amount actually distributed or made available to any distributee by any trust described in paragraph (1) shall be taxable to the distributee, in the taxable year in which so distributed or made available, under section 72 [26 USCS § 72] (relating to annuities), except that distributions of income of such trust before the annuity starting date (as defined in section 72(c)(4) [26 USCS § 72(c)(4)]) shall be included in the gross income of the employee without regard to section 72(e)(5) [26 USCS § 72(e)(5)] (relating to amounts not received as annuities).

(3) Grantor trusts. A beneficiary of any trust described in paragraph (1) shall not be considered the owner of any portion of such trust under subpart E of part I of subchapter J [26 USCS §§ 671 et seq.] (relating to grantors and others treated as substantial owners).

(4) Failure to meet requirements of section 410(b).

(A) Highly compensated employees. If 1 of the reasons a trust is not exempt from tax under section 501(a) [26 USCS § 501(a)] is the failure of the plan of which it is a part to meet the requirements of section 401(a)(26) or 410(b) [26 USCS § 401(a)(26) or 410(b)], then a highly compensated employee shall, in lieu of the amount determined under paragraph (1) or (2) include in gross income for the taxable year with or within which the taxable year of the trust ends an amount equal to the vested accrued benefit of such employee (other than the employee's investment in the contract) as of the close of such taxable year of the trust.

(B) Failure to meet coverage tests. If a trust is not exempt from tax under section 501(a) [26 USCS § 501(a)] for any taxable year solely because such trust is part of a plan which fails to meet the requirements of section 401(a)(26) or 410(b) [26 USCS § 401(a)(26) or 410(b)], paragraphs (1) and (2)

shall not apply by reason of such failure to any employee who was not a highly compensated employee during—

(i) such taxable year, or

(ii) any preceding period for which service was creditable to such employee under the plan.

(C) Highly compensated employee. For purposes of this paragraph, the term "highly compensated employee" has the meaning given such term by section 414(q) [26 USCS § 414(q)].

(c) Rules applicable to rollovers from exempt trusts.

(1) Exclusion from income. If—

(A) any portion of the balance to the credit of an employee in a qualified trust is paid to the employee in an eligible rollover distribution,

(B) the distributee transfers any portion of the property received in such distribution to an eligible retirement plan, and

(C) in the case of a distribution of property other than money, the amount so transferred consists of the property distributed,

then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

(2) Maximum amount which may be rolled over. In the case of any eligible rollover distribution, the maximum amount transferred to which paragraph (1) applies shall not exceed the portion of such distribution which is includible in gross income (determined without regard to paragraph (1)). The preceding sentence shall not apply to such distribution to the extent—

(A) such portion is transferred in a direct trustee-to-trustee transfer to a qualified trust or to an annuity contract described in section 403(b) [26 USCS § 403(b)] and such trust or contract provides for separate accounting for amounts so transferred (and earnings thereon), including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible, or

(B) such portion is transferred to an eligible retirement plan described in clause (i) or (ii) of paragraph (8)(B).

In the case of a transfer described in subparagraph (A) or (B), the amount transferred shall be treated as consisting first of the portion of such distribution that is includible in gross income (determined without regard to paragraph (1)).

(3) Transfer must be made within 60 days of receipt.

(A) In general. Except as provided in subparagraph (B), paragraph (1) shall not apply to any transfer of a distribution made after the 60th day following the day on which the distributee received the property distributed.

(B) Hardship exception. The Secretary may waive the 60-day requirement under subparagraph (A) where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement.

(4) Eligible rollover distribution. For purposes of this subsection, the term "eligible rollover distribution" means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust; except that such term shall not include—

(A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made—

(i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee's designated beneficiary, or

(ii) for a specified period of 10 years or more,

(B) any distribution to the extent such distribution is required under section 401(a)(9) [26 USCS § 401(a)(9)], and

(C) any distribution which is made upon hardship of the employee.

If all or any portion of a distribution during 2009 is treated as an eligible rollover distribution but would not be so treated if the minimum distribution requirements under section 401(a)(9) [26 USCS

§ 401(a)(9)] had applied during 2009, such distribution shall not be treated as an eligible rollover distribution for purposes of section 401(a)(31) [26 USCS § 401(a)(31)] or 3405(c) [26 USCS § 3405(c)] or subsection (f) of this section.

(5) Transfer treated as rollover contribution under section 408. For purposes of this title, a transfer to an eligible retirement plan described in clause (i) or (ii) of paragraph (8)(B) resulting in any portion of a distribution being excluded from gross income under paragraph (1) shall be treated as a rollover contribution described in section 408(d)(3) [26 USCS § 408(d)(3)].

(6) Sales of distributed property. For purposes of this subsection—

(A) Transfer of proceeds from sale of distributed property treated as transfer of distributed property. The transfer of an amount equal to any portion of the proceeds from the sale of property received in the distribution shall be treated as the transfer of property received in the distribution.

(B) Proceeds attributable to increase in value. The excess of fair market value of property on sale over its fair market value on distribution shall be treated as property received in the distribution.

(C) Designation where amount of distribution exceeds rollover contribution. In any case where part or all of the distribution consists of property other than money—

(i) the portion of the money or other property which is to be treated as attributable to amounts not included in gross income, and

(ii) the portion of the money or other property which is to be treated as included in the rollover contribution,

shall be determined on a ratable basis unless the taxpayer designates otherwise. Any designation under this subparagraph for a taxable year shall be made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof). Any such designation, once made, shall be irrevocable.

(D) Nonrecognition of gain or loss. No gain or loss shall be recognized on any sale described in subparagraph (A) to the extent that an amount equal to the proceeds is transferred pursuant to paragraph (1).

(7) Special rule for frozen deposits.

(A) In general. The 60-day period described in paragraph (3) shall not—

(i) include any period during which the amount transferred to the employee is a frozen deposit, or

(ii) end earlier than 10 days after such amount ceases to be a frozen deposit.

(B) Frozen deposits. For purposes of this subparagraph, the term "frozen deposit" means any deposit which may not be withdrawn because of—

(i) the bankruptcy or insolvency of any financial institution, or

(ii) any requirement imposed by the State in which such institution is located by reason of the bankruptcy or insolvency (or threat thereof) of 1 or more financial institutions in such State.

A deposit shall not be treated as a frozen deposit unless on at least 1 day during the 60-day period described in paragraph (3) (without regard to this paragraph) such deposit is described in the preceding sentence.

(8) Definitions. For purposes of this subsection

(A) Qualified trust. The term "qualified trust" means an employees' trust described in section 401(a) [26 USCS § 401(a)] which is exempt from tax under section 501(a) [26 USCS § 501(a)].

(B) Eligible retirement plan. The term "eligible retirement plan" means—

(i) an individual retirement account described in section 408(a) [26 USCS § 408(a)],

(ii) an individual retirement annuity described in section 408(b) [26 USCS § 408(b)] (other than an endowment contract),

(iii) a qualified trust,

(iv) an annuity plan described in section 403(a) [26 USCS § 403(a)],

(v) an eligible deferred compensation plan described in section 457(b) [26 USCS § 457(b)] which is maintained by an eligible employer described in section 457(e)(1)(A) [26 USCS § 457(e)(1)(A)], and

(vi) an annuity contract described in section 403(b) [26 USCS § 403(b)].

If any portion of an eligible rollover distribution is attributable to payments or distributions from a designated Roth account (as defined in section 402A [26 USCS § 402A]), an eligible retirement plan with respect to such portion shall include only another designated Roth account and a Roth IRA.

(9) Rollover where spouse receives distribution after death of employee. If any distribution attributable to an employee is paid to the spouse of the employee after the employee's death, the preceding provisions of this subsection shall apply to such distribution in the same manner as if the spouse were the employee.

(10) Separate accounting. Unless a plan described in clause (v) of paragraph (8)(B) agrees to separately account for amounts rolled into such plan from eligible retirement plans not described in such clause, the plan described in such clause may not accept transfers or rollovers from such retirement plans.

(11) Distributions to inherited individual retirement plan of nonspouse beneficiary.

(A) In general. If, with respect to any portion of a distribution from an eligible retirement plan described in paragraph (8)(B)(iii) of a deceased employee, a direct trustee-to-trustee transfer is made to an individual retirement plan described in clause (i) or (ii) of paragraph (8)(B) established for the purposes of receiving the distribution on behalf of an individual who is a designated beneficiary (as defined by section 401(a)(9)(E) [26 USCS § 401(a)(9)(E)]) of the employee and who is not the surviving spouse of the employee—

(i) the transfer shall be treated as an eligible rollover distribution for purposes of this subsection,

(ii) the individual retirement plan shall be treated as an inherited individual retirement account or individual retirement annuity (within the meaning of section 408(d)(3)(C) [26 USCS § 408(d)(3)(C)]) for purposes of this title, and

(iii) section 401(a)(9)(B) [26 USCS § 401(a)(9)(B)] (other than clause (iv) thereof) shall apply to such plan.

(B) Certain trusts treated as beneficiaries. For purposes of this paragraph, to the extent provided in rules prescribed by the Secretary, a trust maintained for the benefit of one or more designated beneficiaries shall be treated in the same manner as a designated beneficiary.

(d) Taxability of beneficiary of certain foreign situs trusts. For purposes of subsections (a), (b), and (c), a stock bonus, pension, or profit-sharing trust which would qualify for exemption from tax under section 501(a) [26 USCS § 501(a)] except for the fact that it is a trust created or organized outside the United States shall be treated as if it were a trust exempt from tax under section 501(a) [26 USCS § 501(a)].

(e) Other rules applicable to exempt trusts.

(1) Alternate payees.

(A) Alternate payee treated as distributee. For purposes of subsection (a) and section 72 [26 USCS § 72], an alternate payee who is the spouse or former spouse of the participant shall be treated as the distributee of any distribution or payment made to the alternate payee under a qualified domestic relations order (as defined in section 414(p) [26 USCS § 414(p)]).

(B) Rollovers. If any amount is paid or distributed to an alternate payee who is the spouse or former spouse of the participant by reason of any qualified domestic relations order (within the meaning of section 414(p) [26 USCS § 414(p)]), subsection (c) shall apply to such distribution in the same manner as if such alternate payee were the employee.

(2) Distributions by United States to nonresident aliens. The amount includible under subsection (a) in the gross income of a nonresident alien with respect to a distribution made by the United States in respect of services performed by an employee of the United States shall not exceed an amount which bears the same ratio to the amount includible in gross income without regard to this paragraph as—

(A) the aggregate basic pay paid by the United States to such employee for such services, reduced by the amount of such basic pay which was not includible in gross income by reason of being from sources without the United States, bears to

(B) the aggregate basic pay paid by the United States to such employee for such services.

In the case of distributions under the civil service retirement laws, the term "basic pay" shall have the meaning provided in section 8331(3) of title 5, United States Code.

(3) Cash or deferred arrangements. For purposes of this title, contributions made by an employer on behalf of an employee to a trust which is a part of a qualified cash or deferred arrangement (as defined in section 401(k)(2) [26 USCS § 401(k)(2)]) or which is part of a salary reduction agreement under section 403(b) [26 USCS § 403(b)] shall not be treated as distributed or made available to the employee nor as contributions made to the trust by the employee merely because the arrangement includes provisions under which the employee has an election whether the contribution will be made to the trust or received by the employee in cash.

(4) Net unrealized appreciation.

(A) Amounts attributable to employee contributions. For purposes of subsection (a) and section 72 [26 USCS § 72], in the case of a distribution other than a lump sum distribution, the amount actually distributed to any distributee from a trust described in subsection (a) shall not include any net unrealized appreciation in securities of the employer corporation attributable to amounts contributed by the employee (other than deductible employee contributions within the meaning of section 72(o)(5) [26 USCS § 72(o)(5)]). This subparagraph shall not apply to a distribution to which subsection (c) applies.

(B) Amounts attributable to employer contributions. For purposes of subsection (a) and section 72 [26 USCS § 72], in the case of any lump sum distribution which includes securities of the employer corporation, there shall be excluded from gross income the net unrealized appreciation attributable to that part of the distribution which consists of securities of the employer corporation. In accordance with rules prescribed by the Secretary, a taxpayer may elect, on the return of tax on which a lump sum distribution is required to be included, not to have this subparagraph apply to such distribution.

(C) Determination of amounts and adjustments. For purposes of subparagraphs (A) and (B), net unrealized appreciation and the resulting adjustments to basis shall be determined in accordance with regulations prescribed by the Secretary.

(D) Lump-sum distribution. For purposes of this paragraph—

(i) In general. The term "lump-sum distribution" means the distribution or payment within one taxable year of the recipient of the balance to the credit of an employee which becomes payable to the recipient—

(I) on account of the employee's death,

(II) after the employee attains age 59 1/2,

(III) on account of the employee's separation from service, or

(IV) after the employee has become disabled (within the meaning of section 72(m)(7) [26 USCS § 72(m)(7)]),

from a trust which forms a part of a plan described in section 401(a) [26 USCS § 401(a)] and which is exempt from tax under section 501 [26 USCS § 501] or from a plan described in section 403(a) [26 USCS § 403(a)]. Subclause (III) of this clause shall be applied only with respect to an individual who is an employee without regard to section 401(c)(1) [26 USCS § 404(c)(1)], and subclause (IV) shall be applied only with respect to an employee within the meaning of section 401(c)(1) [26 USCS § 401(c)(1)]. For purposes of this clause, a distribution to two or more trusts shall be treated as a distribution to one recipient. For purposes of this paragraph, the balance to the credit of the employee does not include the accumulated deductible employee contributions under the plan (within the meaning of section 72(o)(5) [26 USCS § 72(o)(5)]).

(ii) Aggregation of certain trusts and plans. For purposes of determining the balance to the credit of an employee under clause (i)—

(I) all trusts which are part of a plan shall be treated as a single trust, all pension plans maintained by the employer shall be treated as a single plan, all profit-sharing plans maintained by the employer shall be treated as a single plan, and all stock bonus plans maintained by the employer shall be treated as a single plan, and

(II) trusts which are not qualified trusts under section 401(a) [26 USCS § 401(a)] and annuity contracts which do not satisfy the requirements of section 404(a)(2) [26 USCS § 404(a)(2)] shall not be taken into account.

(iii) Community property laws. The provisions of this paragraph shall be applied without regard to community property laws.

(iv) Amounts subject to penalty. This paragraph shall not apply to amounts described in subparagraph (A) of section 72(m)(5) [26 USCS § 72(m)(5)] to the extent that section 72(m)(5) [26 USCS § 72(m)(5)] applies to such amounts.

(v) Balance to credit of employee not to include amounts payable under qualified domestic relations order. For purposes of this paragraph, the balance to the credit of an employee shall not include any amount payable to an alternate payee under a qualified domestic relations order (within the meaning of section 414(p) [26 USCS § 414(p)]).

(vi) Transfers to cost-of-living arrangement not treated as distribution. For purposes of this paragraph, the balance to the credit of an employee under a defined contribution plan shall not include any amount transferred from such defined contribution plan to a qualified cost-of-living arrangement (within the meaning of section 415(k)(2) [26 USCS § 415(k)(2)]) under a defined benefit plan.

(vii) Lump-sum distributions of alternate payees. If any distribution or payment of the balance to the credit of an employee would be treated as a lump-sum distribution, then, for purposes of this paragraph, the payment under a qualified domestic relations order (within the meaning of section 414(p) [26 USCS § 414(p)]) of the balance to the credit of an alternate payee who is the spouse or former spouse of the employee shall be treated as a lump-sum distribution. For purposes of this clause, the balance to the credit of the alternate payee shall not include any amount payable to the employee.

(E) Definitions relating to securities. For purposes of this paragraph—

(i) Securities. The term "securities" means only shares of stock and bonds or debentures issued by a corporation with interest coupons or in registered form.

(ii) Securities of the employer. The term "securities of the employer corporation" includes securities of a parent or subsidiary corporation (as defined in subsections (e) and (f) of section 424 [26 USCS § 442]) of the employer corporation.

(5) [Deleted]

(6) Direct trustee-to-trustee transfers. Any amount transferred in a direct trustee-to-trustee transfer in accordance with section 401(a)(31) [26 USCS § 401(a)(31)] shall not be includible in gross income for the taxable year of such transfer.

(f) Written explanation to recipients of distributions eligible for rollover treatment.

(1) In general. The plan administrator of any plan shall, within a reasonable period of time before making an eligible rollover distribution, provide a written explanation to the recipient—

(A) of the provisions under which the recipient may have the distribution directly transferred to an eligible retirement plan and that the automatic distribution by direct transfer applies to certain distributions in accordance with section 401(a)(31)(B) [26 USCS § 401(a)(31)(B)],

(B) of the provision which requires the withholding of tax on the distribution if it is not directly transferred to an eligible retirement plan,

(C) of the provisions under which the distribution will not be subject to tax if transferred to an eligible retirement plan within 60 days after the date on which the recipient received the distribution,

(D) if applicable, of the provisions of subsections (d) and (e) of this section, and

(E) of the provisions under which distributions from the eligible retirement plan receiving the distribution may be subject to restrictions and tax consequences which are different from those applicable to distributions from the plan making such distribution.

(2) Definitions. For purposes of this subsection—

(A) Eligible rollover distribution. The term "eligible rollover distribution" has the same meaning as when used in subsection (c) of this section, paragraph (4) of section 403(a) [26 USCS § 403(a)], subparagraph (A) of section 403(b)(8) [26 USCS § 403(b)(8)], or subparagraph (A) of section 457(e)(16) [26 USCS § 457(e)(16)].

(B) Eligible retirement plan. The term "eligible retirement plan" has the meaning given such term by subsection (c)(8)(B).

(g) Limitation on exclusion for elective deferrals.

(1) In general.

(A) Limitation. Notwithstanding subsections (e)(3) and (h)(1)(B), the elective deferrals of any individual for any taxable year shall be included in such individual's gross income to the extent the amount of such deferrals for the taxable year exceeds the applicable dollar amount. The preceding sentence shall not apply to the portion of such excess as does not exceed the designated Roth contributions of the individual for the taxable year.

(B) Applicable dollar amount. For purposes of subparagraph (A), the applicable dollar amount shall be the amount determined in accordance with the following table:

For taxable years beginning in calendar year:	the applicable dollar amount:
2002	$ 11,000
2003	$ 12,000
2004	$ 13,000
2005	$ 14,000
2006 or thereafter	$ 15,000.

(C) Catch-up contributions. In addition to subparagraph (A), in the case of an eligible participant (as defined in section 414(v) [26 USCS § 414(v)]), gross income shall not include elective deferrals in excess of the applicable dollar amount under subparagraph (B) to the extent that the amount of such elective deferrals does not exceed the applicable dollar amount under section 414(v)(2)(B)(i) [26 USCS § 414(v)(2)(B)(i)] for the taxable year (without regard to the treatment of the elective deferrals by an applicable employer plan under section 414(v) [26 USCS § 414(v)]).

(2) Distribution of excess deferrals.

(A) In general. If any amount (hereinafter in this paragraph referred to as "excess deferrals") is included in the gross income of an individual under paragraph (1) (or would be included but for the last sentence thereof) for any taxable year—

(i) not later than the 1st March 1 following the close of the taxable year, the individual may allocate the amount of such excess deferrals among the plans under which the deferrals were made and may notify each such plan of the portion allocated to it, and

(ii) not later than the 1st April 15 following the close of the taxable year, each such plan may distribute to the individual the amount allocated to it under clause (i) (and any income allocable to such amount through the end of such taxable year).

The distribution described in clause (ii) may be made notwithstanding any other provision of law.

(B) Treatment of distribution under section 401(k) [26 USCS § 401(k)]. Except to the extent provided under rules prescribed by the Secretary, notwithstanding the distribution of any portion of an excess deferral from a plan under subparagraph (A)(ii), such portion shall, for purposes of applying section 401(k)(3)(A)(ii) [26 USCS § 401(k)(3)(A)(ii)], be treated as an employer contribution.

(C) Taxation of distribution. In the case of a distribution to which subparagraph (A) applies—

(i) except as provided in clause (ii), such distribution shall not be included in gross income, and

(ii) any income on the excess deferral shall, for purposes of this chapter [26 USCS §§ 1 et seq.], be treated as earned and received in the taxable year in which such income is distributed.

No tax shall be imposed under section 72(t) [26 USCS § 72(t)] on any distribution described in the preceding sentence.

(D) Partial distributions. If a plan distributes only a portion of any excess deferral and income allocable thereto, such portion shall be treated as having been distributed ratably from the excess deferral and the income.

(3) Elective deferrals. For purposes of this subsection, the term "elective deferrals" means, with respect to any taxable year, the sum of—

(A) any employer contribution under a qualified cash or deferred arrangement (as defined in section 401(k) [26 USCS § 401(k)]) to the extent not includible in gross income for the taxable year under subsection (e)(3) (determined without regard to this subsection),

(B) any employer contribution to the extent not includible in gross income for the taxable year under subsection (h)(1)(B) (determined without regard to this subsection),

(C) any employer contribution to purchase an annuity contract under section 403(b) [26 USCS § 403(b)] under a salary reduction agreement (within the meaning of section 3121(a)(5)(D) [26 USCS § 3121(a)(5)(D)]), and

(D) any elective employer contribution under section 408(p)(2)(A)(i) [26 USCS § 408(p)(2)(A)(i)].

An employer contribution shall not be treated as an elective deferral described in subparagraph (C) if under the salary reduction agreement such contribution is made pursuant to a one-time irrevocable election made by the employee at the time of initial eligibility to participate in the agreement or is made pursuant to a similar arrangement involving a one-time irrevocable election specified in regulations.

(4) Cost-of-living adjustment. In the case of taxable years beginning after December 31, 2006, the Secretary shall adjust the $ 15,000 amount under paragraph (1)(B) at the same time and in the same manner as under section 415(d) [26 USCS § 415(d)], except that the base period shall be the calendar quarter beginning July 1, 2005, and any increase under this paragraph which is not a multiple of $ 500 shall be rounded to the next lowest multiple of $ 500.

(5) Disregard of community property laws. This subsection shall be applied without regard to community property laws.

(6) Coordination with section 72. For purposes of applying section 72 [26 USCS § 72], any amount includible in gross income for any taxable year under this subsection but which is not distributed from the plan during such taxable year shall not be treated as investment in the contract.

(7) Special rule for certain organizations.

(A) In general. In the case of a qualified employee of a qualified organization, with respect to employer contributions described in paragraph (3)(C) made by such organization, the limitation of paragraph (1) for any taxable year shall be increased by whichever of the following is the least:

(i) $ 3,000,

(ii) $ 15,000 reduced by the sum of—

(I) the amounts not included in gross income for prior taxable years by reason of this paragraph, plus

(II) the aggregate amount of designated Roth contributions (as defined in section 402A(c) [26 USCS § 402A(c)]) permitted for prior taxable years by reason of this paragraph, or

(iii) the excess of $ 5,000 multiplied by the number of years of service of the employee with the qualified organization over the employer contributions described in paragraph (3) made by the organization on behalf of such employee for prior taxable years (determined in the manner prescribed by the Secretary).

(B) Qualified organization. For purposes of this paragraph, the term "qualified organization" means any educational organization, hospital, home health service agency, health and welfare service agency, church, or convention or association of churches. Such term includes any organization described in section 414(e)(3)(B)(ii) [26 USCS § 414(e)(3)(B)(ii)] (as in effect before the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 [enacted June 7, 2001]). Terms used in this subparagraph shall have the same meaning as when used in section 415(c)(4) [26 USCS § 415(c)(4)].

(C) Qualified employee. For purposes of this paragraph, the term "qualified employee" means any employee who has completed 15 years of service with the qualified organization.

(D) Years of service. For purposes of this paragraph, the term "years of service" has the meaning given such term by section 403(b) [26 USCS § 403(b)].

(8) Matching contributions on behalf of self-employed individuals not treated as elective employer contributions. Except as provided in section 401(k)(3)(D)(ii) [26 USCS § 401(k)(3)(D)(ii)], any matching contribution described in section 401(m)(4)(A) [26 USCS § 401(m)(4)(A)] which is made on behalf of a self-employed individual (as defined in section 401(c) [26 USCS § 401(c)]) shall not be treated as an elective employer contribution under a qualified cash or deferred arrangement (as defined in section 401(k) [26 USCS § 401(k)]) for purposes of this title.

(h) Special rules for simplified employee pensions. For purposes of this chapter [26 USCS §§ 1 et seq.]—

(1) In general. Except as provided in paragraph (2), contributions made by an employer on behalf of an employee to an individual retirement plan pursuant to a simplified employee pension (as defined in section 408(k) [26 USCS § 408(k)])—

(A) shall not be treated as distributed or made available to the employee or as contributions made by the employee, and

(B) if such contributions are made pursuant to an arrangement under section 408(k)(6) [26 USCS § 408(k)(6)] under which an employee may elect to have the employer make contributions to the simplified employee pension on behalf of the employee, shall not be treated as distributed or made available or as contributions made by the employee merely because the simplified employee pension includes provisions for such election.

(2) Limitations on employer contributions. Contributions made by an employer to a simplified employee pension with respect to an employee for any year shall be treated as distributed or made available to such employee and as contributions made by the employee to the extent such contributions exceed the lesser of—

(A) 25 percent of the compensation (within the meaning of section 414(s) [26 USCS § 414(s)]) from such employer includible in the employee's gross income for the year (determined without regard to the employer contributions to the simplified employee pension), or

(B) the limitation in effect under section 415(c)(1)(A) [26 USCS § 415(c)(1)(A)], reduced in the case of any highly compensated employee (within the meaning of section 414(q) [26 USCS § 414(q)]) by the amount taken into account with respect to such employee under section 408(k)(3)(D) [26 USCS § 408(k)(3)(D)].

(3) Distributions. Any amount paid or distributed out of an individual retirement plan pursuant to a simplified employee pension shall be included in gross income by the payee or distributee, as the case may be, in accordance with the provisions of section 408(d) [26 USCS § 408(d)].

(i) Treatment of self-employed individuals. For purposes of this section, except as otherwise provided in subparagraph (A) of subsection (d)(4), the term "employee" includes a self-employed individual (as defined in section 401(c)(1)(B) [26 USCS § 401(c)(1)(B)]) and the employer of such individual shall be the person treated as his employer under section 401(c)(4) [26 USCS § 401(c)(4)].

(j) Effect of disposition of stock by plan on net unrealized appreciation.

(1) In general. For purposes of subsection (e)(4), in the case of any transaction to which this subsection applies, the determination of net unrealized appreciation shall be made without regard to such transaction.

(2) Transaction to which subsection applies. This subsection shall apply to any transaction in which—

(A) the plan trustee exchanges the plan's securities of the employer corporation for other such securities, or

(B) the plan trustee disposes of securities of the employer corporation and uses the proceeds of such disposition to acquire securities of the employer corporation within 90 days (or such longer period as the Secretary may prescribe), except that this subparagraph shall not apply to any employee with re-

spect to whom a distribution of money was made during the period after such disposition and before such acquisition.

(k) Treatment of simple retirement accounts. Rules similar to the rules of paragraphs (1) and (3) of subsection (h) shall apply to contributions and distributions with respect to a simple retirement account under section 408(p) [26 USCS § 408(p)].

(l) Distributions from governmental plans for health and long-term care insurance.

(1) In general. In the case of an employee who is an eligible retired public safety officer who makes the election described in paragraph (6) with respect to any taxable year of such employee, gross income of such employee for such taxable year does not include any distribution from an eligible retirement plan maintained by the employer described in paragraph (4)(B) to the extent that the aggregate amount of such distributions does not exceed the amount paid by such employee for qualified health insurance premiums) for such taxable year.

(2) Limitation. The amount which may be excluded from gross income for the taxable year by reason of paragraph (1) shall not exceed $ 3,000.

(3) Distributions must otherwise be includible.

(A) In general. An amount shall be treated as a distribution for purposes of paragraph (1) only to the extent that such amount would be includible in gross income without regard to paragraph (1).

(B) Application of section 72. Notwithstanding section 72 [26 USCS § 72], in determining the extent to which an amount is treated as a distribution for purposes of subparagraph (A), the aggregate amounts distributed from an eligible retirement plan in a taxable year (up to the amount excluded under paragraph (1)) shall be treated as includible in gross income (without regard to subparagraph (A)) to the extent that such amount does not exceed the aggregate amount which would have been so includible if all amounts to the credit of the eligible public safety officer in all eligible retirement plans maintained by the employer described in paragraph (4)(B) were distributed during such taxable year and all such plans were treated as 1 contract for purposes of determining under section 72 [26 USCS § 72] the aggregate amount which would have been so includible. Proper adjustments shall be made in applying section 72 [26 USCS § 72] to other distributions in such taxable year and subsequent taxable years.

(4) Definitions. For purposes of this subsection—

(A) Eligible retirement plan. For purposes of paragraph (1), the term "eligible retirement plan" means a governmental plan (within the meaning of section 414(d) [26 USCS § 414(d)]) which is described in clause (iii), (iv), (v), or (vi) of subsection (c)(8)(B).

(B) Eligible retired public safety officer. The term "eligible retired public safety officer" means an individual who, by reason of disability or attainment of normal retirement age, is separated from service as a public safety officer with the employer who maintains the eligible retirement plan from which distributions subject to paragraph (1) are made.

(C) Public safety officer. The term "public safety officer" shall have the same meaning given such term by section 1204(9)(A) of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796b(9)(A)).

(D) Qualified health insurance premiums. The term "qualified health insurance premiums" means premiums for coverage for the eligible retired public safety officer, his spouse, and dependents (as defined in section 152 [26 USCS § 152]), by an accident or health plan or qualified long-term care insurance contract (as defined in section 7702B(b) [26 USCS § 7702B(b)]).

(5) Special rules. For purposes of this subsection—

(A) Direct payment to insurer required. Paragraph (1) shall only apply to a distribution if payment of the premiums is made directly to the provider of the accident or health plan or qualified long-term care insurance contract by deduction from a distribution from the eligible retirement plan.

(B) Related plans treated as 1. All eligible retirement plans of an employer shall be treated as a single plan.

(6) Election described.

(A) In general. For purposes of paragraph (1), an election is described in this paragraph if the election is made by an employee after separation from service with respect to amounts not distributed from an eligible retirement plan to have amounts from such plan distributed in order to pay for qualified health insurance premiums.

(B) Special rule. A plan shall not be treated as violating the requirements of section 401 [26 USCS § 401], or as engaging in a prohibited transaction for purposes of section 503(b) [26 USCS § 503(b)], merely because it provides for an election with respect to amounts that are otherwise distributable under the plan or merely because of a distribution made pursuant to an election described in subparagraph (A).

(7) Coordination with medical expense deduction. The amounts excluded from gross income under paragraph (1) shall not be taken into account under section 213 [26 USCS § 213].

(8) Coordination with deduction for health insurance costs of self-employed individuals. The amounts excluded from gross income under paragraph (1) shall not be taken into account under section 162(l) [26 USCS § 162(l)].

(Aug. 16, 1954, ch 736, 68A Stat. 135; April 22, 1960, P. L. 86-437, § 1, 2(a), 74 Stat. 79; Oct. 10, 1962, P. L. 87-792, § 4(c), 76 Stat. 825; Feb. 26, 1964, P. L. 88-272, Title II, §§ 221(c)(1), 232(e)(1)-(3), 78 Stat. 75, 111; Dec. 30, 1969, P. L. 91-172, Title III, § 321(b)(1), Title V, § 515(a)(1), 83 Stat. 590, 643; Sept. 2, 1974, P. L. 93-406, Title II, §§ 2002(g)(5), 2005(a), (b)(1), (c)(1), (2), 88 Stat. 968, 987, 990, 991: April 15, 1976, P. L. 94-267, § 1(a), 90 Stat. 365; Oct. 4, 1976, P. L. 94-455, Title XIV, § 1402(b)(1)(C), (2), Title XV, § 1512(a), Title XIX, §§ 1901(a)(57)(A)-(C)(i), 1906(b)(13)(A), 90 Stat. 1731, 1732, 1742, 1773, 1774, 1834; May 23, 1977, P. L. 95-30, Title I, § 102(b)(4), 91 Stat. 137; Oct. 14, 1978, P. L. 95-458, § 4(a), (c), 92 Stat. 1257, 1259; Nov. 6, 1978, P. L. 95-600, Title I, §§ 101(d)(1), 135(b), 157(f)(1), (g)(1), (h)(1), 92 Stat. 2770, 2787, 2806-2808; April 1, 1980, P. L. 96-222, Title I, § 101(a)(14)(C), (E)(i), 94 Stat. 204, 205; Dec. 28, 1980, P. L. 96-608, § 2(a), 94 Stat. 3551; Aug. 13, 1981, P. L. 97-34, Title III, §§ 311(b)(2), (3)(A), (c), 314(c)(1), 95 Stat. 280, 286; Jan. 12, 1983, P. L. 97-448, Title I, §§ 101(b), 103(c)(7), (8)(A), (12)(D), 96 Stat. 2366, 2376, 2377; July 18, 1984, P. L. 98-369, Div A, Title IV, § 491(c)(2), (d)(9)-(11), Title V, § 522(a)(1), (b)-(d)(8), Title VII, § 713(c)(3), Title X, § 1001(b)(3), (e), 98 Stat. 848, 849, 868-870, 957, 1011, 1012; Aug. 23, 1984, P. L. 98-397, Title II, §§ 204(c)(1), (3), (4), 207(a), 98 Stat. 1448, 1449; April 7, 1986, P. L. 99-272, Title XI, § 11012(c), 100 Stat. 260; Oct. 22, 1986, P. L. 99-514, Title I, § 104(b)(5), Title XI, §§ 1105(a), 1106(c)(2), 1108(b), 1112(c), 1121(c)(1), 1122(a), (b)(1)(A), (2), (e)(1), (2)(A), (g), Title XVIII, §§ 1852(a)(5)(A), (b)(1)-(7), (c)(5), 1854(f)(2), 1875(c)(1)(A), 1898(a)(2), (3), (c)(1)(A), (7)(A)(i), (e), 100 Stat. 2105, 2417, 2423, 2432, 2444, 2465, 2466, 2469, 2470, 2865-2867, 2881, 2894, 2942, 2943, 2951, 2954, 2955; Nov. 10, 1988, P. L. 100-647, Title I, §§ 1011(c)(1)-(6)(B), (11), (h)(4), 1011A(a)(1), (b)(4)(A)-(D), (5)-(8), (10), (c)(9), 1018(t)(8)(A), (C), (u)(1), (6), (7), Title VI, § 6068(a), 102 Stat. 3457-3459, 3464, 3472-3474, 3476, 3589, 3590, 3703; Dec. 19, 1989, P. L. 101-239, Title VII, § 7811(g)(2), (i)(13), 103 Stat. 2409, 2411; Nov. 5, 1990, P. L. 101-508, Title XI, § 11801(c)(9)(I), 104 Stat. 1388-526; July 3, 1992, P. L. 102-318, Title V, §§ 521(a), (b)(9)-(11), 522(c)(1), 106 Stat. 300, 310, 311, 315; Dec. 8, 1994, P. L. 103-465, Title VII, § 732(c), 108 Stat. 5005; Aug. 20, 1996, P. L. 104-188, Title I, §§ 1401(a)-(b)(2), (13), 1421(b)(3)(A), (9)(B), 1450(a)(2), 1704(t)(68), 110 Stat. 1787-1789, 1796, 1798, 1814, 1891; Aug. 5, 1997, P. L. 105-34, Title XV, § 1501(a), 111 Stat. 1058; July 22, 1998, P. L. 105-206, Title VI, § 6005(c)(2)(A), 112 Stat. 800; June 7, 2001, P. L. 107-16, Title VI, §§ 611(d)(1)-(3)(A), 617(b), (c), 632(a)(3)(G), 636(b)(1), 641(a)(2)(A), (B), (b)(2)-(d), (e)(4)-(6), 643(a), 644(a), 657(b), 115 Stat. 97, 98, 105, 114, 117, 119-123, 136; March 9, 2002, P. L. 107-147, Title IV, Subtitle B, § 411(l)(3), (o)(1), (p)(6), (q)(2), 116 Stat. 47, 48, 51; Dec. 21, 2005, P. L. 109-135, Title IV, Subtitle A, § 407(a), 119 Stat. 2635; Aug. 17, 2006, P. L. 109-280, Title VIII, Subtitle C, §§ 822(a), 829(a)(1), Subtitle D, § 845(a), 120 Stat. 998, 1001, 1013; Dec. 29, 2007, P. L. 110-172, § 8(a)(1), 121 Stat. 2483; Dec. 23, 2008, P. L. 110-458, Title I, Subtitle A, §§ 108(f)(1), (2)(A), (B), (j), 109(b)(3), Title II, § 201(b), 122 Stat. 5109, 5110, 5111, 5117.)

Notes of Decisions

I. IN GENERAL

1. Generally

IRS could not, under economic benefit doctrine, tax certain deferred compensation placed in trust, since economic benefit doctrine is applicable only if employer's promise is capable of valuation, as where employer makes contribution to employee's deferred compensation plan which is nonforfeitable, fully vested in employee and secured against employer's creditors by trust arrangement. Minor v United States (1985, CA9 Wash) 772 F2d 1472, 6 EBC 2473, 85-2 USTC P 9717, 56 AFTR 2d 6037.

Disqualification of plan does not bar tax free roll over; although under literal reading of 26 USCS § 402(a)(5) at time of distribution trust must be exempt, loss of exemption should not convert existing qualified assets in exempt trust to nonexempt trust since such rule would penalize innocent employee who had no say in management of trust and would retroactively change ground rules that he could fairly have anticipated would govern tax liability of payments. Hesse v United States (1980, ED Mo) 81-1 USTC P 9153, 47 AFTR 2d 1024.

"Distributee" who is subject to tax is participant or beneficiary, who under plan is entitled to distribution, and is not automatically person to whom distribution is made; plan which distributes lump sum to participant who is obligated to turn over part of distribution to former wife pursuant to divorce decree is distributee of entire amount. Darby v Commissioner (1991) 97 TC 51, 14 EBC 1153.

If taxpayer participated in profit-sharing plan for any part of taxable year, even if not for entire year, such year is counted toward five years of planned participation required to qualify plan distribution for 10-year averaging. Boyer v Commissioner (1988) TC Memo 1988-220, RIA TC Memo P 88220, 55 CCH TCM 871.

IRS argued that payments were tax free to petitioner's former spouse under I.R.C. § 402(a) because payments were not distributions from her former husband's pension plan; section 402(a) provided how distributions that were made from qualified trust under qualified pension plan were taxed, but no distributions from qualified trust were made, and thus, by its terms, § 402 did not apply. Dunkin v Comm'r (2005) 35 EBC 1189, 124 TC No. 10.

Taxpayer's employee stock ownership plan (ESOP) was not qualified under I.R.C. §§ 401(a) and 501(a) because ESOP was not timely amended to include provisions required by I.R.C. §§ 402(c)(4)(C), 414(n)(2)(C), (q), and (u), and 415(c)(3), did not follow vesting schedule required by I.R.C. § 411(a)(2)(B), and failed to use independent appraiser to appraise employer securities as required by I.R.C. § 401(a)(28)(C). Hollen v Comm'r (2011) 50 EBC 1777, TC Memo 2011-2, 101 CCH TCM 1004.

Unpublished Opinion

Suggestion that inherited Individual Retirement Account was exempt under I.R.C. § 402(c)(11) was rejected; nothing in § 402 independently provided for tax-exemption. In re Weilhammer (2010, BC SD Cal) 2010 Bankr LEXIS 2935.

2. Constitutionality

26 USCS § 402(e)(4)(A)(ii), which requires that employee have attained age 59 and 1/2 for distribution to qualify as lump sum distribution, is constitutional. Addison v Commissioner (1979) TC Memo 1979-317, RIA TC Memo P 79317, 38 CCH TCM 1226.

3. Nonexempt trusts

10-year averaging cannot be used for lump sum distribution from pension plan that was not qualified at time of distribution. Meyers v Commissioner (1994) TC Memo 1994-598, RIA TC Memo P 94598, 68 CCH TCM 1354, 94 TNT 238-11, affd (1996, CA7) 96-1 USTC P 50215, 77 AFTR 2d 1526, reh, en banc, den (1996, CA7) 1996 US App LEXIS 9949.

Where pension plan is not qualified due to failure to meet participation requirements, but is not terminated in accordance with ERISA requirements, employer's sole shareholder, who is participant in plan, must include in income for years prior to termination of plan vested accrued benefits. Gant v Commissioner (1998) TC Memo 1998-440, RIA TC Memo P 98440.

Annual contributions by employer-corporation to educational benefit trust established to pay for college education of children of certain eligible employees are taxable to employee where contributions are based on employee's employment and earnings record and not on competitive criteria like need, merit or motivation only

when his child actually incurs qualified education expense; it is not until such time that under plan contributions are no longer subject to substantial risk of forfeiture. Rev Rul 75-448 (1975) 1975-2 CB 55.

In secular trust arrangement, where participating employee does not have vested right to income allocable to his account balance until benefit under plan becomes payable, highly compensated employee is required to include in gross income for each taxable year amount equal to vested accrued benefit (other than his investment in contract) under trust as of close of the taxable year of the trust that ends with or within the taxable year of the participant; for years in which employer has power to allocate trust income from participant's account to other accounts, participant's vested accrued benefit is lesser of present value of his trust account balance payable at time provided under plan or present value of his benefit under plan. Private Letter Ruling 9207010.

4. Trust instrument

Severance pay distribution which is not made out of trust fund is not eligible for favorable tax treatment; thus, lump sum received by taxpayer upon his voluntary resignation, from severance pay plan established under collective bargaining agreement, does not qualify for favorable tax treatment under 26 USCS § 402(e), where employer never set up any trust fund for plan. De La Fuente v United States (1984, ED NY) 586 F Supp 526, 84-1 USTC P 9467, 54 AFTR 2d 5086.

Trust instrument must be in writing and oral agreement is not sufficient to establish valid trust; although trust instrument is not required to be in specified form, it must be in such form that provisions of agreement can be enforced on basis of such written evidence alone. Rev Rul 69-231 (1969) 1969-1 CB 118.

Bank may name its trust department officer as trustee of pension plan provided it does not violate its charter or by-laws or state law. Rev Rul 69-535 (1969) 1969-2 CB 90.

5. "Employer's securities"

Each of 2 equal corporate partners, is considered employer of partnership's employees for purposes of provisions dealing with qualified employee benefit plans; thus, partnership's exempt employee's trust which acquired stock of one of corporate partners acquired "employer's securities." Rev Rul 68-437 (1968) 1968-2 CB 183.

Separated employee received "employer securities" where profit-sharing plan invested in employer's stock, following which plan and participants were transferred to another corporation under sales agreement, since transfer did not change status. Rev Rul 73-29 (1973) 1973-1 CB 198.

Mere conversion of stock into stock of successor corporation by merger does not change its status as stock of employer. Rev Rul 73-312 (1973) 1973-2 CB 142.

Net unrealized appreciation in employer securities is includible in basis of securities received by beneficiary to extent amount was excluded as death benefit under 26 USCS § 101(b); such amount is deemed to be additional consideration paid by employee. Rev Rul 74-398 (1974) 1974-2 CB 136.

6. Foreign situs trusts

Trust was not domestic trust since it was operated primarily in Canada for Canadians with separate fund created for employees of U.S. subsidiary; U.S. bank was merely acting as agent for Canadian trustee for sole purpose of making distributions to U.S. employees. Rev Rul 55-200 (1955) 1955-1 CB 633.

Employees' trust created in Canada that operates exclusively in U.S. for benefit of U.S. employees of Canadian organization doing business in U.S. and subject to continuous U.S. jurisdiction is domestic trust. Rev Rul 70-242 (1970) 1970-1 CB 89.

7. Parent-subsidiary corporations

Money received by subsidiary employee as full distribution of taxpayer's interest in pension and profit-sharing fund of parent corporation was ordinary income and could not be accorded capital gains treatment. McGowan v United States (1960, CA7 Wis) 277 F2d 613, 60-1 USTC P 9443, 5 AFTR 2d 1345.

Taxpayers' lump sum distributions from profit-sharing trust established by subsidiary which merged into parent were not distributions "on account of" separation from service of their employer and therefore distributions were ordinary income and not capital gains. Clarke v Commissioner (1970) 54 TC 1679.

Anti-diversion rule is not violated by parent-subsidiary commonly trusteed profit-sharing plan merely because it is possible that contributions made by one corporation may be allocated to employees of other, as long as once contributions are allocated to employees' individual accounts, they cannot be reallocated to other employees'

accounts; but each corporation's contribution on behalf of employees of another member of parent-subsidiary group is subject to special make-up limitation. Rev Rul 69-35 (1969) 1969-1 CB 117.

Transfer of employer securities, consisting of stock in parent corporation, from exempt employees' trust that is maintained by parent corporation and its subsidiary to newly established exempt employees' trust of subsidiary corporation will not change basis of securities for purpose of computing net unrealized appreciation in such securities. Rev Rul 80-138 (1980) 1980-1 CB 87.

8. Pick up contributions

Contributions by employer-school district which agrees to pick up teacher's contributions to state pension plan constitute employer contributions that are excluded from employee's gross incomes until they are distributed or made available to employees where state law requires teachers to contribute. Rev Rul 77-462 (1977) 1977-2 CB 358.

9. Surrender of contract

Regs § 1.402(a)-1(a)(2) properly provide that upon distribution from tax-exempt pension trust of annuity contract which has cash value available to employee by surrendering contract, cash value is not income to employee unless and until contract is surrendered. Russell v Commissioner (1966) 47 TC 8.

Taxpayers' realized income from distribution of "entire value" of cash value life insurance policy from employer trust to taxpayer could, pursuant to 26 USCS § 402(b)(2) and annuity rules of 26 USCS § 72, be subject to reduction by applicable surrender charges on policy. Lowe v Comm'r (2011) TC Memo 2011-106, 101 CCH TCM 1525.

II. SEPARATION FROM SERVICE

10. Generally

Lump sum payment was not on account of separation from service where employee, after reaching retirement age of 70 years, received lump-sum payment but continued to render some service and to receive from his employer same compensation as previously; therefore, payment was taxable to employee as annuity, rather than as capital gain. Fry's Estate v Commissioner (1953, CA3) 205 F2d 517, 53-2 USTC P 9458, 44 AFTR 98.

"Separation from the service" means separation from service of employer. McGowan v United States (1960, CA7 Wis) 277 F2d 613, 60-1 USTC P 9443, 5 AFTR 2d 1345.

Ordinary income results from distribution of profit-sharing trust, when separation from service is incident to technical change in employment relationship without meaningful change in beneficial ownership of business. United States v Haggart (1969, CA8 ND) 410 F2d 449, 69-1 USTC P 9385, 23 AFTR 2d 1326; Wysong v United States (1971, DC Minn) 326 F Supp 1384, 71-2 USTC P 9605, 28 AFTR 2d 5503.

Lump-sum distribution to employee who resigned several months after his employer voted to terminate its plan, which termination was conditioned on approval by Treasury of its termination and on retention of its tax-exempt status but before Treasury issued favorable termination ruling to employer, was capital gain and not ordinary income. Green v United States (1975, ND Ala) 75-2 USTC P 9661, 36 AFTR 2d 5629.

Distribution was not on account of separation from service where taxpayer was re-elected treasurer of his employer on day pension trust was terminated and distributions of its assets made to participant employees, including taxpayer. Oliphint v Commissioner (1955) 24 TC 744, affd (1956, CA5) 234 F2d 699, 56-2 USTC P 9676, 49 AFTR 1489.

Distribution was not on account of separation from service where officer and stockholder sold all of his shares to another company and signed agreement with corporate employer under which he would stay in his employment in advisory and consulting capacity in exchange for employer's payment of premiums on life insurance policy on taxpayer's life, pursuant to existing tax-exempt pension trust for all employees. Bolden v Commissioner (1963) 39 TC 829.

Distribution to employee from qualified plan that was made more than 5 years subsequent to date of separation from service was made on account of separation from service within meaning of 26 USCS § 402(e)(4)(A)(iii) and may be rolled over into eligible retirement plan; taxable year in which total distribution must be made is not limited to year of, or year following, employees actual separation from service. Private Letter Ruling 8203095.

Any amount credited to account of employee after date of termination of his service and based on employer's contributions to employee's pension plan (other than employee's pro rata share of employer's contributions to plan for year of retirement of employee) is taxable as ordinary income in year of distribution, since it is not part of balance which becomes payable to distributee on account of his separation from service. Rev Rul 62-190 (1962) 1962-2 CB 130.

11. Contract service

Distributions to taxpayer, upon expiration of contract, from retirement income plan set up by company to which both employer and taxpayer made specified contributions could properly be reported by taxpayer as capital gains, as being distribution from exempt trust paid on account of employee's separation from service. Sterling v United States (1963, CA5 Tex) 325 F2d 236, 63-2 USTC P 9839, 12 AFTR 2d 5989.

Although employee must be separated from employer's service, capital gain benefit can apply even if retired employee continues to do some work for his employer, as long as his relationship to employer is no longer that of employee; thus, continuing to work on consulting basis will not nullify tax benefit if former employee subsequently operates as independent contractor. Rev Rul 69-647 (1969) 1969-2 CB 100.

12. Change in status

Employee who changes from full time to part time employment with same employer does not thereby separate from service and is not entitled to use 10-year forward averaging for lump sum distribution. Edwards v Commissioner (1990, CA4) 906 F2d 114, 12 EBC 1835, 90-2 USTC P 50360, 66 AFTR 2d 5210.

Promotion of common law employee to partner does not constitute separation from service for purposes of 26 USCS § 402(e)(4)(A)(iii). Ridenour v United States (1983) 3 Cl Ct 128, 4 EBC 1801, 83-2 USTC P 9491, 52 AFTR 2d 5584.

Lump sum distribution to taxpayer who bought all outstanding stock of his employer and became its president and general manager from existing employee pension plan, more than 4 years after stock purchase, was not made "on account of" his separation from service. Osterman v Commissioner (1968) 50 TC 970.

Lump sum distribution is not on account of separation from service where profit-sharing plan provides that when employee reaches age 60, he can retire from plan or terminate his profit-sharing employment and receive lump-sum distribution, or may continue to work (in which event, his records will indicate that he is no longer eligible for profit-sharing), and employee terminates his participation in plan but continues employment. Rev Rul 56-214 (1956) 1956-1 CB 196.

National Guard caretakers were deemed to be separated from service when under National Guard Technician Act of 1968 they were no longer state employees but became federal employees; accordingly distributions from state retirement systems made to them qualified for capital gain treatment. Rev Rul 70-422 (1970) 1970-2 CB 93.

Distribution from exempt employees' trust established by partnership to participant whose status has changed from common-law employee to partner may not be treated as distribution on account of separation from service within meaning of 26 USCS § 402(e)(4)(A)(iii). Rev Rul 81-26 (1981) 1981-1 CB 200.

13. Union agreements

Taxpayer was not entitled to long-term capital gains treatment of lump sum distribution from qualified retirement plan because payment was made as result of union's bargaining agreement and not made on account of taxpayer's "separation from service" from his employer. Stewart v Commissioner (1969) 53 TC 344.

Lump-sum distribution to employee, participant in qualified profit-sharing trust, was taxable as ordinary income not capital gain since payment was due to post-strike union agreement and not on account of "separation from the service" of employer. Wilkins v Commissioner (1970) 54 TC 362.

Distributions made to taxpayers from qualified profit-sharing retirement plan were taxable as ordinary income because payments were not made "on account of" separation from service, where taxpayers, under agreement between employer and union, received distribution of one-half of taxpayers' interest in plan on Aug. 3, 1967, on Sept. 1, 1967 company purchased all of assets of taxpayers' employer, and on Sept. 20, 1967, plan was amended providing for continuation of plan by purchaser. Richards v Commissioner (1971) 57 TC 278.

14. Change in corporate: structure

While change of employer amounted to "separation from the service" of old company, subsequent distribution of funds from retirement plan was not on account of such separation, and therefore taxpayer was not entitled to capital gains treatment with respect to payments to him, where taxpayer had transferred his employment to acquiring corporation and pension plan of his old employer had been continued by such corporation, discontinuance thereof taking place after taxpayer had become employee of acquiring corporation. Schlegel v Commissioner (1966) 46 TC 706.

Lump-sum distribution to taxpayer on his election not to remain in transferor's corporation profit-sharing plan, upon reorganization in which newly-organized transferee continued transferor's business under same name and with substantially same employees although in different state, was not made on account of separation of service since plan was continued under adoption by transferee. Gittens v Commissioner (1968) 49 TC 419.

Taxpayer's liquidation of professional corporation and continuation of practice as sole proprietor is not "separation form service" within meaning of § 402, and accordingly distributions were not lump-sum distributions eligible for 10-year forward averaging. Burton v Commissioner (1992) 99 TC 622, 16 EBC 1057.

Total distribution within 1 taxable year to employee from exempt noncontributory profit-sharing employees' trust as result of corporate takeover and reorganization, in which employee remained in same job, does not qualify as distribution on account of separation from service within meaning of 26 USCS § 402. Rev Rul 79-336 (1979) 1979-2 CB 187.

Distribution from exempt employees' trust will not be treated as distribution on account of separation from service where business of partnership or corporation is terminated along with its qualified plan and partnership is formed to continue business, if employee continues on same job for successor employer. Rev Rul 80-129 (1980) 1980-1 CB 86.

15. Control

Substantial change in ownership of stock and control of corporation, or appointment of receiver for rehabilitation of corporation does not cause separation from service of corporation by taxpayers within meaning of 26 USCS § 402. Nelson v United States (1963, DC Idaho) 222 F Supp 712, 63-2 USTC P 9739, 12 AFTR 2d 5705.

Change from full-time to part-time employment does not constitute separation from service by fact that employer changed ownership, from two 50% shareholders to one 100% shareholder, since mere reduction in work schedule does not constitute separation from service. Edwards v Commissioner (1989) 11 EBC 1406, TC Memo 1989-409, RIA TC Memo P 89409, 57 CCH TCM 1217, affd (1990, CA4) 906 F2d 114, 12 EBC 1835, 90-2 USTC P 50360, 66 AFTR 2d 5210.

16. Mergers and consolidations

Lump-sum distribution made to taxpayer by corporate employer from tax-exempt retirement trust was not paid on account of "separation from service" of his employer so as to qualify for preferential capital gains treatment, where payment was made upon termination of noncontributory retirement plan after another corporation purchased over 99 per cent of employer's stock and merged into employer, but taxpayer continued as employee of employer after merger. United States v Martin (1964, CA8 Minn) 337 F2d 171, 64-2 USTC P 9795, 14 AFTR 2d 5807.

Lump-sum payments made by surviving corporation in 1959 to employee who had same position with surviving corporation as he had with merged corporation were to be treated as ordinary income, even though surviving and merged corporations had carefully entered contract whereby merged corporation's pension trust was to be continued, because funds were not paid on account of separation from service, since he did not retire until two years later. Funkhouser v Commissioner (1967, CA4) 375 F2d 1, 67-1 USTC P 9339, 19 AFTR 2d 1051, 3 ALR Fed 709.

Distribution to employee upon termination of plan was not on account of taxpayer's separation from original employer's service where employer had been merged into another corporation which adopted plan but terminated plan 2 years after merger. Price v United States (1979, CA4 NC) 599 F2d 594, 1 EBC 1216, 79-1 USTC P 9400, 44 AFTR 2d 5120.

Taxpayer who continues her employment following employer's change in corporate ownership, decrease in number of employees, and later distribution from termination of profit sharing plans, is not separated from service and is not therefore not entitled to special forward averaging for distributions. Edwards v Commissioner (1990, CA4) 906 F2d 114, 12 EBC 1835, 90-2 USTC P 50360, 66 AFTR 2d 5210.

Sale of assets by old employer of taxpayer to another corporation followed by merger of old employer into acquiring corporation resulted in taxpayer being separated from service of his old employer, where taxpayer was employed by subsidiary to whom acquiring corporation transferred assets of old employer, but profit-sharing plan of old employer was not adopted or continued by new employer. Houg v Commissioner (1970) 54 TC 792, acq and acq withdrawn, not acq.

Successor employer is denied capital gain treatment where distribution of profit-sharing funds on termination of plan occurred 2 years after predecessor employer was merged into successor employer corporation, since it adopted predecessor employer's plan as there was no showing that predecessor employer had any intent prior to merger to terminate plan; it did not matter that taxpayer's employment was terminated 2 years after distribution. Roth v Commissioner (1973) TC Memo 1973-175, RIA TC Memo P 73175, 32 CCH TCM 834.

17. Transfer of subsidiary or spin off

Distribution is not on account of separation from service where subsidiary separates from its parent and continues to operate as taxable entity with same employees. Rev Rul 81-141 (1981) 1981-1 CB 204.

18. Change in business

Taxpayer is deemed separated from service of employer where he was president and sole shareholder of corporation which transferred all operating assets and employees to new corporation except taxpayer, who remained president of "shell" corporation, as transfer caused radical change in business and duties of taxpayer. Enright v Commissioner (1976) TC Memo 1976-393, RIA TC Memo P 76393, 35 CCH TCM 1770.

Bank's sale of its "merchant business" constitutes sale of all or substantially all of the assets of a separate business. Private Letter Ruling 9101032.

Transfer of employer's assets to another business entity does not constitute separation form service which entitles employee to use ten-year averaging method. Vidrine v Commissioner (1993) 16 EBC 2697, TC Memo 1993-308, RIA TC Memo P 93308, 66 CCH TCM 123, 93 TNT 148-10.

19. Liquidations

Lump-sum distributions were made on account of separation from service and not because plan was terminated, where corporation, in anticipation of liquidation, terminated its plan and made lump-sum distributions to its employees even though employees remained on job for several months until corporation completed its liquidation. Snow v United States (1975, ED Wash) 75-2 USTC P 9618, 36 AFTR 2d 5446.

Liquidation of corporation constitutes separation from service even if employee continues to be employed by new company, and taxpayer-employee consequently can utilize 10-year averaging with respect to lump-sum distributions which she received upon termination of qualified pension plan by company which had acquired her old employer and liquidated it, where plan termination had not been part of acquisition plan. Heslin v United States (1984, WD Ky) 6 EBC 2048, 85-1 USTC P 9412, 56 AFTR 2d 5292.

Distribution by transferee corporation which agreed to assume qualified pension plan existing among employees of dissolved company but subsequently terminated plan and distributed its assets to participants, including taxpayer, was not made "on account of the employee's separation from the service" since transferee corporation continued pension plan of old employer some years after latter was dissolved. Buckley v Commissioner (1957) 29 TC 455.

20. Death

Distribution was not on account of employee's death or other separation from service since right to receive distribution originated in termination of plan where employee died after plan was terminated but before distribution was made; distribution would have been less if plan had not been terminated but rather based solely on employee's death. Estate of Stefanowski v Commissioner (1974) 63 TC 386.

21. Uncompensated service

It is rendition of services or being employed to render services and not compensation which is determinative factor in whether or not there has been separation from service; consequently, distribution of lump sum is taxable as ordinary income to one who continues in uncompensated status to serve employer. Rev Rul 57-115 (1957) 1957-1 CB 160.

III. TAXABILITY OF SPECIFIC DISTRIBUTIONS

22. Payment less than amount of contribution

Employee who receives total distribution under qualified stock bonus plan consisting of employer's stock where fair market value of stock is less than his contribution to plan is not entitled to loss deduction at time of distribution; he has gain or loss, as case may be, when he sells stock. Rev Rul 71-251 (1971) 1971-1 CB 129, amplified (1972) 1972-1 CB 114.

If employee's contributions exceed lump sum distribution, as result of investment losses by trust, employee has loss on transaction entered into for profit which is deductible as ordinary loss in year employee receives distribution, but only if employee itemizes his deductions for that year. Rev Rul 72-305 (1972) 1972-1 CB 116.

23. Annuities

President-employee was not liable for present income tax for any part of amount paid by trustees for his annuity contract under retirement plan, inasmuch as true pension trust for exclusive benefit of employees pursuant to predecessor to 26 USCS § 402 was created. Lord v Commissioner (1942) 1 TC 286, acq.

Distribution of annuity contract to taxpayer from qualified employee's trust was taxable as ordinary income, where there was no employee separation from service of employer by reason of death or termination of employment relationship. Russell v Commissioner (1966) 47 TC 8.

Benefits will be considered paid from trust where benefits under employees' pension plan and trust are funded by group annuity contract purchased by trust from insurance company, and where, as matter of administrative convenience, trustee, rather than have retirement, death, and severance benefits paid to trust, has them paid directly to beneficiaries by insurer. Rev Rul 59-401 (1959) 1959-2 CB 121, obsoleted, in part (1988) 1988-2 CB 333.

24. Part cash and part annuity

Special break did not apply to cash portion of payout where annuity portion of distribution from benefit plan was to be paid out of employer's benefit plan instead of by purchase of independent insurer's annuity, employer's qualified profit-sharing plan providing that on employee's retirement half of his benefit was to be paid in lump sum and balance in periodic payments over his life, and amount to be paid in periodic payments was transferred to trust under separate qualified plan just before employee's retirement date, since distribution to retired employee would be only half of total share accumulated for him; total amount accumulated for him was not reduced by transfer of half that amount to separate employer trust immediately before his retirement. Rev Rul 72-242 (1972) 1972-1 CB 116.

Distribution of entire balance of employee's credit in qualified retirement plan that consists of cash and annuity contract which is not surrendered in distribution year entitles recipient to lump-sum distribution tax treatment for cash; value of annuity contract is taken into account in computing amount of tax on ordinary income portion of cash distribution. Rev Rul 81-107 (1981) 1981-1 CB 201.

25. Distribution made within one year of eligibility

Long-term capital gain treatment applies to appreciation in employer stock attributable to period after lump-sum distribution to retired employee from qualified trust only if employee holds stock for more than one year prior to selling it. Rev Rul 81-122 (1981) 1981-1 CB 202.

Lump-sum distribution paid to one of 25 highest paid employees participating under qualified pension plan before plan has been in existence for 10 years is entitled to special lump-sum tax treatment where agreement between participant and trustee guarantees repayment should plan terminate within first 10 years or if full current costs of plan are not met at any time during period. Rev Rul 81-135 (1981) 1981-1 CB 203, obsoleted (1992) 1992-2 CB 76.

26. Benefits paid after death of employee

Pension paid to deceased employee's widow is income in respect of decedent. Miller v United States (1968, CA5 Tex) 389 F2d 656, 68-1 USTC P 9146, 21 AFTR 2d 379.

Payments to secondary beneficiaries are denied capital gain treatment where participant in employees' trust died, and his widow, primary beneficiary, received several payments from trust and, subsequently, she died, and

balance was paid over to secondary beneficiaries, since they were not received "on account of" death of covered employee. Gunnison v Commissioner (1972, CA7) 461 F2d 496, 72-1 USTC P 9389, 29 AFTR 2d 1052.

Summary denial of estate executor's claim to partial refund for overvaluing decedent's retirement accounts in calculating federal estate taxes was affirmed where district court properly calculated fair market value. Smith v United States (2004, CA5 Tex) 391 F3d 621, 33 EBC 2931, 2004-2 USTC P 60493.

Payments by employer to deceased employee's widow or estate under contract of employment is income in respect of decedent. Collins v United States (1970, CD Cal) 318 F Supp 382, 70-2 USTC P 9621, 26 AFTR 2d 5577, affd (1971, CA9 Cal) 448 F2d 787, 71-2 USTC P 9688, 28 AFTR 2d 5795.

Monthly payments to deceased employee's widow for life provided she remained unmarried were income in respect of decedent, where payments were made pursuant to employment contract deferring receipt of deceased employee's compensation. Estate of Nilssen v United States (1971, DC Minn) 322 F Supp 260, 71-1 USTC P 9384, 27 AFTR 2d 1318.

Son was distributee of his father's 401(k) survivor benefits and was properly taxed under 26 USCS § 402(a)(1) where primary beneficiary, father's wife, had pled guilty to offense that statutorily precluded her rights to 401(k) plan benefits, and under Or. Rev. Stat. § 112.515(4), benefits were paid to son as second beneficiary. D.N. v United States (2009, DC Or) 104 AFTR 2d 7725.

Distribution was not on account of death where employee died shortly after plan had formally been terminated, and later lump-sum distribution was made to his designated beneficiary; although death determined identity of distributee (beneficiary), amount to be distributed became fixed at termination. Estate of Stefanowski v Commissioner (1974) 63 TC 386.

Payment was not entitled to capital gains treatment where trustee under exempt employees' trust purchased annuity contract and distributed it to employee at time of his retirement, and where following employee's death after receiving payments for two years, his beneficiary surrendered contract to insurer and received lump-sum payment in satisfaction of payments that otherwise would have been due under annuity contract, since payment was not distribution from trust described in 26 USCS § 402(a)(2) for year in question, but was rather payment in settlement of insurer's liability to make any future payments. Rev Rul 68-287 (1968) 1968-1 CB 174.

If executor distributes employer securities to residuary legatees, any net unrealized appreciation will be includible in their gross income in year when they dispose of securities in subsequent taxable transaction; each legatee will then be entitled to income tax deduction to extent of his proportionate share of estate tax paid. Rev Rul 69-297 (1969) 1969-1 CB 131.

Death benefit is includible in beneficiary's gross income where no contract was purchased from insurance company so that no amount was to be currently includible in employee's gross income by reason of provision for payment to employee's beneficiaries, and where no portion of trust was currently distributed to pay insurance premiums or otherwise until retirement or death of employee-participant. Rev Rul 71-154 (1971) 1971-1 CB 128.

27. Discontinuance or termination of plan

Cash distributions to employees in total liquidation of certain employees' retirement trust fund, set up by their former employer, paid to them on account of their separation from service, qualified for long-term capital gain treatment and not as income. Commissioner v Miller (1955, CA6) 226 F2d 618, 55-2 USTC P 9726, 48 AFTR 306.

Lump-sum distributions from employees' retirement trust upon change of ownership in corporate employer's stock, resulting in new management's termination of retirement plan were required to be treated as ordinary income and not capital gain, since transaction was not change of employers tantamount to "separation from the service." United States v Johnson (1964, CA5 Ala) 331 F2d 943, 64-1 USTC P 9472, 13 AFTR 2d 1371; United States v Peebles (1964, CA5 Ala) 331 F2d 955, 64-1 USTC P 9473, 13 AFTR 2d 1382.

Beneficiaries could not take capital gains where successor corporation acquired assets of another corporation, including employees' profit-sharing and benefit plan which provided that successor corporation could adopt or permit it to lapse, and successor adopted plan and discontinued it 2 years later. Rybacki v Conley (1965, CA2 Conn) 340 F2d 944, 65-1 USTC P 9168, 15 AFTR 2d 113.

Lump-sum payment to taxpayer was not entitled to capital gains treatment where there was no substantial change in makeup of employees, there was only technical change in employment relationship, and there was no meaningful change in beneficial ownership of business resulting from reorganization during which plan was terminated. United States v Haggart (1969, CA8 ND) 410 F2d 449, 69-1 USTC P 9385, 23 AFTR 2d 1326.

Portion of distribution from disqualified plan accumulated while plan was still exempt is not subject to lump sum treatment, since trust's status at distribution is determinative. Woodson v Commissioner (1981, CA5) 651 F2d 1094, 2 EBC 1652, 81-2 USTC P 9578, 48 AFTR 2d 5700.

Employee was not entitled to capital gains treatment on distribution received, where employer was dissolved and its assets transferred to purchaser of its stock, with no substantial change in makeup of employees who thereafter voted for termination of noncontributory profit-sharing plan and for immediate distribution of funds. Wysong v United States (1971, DC Minn) 326 F Supp 1384, 71-2 USTC P 9605, 28 AFTR 2d 5503.

Lump-sum distributions were made on account of separation from service and not because plan was terminated where corporation, in anticipation of liquidation, terminated its plan and made lump-sum distributions to its employees even though employees remained on job for several months until corporation completed its liquidation. Snow v United States (1975, ED Wash) 75-2 USTC P 9618, 36 AFTR 2d 5446.

Lump-sum distribution to employee who resigned several months after his employer voted to terminate its plan, which termination was conditioned on approval by Treasury of its termination and on retention of its tax-exempt status but before Treasury issued favorable termination ruling to employer, was capital gain and not ordinary income. Green v United States (1975, ND Ala) 75-2 USTC P 9661, 36 AFTR 2d 5629.

Liquidation of corporation constitutes separation from service even if employee continues to be employed by new company, and taxpayer-employee consequently can utilize 10-year averaging with respect to lump-sum distributions which she received upon termination of qualified pension plan by company which had acquired her old employer and liquidated it, where plan termination had not been part of acquisition plan. Heslin v United States (1984, WD Ky) 6 EBC 2048, 85-1 USTC P 9412, 56 AFTR 2d 5292.

Employee who leaves his employment before his employer merges with another company is entitled to treat payments to him under existing pension trust as capital gains, although he receives his benefits after termination of trust. Judkins v Commissioner (1959) 31 TC 1022, acq and acq withdrawn, not acq.

Distribution was not on account of employee's death or other separation from service since right to receive distribution originated in termination of plan where employee died after plan had been terminated (and employees had been so advised) though before distribution was made; distribution would have been less if plan had not been terminated but rather based solely on employee's death. Estate of Stefanowski v Commissioner (1974) 63 TC 386.

Distribution in 1971 from plan disqualified for discrimination in 1971 could not receive lump-sum treatment even though plan was set up in 1965. Epstein v Commissioner (1978) 70 TC 439.

Corporate president's waiver of right to receive benefits from wholly-owned corporation's qualified plan constitutes taxable distribution from plan where plan was terminated, rank and file employees were paid their benefits, and benefits payable to president were contributed to corporation; waiver was equivalent to prohibited assignment or alienation of benefits. Gallade v Commissioner (1996) 106 TC 355, 20 EBC 1225.

Cash distribution received by taxpayer following termination of employer's qualified profit sharing plan is not lump sum distribution, and taxpayer is not entitled to utilize 10-year averaging rules available to recipients of lump sum distributions. Somont Oil Co. v Commissioner (1991) TC Memo 1991-245, RIA TC Memo P 91245, 61 CCH TCM 2772.

Distribution representing balance to employee's credit under pension plan of ex-employer is lump sum distribution within meaning of 26 USCS § 402(e)(4) (A) where employee of 2 corporate employers, whose separate qualified pension plans were funded by contributions to single trust, terminated employment with one employer. Rev Rul 80-128 (1980) 1980-1 CB 86.

28. Stock as medium of distribution

For sale or other disposition of employer securities occurring after May 6, 1997, actual period that security was held by plan need not be calculated to determine whether, with respect to net unrealized appreciation, disposition qualifies an long term capital gain. Rev Rul 98-22 (1998) 1998-19 IRB 5.

Where employee designated his estate beneficiary of interest in exempt profit-sharing trust and upon death entire interest was distributed within one taxable year and included appreciated stock of employer corporation, net unrealized appreciation is includible in gross income in taxable year of disposition of stock in taxable transaction as income in respect of decedent. Rev Rul 69-297 (1969) 1969-1 CB 131.

Employee's contributions to benefit plan are allocated to stock he receives for purpose of determining gain or loss on future sale or exchange. Rev Rul 72-15 (1972) 1972-1 CB 114.

Unrealized appreciation was income in respect of decedent where employee who retired in 1969 received lump-sum distribution of his employer's securities from exempt employees trust died on June 30, 1974 leaving appreciated securities that his wife sold. Rev Rul 75-125 (1975) 1975-1 CB 254.

Distribution received by nonresident alien from ESOP representing cash proceeds of sale of stock by ESOP is cash, not stock, distribution even though terms of plan contemplated only stock distributions. Clayton v United States (1995) 33 Fed Cl 628, 19 EBC 1673, 95-2 USTC P 50391, 76 AFTR 2d 5197, 95 TNT 134-10, affd (1996, CA FC) 20 EBC 2390, 96-1 USTC P 50314, 77 AFTR 2d 2484.

Upon distribution of S corporation stock by employee stock ownership plan to participant, stock's net unrealized appreciation under 26 USCS § 402(e)(4) is determined using plan's adjusted basis in stock. Rev Rul 2003-27 (2003) 2003-11 IRB 597.

29. Constructive receipt

Funds, undistributed from employee's qualified profit-sharing trust due to waiver agreements restraining taxpayers' rights to funds during specific years, are not taxable. Leavens v Commissioner (1972, CA3) 467 F2d 809, 72-2 USTC P 9680, 30 AFTR 2d 5586.

Severance pay distribution which is not made out of trust fund is not eligible for favorable tax treatment; thus, lump sum received by taxpayer upon his voluntary resignation, from severance pay plan established under collective bargaining agreement, does not qualify for favorable tax treatment under 26 USCS § 402(e), where employer never set up any trust fund for plan. De La Fuente v United States (1984, ED NY) 586 F Supp 526, 84-1 USTC P 9467, 54 AFTR 2d 5086.

Cash-basis pension plan participant was taxable at retirement on amount of his vested interest in plan which he could have withdrawn, or otherwise used, but did not because he believed, without foundation, that larger sum was due. Sperzel v Commissioner (1969) 52 TC 320.

Where participant's account balances are offset against participant's outstanding loans, transaction is treated as constructive distribution includable in participant's gross income and subject to excess distributions tax, and income is not treated as discharge of indebtedness excludable by insolvent taxpayer. Caton v Commissioner (1995) TC Memo 1995-80, RIA TC Memo P 95080, 69 CCH TCM 1937, 95 TNT 37-9.

Alternate payee of distribution under QDRO is required to pay applicable taxes on distribution, even order shifts burden of taxes to other spouse. Clawson v Commissioner (1996) TC Memo 1996-446, 72 CCH TCM 814.

Under rules of constructive receipt, provision in annuity contract which grants employee unrestricted right to withdraw amounts standing to his credit, renders such amounts currently available and therefore currently taxable to him; however, if right to withdrawal is subject to "substantial limitation", amount will not be deemed currently available; where provision in annuity contract permitting employee to surrender contract, at any time, and receive its cash value, is "substantial limitation" since employee will suffer significant penalty if he surrenders contract. Rev Rul 68-482 (1968) 1968-2 CB 186.

Employee with vested account balance in profit-sharing trust of $ 3,000 who obtained approval to withdraw $ 500, but actually withdrew only $ 400, must include $ 500 in gross income since this amount was available to him without further restriction. Rev Rul 71-332 (1971) 1971-2 CB 210, obsoleted (1991) 1991-1 CB 281.

Compensation payable under deferred compensation agreement is not includible in employee's gross income until taxable year in which actually received (or otherwise made available) because employee has no present interest in either account or in annuity contract. REv Rul 72-25 (1972) 1972-1 CB 127.

In year in which plan overpays beneficiary, all of amount, including overpayment, is includable in income, and in subsequent year when overpayment is repaid to plan, beneficiary is entitled to deduction under § 165 for amount repaid; where plan recovers overpayment in one year by reducing payments in following year, gross income in later includes only net benefit after reduction for prior overpayment. Rev. Rul. 2002-84 (2002) 2002-50 IRB 953.

30. Effect of source of funds

Distribution is taxable even if it represents tax-free interest earned by trust. Rev Rul 55-61 (1955) 1955-1 CB 40.

Distributions of accrued interest or other earned increments on withdrawal of employee contributions are taxable in year distributed. Rev Rul 73-581 (1973) 1973-2 CB 131.

31. Distribution from non-exempt trust

Amount which stood in taxpayer's name on books of profit-sharing trust on day trust lost its tax-exempt status because of fundamental change in nature of company business was taxable 5 years later when such amount was distributed to taxpayer, at capital gain rates, but remainder of distribution, being from discriminatory trust, was taxable as ordinary income in year of distribution. Greenwald v Commissioner (1966, CA2) 366 F2d 538, 1 EBC 1089, 66-2 USTC P 9652, 18 AFTR 2d 5645.

Regulation § 1.402(a)-1(a)(1)(ii), under which distribution qualifies for lump-sum treatment only if trust is exempt at time of distribution, is valid. Benbow v Commissioner (1985, CA7) 774 F2d 740, 6 EBC 2379, 85-2 USTC P 9721, 56 AFTR 2d 5998.

Where pension plan made termination distribution in 1978, but plan's tax-exempt status was retroactively revoked in 1979 for contributions made after 1975, distributions attributable to periods before retroactive revocation could be rolled over tax-free into IRA; only those distributions attributable to periods after 1975 were taxable. Benbow v Commissioner (1985, CA7) 774 F2d 740, 6 EBC 2379, 85-2 USTC P 9721, 56 AFTR 2d 5998.

Taxpayer was entitled to capital gains treatment with respect to that portion of distribution from disqualified plan that was accumulated while plan was still exempt. Dudinsky v United States (1978, MD Fla) 78-2 USTC P 9688, 46 AFTR 2d 5111.

Treatment of distribution from pension plan depends upon whether plan is qualified at time of distribution; where plan is not qualified at time that final terminating distribution is made, distribution is fully taxable and cannot be rolled over into IRA. Fazi v Commissioner (1994) 102 TC 695, 18 EBC 1643, 94 TNT 98-10, judgment entered (1995) 105 TC 436, 95 TNT 247-13.

32. Incidental life insurance

Amounts applied by exempt employees' trust for purchase of incidental life insurance protection under qualified plan that contains forfeiture provisions are includible in insured participants' gross income in year of payment. Rev Rul 79-202 (1979) 1979-2 CB 31.

33. Rollovers

Employee who is not advised by employer of possibility of using rollover to defer taxation of distribution is not entitled to money damages against employer. Fraser v Lintas (1995, CA6 Mich) 56 F3d 722, 19 EBC 1497, 95-2 USTC P 50360, 75 AFTR 2d 2607, 95 TNT 114-13, 1995 FED App 179P, cert den (1995) 516 US 975, 133 L Ed 2d 405, 116 S Ct 477, 19 EBC 2760.

Executor who receives lump-sum distribution from qualified plan can roll it over into individual retirement account within 60 days of distribution and executor stands in shoes of decedent for such purposes; thus, distribution from plan is not includable in decedent's income. Gunther v United States (1982, WD Mich) 573 F Supp 126, 4 EBC 1355, 82-2 USTC P 13498, 83-1 USTC P 9252, 51 AFTR 2d 1314, 52 AFTR 2d 5821.

Where state employee receives refund of employee contributions and accumulated interest, but retains service credits which are transferred to other pension plan provided by state, distribution is not lump sum distribution and accordingly is not eligible for 10 year forward averaging. Sites v United States (1995, DC Md) 896 F Supp 500, 95-1 USTC P 50280, 75 AFTR 2d 2503, 95 TNT 111-18.

Taxpayer's failure to file Form 4972 to elect treatment of partial distribution as rollover bars claim for relief from excise tax under 26 USCS § 4973. Smith v United States (1999, DC Md) 22 EBC 2869, 99-1 USTC P 50357.

Since debtor rolled over her withdrawal from her retirement plan account into new retirement plan account, she was entitled to list those funds as exempt property in her bankruptcy proceeding, as Internal Revenue Code provided that withdrawal of those funds enjoyed tax-exempt status for 60 days provided that she roll over funds into another qualified retirement account within that time period, which she did. Wolff v Gibson (In re Gibson) (2003, DC Md) 300 BR 866, 31 EBC 2443, CCH Bankr L Rptr P 80003.

Rollover is timely even though trustee, due to bookkeeping error, did not credit recipient's rollover account until after 60-day period had expired; where employee takes reasonable steps to establish rollover account and to transfer lump sum distribution in timely manner, failure of trustee to record transfer which is mere bookkeeping error, does not void attempted rollover. Wood v Commissioner (1989) 93 TC 114, 11 EBC 1401.

Treatment of distribution from pension plan depends upon whether plan is qualified at time of distribution; where plan is not qualified at time that final terminating distribution is made, distribution is fully taxable and

cannot be rolled over into IRA. Fazi v Commissioner (1994) 102 TC 695, 18 EBC 1643, 94 TNT 98-10, judgment entered (1995) 105 TC 436, 95 TNT 247-13.

Rollover of husband's lump sum distribution to wife's IRA does not qualify as tax-free rollover since spouse's IRA does not qualify as eligible retirement plan for benefit of distributee. Rodoni v Commissioner (1995) 105 TC 29, 19 EBC 1733, 95 TNT 144-11.

Taxpayer cannot elect 10-year averaging for remaining balance of lump sum distribution which is partially rolled-over since statute clearly provides that averaging is not available if taxpayer elects to roll-over any portion of distribution. Barrett v Commissioner (1992) TC Memo 1992-611, RIA TC Memo P 92611, 64 CCH TCM 1080.

Contribution of stock was properly designated by taxpayer as rollover contribution under I.R.C. § 402(c)(3) within 60 days of distribution of stock from employee stock option plan, since taxpayer opened rollover individual retirement account, hand-delivered stock certificate to account agent, and received receipt indicating deposit to rollover account, and it was irrelevant that taxpayer did not execute formal rollover documentation until after 60-day period expired. Kopty v Comm'r (2007) TC Memo 2007-343, 94 CCH TCM 480.

Although lump-sum distribution which taxpayer received from his employer's qualified pension plan in 1978 would have been eligible for 10-year averaging under 26 USCS § 402 in 1978, taxpayer lost benefits of 10-year averaging by rolling over this distribution into individual retirement account with his bank and then withdrawing all funds in that account in 1980 when he was over 59 and one-half years of age. Costanza v Commissioner (1985) 6 EBC 1958, TC Memo 1985-317, RIA TC Memo P 85317, 50 CCH TCM 280.

Contribution of cash representing fair market value of retained property received in qualified total distribution does not qualify as rollover contribution under 26 USCS § 402(a) as amended by Tax Reform Act of 1986. Rev Rul 87-77 (1987) 1987-2 CB 115.

Employees who receive property other than cash as part of total distribution from qualified plan with which to make rollover contribution must either contribute property in kind or sell property in bona fide sale and contribute proceeds; distribution does not qualify as rollover where employee retains property and contributes its cash equivalent. Rev Rul 87-77 (1987) 1987-2 CB 115.

60-day period for rollovers does not start to run until distribution is actually received; where trustee received distribution check in name of former employee but check was not received until 10 months after date of issue, 60-day period did not begin to run until former employee actually received check. Private Letter Ruling 8833043.

Qualifying rollover distribution of cash, from trust forming part of qualifying plan received by employee and transferred within 60 days into several individual retirement accounts is not includible in employee's gross income. Rev Rul 79-265 (1979) 1979-2 CB 186.

34. Lump sum distributions

Lump sum distribution made by profit-sharing trust cannot be rolled over into IRA tax-free despite fact that IRS revoked trust's tax exemption several years before date of distribution; code requires plan to be qualified at time of distribution in order for special favorable tax rules of qualified plan distribution to be available. Baetens v Commissioner (1985, CA6) 777 F2d 1160, 6 EBC 2583, 85-2 USTC P 9847, 57 AFTR 2d 375.

Lump sum received upon transfer of employee from state retirement system to state pension system made in order not to forfeit opportunity to obtain transfer refund is distribution occurring incident to retirement and not early distribution. Adler v Commissioner (1996, CA4) 86 F3d 378, 20 EBC 1445, 96-2 USTC P 50328, 78 AFTR 2d 5110.

Ten year averaging method is not applicable to lump sum distribution received from pension plan in year for which plan's tax-exempt status was revoked. Meyers v Commissioner (1996, CA7) 96-1 USTC P 50215, 77 AFTR 2d 1526, reh, en banc, den (1996, CA7) 1996 US App LEXIS 9949.

Severance pay distribution which is not made out of trust fund is not eligible for favorable tax treatment; thus, lump sum received by taxpayer upon his voluntary resignation, from severance pay plan established under collective bargaining agreement, does not qualify for favorable tax treatment under 26 USCS § 402(e), where employer never set up any trust fund for plan. De La Fuente v United States (1984, ED NY) 586 F Supp 526, 84-1 USTC P 9467, 54 AFTR 2d 5086.

Amount taxable in lump sum distribution is amount distributed to distributee; distributee is participant or beneficiary under plan who is entitled to distribution, and where plan distributes lump sum to participant who is obligated under divorce decree to turn over part of distribution to former spouse, divorce decree does not make

former spouse a distributee, and accordingly participant is required to include entire distribution in income. Darby v Commissioner (1991) 97 TC 51, 14 EBC 1153.

Lump sum received from Civil Service retirement system is payment received from qualified plan; view that civil service retirement system is qualified employee trust is of long standing, reflected in regulations and rulings. Guilzon v Commissioner (1991) 97 TC 237, 14 EBC 1362, affd (1993, CA5) 985 F2d 819, 16 EBC 1785, 93-1 USTC P 50146, 71 AFTR 2d 1160, reh den (1993, CA5) 1993 US App LEXIS 9639 and (criticized in Emmons v Commissioner (1996) TC Memo 1996-265, RIA TC Memo P 96265, 71 CCH TCM 3159) and (criticized in George v United States (1996, CA FC) 90 F3d 473, 96-2 USTC P 50389, 78 AFTR 2d 5479).

Ten-year averaging for lump sum distributions is available only if all of lump sum distributions in taxable year are included within election; taxpayer who receives lump sum distributions from both profit sharing plan and from savings plan cannot elect 10-year averaging on distribution from one plan and rollover from another within same year. Fowler v Commissioner (1992) 98 TC 503, 15 EBC 1659.

Taxpayer in community property state is liable for tax on entire distribution, including amount paid directly to ex-spouse pursuant to consent agreement. Karem v Commissioner (1993) 100 TC 521, 16 EBC 2728, 93 TNT 126-18.

Five-year income averaging is disallowed for lump sum distribution to widow of employee who died at age 45 since five-year averaging applies only to distributions made after employee reaches age 59 1/2. Cebula v Commissioner (1993) 101 TC 70, 17 EBC 1337, 93 TNT 153-8.

Where taxpayer received from her husband's retirement plan entire balance of $ 77,000 less taxes withheld of $ 16,940, for net of $ 60,060, but under qualified domestic relations order, taxpayer was alternate payee of only portion of distribution, specifically, $ 51,497, with amount of $ 25,503 being attributable to taxpayer's former husband, taxpayer was liable for tax on additional portion of distribution; however, as alternate payee of distribution from her former husband's retirement plan, she was not liable for additional tax pursuant to 26 USCS § 72(t). Seidel v Comm'r (2005) TC Memo 2005-67, 89 CCH TCM 972.

Where taxpayer was liable for 10-percent additional tax under 26 USCS § 72(t) for failure to repay loan take from her qualified retirement plan, § 72(t)(2)(B) exemption did not apply to medical expenses that taxpayer paid in 2000 because taxable year of early distribution from her qualified retirement plan account was 2001. Duncan v Comm'r (2005) TC Memo 2005-171, 90 CCH TCM 35.

Although lump-sum distribution which taxpayer received from his employer's qualified pension plan in 1978 would have been eligible for 10-year averaging under 26 USCS § 402 in 1978, taxpayer lost benefits of 10-year averaging by rolling over this distribution into individual retirement account with his bank and then withdrawing all funds in that account in 1980 when he was over 59 and one-half years of age. Costanza v Commissioner (1985) 6 EBC 1958, TC Memo 1985-317, RIA TC Memo P 85317, 50 CCH TCM 280.

Where taxpayer rolls over qualified plan distribution into IRA and within same year receives lump sum distribution from IRA, taxpayer may not revoke rollover of qualified plan distribution in order to reduce 10 percent additional tax on IRA distribution by distribution from qualified plan which might otherwise have qualified for ten-year averaging. Barnes v Commissioner (1994) 18 EBC 1421, TC Memo 1994-95, RIA TC Memo P 94095, 67 CCH TCM 2341, 94 TNT 43-8.

Lump sum distribution from qualified trust, on account of death of employee, to inter vivos trust for benefit of surviving spouse and children qualifies for special tax treatment under 26 USCS § 402(a) and (e). Rev Rul 83-121 (1983) 1983-2 CB 74.

Distribution on separation from service qualifies as lump sum distribution even though employee had already been receiving minimum annual distributions; amount distributed on account of separation from service, reduced by any required minimum distribution for year distribution, is lump sum distribution which can be rolled over into IRA. Private Letter Ruling 9143078.

Taxpayer who was separated from service in 1985 was entitled to use 10-year averaging for portion of lump-sum distribution received prior to March 16, 1987, but could not use averaging after that date; first distribution qualifies as lump sum payment of entire balance even though later payment was actually made where later payment was merely adjustment. Samonds v Commissioner (1993) 17 EBC 1131, TC Memo 1993-329, RIA TC Memo P 93329, 66 CCH TCM 235, 93 TNT 156-11.

There was no merit to taxpayer's argument that he was entitled to deduct one-half of early retirement distribution from his gross income because, under state community property law, one-half of distribution belonged to his wife. Barkley v Comm'r (2004) 34 EBC 2977, TC Memo 2004-287, 88 CCH TCM 634.

35. Miscellaneous

Judgment in favor of claimant on his claim brought under 29 USCS § 1132 was affirmed because claimant had same type of possession and control of funds once transferred into individual retirement account pursuant to trustee-to-trustee transfer that he would have had were funds left with employer; therefore, he did not "receive" funds for purposes of offset under disability plan. Blankenship v Liberty Life Assur. Co. (2007, CA9 Cal) 486 F3d 620, 40 EBC 2239.

Congress intended I.R.C. § 3121(a)(5)(D) to include "salary reduction agreements", voluntary or mandatory, in Federal Insurance Contributions Act (FICA) wage base; thus, plaintiff university was liable for failure to withhold and pay FICA assessments; while I.R.C. § 402(g)(3)(C) borrowed meaning of salary reduction agreement from § 3121(a)(5)(D), § 402 did not conversely inject its context into § 3121. Univ. of Chicago v United States (2008, CA7 Ill) 547 F3d 773, 45 EBC 1173.

Declaratory Judgment Act, 28 USCS § 2201(a), barred investor's claim for declaratory relief against bank for placing his funds in ordinary savings account rather than "rollover" Individual Retirement Account under 26 USCS § 402(c)(1), which qualified for beneficial tax treatment and was requested by investor; Declaratory Judgment Act's exception with respect to federal taxes applied even if IRS had not yet assessed tax against taxpayer. Chirik v TD BankNorth, N.A. (2008, ED Pa) 101 AFTR 2d 600.

The cash value of life insurance policy on taxpayer's life contained in single-employer plan made under 26 USCS § 402(b)(1) was required to be included in taxpayer's gross income, in addition to excess contribution to plan, and that year's cost of term life insurance on petitioner's life. Cadwell v Comm'r (2011) 136 TC 38, 50 EBC 2332.

Taxpayer's claimed financial hardship and his argument that he had spent money primarily for charitable purposes and was not able to pay his tax liability were irrelevant to whether he was liable for tax for distribution that he received pursuant to qualified domestic relations order. Joubert v Comm'r (2007) TC Memo 2007-292, 94 CCH TCM 327.

Domestic relations order (DRO) was not qualified domestic relations order (QDRO) under 26 USCS § 414(p)(1) where it did not give taxpayer right to receive distribution directly from plan, so exception in 26 USCS § 402(e)(1) did not apply; fact that taxpayer's former husband was ordered to pay amount to her and "end result" was that taxpayer received funds originating from plan did not help because this argument ignored statutory requirement that to be qualified, DRO was required to create or recognize in alternate payee right to receive all or portion of benefits payable with respect to participant under plan. Amarasinghe v Comm'r (2007) TC Memo 2007-333, 94 CCH TCM 447.

When taxpayer failed to make payments on his loans from qualified plan during first quarter of 2005 after being placed on "suspended without pay status" and despite being granted cure period by plan administrator, loans ceased to satisfy level amortization requirement 26 USCS § 72(p)(2)(C). and caused deemed distribution to be made; taxpayer was liable for 10 percent additional tax under § 72(t) because he did not claim that any exception applied to him, and his argument that he was wrongfully terminated and thus, his former employer was liable for 10 percent additional tax, was without merit. Owusu v Comm'r (2010) TC Memo 2010-186, 100 CCH TCM 166.

In preparing substitutes for return pursuant to 26 USCS § 6020, Commissioner of Internal Revenue properly included in taxpayer's gross income, based on third-party information returns, compensation for services, interest, dividends, and distributions from individual retirement accounts pursuant to 26 USCS §§ 61(a)(1), (4), (7), 72(a), and 402(a); state income tax refund was also includable in gross income under tax benefit rule. Hyde v Comm'r (2011) TC Memo 2011-104, 101 CCH TCM 1502.

Amounts distributed from qualified retirement plan that distributee elects to have applied to pay health insurance premiums under cafeteria plan are includible in distributee's gross income; same conclusion applies if amounts distributed from qualified retirement plan are applied directly to reimburse medical care expenses incurred by participant in qualified retirement plan. Rev Rul 2003-62 (2003) 2003-25 IRB 1034.

§ 403. Taxation of employee annuities

(a) Taxability of beneficiary under a qualified annuity plan.

(1) Distributee taxable under section 72. If an annuity contract is purchased by an employer for an employee under a plan which meets the requirements of section 404(a)(2) [26 USCS § 404(a)(2)] (whether or not the employer deducts the amounts paid for the contract under such section), the

amount actually distributed to any distributee under the contract shall be taxable to the distributee (in the year in which so distributed) under section 72 [26 USCS § 72] (relating to annuities).

(2) Special rule for health and long-term care insurance. To the extent provided in section 402(l) [26 USCS § 402(l)], paragraph (1) shall not apply to the amount distributed under the contract which is otherwise includible in gross income under this subsection.

(3) Self-employed individuals. For purposes of this subsection, the term "employee" includes an individual who is an employee within the meaning of section 401(c)(1) [26 USCS § 401(c)(1)], and the employer of such individual is the person treated as his employer under section 401(c)(4) [26 USCS § 401(c)(4)].

(4) Rollover amounts.

(A) General rule. If—

(i) any portion of the balance to the credit of an employee in an employee annuity described in paragraph (1) is paid to him in an eligible rollover distribution (within the meaning of section 402(c)(4) [26 USCS § 402(c)(4)]),

(ii) the employee transfers any portion of the property he receives in such distribution to an eligible retirement plan, and

(iii) in the case of a distribution of property other than money, the amount so transferred consists of the property distributed,

then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

(B) Certain rules made applicable. The rules of paragraphs (2) through (7) and (11) [and (9)] of section 402(c) [26 USCS § 402(c)] and section 402(f) [26 USCS § 402(f)] shall apply for purposes of subparagraph (A).

(5) Direct trustee-to-trustee transfer. Any amount transferred in a direct trustee-to-trustee transfer in accordance with section 401(a)(31) [26 USCS § 401(a)(31)] shall not be includible in gross income for the taxable year of such transfer.

(b) Taxability of beneficiary under annuity purchased by section 501(c)(3) organization or public school.

(1) General rule. If—

(A) an annuity contract is purchased—

(i) for an employee by an employer described in section 501(c)(3) [26 USCS § 501(c)(3)] which is exempt from tax under section 501(a) [26 USCS § 501(a)],

(ii) for an employee (other than an employee described in clause (i)), who performs services for an educational organization described in section 170(b)(1)(A)(ii) [26 USCS § 170(b)(1)(A)(ii)], by an employer which is a State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing, or

(iii) for the minister described in section 414(e)(5)(A) [26 USCS § 414(e)(5)(A)] by the minister or by an employer,

(B) such annuity contract is not subject to subsection (a),

(C) the employee's rights under the contract are nonforfeitable, except for failure to pay future premiums,

(D) except in the case of a contract purchased by a church, such contract is purchased under a plan which meets the nondiscrimination requirements of paragraph (12), and

(E) in the case of a contract purchased under a salary reduction agreement, the contract meets the requirements of section 401(a)(30) [26 USCS § 401(a)(30)],

then contributions and other additions by such employer for such annuity contract shall be excluded from the gross income of the employee for the taxable year to the extent that the aggregate of such contributions and additions (when expressed as an annual addition (within the meaning of section 415(c)(2) [26 USCS § 415(c)(2)])) does not exceed the applicable limit under section 415 [26 USCS § 415]. The amount actually distributed to any distributee under such contract shall be taxable to the distributee (in the year in which so distributed) under section 72 [26 USCS § 72] (relating to annui-

ties). For purposes of applying the rules of this subsection to contributions and other additions by an employer for a taxable year, amounts transferred to a contract described in this paragraph by reason of a rollover contribution described in paragraph (8) of this subsection or section 408(d)(3)(A)(ii) [26 USCS § 408(d)(3)(A)(ii)] shall not be considered contributed by such employer.

(2) Special rule for health and long-term care insurance. To the extent provided in section 402(l) [26 USCS § 402(l)], paragraph (1) shall not apply to the amount distributed under the contract which is otherwise includible in gross income under this subsection.

(3) Includible compensation. For purposes of this subsection, the term "includible compensation" means, in the case of any employee, the amount of compensation which is received from the employer described in paragraph (1)(A), and which is includible in gross income (computed without regard to section 911 [26 USCS § 911]) for the most recent period (ending not later than the close of the taxable year) which under paragraph (4) may be counted as one year of service, and which precedes the taxable year by no more than five years. Such term does not include any amount contributed by the employer for any annuity contract to which this subsection applies. Such term includes—

(A) any elective deferral (as defined in section 402(g)(3) [26 USCS § 402(g)(3)]), and

(B) any amount which is contributed or deferred by the employer at the election of the employee and which is not includible in the gross income of the employee by reason of section 125, 132(f)(4), or 457 [26 USCS § 125, 132(f)(4), or 457].

(4) Years of service. In determining the number of years of service for purposes of this subsection, there shall be included—

(A) one year for each full year during which the individual was a full-time employee of the organization purchasing the annuity for him, and

(B) a fraction of a year (determined in accordance with regulations prescribed by the Secretary) for each full year during which such individual was a part-time employee of such organization and for each part of a year during which such individual was a full-time or part-time employee of such organization.

In no case shall the number of years of service be less than one.

(5) Application to more than one annuity contract. If for any taxable year of the employee this subsection applies to 2 or more annuity contracts purchased by the employer, such contracts shall be treated as one contract.

(6) [Deleted]

(7) Custodial accounts for regulated investment company stock.

(A) Amounts paid treated as contributions. For purposes of this title, amounts paid by an employer described in paragraph (1)(A) to a custodial account which satisfies the requirements of section 401(f)(2) [26 USCS § 401(f)(2)] shall be treated as amounts contributed by him for an annuity contract for his employee if—

(i) the amounts are to be invested in regulated investment company stock to be held in that custodial account, and

(ii) under the custodial account no such amounts may be paid or made available to any distributee (unless such amount is a distribution to which section 72(t)(2)(G) [26 USCS § 72(t)(2)(G)] applies) before the employee dies, attains age 59 1/2, has a severance from employment, becomes disabled (within the meaning of section 72(m)(7) [26 USCS § 72(m)(7)]), or in the case of contributions made pursuant to a salary reduction agreement (within the meaning of section 3121(a)(5)(D) [26 USCS § 3121(a)(5)(D)]), encounters financial hardship.

(B) Account treated as plan. For purposes of this title, a custodial account which satisfies the requirements of section 401(f)(2) [26 USCS § 401(f)(2)] shall be treated as an organization described in section 401(a) [26 USCS § 401(a)] solely for purposes of subchapter F and subtitle F [26 USCS §§ 501 et seq. and 6001 et seq.] with respect to amounts received by it (and income from investment thereof).

(C) Regulated investment company. For purposes of this paragraph, the term "regulated investment company" means a domestic corporation which is a regulated investment company within the meaning of section 851(a) [26 USCS § 851(a)].

(8) Rollover amounts.

(A) General rule. If—

(i) any portion of the balance to the credit of an employee in an annuity contract described in paragraph (1) is paid to him in an eligible rollover distribution (within the meaning of section 402(c)(4) [26 USCS § 402(c)(4)]),

(ii) the employee transfers any portion of the property he receives in such distribution to an eligible retirement plan described in section 402(c)(8)(B) [26 USCS § 402(c)(8)(B)], and

(iii) in the case of a distribution of property other than money, the property so transferred consists of the property distributed,

then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

(B) Certain rules made applicable. The rules of paragraphs (2) through (7), (9), and (11) of section 402(c) [26 USCS § 402(c)] and section 402(f) [26 USCS § 402(f)] shall apply for purposes of subparagraph (A), except that section 402(f) [26 USCS § 402(f)] shall be applied to the payor in lieu of the plan administrator.

(9) Retirement income accounts provided by churches, etc.

(A) Amounts paid treated as contributions. For purposes of this title—

(i) a retirement income account shall be treated as an annuity contract described in this subsection, and

(ii) amounts paid by an employer described in paragraph (1)(A) to a retirement income account shall be treated as amounts contributed by the employer for an annuity contract for the employee on whose behalf such account is maintained.

(B) Retirement income account. For purposes of this paragraph, the term "retirement income account" means a defined contribution program established or maintained by a church, or a convention or association of churches, including an organization described in section 414(e)(3)(A) [26 USCS § 414(e)(3)(A)], to provide benefits under section 403(b) [26 USCS § 403(b)] for an employee described in paragraph (1) or his beneficiaries.

(10) Distribution requirements. Under regulations prescribed by the Secretary, this subsection shall not apply to any annuity contract (or to any custodial account described in paragraph (7) or retirement income account described in paragraph (9)) unless requirements similar to the requirements of sections 401(a)(9) and 401(a)(31) [26 USCS §§ 401(a)(9) and 401(a)(31)] are met (and requirements similar to the incidental death benefit requirements of section 401(a) [26 USCS § 401(a)] are met) with respect to such annuity contract (or custodial account or retirement income account). Any amount transferred in a direct trustee-to-trustee transfer in accordance with section 401(a)(31) [26 USCS § 401(a)(31)] shall not be includible in gross income for the taxable year of the transfer.

(11) Requirement that distributions not begin before age 59 1/2, severance from employment, death, or disability. This subsection shall not apply to any annuity contract unless under such contract distributions attributable to contributions made pursuant to a salary reduction agreement (within the meaning of section 402(g)(3)(C) [26 USCS § 402(g)(3)(C)]) may be paid only—

(A) when the employee attains age 59 1/2, has a severance from employment, dies, or becomes disabled (within the meaning of section 72(m)(7) [26 USCS § 72(m)(7)]),

(B) in the case of hardship, or

(C) for distributions to which section 72(t)(2)(G) [26 USCS § 72(t)(2)(G)] applies.

Such contract may not provide for the distribution of any income attributable to such contributions in the case of hardship.

(12) Nondiscrimination requirements.

(A) In general. For purposes of paragraph (1)(D), a plan meets the nondiscrimination requirements of this paragraph if—

(i) with respect to contributions not made pursuant to a salary reduction agreement, such plan meets the requirements of paragraphs (4), (5), (17), and (26) of section 401(a) [26 USCS § 401(a)], section 401(m) [26 USCS § 401(m)], and section 410(b) [26 USCS § 410(b)] in the same manner as if such plan were described in section 401(a) [26 USCS § 401(a)], and

(ii) all employees of the organization may elect to have the employer make contributions of more than $ 200 pursuant to a salary reduction agreement if any employee of the organization may elect to have the organization make contributions for such contracts pursuant to such agreement.

For purposes of clause (i), a contribution shall be treated as not made pursuant to a salary reduction agreement if under the agreement it is made pursuant to a 1-time irrevocable election made by the employee at the time of initial eligibility to participate in the agreement or is made pursuant to a similar arrangement involving a one-time irrevocable election specified in regulations. For purposes of clause (ii), there may be excluded any employee who is a participant in an eligible deferred compensation plan (within the meaning of section 457 [26 USCS § 457]) or a qualified cash or deferred arrangement of the organization or another annuity contract described in this subsection. Any nonresident alien described in section 410(b)(3)(C) [26 USCS § 410(b)(3)(C)] may also be excluded. Subject to the conditions applicable under section 410(b)(4) [26 USCS § 410(b)(4)], there may be excluded for purposes of this subparagraph employees who are students performing services described in section 3121(b)(10) [26 USCS § 3121(b)(10)] and employees who normally work less than 20 hours per week.

(B) Church. For purposes of paragraph (1)(D), the term "church" has the meaning given to such term by section 3121(w)(3)(A) [26 USCS § 3121(w)(3)(A)]. Such term shall include any qualified church-controlled organization (as defined in section 3121(w)(3)(B) [26 USCS § 3121(w)(3)(B)]).

(C) State and local governmental plans. For purposes of paragraph (1)(D), the requirements of subparagraph (A)(i) (other than those relating to section 401(a)(17) [26 USCS § 401(a)(17)]) shall not apply to a governmental plan (within the meaning of section 414(d) [26 USCS § 414(d)]) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof).

(13) Trustee-to-trustee transfers to purchase permissive service credit. No amount shall be includible in gross income by reason of a direct trustee-to-trustee transfer to a defined benefit governmental plan (as defined in section 414(d) [26 USCS § 414(d)]) if such transfer is—

(A) for the purchase of permissive service credit (as defined in section 415(n)(3)(A) [26 USCS § 415(n)(3)(A)]) under such plan, or

(B) a repayment to which section 415 [26 USCS § 415] does not apply by reason of subsection (k)(3) thereof.

(14) Death benefits under USERRA-qualified active military service. This subsection shall not apply to an annuity contract unless such contract meets the requirements of section 401(a)(37) [26 USCS § 401(a)(37)].

(c) Taxability of beneficiary under nonqualified annuities or under annuities purchased by exempt organizations. Premiums paid by an employer for an annuity contract which is not subject to subsection (a) shall be included in the gross income of the employee in accordance with section 83 [26 USCS § 83] (relating to property transferred in connection with performance of services), except that the value of such contract shall be substituted for the fair market value of the property for purposes of applying such section. The preceding sentence shall not apply to that portion of the premiums paid which is excluded from gross income under subsection (b). In the case of any portion of any contract which is attributable to premiums to which this subsection applies, the amount actually paid or made available under such contract to any beneficiary which is attributable to such premiums shall be taxable to the beneficiary (in the year in which so paid or made available) under section 72 [26 USCS § 72] (relating to annuities).

(Aug. 16, 1954, ch 736, 68A Stat. 137; Sept. 2, 1958, P.L. 85-866, Title I, § 23(a)-(c), 72 Stat. 1620-1622; Oct. 4, 1961, P.L. 87-370, § 3(a), 75 Stat. 801; Oct. 10, 1962, P.L. 87-792, § 4(d), 76 Stat. 825; Feb. 26, 1964, P.L. 88-272, Title II, § 232(e)(4)-(6), 78 Stat. 111; Dec. 30, 1969, P.L. 91-172, Title III, § 321(b)(2), Title V, § 515(a)(2), 83 Stat. 591, 644; Sept. 2, 1974, P.L. 93-406, Title II, §§ 1022(e),

2002(g)(6), 2004(c)(4), 2005(b)(2), 88 Stat. 940, 969, 986, 991; April 15, 1976, P.L. 94-267, § 1(b), 90 Stat. 366; Oct. 4, 1976, P.L. 94-455, Title XIV, § 1402(b)(1)(D), (2), Title XV, § 1504(a), Title XIX, §§ 1901(a)(58), (b)(8)(A), 1906(b)(13)(A), 90 Stat. 1731, 1732, 1738, 1774, 1794, 1834; Oct. 14, 1978, P.L. 95-458, § 4(b), 92 Stat. 1259; Nov. 6, 1978, P.L. 95-600, Title I, §§ 154(a), 156(a), (b), 157(g)(2), 92 Stat. 2801, 2802, 2808; April 1, 1980, P.L. 96-222, Title I, § 101(a)(12), (13)(C), 94 Stat. 204; Aug. 13, 1981, P.L. 97-34, Title III, § 311(b)(3)(B), 95 Stat. 280; Sept. 3, 1982, P.L. 97-248, Title II, § 251(a), (b), (c)(3), 96 Stat. 529-531; Jan. 12, 1983, P.L. 97-448, Title I, § 103(c)(8)(B), 96 Stat. 2377; April 20, 1983, P.L. 98-21, Title I, § 122(c)(4), 97 Stat. 87; July 18, 1984, P.L. 98-369, Div A, Title IV, § 491(d)(12), Title V, §§ 521(c), 522(a)(2), (3), (d)(9)-(11), Title X, § 1001(b)(4), (e), 98 Stat. 849, 867, 869-871, 1011, 1012; Oct. 22, 1986, P.L. 99-514, Title XI, §§ 1120(a), (b), 1122(b)(1)(B), (d), 1123(c), Title XVIII, § 1852(a)(3)(A), (B), (5)(B), (b)(10), 100 Stat. 2463, 2466, 2469, 2474, 2865, 2867; Nov. 10, 1988, P.L. 100-647, Title I, § 1011(c)(7)(B), (12), (m)(1), (2), Title VI, § 6052(a)(1), 102 Stat. 3458, 3459, 3471, 3696; Nov. 5, 1990, P.L. 101-508, Title XI, § 11701(k), 104 Stat. 1388-513; July 3, 1992, P.L. 102-318, Title V, §§ 521(b)(12), (13), 522(a)(3), (c)(2), (3), 106 Stat. 311, 314, 315; Aug. 20, 1996, P.L. 104-188, Title I, §§ 1450(c)(1), 1704(t)(69), 110 Stat. 1815, 1891; Aug. 5, 1997, P.L. 105-34, Title XV, §§ 1504(a)(1), 1505(c), Title XVI, § 1601(d)(6)(B), 111 Stat. 1063, 1064, 1090; July 22, 1998, P.L. 105-206, Title VI, § 6005(c)(2)(B), 112 Stat. 800; Dec. 21, 2000, P.L. 106-554, § 1(a)(7) (Title III, § 314(e)(1)), 114 Stat. 2763, 2763A-643; June 7, 2001, P.L. 107-16, Title VI, §§ 632(a)(2), 641(b)(1), (e)(7), 642(b)(1), 646(a)(2), 647(a), 115 Stat. 113, 120, 121, 126, 127; March 9, 2002, P.L. 107-147, Title IV, Subtitle B, § 411(p)(1)-(3), 116 Stat. 49, 50; Oct. 4, 2004, P.L. 108-311, Title IV, §§ 404(e), 408(a)(11), 118 Stat. 1188, 1191; Dec. 21, 2005, P.L. 109-135, Title IV, Subtitle A, § 412(w), 119 Stat. 2638; Aug. 17, 2006, P.L. 109-280, Title VIII, Subtitle C, §§ 827(b)(2), (3), 829(a)(2), Subtitle D, § 845(b)(1), (2), 120 Stat. 1000, 1002, 1015; June 17, 2008, P.L. 110-245, Title I, § 104(c)(2), 122 Stat. 1627.)

Notes of Decisions

I. IN GENERAL

1. Generally

Tex. Prop. Code Ann. § 42.0021 incorporates, for purposes of determining retirement plan's exemption status, federal tax treatment of deemed distributions from I.R.C. § 403(b) retirement plan: (1) bankruptcy debtor's pledge of specified sum from his § 403(b) retirement account as security for alimony due under divorce decree constitutes loan within meaning of I.R.C. § 72(p)(1)(B); (2) loans under § 72(p)(1)(B) are deemed to be distributions under § 72(p)(1)(A) for tax purposes; (3) assignment/pledge of portion of § 403(b) retirement plan account constitutes deemed distribution that destroys tax qualification of that portion and renders it non-tax qualified under § 403(b); and (4) amount covered by deemed distribution, once effectively removed from tax-exempt protection of § 403(b) plan, also lacks protection of § 42.0021. Coppola v Beeson (In re Coppola) (2005, CA5 Tex) 419 F.3d 323, 35 EBC 1641, CCH Bankr L Rptr 80324, 2005-2 USTC 50503, 96 AFTR 2d 5375.

Bankruptcy court properly determined that portion of debtor's I.R.C. § 403(b) retirement plan account, which he had pledged to secure his payment of alimony pursuant to divorce decree, was not exempt under 11 USCS § 522(b), which incorporated exemption found in Tex. Prop. Code Ann. § 42.0021: (1) § 42.0021 incorporated federal tax treatment of distributions from retirement accounts; (2) pursuant to I.R.C. § 72(p)(1)(A), (p)(1)(B), pledge was considered to be loan to debtor and was also deemed to be distribution to him; and (3) pledged portion of account was not exempt under § 42.0021 because deemed distribution of pledged amount destroyed tax qualification of that portion and rendered it non-tax qualified under § 403(b). Coppola v Beeson (In re Coppola) (2005, CA5 Tex) 419 F.3d 323, 35 EBC 1641, CCH Bankr L Rptr 80324, 2005-2 USTC 50503, 96 AFTR 2d 5375.

Only contracts issued by insurance companies, qualified custodial accounts, and mutual funds are eligible for tax deferred annuity treatment under 26 USCS § 403; school district's contributions to credit union on behalf of school district employee consequently do not qualify for such treatment. Corbin v United States (1984, ED Mo) 595 F Supp 181, 5 EBC 2292, 84-2 USTC P 9807, 54 AFTR 2d 6220, affd (1985, CA8 Mo) 760 F2d 234, 6 EBC 1417, 85-1 USTC P 9350, 55 AFTR 2d 1416.

26 USCS § 403(b) annuity does not constitute "trust" for 11 USCS § 541(c)(2) exclusion purposes; § 541(c)(2) does not encompass any pension plan interests other than "trusts," and only debtor's beneficial interest in trust may be excluded from bankruptcy estate pursuant to § 541(c)(2). Skiba v Gould (2005, WD Pa) 337 BR 71.

Bankruptcy court erred when it excluded portion of Chapter 7 debtor's 26 USCS § 403(b) retirement annuity account from bankruptcy estate pursuant to 11 USCS § 541(c)(2) because only debtor's beneficial interest in trust could be excluded pursuant to § 541(c)(2); retirement account was non-excludable annuity rather than trust. Skiba v Gould (2005, WD Pa) 337 BR 71.

Bankruptcy court committed reversible error when it denied Chapter 7 trustee's objection to 11 USCS § 541(c)(2) exemption claimed by two joint Chapter 7 debtors, with regard to funds held in two pensions owned by one debtor: (1) pensions were in form of annuities under I.R.C. §§ 403(b), 401(a); (2) only trusts were subject to exclusion from bankruptcy estate under 11 USCS § 541(c)(2); and (3) as parties agreed, for purposes of appeal, that pensions were not trusts, none of pension funds qualified for exemption under § 541(c)(2), regardless of whether or not pension plans contained anti-assignment or anti-alienation provisions. Skiba v Plonski (2006, WD Pa) 40 EBC 1759.

In chapter 7 liquidation case, debtors' pension plan established pursuant to § 457 of Internal Revenue Code, 26 USCS § 457, was not exempt from creditors' claims; pension plan was not ERISA-based plan, nor was it qualified plan under § 501(a), 403(a), (b) or 408 of Internal Revenue Code of 1986. In re Madia (2003, BC MD Fla) 294 BR 177, 16 FLW Fed B 121.

Debtor failed to produce evidence meeting requirements of 11 USCS § 541(c)(2) because documents that governed 26 USCS § 403 church plan or annuity pension plan in which he was participant contained no provisions purporting to establish trust or restricting voluntary or involuntary transfer of debtor's interest in any asset that was acquired through plan; therefore, funds that were held in plan were not excluded from debtor's bankruptcy estate In re Wendt (2005, BC DC Minn) 320 BR 904.

Bankruptcy Court sees no reason to treat corporate pension plan differently than 26 USCS § 403(b) annuity pension plan—both are set up by third party, utilize tax vehicles provided by Internal Revenue Code to accumulate funds on tax-free basis, and contain anti-alienation clauses to prevent creditors from reaching debtor's interests in plan; this broader view of 11 USCS § 541(c)(2) is supported by congressional goal of protecting pension benefits. Skiba v Gould (In re Gould) (2005, BC WD Pa) 322 BR 741, 2005-1 USTC P 50318.

Tax sheltered annuity plan that qualified under 26 USCS § 403(b) that was maintained by debtor's was excluded from bankruptcy estate by provisions of 11 USCS § 541(c)(2) where anti-alienation clause set forth in debtor's pension plan sufficiently restricted debtor's use of funds such that, outside of bankruptcy, no creditor would have been able to reach debtor's interests. Skiba v Gould (In re Gould) (2005, BC WD Pa) 322 BR 741, 2005-1 USTC P 50318.

Bankruptcy court found that all contributions debtor made to retirement plan not-for-profit hospital established under I.R.C. § 403(b) were excluded from debtor's bankruptcy estate, pursuant to 11 USCS § 541(b)(7), and because account was not part of bankruptcy estate, court did not have to decide if debtor's contributions were exempt from attachment and execution under Vt. Stat. Ann. tit. 12, § 2470(16). In re Leahy (2007, BC DC Vt) 370 BR 620.

Trustee's status as nondiscretionary or directed trustee does not make trust or any provision of it unenforceable; instead, trustee's status as directed trustee within meaning of 26 USCS § 403(b) affects only kind of actions for which trustee will be liable; moreover, as shown by 29 USCS § 1103, Employee Retirement Income Security Act of 1974 does not require that assets of so-called "§ 403(b)" plan be held in trust. Rhiel v OhioHealth Corp. (In re Hunter) (2008, BC SD Ohio) 380 BR 753.

Bankruptcy court denied bid by several Chapter 7 trustees for order requiring turnover of balances in debtors' accounts in 26 USCS § 403(b) plans as those accounts were in trusts that were subject to restrictions that were enforceable under Employee Retirement Income Security Act of 1974, 29 USCS § 1056(d)(1), and thus, were excluded from estate of each debtor by 11 USCS § 541(c)(2); nor could one particular trustee obtain order turning over debtor's interest in retirement annuity because debtor's interest therein was but future possessory interest that was contingent on happening of future events and debtor had no current right to distribution. Rhiel v OhioHealth Corp. (In re Hunter) (2008, BC SD Ohio) 380 BR 753.

Obligation of Chapter 7 debtors to repay money borrowed from 26 USCS § 403 retirement fund could not be considered secured debt as defined by 11 USCS § 101(12). In re Mowris (2008, BC WD Mo) 384 BR 235.

26 USCS § 402 and not 26 USCS § 403 applied where distribution of annuity contract to taxpayer was from qualified employee's trust. Russell v Commissioner (1966) 47 TC 8.

Employer's payments to bank custodian are not contributions to purchase tax-sheltered annuity even though amounts may subsequently be paid by custodian to insurance company as premiums for purchase of annuity benefits for employees where no benefits are payable unless employee directs custodian to pay premiums. Rev Rul 68-487 (1968) 1968-2 CB 187.

Variable annuity contract qualifies for tax benefits as tax-sheltered annuity where employer makes payments to bank custodian under contractual arrangement to purchase annuity contract and where initial payment is made to insurance company that immediately becomes obligated to provided annuity benefits at guaranteed rate regardless of whether custodian fulfills its obligation to sell investments and pay proceeds to insurance company. Rev Rul 68-488 (1968) 1968-2 CB 188.

Annuity premiums paid by tax exempt organization are excluded from taxpayer's gross income only if he is employee of tax exempt organization; exclusion was not applied in case of independent contractor. Rev Rul 70-136 (1970) 1970-1 CB 12.

Since annuity must not only be nonforfeitable, but must also be nontransferable, clause in annuity purchase agreement entered into between organization and employee providing that employee would hold annuity contract purchased thereunder, and would not transfer it prior to time he reached retirement age is not enough; annuity contract itself must contain express provision making it nontransferable. Rev Rul 74-458 (1974) 1974-2 CB 138.

Debtors were not permitted to claim that interpreting "benefits" under Mont. Code Ann. § 25-13-608(1)(f) to include stock proceeds at issue would have been consistent with exemptions such as those in 11 USCS § 522(d)(10)(E); agreement, guarantee, and promissory note contained no direction or indication that monthly payments one debtor received from sale of stock, which then paid for debtor's end-of-life medical care and medications, were intended as benefits that qualified under specific sections of 26 USCS §§ 401(a), 403(a), (b), 408, and federal exemptions, which in any event, did not apply in opt-out state like Montana, provided no support for debtors' claim that exemption they claimed was reasonable. In re Archer (2006) 2006 MT 82, 332 Mont 1, 136 P3d 563.

2. Purpose

Purpose of 26 USCS § 403(a) is to provide that where employers purchase annuity contracts for employees, employees are to be taxed in same manner as under pension plans, only distinction between purchases by exempt employers and other employers being that in former case annuity plan need not meet requirements of qualified plan; it was not intended that current compensation of employee available to him without substantial limitation or restriction may be used by employer, with consent or direction of employee, to purchase annuity for him and thereby accomplish deferment of tax on such compensation. Zeltzerman v Commissioner (1960) 34 TC 73, affd (1960, CA1) 283 F2d 514, 60-2 USTC P 9807, 6 AFTR 2d 5958.

3. Conversion from one annuity plan to another

Taxpayer, as participant in trusted pension plan that was converted to nontrusteed plan which was terminated in 1957 and to whom was assigned annuity contract in 1957 did not realize ordinary income in 1961; election in 1960 of taxpayer to receive installment payments and his death in 1961 when his estate surrendered annuity contract resulted in capital gains tax; assignment in 1957 was not "distribution" subject to tax, since annuity plan is not considered distribution of total distributions payable until surrender of policy and collection of proceeds. Estate of Benjamin v Commissioner (1970) 54 TC 953, affd (1972, CA7) 465 F2d 982, 72-1 USTC P 9472, 29 AFTR 2d 1358.

Continuing salary reduction agreement entered into in prior taxable year does not preclude employee from entering into new salary reduction agreement at any time during employee's current taxable year. Rev Rul 87-114 (1987) 1987-2 CB 116.

Portion of distribution from 26 USCS § 403(b) annuity contract that was previously included in employee's income may not be rolled over into IRA. Rev Rul 89-43 (1989) 1989-1 CB 213.

Direct transfer between investment vehicles under 26 USCS § 403(b) does not constitute actual distribution under § 403(b)(1) (Rev Rul 73-124 revoked). Rev Rul 90-24 (1990) 1990-1 CB 97.

Changing insurers during taxable year in which salary reduction agreement was made does not result in new agreement, even though name of first insurer is initially specified in agreement. Rev Rul 68-179 (1968) 1968-1 CB 179.

Contract qualified as tax-sheltered annuity where retirement income endowment contract purchased on level premium basis provided for (1) accumulation of fund sufficient to pay life annuity upon attainment of age 65

with death benefit before retirement equal to $ 1,000 for each $ 10 of expected monthly annuity, (2) that if any premium in default remained unpaid at end of its grace period, contract would be automatically continued in force as participating reduced paid-up endowment insurance, (3) amount of insurance would be that which net cash value would provide when applied at net single premium rate, and (4) at no time would death benefits exceed 100 times monthly retirement benefit. Rev Rul 70-581 (1970) 1970-2 CB 94.

4. Cost of annuity as taxable to employee-beneficiary

Portion of taxpayer's salary withheld for purchase of annuity and other protection afforded by Civil Service Retirement Act constituted income to him, under predecessor to 26 USCS § 403, just as if he had received his entire salary in cash; taxpayer's contention that he had no vested rights under Act was without merit, since he had right to receive annuity upon retirement, and to receive return of amount withheld from his salary, with interest upon his separation from service. Miller v Commissioner (1944, CA4) 144 F2d 287, 44-1 USTC P 9175, 32 AFTR 1193.

Under predecessor to 26 USCS § 403, employees received taxable income in year of delivery to extent of value in that year employer-purchased annuity contracts, although at delivery contracts had no cash value and right of employees to receive income under contract was postponed for period of 8 years after delivery; amounts expended by employer in purchase of annuity contracts is measure of value of contracts at time of delivery to employees. Oberwinder v Commissioner (1945, CA8) 147 F2d 255, 45-1 USTC P 9165, 33 AFTR 654; Drescher v Commissioner (1945, CA8) 150 F2d 541, 34 AFTR 60; Johns v Commissioner (1945, CA8) 150 F2d 542, 34 AFTR 61; Krebs v Commissioner (1945, CA8) 150 F2d 542, 34 AFTR 61; Sullivan v Commissioner (1945, CA8) 150 F2d 544, 34 AFTR 63; Thurber v Commissioner (1945, CA8) 150 F2d 544, 34 AFTR 63.

Under predecessor to 26 USCS § 403, employees were taxable on premiums paid by employer for annuity contracts where creation of trust and purchase of annuity contracts was device to provide additional compensation to employee-beneficiaries of trust and to defer tax on compensation, and there was no prohibition in trust agreement against assignment of annuity contracts or benefits thereunder, and there was no provision against taxpayers' obtaining cash surrender value of policies upon leaving employment of company at any time. Hubbell v Commissioner (1945, CA6) 150 F2d 516, 45-2 USTC P 9355, 34 AFTR 42, 161 ALR 764.

Under predecessor to 26 USCS § 403, annuity contract purchased for employee as additional compensation for services rendered was treated for tax purposes as assignable in year purchased, and value of it in that year was includible in gross income for period. Ward v Commissioner (1947, CA2) 159 F2d 502, 47-1 USTC P 9159, 35 AFTR 805.

Under predecessor to 26 USCS § 403, employee was taxable in year of retirement on amounts paid by employer where employer purchased annuity for retirement purposes and gave employee no rights whatsoever in contract until it was endorsed over to him in year of retirement. Morse v Commissioner (1953, CA2) 202 F2d 69, 53-1 USTC P 9202, 43 AFTR 257.

Employees who upon dissolution of corporation in year when its pension trust was not exempt received annuity contracts which trustee purchased with amounts credited to employees in trust plus additional sums received income in at least amounts credited. Einstein v Commissioner (1955) TC Memo 1955-6, RIA TC Memo P 55006, 14 CCH TCM 19, affd (1956, CA6) 230 F2d 951, 56-1 USTC P 9332, 49 AFTR 385.

Cash basis independent contractor who is partially compensated for his services by payment of premiums on annuity insurance policy resting all privileges of ownership in contractor must include premiums in his income in year paid. Rev Rul 70-136 (1970) 1970-1 CB 12.

5. Gift or compensation motive for payment

Cost of retirement annuity policy which employee received in 1941 was taxable income in that year and was not gift, although it had no cash surrender or loan value and was nonassignable. Estate of Morgan v Commissioner (1949) RIA TC Memo P 49145, 8 CCH TCM 567.

Annuities, purchase of which were authorized by corporation for employee in recognition of services and which were delivered to him, constituted income and not gift, although such purchase was arranged for by stockholders of corporation in which they sold their stock for amount in excess of cost of annuities which purchaser agreed to cause corporation to buy. Gott v Commissioner (1953) RIA TC Memo P 53136, 12 CCH TCM 435, affd (1954, CA2) 212 F2d 205, 54-1 USTC P 9356, 45 AFTR 1401.

6. Single premium or paid-up annuity contract

Single-premium annuity policies purchased in 1939 and 1940 for principal corporate officers to provide retirement income in later years was taxable income to employees in year of purchase although policies were nonassignable and retained by employer; employee received present economic benefit in amount to be determined but less than employer's cost of annuity since policy provided for accelerating date of annuity payments and employee could not exercise such option so long as employer retained possession. United States v Drescher (1950, CA2 NY) 179 F2d 863, 50-1 USTC P 9186, 38 AFTR 1357, cert den (1950) 340 US 821, 95 L Ed 603, 71 S Ct 53 and cert den (1950) 340 US 821, 95 L Ed 603, 71 S Ct 60.

Trial court erred in finding employee taxable on amount of premium, where employer funded pension for employee already retired by purchasing single-premium annuity; on new trial there should be no presumption that compensation was intended and jury should find dominant motive. Peters v Smith (1955, CA3 Pa) 221 F2d 721, 55-1 USTC P 9346, 47 AFTR 737.

Under predecessor to 26 USCS § 403, corporate president received compensation where president was entitled to receive money, and corporation, at his direction, purchased with such money single premium retirement annuity contract and delivered it to him. Deupree v Commissioner (1942) 1 TC 113.

Corporate employer's purchase of single premium retirement annuity contracts for employees was taxable income to employees under predecessor to 26 USCS § 403, where annuity contracts were procured by employer upon joint application of employer and employee, issued directly to employee in his name, fully paid for out of special remuneration fund without any restrictions or conditions attached as to term of employment, and were part of plan for, and intended as, additional compensation to employee, notwithstanding annuity contracts could not be assigned and had no cash surrender value. Brodie v Commissioner (1942) 1 TC 275.

Successor trustee's purchase of single-premium annuity contracts for taxpayer and wife, in compromise of taxpayer's claim for stated annual salary for services as accountant to decedent's estate, constituted taxable income under predecessor to 26 USCS § 403. Freeman v Commissioner (1945) 4 TC 582.

Retiring employee for whom employer, having no retirement plan, purchased single-premium no-refund annuity having cash surrender value or survivorship features, but being assignable, was taxable in year of purchase on amount of premium, annuity being "non-qualified" and employee's rights "nonforfeitable" under 26 USCS § 403(c). Wilson v Commissioner (1962) 39 TC 362.

Purchase of annuity with employee as beneficiary to receive immediate payments rendered employee taxable on purchase price. Rev Rul 55-691 (1955) 1955-2 CB 21.

7. Termination of annuity plan

When trusteed pension plan was terminated, assignment of trust annuity contracts by trustee to employee converted trusteed plan into qualified non-trusteed plan, entitling employee's widow to capital gains treatment for lump sum payment. Estate of Benjamin v Commissioner (1972, CA7) 465 F2d 982, 72-1 USTC P 9472, 29 AFTR 2d 1358.

Lump sum distribution to beneficiary of employee who died shortly after plan had formally been terminated was not on account of death; although death determined identity of distributee (beneficiary), amount to be distributed became fixed at termination. Estate of Stefanowski v Commissioner (1974) 63 TC 386.

Employer's contributions to annuity plan are taxed to employee in year they are made where plan is "nonqualified" and employee's rights under annuity contract are nonforfeitable. Blanchard v District of Columbia (1980, Dist Col App) 420 A2d 1373.

Defined benefit plans can convert into insurance contract plans under § 412(i) if all benefits accrued before conversion are guaranteed by insurance or annuity contracts purchased within one month after conversion, all benefits accruing after conversion are funded by level annual premium contracts, meaningful benefit accruals continue for at least three years after conversion date, remaining plan assets are used to pay or prepay premiums for level annual premium contracts by conversion date, and appropriate plan amendments are adopted and effective by conversion date. Rev Rul 94-75 (1994) 1994-2 CB 60, 94 TNT 233-6.

8. Rollover

Early withdrawal requirements under § 403(b)(11) for rollover to IRA were not impliedly repealed by 1992 unemployment compensation amendments, and teacher could not compel retirement system to effect direct rollover to IRA. Frank v Aaronson (1997, CA2 NY) 120 F3d 10, 21 EBC 1394, 97-2 USTC P 50563, 80 AFTR 2d 5641.

Distribution from tax-sheltered annuity previously included in employee's gross income because it exceeded exclusion allowance may not be rolled over into IRA since such amounts are treated as employee contributions and such contributions are not eligible for rollover; ineligibility of part of distribution does not affect rollover treatment of eligible portion, and thus eligible portion of distribution is treated as rollover contribution. Rev Rul 89-50 (1989) 1989-1 CB 112.

Transfer of all or part of holder's interest in § 403(b)(1) annuity contract or § 403(b)(7) custodial account is tax free if transferred funds remain subject to same restrictions on early distribution that applied before transfer; mere change in issuers does not violate nontransferability requirement. Rev Rul 90-24 (1990) 1990-1 CB 97.

Unpublished Opinions

Unpublished: Taxpayers' flexible premium retirement annuity (FPRA) did not meet definition of qualified annuity under I.R.C. § 403(a)(1) to be entitled to tax-free rollover where employer did not set up FPRA for taxpayers' benefit in that taxpayers set up FPRA with their own post-tax funds. Sadberry v Comm'r (2005, CA5 Tex) 153 Fed Appx 336, 2005-2 USTC P 50644, 96 AFTR 2d 7119.

9. Withholding tax on annuity purchase

Congress intended I.R.C. § 3121(a)(5)(D) to include "salary reduction agreements", voluntary or mandatory, in Federal Insurance Contributions Act (FICA) wage base; thus, plaintiff university was liable for failure to withhold and pay FICA assessments; I.R.C. § 403(b) did not require courts to read limitation of only voluntary agreements into I.R.C. § 3121(a)(5)(D). Univ. of Chicago v United States (2008, CA7 Ill) 547 F3d 773, 45 EBC 1173.

Portion of premium used to purchase current life insurance protection, even though part of salary reduction, and portion of premium used to purchase annuity in excess of exclusion allowance are subject to withholding; thus, where exclusion allowance was $ 995 and annual premium for annuity was $ 1,015, excess $ 20 was subject to withholding. Rev Rul 70-453 (1970) 1970-2 CB 287.

II. SPECIFIC ANNUITY BENEFICIARIES

10. Medical personnel

Amounts deducted from doctor's percentage of gross receipts of hospitals, to which he was entitled as salary, and paid out at his direction to insurance company for retirement annuities, were not employers' contributions, but were income constructively received by doctor and as such constituted taxable income to him. Llewellyn v Commissioner (1961, CA7) 295 F2d 649, 61-2 USTC P 9735, 8 AFTR 2d 5720.

Radiologist who was salaried by hospital was not employee of hospital so as to qualify annuity premiums paid by hospital under 26 USCS § 403, where there was no control exercised by hospital over radiologist. Azad v United States (1966, DC Minn) 277 F Supp 258, 66-2 USTC P 9635, 18 AFTR 2d 5482, affd (1968, CA8 Minn) 388 F2d 74, 68-1 USTC P 9162, 21 AFTR 2d 486.

Employer-employee relation existed where doctor sought to defer tax by taking hospital pay in form of annuity, although there was no mention of employer-employee relationship in his contract with hospital and no withholding of taxes from his pay. Ravel v Commissioner (1967) TC Memo 1967-182, RIA TC Memo P 67182, 26 CCH TCM 885.

Taxpayer, doctor and director of pathology department of hospital, was employee of hospital so that amounts withheld from compensation by employer and paid to acquire annuity were excludable from his income under 26 USCS § 403(b), where he could be discharged without notice or cause, he could not engage in private practice, hospital provided all facilities used to run laboratory, fee statements were mailed by hospital, taxpayer had no private office nor business stationery, and his only telephone listing was his home. Haugen v Commissioner (1971) TC Memo 1971-294, RIA TC Memo P 71294, 30 CCH TCM 1247.

11. Employees of § 501(c)(3) organization

Amount paid by employer exempt from tax under predecessor to 26 USCS § 501 did not need to be included in income of employee. Rev Rul 181 (1953) 1953-2 CB 111.

Organization, exempt under 26 USCS § 501(c)(3), which utilizes annuity contract originally issued to employee under qualified trust maintained by former employer, is considered as purchasing new annuity contract, for purposes of 26 USCS § 403(b), as of date first premium is paid by new employer and insurance company

agrees to arrangement; if new contract is purchased after December 31, 1962, it must be made nontransferable. Rev Rul 68-33 (1968) 1968-1 CB 175.

To qualify for tax benefits of annuity purchased by § 501(c)(3) organization, annuity must be purchased by employer for employee under 26 USCS § 403(b); therefore, if benefits under plan provide for annuity benefit and term insurance for employee and insured's spouse and children plan is not for sole benefit of employee, and contract is not annuity contract within 26 USCS § 403(b), amount contributed by employer is not excludible for employee's income. Rev Rul 69-146 (1969) 1969-1 CB 132.

12. Employees of public schools

Retirement annuities marketed by union to public school district employees were not subject to Employee Retirement Income Security Act of 1974, 29 USCS §§ 1001 et seq.; union's marketing program was not "employee pension benefit plan" under 29 USCS § 1002(2)(A), and employees' 26 USCS § 403(b) plans fell under governmental plans exception, 29 USCS § 1003(b)(1). Daniels-Hall v Nat'l Educ. Ass'n (2010, CA9 Wash) 629 F.3d 992, 50 EBC 1481, 160 CCH LC ¶ 10333.

If court were to determine that plan involving school teachers was not "established or maintained" by school district, governmental entity, under 29 USCS § 1002(32), then validity of tax benefits given to plan under 26 USCS § 403(b) would also be called into question. Montoya v ING Life Ins. & Annuity Co. (2009, SD NY) 653 F Supp 2d 344, 47 EBC 2185.

Exclusion allowance of teacher employed in county school system that contributes to annuity plan is decreased by state contributions to separate county retirement plan; computation of county school teacher's "years of service" does not take into account teacher's prior service with another county school system. Rev Rul 69-629 (1969) 1969-2 CB 101.

Taxpayer, state employee, was not entitled to benefits of tax-sheltered annuity because he was not performing services for educational institution, where he worked in service division under department which was not educational institute, nor did services involve operation or direction of state's educational program as carried on through educational institutions; division he worked for supervised payable and timekeeping functions for employees of certain public schools operated for handicapped children. Rev Rul 72-390 (1972) 1972-2 CB 227.

Employees of state's department of education who are appointed under state law to perform janitorial, custodial, and general clerical services are not deemed to be holding appointive office so as to be disqualified from exclusion benefit since they are considered to be performing services indirectly for educational institution; employees of department of education who hold positions involving significant degree of executive authority or policy making who are appointed only if they have received training, or are experienced in field of education, also qualify as indirectly performing services. Rev Rul 73-607 (1973) 1973-2 CB 145.

Employer's contributions to qualified state teacher's retirement plan for employee that are excludable from gross income may not be added to amount of employee's "includable compensation" in computing exclusion allowance under 26 USCS § 403(b)(2); contributions made in prior years must be used to reduce employee's exclusion allowance. Rev Rul 79-221 (1979) 1979-2 CB 188.

Amounts contributed by state teachers' retirement system to purchase annuity contracts for employees of retirement system are not excludible from employees' gross income under 26 USCS § 403(b). Rev Rul 80-139 (1980) 1980-1 CB 88.

13. Foreign residents

Employer's contributions to cost of annuity conditioned on employee's remaining in employment until eligible for retirement were income in year employee became eligible to retire, although not taxable to employee who was foreign resident. Crispin v United States (1952, CA9 Cal) 200 F2d 99, 52-2 USTC P 9545, 42 AFTR 925.

14. Persons other than employee plan participants

Sponsors of 26 USCS § 403(b) annuity retirement plans were proper parties in interest for purposes of challenging Chapter 7 bankruptcy trustees' motions to turnover plan assets to bankruptcy estates, in cases filed prior to effective date of 11 USCS § 541(a)(7). Rhiel v Ohio Health Corp. (In re Guikema) (2007, BC SD Ohio) 363 BR 853.

Provision permitting payment of annuity to retired employee for life and thereafter to his designated beneficiary for as long as employee's spouse lives meets requirement that payments to person other than employee

participants be incidental, where each periodic payment to beneficiary will be no greater than each payment to participant during his lifetime. Rev Rul 73-239 (1973) 1973-1 CB 201.

§ 408. Individual retirement accounts

(a) Individual retirement account. For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:

(1) Except in the case of a rollover contribution described in subsection (d)(3) in section 402(c), 403(a)(4), 403(b)(8), or 457(e)(16) [26 USCS § 402(c), 403(a)(4), 403(b)(8), or 457(e)(16)], no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section 219(b)(1)(A) [26 USCS § 219(b)(1)(A)].

(2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

(3) No part of the trust funds will be invested in life insurance contracts.

(4) The interest of an individual in the balance in his account is nonforfeitable.

(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) [26 USCS § 401(a)(9)] and the incidental death benefit requirements of section 401(a) [26 USCS § 401(a)] shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

(b) Individual retirement annuity. For purposes of this section, the term "individual retirement annuity" means an annuity contract, or an endowment contract (as determined under regulations prescribed by the Secretary), issued by an insurance company which meets the following requirements:

(1) The contract is not transferable by the owner.

(2) Under the contract—

(A) the premiums are not fixed,

(B) the annual premium on behalf of any individual will not exceed the dollar amount in effect under section 219(b)(1)(A) [26 USCS § 219(b)(1)(A)], and

(C) any refund of premiums will be applied before the close of the calendar year following the year of the refund toward the payment of future premiums or the purchase of additional benefits.

(3) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) [26 USCS § 401(a)(9)] and the incidental death benefit requirements of section 401(a) [26 USCS § 401(a)] shall apply to the distribution of the entire interest of the owner.

(4) The entire interest of the owner is nonforfeitable.

Such term does not include such an annuity contract for any taxable year of the owner in which it is disqualified on the application of subsection (e) or for any subsequent taxable year. For purposes of this subsection, no contract shall be treated as an endowment contract if it matures later than the taxable year in which the individual in whose name such contract is purchased attains age 70 1/2; if it is not for the exclusive benefit of the individual in whose name it is purchased or his beneficiaries; or if the aggregate annual premiums under all such contracts purchased in the name of such individual for any taxable year exceed the dollar amount in effect under section 219(b)(1)(A) [26 USCS § 219(b)(1)(A)].

(c) Accounts established by employers and certain associations of employees. A trust created or organized in the United States by an employer for the exclusive benefit of his employees or their beneficiaries, or by an association of employees (which may include employees within the meaning of section 401(c)(1) [26 USCS § 401(c)(1)]) for the exclusive benefit of its members or their beneficiaries,

shall be treated as an individual retirement account (described in subsection (a)), but only if the written governing instrument creating the trust meets the following requirements:

(1) The trust satisfies the requirements of paragraphs (1) through (6) of subsection (a).

(2) There is a separate accounting for the interest of each employee or member (or spouse of an employee or member).

The assets of the trust may be held in a common fund for the account of all individuals who have an interest in the trust.

(d) Tax treatment of distributions.

(1) In general. Except as otherwise provided in this subsection, any amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72 [26 USCS § 72].

(2) Special rules for applying section 72. For purposes of applying section 72 [26 USCS § 72] to any amount described in paragraph (1)—

(A) all individual retirement plans shall be treated as 1 contract,

(B) all distributions during any taxable year shall be treated as 1 distribution, and

(C) the value of the contract, income on the contract, and investment in the contract shall be computed as of the close of the calendar year in which the taxable year begins.

For purposes of subparagraph (C), the value of the contract shall be increased by the amount of any distributions during the calendar year.

(3) Rollover contribution. An amount is described in this paragraph as a rollover contribution if it meets the requirements of subparagraphs (A) and (B).

(A) In general. Paragraph (1) does not apply to any amount paid or distributed out of an individual retirement account or individual retirement annuity to the individual for whose benefit the account or annuity is maintained if—

(i) the entire amount received (including money and any other property) is paid into an individual retirement account or individual retirement annuity (other than an endowment contract) for the benefit of such individual not later than the 60th day after the day on which he receives the payment or distribution; or

(ii) the entire amount received (including money and any other property) is paid into an eligible retirement plan for the benefit of such individual not later than the 60th day after the date on which the payment or distribution is received, except that the maximum amount which may be paid into such plan may not exceed the portion of the amount received which is includible in gross income (determined without regard to this paragraph).

For purposes of clause (ii), the term "eligible retirement plan" means an eligible retirement plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B) [26 USCS § 402(c)(8)(B)].

(B) Limitation. This paragraph does not apply to any amount described in subparagraph (A)(i) received by an individual from an individual retirement account or individual retirement annuity if at any time during the 1-year period ending on the day of such receipt such individual received any other amount described in that subparagraph from an individual retirement account or an individual retirement annuity which was not includible in his gross income because of the application of this paragraph.

(C) Denial of rollover treatment for inherited accounts, etc.

(i) In general. In the case of an inherited individual retirement account or individual retirement annuity—

(I) this paragraph shall not apply to any amount received by an individual from such an account or annuity (and no amount transferred from such account or annuity to another individual retirement account or annuity shall be excluded from gross income by reason of such transfer), and

(II) such inherited account or annuity shall not be treated as an individual retirement account or annuity for purposes of determining whether any other amount is a rollover contribution.

(ii) Inherited individual retirement account or annuity. An individual retirement account or individual retirement annuity shall be treated as inherited if—

(I) the individual for whose benefit the account or annuity is maintained acquired such account by reason of the death of another individual, and

(II) such individual was not the surviving spouse of such other individual.

(D) Partial rollovers permitted.

(i) In general. If any amount paid or distributed out of an individual retirement account or individual retirement annuity would meet the requirements of subparagraph (A) but for the fact that the entire amount was not paid into an eligible plan as required by clause (i) or (ii) of subparagraph (A), such amount shall be treated as meeting the requirements of subparagraph (A) to the extent it is paid into an eligible plan referred to in such clause not later than the 60th day referred to in such clause.

(ii) Eligible plan. For purposes of clause (i), the term "eligible plan" means any account, annuity, contract, or plan referred to in subparagraph (A).

(E) Denial of rollover treatment for required distributions. This paragraph shall not apply to any amount to the extent such amount is required to be distributed under subsection (a)(6) or (b)(3).

(F) Frozen deposits. For purposes of this paragraph, rules similar to the rules of section 402(c)(7) [26 USCS § 402(c)(7)] (relating to frozen deposits) shall apply.

(G) Simple retirement accounts. In the case of any payment or distribution out of a simple retirement account (as defined in subsection (p)) to which section 72(t)(6) [26 USCS § 72(t)(6)] applies, this paragraph shall not apply unless such payment or distribution is paid into another simple retirement account.

(H) Application of section 72.

(i) In general. If—

(I) a distribution is made from an individual retirement plan, and

(II) a rollover contribution is made to an eligible retirement plan described in section 402(c)(8)(B)(iii), (iv), (v), or (vi) [26 USCS § 402(c)(8)(B)(iii), (iv), (v), or (vi)] with respect to all or part of such distribution,

then, notwithstanding paragraph (2), the rules of clause (ii) shall apply for purposes of applying section 72 [26 USCS § 72].

(ii) Applicable rules. In the case of a distribution described in clause (i)—

(I) section 72 [26 USCS § 72] shall be applied separately to such distribution,

(II) notwithstanding the pro rata allocation of income on, and investment in, the contract to distributions under section 72 [26 USCS § 72], the portion of such distribution rolled over to an eligible retirement plan described in clause (i) shall be treated as from income on the contract (to the extent of the aggregate income on the contract from all individual retirement plans of the distributee), and

(III) appropriate adjustments shall be made in applying section 72 [26 USCS § 72] to other distributions in such taxable year and subsequent taxable years.

(I) Waiver of 60-day requirement. The Secretary may waive the 60-day requirement under subparagraphs (A) and (D) where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement.

(4) Contributions returned before due date of return. Paragraph (1) does not apply to the distribution of any contribution paid during a taxable year to an individual retirement account or for an individual retirement annuity if—

(A) such distribution is received on or before the day prescribed by law (including extensions of time) for filing such individual's return for such taxable year,

(B) no deduction is allowed under section 219 [26 USCS § 219] with respect to such contribution, and

(C) such distribution is accompanied by the amount of net income attributable to such contribution.

In the case of such a distribution, for purposes of section 61 [26 USCS § 61], any net income described in subparagraph (C) shall be deemed to have been earned and receivable in the taxable year in which such contribution is made.

(5) Distributions of excess contributions after due date for taxable year and certain excess rollover contributions.

(A) In general. In the case of any individual, if the aggregate contributions (other than rollover contributions) paid for any taxable year to an individual retirement account or for an individual retirement annuity do not exceed the dollar amount in effect under section 219(b)(1)(A) [26 USCS § 219(b)(1)(A)], paragraph (1) shall not apply to the distribution of any such contribution to the extent that such contribution exceeds the amount allowable as a deduction under section 219 [26 USCS § 219] for the taxable year for which the contribution was paid—

(i) if such distribution is received after the date described in paragraph (4),

(ii) but only to the extent that no deduction has been allowed under section 219 [26 USCS § 219] with respect to such excess contribution.

If employer contributions on behalf of the individual are paid for the taxable year to a simplified employee pension, the dollar limitation of the preceding sentence shall be increased by the lesser of the amount of such contributions or the dollar limitation in effect under section 415(c)(1)(A) [26 USCS § 415(c)(1)(A)] for such taxable year.

(B) Excess rollover contributions attributable to erroneous information. If—

(i) the taxpayer reasonably relies on information supplied pursuant to subtitle F [26 USCS §§ 6001 et seq.] for determining the amount of a rollover contribution, but

(ii) the information was erroneous,

subparagraph (A) shall be applied by increasing the dollar limit set forth therein by that portion of the excess contribution which was attributable to such information. For purposes of this paragraph, the amount allowable as a deduction under section 219 [26 USCS § 219] shall be computed without regard to section 219(g) [26 USCS § 219(g)].

(6) Transfer of account incident to divorce. The transfer of an individual's interest in an individual retirement account or an individual retirement annuity to his spouse or former spouse under a divorce or separation instrument described in subparagraph (A) of section 71(b)(2) [26 USCS § 71(b)(2)] is not to be considered a taxable transfer made by such individual notwithstanding any other provision of this subtitle [26 USCS §§ 1 et seq.], and such interest at the time of the transfer is to be treated as an individual retirement account of such spouse, and not of such individual. Thereafter such account or annuity for purposes of this subtitle [26 USCS §§ 1 et seq.] is to be treated as maintained for the benefit of such spouse.

(7) Special rules for simplified employee pensions or simple retirement accounts.

(A) Transfer or rollover of contributions prohibited until deferral test met. Notwithstanding any other provision of this subsection or section 72(t) [26 USCS § 72(t)], paragraph (1) and section 72(t)(1) [26 USCS § 72(t)(1)] shall apply to the transfer or distribution from a simplified employee pension of any contribution under a salary reduction arrangement described in subsection (k)(6) (or any income allocable thereto) before a determination as to whether the requirements of subsection (k)(6)(A)(iii) are met with respect to such contribution.

(B) Certain exclusions treated as deductions. For purposes of paragraphs (4) and (5) and section 4973 [26 USCS § 4973], any amount excludable or excluded from gross income under section 402(h) or 402(k) [26 USCS § 402(h) or 402(k)] shall be treated as an amount allowable or allowed as a deduction under section 219 [26 USCS § 219].

(8) Distributions for charitable purposes.

(A) In general. So much of the aggregate amount of qualified charitable distributions with respect to a taxpayer made during any taxable year which does not exceed $ 100,000 shall not be includible in gross income of such taxpayer for such taxable year.

(B) Qualified charitable distribution. For purposes of this paragraph, the term "qualified charitable distribution" means any distribution from an individual retirement plan (other than a plan described in subsection (k) or (p))—

(i) which is made directly by the trustee to an organization described in section 170(b)(1)(A) [26 USCS § 170(b)(1)(A)] (other than any organization described in section 509(a)(3) [26 USCS § 509(a)(3)] or any fund or account described in section 4966(d)(2) [26 USCS § 4966(d)(2)]), and

(ii) which is made on or after the date that the individual for whose benefit the plan is maintained has attained age 70 1/2.

A distribution shall be treated as a qualified charitable distribution only to the extent that the distribution would be includible in gross income without regard to subparagraph (A).

(C) Contributions must be otherwise deductible. For purposes of this paragraph, a distribution to an organization described in subparagraph (B)(i) shall be treated as a qualified charitable distribution only if a deduction for the entire distribution would be allowable under section 170 [26 USCS § 170] (determined without regard to subsection (b) thereof and this paragraph).

(D) Application of section 72. Notwithstanding section 72 [26 USCS § 72], in determining the extent to which a distribution is a qualified charitable distribution, the entire amount of the distribution shall be treated as includible in gross income without regard to subparagraph (A) to the extent that such amount does not exceed the aggregate amount which would have been so includible if all amounts in all individual retirement plans of the individual were distributed during such taxable year and all such plans were treated as 1 contract for purposes of determining under section 72 [26 USCS § 72] the aggregate amount which would have been so includible. Proper adjustments shall be made in applying section 72 [26 USCS § 72] to other distributions in such taxable year and subsequent taxable years.

(E) Denial of deduction. Qualified charitable distributions which are not includible in gross income pursuant to subparagraph (A) shall not be taken into account in determining the deduction under section 170 [26 USCS § 170].

(F) Termination. This paragraph shall not apply to distributions made in taxable years beginning after December 31, 2011.

(9) Distribution for health savings account funding.

(A) In general. In the case of an individual who is an eligible individual (as defined in section 223(c) [26 USCS § 223(c)]) and who elects the application of this paragraph for a taxable year, gross income of the individual for the taxable year does not include a qualified HSA funding distribution to the extent such distribution is otherwise includible in gross income.

(B) Qualified HSA funding distribution. For purposes of this paragraph, the term "qualified HSA funding distribution" means a distribution from an individual retirement plan (other than a plan described in subsection (k) or (p)) of the employee to the extent that such distribution is contributed to the health savings account of the individual in a direct trustee-to-trustee transfer.

(C) Limitations.

(i) Maximum dollar limitation. The amount excluded from gross income by subparagraph (A) shall not exceed the excess of—

(I) the annual limitation under section 223(b) [26 USCS § 223(b)] computed on the basis of the type of coverage under the high deductible health plan covering the individual at the time of the qualified HSA funding distribution, over

(II) in the case of a distribution described in clause (ii)(II), the amount of the earlier qualified HSA funding distribution.

(ii) One-time transfer.

(I) In general. Except as provided in subclause (II), an individual may make an election under subparagraph (A) only for one qualified HSA funding distribution during the lifetime of the individual. Such an election, once made, shall be irrevocable.

(II) Conversion from self-only to family coverage. If a qualified HSA funding distribution is made during a month in a taxable year during which an individual has self-only coverage under a high deductible health plan as of the first day of the month, the individual may elect to make an additional qualified HSA funding distribution during a subsequent month in such taxable year during which the

individual has family coverage under a high deductible health plan as of the first day of the subsequent month.

(D) Failure to maintain high deductible health plan coverage.

(i) In general. If, at any time during the testing period, the individual is not an eligible individual, then the aggregate amount of all contributions to the health savings account of the individual made under subparagraph (A)—

(I) shall be includible in the gross income of the individual for the taxable year in which occurs the first month in the testing period for which such individual is not an eligible individual, and

(II) the tax imposed by this chapter for any taxable year on the individual shall be increased by 10 percent of the amount which is so includible.

(ii) Exception for disability or death. Subclauses (I) and (II) of clause (i) shall not apply if the individual ceased to be an eligible individual by reason of the death of the individual or the individual becoming disabled (within the meaning of section 72(m)(7) [26 USCS § 72(m)(7)]).

(iii) Testing period. The term "testing period" means the period beginning with the month in which the qualified HSA funding distribution is contributed to a health savings account and ending on the last day of the 12th month following such month.

(E) Application of section 72. Notwithstanding section 72 [26 USCS § 72], in determining the extent to which an amount is treated as otherwise includible in gross income for purposes of subparagraph (A), the aggregate amount distributed from an individual retirement plan shall be treated as includible in gross income to the extent that such amount does not exceed the aggregate amount which would have been so includible if all amounts from all individual retirement plans were distributed. Proper adjustments shall be made in applying section 72 [26 USCS § 72] to other distributions in such taxable year and subsequent taxable years.

(e) Tax treatment of accounts and annuities.

(1) Exemption from tax. Any individual retirement account is exempt from taxation under this subtitle [26 USCS §§ 1 et seq.] unless such account has ceased to be an individual retirement account by reason of paragraph (2) or (3). Notwithstanding the preceding sentence, any such account is subject to the taxes imposed by section 511 [26 USCS § 511] (relating to imposition of tax on unrelated business income of charitable, etc. organizations).

(2) Loss of exemption of account where employee engages in prohibited transaction.

(A) In general. If, during any taxable year of the individual for whose benefit any individual retirement account is established, that individual or his beneficiary engages in any transaction prohibited by section 4975 [26 USCS § 4975] with respect to such account, such account ceases to be an individual retirement account as of the first day of such taxable year. For purposes of this paragraph—

(i) the individual for whose benefit any account was established is treated as the creator of such account, and

(ii) the separate account for any individual within an individual retirement account maintained by an employer or association of employees is treated as a separate individual retirement account.

(B) Account treated as distributing all its assets. In any case in which any account ceases to be an individual retirement account by reason of subparagraph (A) as of the first day of any taxable year, paragraph (1) of subsection (d) applies as if there were a distribution on such first day in an amount equal to the fair market value (on such first day) of all assets in the account (on such first day).

(3) Effect of borrowing on annuity contract. If during any taxable year the owner of an individual retirement annuity borrows any money under or by use of such contract, the contract ceases to be an individual retirement annuity as of the first day of such taxable year. Such owner shall include in gross income for such year an amount equal to the fair market value of such contract as of such first day.

(4) Effect of pledging account as security. If, during any taxable year of the individual for whose benefit an individual retirement account is established, that individual uses the account or any portion thereof as security for a loan, the portion so used is treated as distributed to that individual.

(5) Purchase of endowment contract by individual retirement account. If the assets of an individual retirement account or any part of such assets are used to purchase an endowment contract for the benefit of the individual for whose benefit the account is established—

(A) to the extent that the amount of the assets involved in the purchase are not attributable to the purchase of life insurance, the purchase is treated as a rollover contribution described in subsection (d)(3), and

(B) to the extent that the amount of the assets involved in the purchase are attributable to the purchase of life, health, accident, or other insurance, such amounts are treated as distributed to that individual (but the provisions of subsection (f) do not apply).

(6) Commingling individual retirement account amounts in certain common trust funds and common investment funds. Any common trust fund or common investment fund of individual retirement account assets which is exempt from taxation under this subtitle [26 USCS §§ 1 et seq.] does not cease to be exempt on account of the participation or inclusion of assets of a trust exempt from taxation under section 501(a) [26 USCS § 501(a)] which is described in section 401(a) [26 USCS § 401(a)].

(f) [Repealed.]

(g) Community property laws. This section shall be applied without regard to any community property laws.

(h) Custodial accounts. For purposes of this section, a custodial account shall be treated as a trust if the assets of such account are held by a bank (as defined in subsection (n)) or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which he will administer the account will be consistent with the requirements of this section, and if the custodial account would, except for the fact that it is not a trust, constitute an individual retirement account described in subsection (a). For purposes of this title, in the case of a custodial account treated as a trust by reason of the preceding sentence, the custodian of such account shall be treated as the trustee thereof.

(i) Reports. The trustee of an individual retirement account and the issuer of an endowment contract described in subsection (b) or an individual retirement annuity shall make such reports regarding such account, contract, or annuity to the Secretary and to the individuals for whom the account, contract, or annuity is, or is to be, maintained with respect to contributions (and the years to which they relate), distributions aggregating $ 10 or more in any calendar year, and such other matters as the Secretary may require. The reports required by this subsection—

(1) shall be filed at such time and in such manner as the Secretary prescribes, and

(2) shall be furnished to individuals—

(A) not later than January 31 of the calendar year following the calendar year to which such reports relate, and

(B) in such manner as the Secretary prescribes.

In the case of a simple retirement account under subsection (p), only one report under this subsection shall be required to be submitted each calendar year to the Secretary (at the time provided under paragraph (2)) but, in addition to the report under this subsection, there shall be furnished, within 31 days after each calendar year, to the individual on whose behalf the account is maintained a statement with respect to the account balance as of the close of, and the account activity during, such calendar year.

(j) Increase in maximum limitations for simplified employee pensions. In the case of any simplified employee pension, subsections (a)(1) and (b)(2) of this section shall be applied by increasing the amounts contained therein by the amount of the limitation in effect under section 415(c)(1)(A) [26 USCS § 415(c)(1)(A)].

(k) Simplified employee pension defined.

(1) In general. For purposes of this title, the term "simplified employee pension" means an individual retirement account or individual retirement annuity—

(A) with respect to which the requirements of paragraphs (2), (3), (4), and (5) of this subsection are met, and

(B) if such account or annuity is part of a top-heavy plan (as defined in section 416 [26 USCS § 416]), with respect to which the requirements of section 416(c)(2) [26 USCS § 416(c)(2)] are met.

(2) Participation requirements. This paragraph is satisfied with respect to a simplified employee pension for a year only if for such year the employer contributes to the simplified employee pension of each employee who—

(A) has attained age 21,

(B) has performed service for the employer during at least 3 of the immediately preceding 5 years, and

(C) received at least $ 450 in compensation (within the meaning of section 414(q)(4) [26 USCS § 414(q)(4)]) from the employer for the year.

For purposes of this paragraph, there shall be excluded from consideration employees described in subparagraph (A) or (C) of section 410(b)(3) [26 USCS § 410(b)(3)]. For purposes of any arrangement described in subsection (k)(6), any employee who is eligible to have employer contributions made on the employee's behalf under such arrangement shall be treated as if such a contribution was made.

(3) Contributions may not discriminate in favor of the highly compensated, etc.

(A) In general. The requirements of this paragraph are met with respect to a simplified employee pension for a year if for such year the contributions made by the employer to simplified employee pensions for his employees do not discriminate in favor of any highly compensated employee (within the meaning of section 414(q) [26 USCS § 414(q)]).

(B) Special rules. For purposes of subparagraph (A), there shall be excluded from consideration employees described in subparagraph (A) or (C) of section 410(b)(3) [26 USCS § 410(b)(3)].

(C) Contributions must bear uniform relationship to total compensation. For purposes of subparagraph (A), and except as provided in subparagraph (D), employer contributions to simplified employee pensions (other than contributions under an arrangement described in paragraph (6)) shall be considered discriminatory unless contributions thereto bear a uniform relationship to the compensation (not in excess of the first $ 200,000) of each employee maintaining a simplified employee pension.

(D) Permitted disparity. For purposes of subparagraph (C), the rules of section 401(1)(2) [26 USCS § 401(1)(2)] shall apply to contributions to simplified employee pensions (other than contributions under an arrangement described in paragraph (6)).

(4) Withdrawals must be permitted. A simplified employee pension meets the requirements of this paragraph only if—

(A) employer contributions thereto are not conditioned on the retention in such pension of any portion of the amount contributed, and

(B) there is no prohibition imposed by the employer on withdrawals from the simplified employee pension.

(5) Contributions must be made under written allocation formula. The requirements of this paragraph are met with respect to a simplified employee pension only if employer contributions to such pension are determined under a definite written allocation formula which specifies—

(A) the requirements which an employee must satisfy to share in an allocation, and

(B) the manner in which the amount allocated is computed.

(6) Employee may elect salary reduction arrangement.

(A) Arrangements which qualify.

(i) In general. A simplified employee pension shall not fail to meet the requirements of this subsection for a year merely because, under the terms of the pension, an employee may elect to have the employer make payments—

(I) as elective employer contributions to the simplified employee pension on behalf of the employee, or

(II) to the employee directly in cash.

(ii) 50 Percent of eligible employees must elect. Clause (i) shall not apply to a simplified employee pension unless an election described in clause (i)(I) is made or is in effect with respect to not less than 50 percent of the employees of the employer eligible to participate.

(iii) Requirements relating to deferral percentage. Clause (i) shall not apply to a simplified employee pension for any year unless the deferral percentage for such year of each highly compensated employee eligible to participate is not more than the product of—

(I) the average of the deferral percentages for such year of all employees (other than highly compensated employees) eligible to participate, multiplied by

(II) 1.25.

(iv) Limitations on elective deferrals. Clause (i) shall not apply to a simplified employee pension unless the requirements of section 401(a)(30) [26 USCS § 401(a)(30)] are met.

(B) Exception where more than 25 employees. This paragraph shall not apply with respect to any year in the case of a simplified employee pension maintained by an employer with more than 25 employees who were eligible to participate (or would have been required to be eligible to participate if a pension was maintained) at any time during the preceding year.

(C) Distributions of excess contributions.

(i) In general. Rules similar to the rules of section 401(k)(8) [26 USCS § 401(k)(8)] shall apply to any excess contribution under this paragraph. Any excess contribution under a simplified employee pension shall be treated as an excess contribution for purposes of section 4979 [26 USCS § 4979].

(ii) Excess contribution. For purposes of clause (i), the term "excess contribution" means, with respect to a highly compensated employee, the excess of elective employer contributions under this paragraph over the maximum amount of such contributions allowable under subparagraph (A)(iii).

(D) Deferral percentage. For purposes of this paragraph, the deferral percentage for an employee for a year shall be the ratio of—

(i) the amount of elective employer contributions actually paid over to the simplified employee pension on behalf of the employee for the year, to

(ii) the employee's compensation (not in excess of the first $ 200,000) for the year.

(E) Exception for state and local and tax-exempt pensions. This paragraph shall not apply to a simplified employee pension maintained by—

(i) a State or local government or political subdivision thereof, or any agency or instrumentality thereof, or

(ii) an organization exempt from tax under this title.

(F) Exception where pension does not meet requirements necessary to insure distribution of excess contributions. This paragraph shall not apply with respect to any year for which the simplified employee pension does not meet such requirements as the Secretary may prescribe as are necessary to insure that excess contributions are distributed in accordance with subparagraph (C), including—

(i) reporting requirements, and

(ii) requirements which, notwithstanding paragraph (4), provide that contributions (and any income allocable thereto) may not be withdrawn from a simplified employee pension until a determination has been made that the requirements of subparagraph (A)(iii) have been met with respect to such contributions.

(G) Highly compensated employee. For purposes of this paragraph, the term "highly compensated employee" has the meaning given such term by section 414(q) [26 USCS § 414(q)].

(H) Termination. This paragraph shall not apply to years beginning after December 31, 1996. The preceding sentence shall not apply to a simplified employee pension of an employer if the terms of simplified employee pensions of such employer, as in effect on December 31, 1996, provide that an employee may make the election described in subparagraph (A).

(7) Definitions. For purposes of this subsection and subsection (1)—

(A) Employee, employer, or owner-employee. The terms "employee", "employer", and "owner-employee" shall have the respective meanings given such terms by section 401(c) [26 USCS § 401(c)].

(B) Compensation. Except as provided in paragraph (2)(C), the term "compensation" has the meaning given such term by section 414(s) [26 USCS § 414(s)].

(C) Year. The term "year" means—

(i) the calendar year, or

(ii) if the employer elects, subject to such terms and conditions as the Secretary may prescribe, to maintain the simplified employee pension on the basis of the employer's taxable year.

(8) Cost-of-living adjustment. The Secretary shall adjust the $ 450 amount in paragraph (2)(C) at the same time and in the same manner as under section 415(d) [26 USCS § 415(d)] and shall adjust the $ 200,000 amount in paragraphs (3)(C) and (6)(D)(ii) at the same time, and by the same amount, as any adjustment under section 401(a)(17)(B) [26 USCS § 401(a)(17)(B)]; except that any increase in the $ 450 amount which is not a multiple of $ 50 shall be rounded to the next lowest multiple of $ 50.

(9) Cross reference. For excise tax on certain excess contributions, see section 4979 [26 USCS § 4979].

(l) Simplified employer reports.

(1) In general. An employer who makes a contribution on behalf of an employee to a simplified employee pension shall provide such simplified reports with respect to such contributions as the Secretary may require by regulations. The reports required by this subsection shall be filed at such time and in such manner, and information with respect to such contributions shall be furnished to the employee at such time and in such manner, as may be required by regulations.

(2) Simple retirement accounts.

(A) No employer reports. Except as provided in this paragraph, no report shall be required under this section by an employer maintaining a qualified salary reduction arrangement under subsection (p).

(B) Summary description. The trustee of any simple retirement account established pursuant to a qualified salary reduction arrangement under subsection (p) and the issuer of an annuity established under such an arrangement shall provide to the employer maintaining the arrangement, each year a description containing the following information:

(i) The name and address of the employer and the trustee or issuer.

(ii) The requirements for eligibility for participation.

(iii) The benefits provided with respect to the arrangement.

(iv) The time and method of making elections with respect to the arrangement.

(v) The procedures for, and effects of, withdrawals (including rollovers) from the arrangement.

(C) Employee notification. The employer shall notify each employee immediately before the period for which an election described in subsection (p)(5)(C) may be made of the employee's opportunity to make such election. Such notice shall include a copy of the description described in subparagraph (B).

(m) Investment in collectibles treated as distributions.

(1) In general. The acquisition by an individual retirement account or by an individually-directed account under a plan described in section 401(a) [26 USCS § 401(a)] of any collectible shall be treated (for purposes of this section and section 402 [26 USCS § 402]) as a distribution from such account in an amount equal to the cost to such account of such collectible.

(2) Collectible defined. For purposes of this subsection, the term "collectible" means—

(A) any work of art,

(B) any rug or antique,

(C) any metal or gem,

(D) any stamp or coin,

(E) any alcoholic beverage, or

(F) any other tangible personal property specified by the Secretary for purposes of this subsection.

(3) Exception for certain coins and bullion. For purposes of this subsection, the term "collectible" shall not include—

(A) any coin which is—

(i) a gold coin described in paragraph (7), (8), (9), or (10) of section 5112(a) of title 31, United States Code,

(ii) a silver coin described in section 5112(e) of title 31, United States Code,

(iii) a platinum coin described in section 5112(k) of title 31, United States Code, or

(iv) a coin issued under the laws of any State, or

(B) any gold, silver, platinum, or palladium bullion of a fineness equal to or exceeding the minimum fineness that a contract market (as described in section 7 of the Commodity Exchange Act, 7 U.S.C. 7) requires for metals which may be delivered in satisfaction of a regulated futures contract,

if such bullion is in the physical possession of a trustee described under subsection (a) of this section.

(n) Bank. For purposes of subsection (a)(2), the term "bank" means—

(1) any bank (as defined in section 581 [26 USCS § 581]),

(2) an insured credit union (within the meaning of paragraph (6) or (7) of section 101 of the Federal Credit Union Act [12 USCS § 1752]), and

(3) a corporation which, under the laws of the State of its incorporation, is subject to supervision and examination by the Commissioner of Banking or other officer of such State in charge of the administration of the banking laws of such State.

(o) Definitions and rules relating to nondeductible contributions to individual retirement plans.

(1) In general. Subject to the provisions of this subsection, designated nondeductible contributions may be made on behalf of an individual to an individual retirement plan.

(2) Limits on amounts which may be contributed.

(A) In general. The amount of the designated nondeductible contributions made on behalf of any individual for any taxable year shall not exceed the nondeductible limit for such taxable year.

(B) Nondeductible limit. For purposes of this paragraph—

(i) In general. The term "nondeductible limit" means the excess of—

(I) the amount allowable as a deduction under section 219 [26 USCS § 219] (determined without regard to section 219(g) [26 USCS § 219(g)]), over

(II) the amount allowable as a deduction under section 219 [26 USCS § 219] (determined with regard to section 219(g) [26 USCS § 219(g)]).

(ii) Taxpayer may elect to treat deductible contributions as nondeductible. If a taxpayer elects not to deduct an amount which (without regard to this clause) is allowable as a deduction under section 219 [26 USCS § 219] for any taxable year, the nondeductible limit for such taxable year shall be increased by such amount.

(C) Designated nondeductible contributions.

(i) In general. For purposes of this paragraph, the term "designated nondeductible contribution" means any contribution to an individual retirement plan for the taxable year which is designated (in such manner as the Secretary may prescribe) as a contribution for which a deduction is not allowable under section 219 [26 USCS § 219].

(ii) Designation. Any designation under clause (i) shall be made on the return of tax imposed by chapter 1 [26 USCS §§ 1 et seq.] for the taxable year.

(3) Time when contributions made. In determining for which taxable year a designated nondeductible contribution is made, the rule of section 219(f)(3) [26 USCS § 219(f)(3)] shall apply.

(4) Individual required to report amount of designated nondeductible contributions.

(A) In general. Any individual who—

(i) makes a designated nondeductible contribution to any individual retirement plan for any taxable year, or

(ii) receives any amount from any individual retirement plan for any taxable year,

shall include on his return of the tax imposed by chapter 1 [26 USCS §§ 1 et seq.] for such taxable year and any succeeding taxable year (or on such other form as the Secretary may prescribe for any such taxable year) information described in subparagraph (B).

(B) Information required to be supplied. The following information is described in this subparagraph:

(i) The amount of designated nondeductible contributions for the taxable year.

(ii) The amount of distributions from individual retirement plans for the taxable year.

(iii) The excess (if any) of—

(I) the aggregate amount of designated nondeductible contributions for all preceding taxable years, over

(II) the aggregate amount of distributions from individual retirement plans which was excludable from gross income for such taxable years.

(iv) The aggregate balance of all individual retirement plans of the individual as of the close of the calendar year in which the taxable year begins.

(v) Such other information as the Secretary may prescribe.

(C) Penalty for reporting contributions not made.

For penalty where individual reports designated nondeductible contributions not made, see section 6693(b) [26 USCS § 6693(b)].

(p) Simple retirement accounts.

(1) In general. For purposes of this title, the term "simple retirement account" means an individual retirement plan (as defined in section 7701(a)(37) [26 USCS § 7701(a)(37)])—

(A) with respect to which the requirements of paragraphs (3), (4), and (5) are met; and

(B) with respect to which the only contributions allowed are contributions under a qualified salary reduction arrangement.

(2) Qualified salary reduction arrangement.

(A) In general. For purposes of this subsection, the term "qualified salary reduction arrangement" means a written arrangement of an eligible employer under which—

(i) an employee eligible to participate in the arrangement may elect to have the employer make payments—

(I) as elective employer contributions to a simple retirement account on behalf of the employee, or

(II) to the employee directly in cash,

(ii) the amount which an employee may elect under clause (i) for any year is required to be expressed as a percentage of compensation and may not exceed a total of the applicable dollar amount for any year,

(iii) the employer is required to make a matching contribution to the simple retirement account for any year in an amount equal to so much of the amount the employee elects under clause (i)(I) as does not exceed the applicable percentage of compensation for the year, and

(iv) no contributions may be made other than contributions described in clause (i) or (iii).

(B) Employer may elect 2-percent nonelective contribution.

(i) In general. An employer shall be treated as meeting the requirements of subparagraph (A)(iii) for any year if, in lieu of the contributions described in such clause, the employer elects to make nonelective contributions of 2 percent of compensation for each employee who is eligible to participate in the arrangement and who has at least $ 5,000 of compensation from the employer for the year. If an employer makes an election under this subparagraph for any year, the employer shall notify employees of such election within a reasonable period of time before the 60-day period for such year under paragraph (5)(C).

(ii) Compensation limitation. The compensation taken into account under clause (i) for any year shall not exceed the limitation in effect for such year under section 401(a)(17) [26 USCS § 401(a)(17)].

(C) Definitions. For purposes of this subsection—

(i) Eligible employer.

(I) In general. The term "eligible employer" means, with respect to any year, an employer which had no more than 100 employees who received at least $ 5,000 of compensation from the employer for the preceding year.

(II) 2-year grace period. An eligible employer who establishes and maintains a plan under this subsection for 1 or more years and who fails to be an eligible employer for any subsequent year shall be treated as an eligible employer for the 2 years following the last year the employer was an eligible employer. If such failure is due to any acquisition, disposition, or similar transaction involving an eligible employer, the preceding sentence shall not apply.

(ii) Applicable percentage.

(I) In general. The term "applicable percentage" means 3 percent.

(II) Election of lower percentage. An employer may elect to apply a lower percentage (not less than 1 percent) for any year for all employees eligible to participate in the plan for such year if the employer notifies the employees of such lower percentage within a reasonable period of time before the 60-day election period for such year under paragraph (5)(C). An employer may not elect a lower percentage under this subclause for any year if that election would result in the applicable percentage being lower than 3 percent in more than 2 of the years in the 5-year period ending with such year.

(III) Special rule for years arrangement not in effect. If any year in the 5-year period described in subclause (II) is a year prior to the first year for which any qualified salary reduction arrangement is in effect with respect to the employer (or any predecessor), the employer shall be treated as if the level of the employer matching contribution was at 3 percent of compensation for such prior year.

(D) Arrangement may be only plan of employer.

(i) In general. An arrangement shall not be treated as a qualified salary reduction arrangement for any year if the employer (or any predecessor employer) maintained a qualified plan with respect to which contributions were made, or benefits were accrued, for service in any year in the period beginning with the year such arrangement became effective and ending with the year for which the determination is being made. If only individuals other than employees described in subparagraph (A) of section 410(b)(3) [26 USCS § 410(b)(3)] are eligible to participate in such arrangement, then the preceding sentence shall be applied without regard to any qualified plan in which only employees so described are eligible to participate.

(ii) Qualified plan. For purposes of this subparagraph, the term "qualified plan" means a plan, contract, pension, or trust described in subparagraph (A) or (B) of section 219(g)(5) [26 USCS § 219(g)(5)].

(E) Applicable dollar amount; cost-of-living adjustment.

(i) In general. For purposes of subparagraph (A)(ii), the applicable dollar amount shall be the amount determined in accordance with the following table:

For years beginning in calendar year:	the applicable dollar amount:
2002	$ 7,000
2003	$ 8,000
2004	$ 9,000
2005 or thereafter	$ 10,000.

(ii) Cost-of-living adjustment. In the case of a year beginning after December 31, 2005, the Secretary shall adjust the $ 10,000 amount under clause (i) at the same time and in the same manner as under section 415(d) [26 USCS § 415(d)], except that the base period taken into account shall be the calendar quarter beginning July 1, 2004, and any increase under this subparagraph which is not a multiple of $ 500 shall be rounded to the next lower multiple of $ 500.

(3) Vesting requirements. The requirements of this paragraph are met with respect to a simple retirement account if the employee's rights to any contribution to the simple retirement account are nonforfeitable. For purposes of this paragraph, rules similar to the rules of subsection (k)(4) shall apply.

(4) Participation requirements.

(A) In general. The requirements of this paragraph are met with respect to any simple retirement account for a year only if, under the qualified salary reduction arrangement, all employees of the employer who—

(i) received at least $ 5,000 in compensation from the employer during any 2 preceding years, and

(ii) are reasonably expected to receive at least $ 5,000 in compensation during the year,

are eligible to make the election under paragraph (2)(A)(i) or receive the nonelective contribution described in paragraph (2)(B).

(B) Excludable employees. An employer may elect to exclude from the requirement under subparagraph (A) employees described in section 410(b)(3) [26 USCS § 410(b)(3)].

(5) Administrative requirements. The requirements of this paragraph are met with respect to any simple retirement account if, under the qualified salary reduction arrangement—

(A) an employer must—

(i) make the elective employer contributions under paragraph (2)(A)(i) not later than the close of the 30-day period following the last day of the month with respect to which the contributions are to be made, and

(ii) make the matching contributions under paragraph (2)(A)(iii) or the nonelective contributions under paragraph (2)(B) not later than the date described in section 404(m)(2)(B) [26 USCS § 404(m)(2)(B)],

(B) an employee may elect to terminate participation in such arrangement at any time during the year, except that if an employee so terminates, the arrangement may provide that the employee may not elect to resume participation until the beginning of the next year, and

(C) each employee eligible to participate may elect, during the 60-day period before the beginning of any year (and the 60-day period before the first day such employee is eligible to participate), to participate in the arrangement, or to modify the amounts subject to such arrangement, for such year.

(6) Definitions. For purposes of this subsection—

(A) Compensation.

(i) In general. The term "compensation" means amounts described in paragraphs (3) and (8) of section 6051(a) [26 USCS § 6051(a)]. For purposes of the preceding sentence, amounts described in section 6051(a)(3) [26 USCS § 6051(a)(3)] shall be determined without regard to section 3401(a)(3) [26 USCS § 3401(a)(3)].

(ii) Self-employed. In the case of an employee described in subparagraph (B), the term "compensation" means net earnings from self-employment determined under section 1402(a) [26 USCS § 1402(a)] without regard to any contribution under this subsection. The preceding sentence shall be applied as if the term "trade or business" for purposes of section 1402 [26 USCS § 1402] included service described in section 1402(c)(6) [26 USCS § 1402(c)(6)].

(B) Employee. The term "employee" includes an employee as defined in section 401(c)(1) [26 USCS § 401(c)(1)].

(C) Year. The term "year" means the calendar year.

(7) Use of designated financial institution. A plan shall not be treated as failing to satisfy the requirements of this subsection or any other provision of this title merely because the employer makes all contributions to the individual retirement accounts or annuities of a designated trustee or issuer. The preceding sentence shall not apply unless each plan participant is notified in writing (either separately or as part of the notice under subsection (l)(2)(C)) that the participant's balance may be transferred without cost or penalty to another individual account or annuity in accordance with subsection (d)(3)(G).

(8) Coordination with maximum limitation under subsection (a). In the case of any simple retirement account, subsections (a)(1) and (b)(2) shall be applied by substituting "the sum of the dollar amount in effect under paragraph (2)(A)(ii) of this subsection and the employer contribution required under subparagraph (A)(iii) or (B)(i) of paragraph (2) of this subsection, whichever is applicable" for "the dollar amount in effect under section 219(b)(1)(A)".

(9) Matching contributions on behalf of self-employed individuals not treated as elective employer contributions. Any matching contribution described in paragraph (2)(A)(iii) which is made on behalf of a self-employed individual (as defined in section 401(c) [26 USCS § 401(c)]) shall not be treated as an elective employer contribution to a simple retirement account for purposes of this title.

(10) Special rules for acquisitions, dispositions, and similar transactions.

(A) In general. An employer which fails to meet any applicable requirement by reason of an acquisition, disposition, or similar transaction shall not be treated as failing to meet such requirement during the transition period if—

(i) the employer satisfies requirements similar to the requirements of section 410(b)(6)(C)(i)(II) [26 USCS § 410(b)(6)(C)(i)(II)]; and

(ii) the qualified salary reduction arrangement maintained by the employer would satisfy the requirements of this subsection after the transaction if the employer which maintained the arrangement before the transaction had remained a separate employer.

(B) Applicable requirement. For purposes of this paragraph, the term "applicable requirement" means—

(i) the requirement under paragraph (2)(A)(i) that an employer be an eligible employer;

(ii) the requirement under paragraph (2)(D) that an arrangement be the only plan of an employer; and

(iii) the participation requirements under paragraph (4).

(C) Transition period. For purposes of this paragraph, the term "transition period" means the period beginning on the date of any transaction described in subparagraph (A) and ending on the last day of the second calendar year following the calendar year in which such transaction occurs.

(q) Deemed IRAs under qualified employer plans.

(1) General rule. If—

(A) a qualified employer plan elects to allow employees to make voluntary employee contributions to a separate account or annuity established under the plan, and

(B) under the terms of the qualified employer plan, such account or annuity meets the applicable requirements of this section or section 408A [26 USCS § 408A] for an individual retirement account or annuity,

then such account or annuity shall be treated for purposes of this title in the same manner as an individual retirement plan and not as a qualified employer plan (and contributions to such account or annuity as contributions to an individual retirement plan and not to the qualified employer plan). For purposes of subparagraph (B), the requirements of subsection (a)(5) shall not apply.

(2) Special rules for qualified employer plans. For purposes of this title, a qualified employer plan shall not fail to meet any requirement of this title solely by reason of establishing and maintaining a program described in paragraph (1).

(3) Definitions. For purposes of this subsection—

(A) Qualified employer plan. The term "qualified employer plan" has the meaning given such term by section 72(p)(4)(A)(i) [26 USCS § 72(p)(4)(A)(i)]; except that such term shall also include an eligible deferred compensation plan (as defined in section 457(b) [26 USCS § 457(b)]) of an eligible employer described in section 457(e)(1)(A) [26 USCS § 457(e)(1)(A)].

(B) Voluntary employee contribution. The term "voluntary employee contribution" means any contribution (other than a mandatory contribution within the meaning of section 411(c)(2)(C) [26 USCS § 411(c)(2)(C)])—

(i) which is made by an individual as an employee under a qualified employer plan which allows employees to elect to make contributions described in paragraph (1), and

(ii) with respect to which the individual has designated the contribution as a contribution to which this subsection applies.

(r) Cross references.

(1) For tax on excess contributions in individual retirement accounts or annuities, see section 4973 [26 USCS § 4973].

(2) For tax on certain accumulations in individual retirement accounts or annuities, see section 4974 [26 USCS § 4974].

(Added Sept. 2, 1974, P.L. 93-406, Title II, § 2002(b), 88 Stat. 959; Oct. 4, 1976, P.L. 94-455, Title XV, § 1501(b)(2), (5), (10), Title XIX, § 1906(b)(13)(A), 90 Stat. 1735-1737, 1834; Nov. 6, 1978, P.L.

95-600, Title I, §§ 152(a), (b), 156(c)(1), (3), 157(c)(1), (d)(1), (e)(1)(A), (g)(3), (h)(2), Title VII, § 703(c)(4), 92 Stat. 2797, 2802, 2803, 2805, 2806, 2808, 2939; April 1, 1980, P.L. 96-222, Title I, § 101(a)(10)(A), (C), (F), (G), (J)(i), (14)(B), (E)(ii), 94 Stat. 201-205; Dec. 28, 1980, P.L. 96-605, Title II, § 225(b)(3), (4), 94 Stat. 3529; Aug. 13, 1981, P.L. 97-34, Title III, §§ 311(g)(1)(A)-(C), (2), (h)(2), 312(b)(2), (c)(5), 313(b)(2), 314(b)(1), 95 Stat. 281-284, 286; Sept. 3, 1982, P.L. 97-248, Title II, §§ 237(e)(3), 238(d)(3), (4), 243(a), (b)(1)(A), Title III, § 335(a)(1), 96 Stat. 512, 513, 521, 522, 628; Jan. 12, 1983, P.L. 97-448, Title I, § 103(d)(1), (e), 96 Stat. 2378; July 18, 1984, P.L. 98-369, Div A, Title I, § 147(a), Title IV, § 491(d)(19)-(24), Title V, §§ 521(b), 522(d)(12), Title VII, § 713(c)(2)(B), (f)(2), (5)(B), (g)(2), (j), 98 Stat. 687, 850, 867, 871, 957, 959, 960; Oct. 22, 1986, P.L. 99-514, Title XI, §§ 1102(a), (b)(2), (c), (e)(2), 1108(a), (d)-(g)(1), (4), (6), 1121(c)(2), 1122(e)(2)(B), 1123(d)(2), 1144(a), Title XVIII, §§ 1852(a)(1), (5)(C), (7)(A), 1875(c)(6)(A), (8), 1898(a)(5), 100 Stat. 2414-2416, 2431, 2433, 2434, 2465, 2470, 2475, 2490, 2864-2866, 2895, 2944; Nov. 10, 1988, P.L. 100-647, Title I, §§ 1011(b)(1)-(3), (c)(7)(C), (f)(1)-(5), (10), (i)(5), 1011A(a)(2)(A), 1018(t)(3)(D), Title VI, § 6057(a), 102 Stat. 3456, 3458, 3461-3463, 3468, 3472, 3588, 3698; Dec. 19, 1989, P.L. 101-239, Title VII, §§ 7811(m)(7), 7841(a)(1), 103 Stat. 2412, 2427; July 3, 1992, P.L. 102-318, Title V, § 521(b)(16)-(19), 106 Stat. 311; Aug. 10, 1993, P.L. 103-66, Title XIII, § 13212(b), 107 Stat. 472; Dec. 8, 1994, P.L. 103-465, Title VII, § 732(d), 108 Stat. 5005; Aug. 20, 1996, P.L. 104-188, Title I, §§ 1421(a), (b)(3)(B), (5), (6), (c), 1427(b)(3), 1431(c)(1)(B), 1455(b)(1), 110 Stat. 1792, 1796-1798, 1802, 1803, 1817; Aug. 5, 1997, P.L. 105-34, Title III, §§ 302(d), 304(a), Title XV, § 1501(b), Title XVI, § 1601(d)(1)(A)-(C)(i), (D)-(G), 111 Stat. 829, 831, 1058, 1087, 1088; July 22, 1998, P.L. 105-206, Title VI, §§ 6015(a), 6016(a)(1), 6018(b), 112 Stat. 820-822; Dec. 21, 2000, P.L. 106-554, § 1(a)(7) (Title III, § 319(3)), 114 Stat. 2763, 2763A-646; June 7, 2001, P.L. 107-16, Title VI, §§ 601(b), 602(a), 611(c)(1), (f)(1), (2), (g)(2), 641(e)(8), 642(a), (b)(2), (3), 643(c), 644(b), 115 Stat. 95, 97, 99, 121-123; March 9, 2002, P.L. 107-147, Title IV, Subtitle B, § 411(i)(1), (j)(1), 116 Stat. 46, 47; Oct. 4, 2004, P.L. 108-311, Title IV, §§ 404(d), 408(a)(12), (13), 118 Stat. 1188, 1191; Aug. 17, 2006, P.L. 109-280, Title XII, Subtitle A, § 1201(a), 120 Stat. 1063; Dec. 20, 2006, P.L. 109-432, Div A, Title III, § 307(a), 120 Stat. 2951; Dec. 29, 2007, P.L. 110-172, § 3(a), 121 Stat. 2474; Oct. 3, 2008, P. L. 110-343, Div C, Title II, § 205(a), 122 Stat. 3865; Dec. 17, 2010, P. L. 111-312, Title VII, Subtitle B, § 725(a), 124 Stat. 3316.)

Notes of Decisions

1. Generally

Because 10 percent penalty under 26 USCS § 72(t) applies proportionally to any amounts withdrawn from account that qualities as Individual Retirement Account (IRA) under 26 USCS § 408(a), it prevents access to 10 percent that individual would forfeit should he withdraw early, and thus it effectively prevents access to entire balance in IRA; penalty therefore limits individual's right to "payment" of balance of his IRA; and because this condition is removed when accountholder turns age 59 1/2, individual's right to balance of his IRA is right to payment "on account of" age within meaning of 11 USCS § 522(d)(10)(E). Rousey v Jacoway (2005, US) 161 L Ed 2d 563, 125 S Ct 1561, 44 BCD 144, 34 EBC 1929, CCH Bankr L Rptr P 80263, 2005-1 USTC P 50258, 18 FLW Fed S 223.

Simplified employee pension that accepted contributions exceeding amount applicable to individual retirement account pursuant to 26 USCS § 408(a), but did not accept contributions exceeding those stated in 26 USCS § 415(c)(1)(a) was qualified retirement plan pursuant to 26 USCS § 408(k); plan did not have to meet definition of Individual Retirement Account under § 408(a) to qualify under § 408(k). Lampkins v Golden (2002, CA6 Mich) 28 Fed Appx 409, 27 EBC 1587, 2002-1 USTC P 50216, 90 AFTR 2d 5303.

Participation requirement stated in 26 USCS § 408(k)(2) expressly uses term "if" in reference to contributions made by employer for given year, thereby leaving it to discretion of employer to make contributions for that year if employer wishes to meet definition; therefore, fact that employer did not make contributions to his simplified employee pension plan on his own behalf some years did not mean that plan could not qualify under § 408(k). Lampkins v Golden (2002, CA6 Mich) 28 Fed Appx 409, 27 EBC 1587, 2002-1 USTC P 50216, 90 AFTR 2d 5303.

Former employee was not precluded from garnishing her former employer's simplified employee pension plan, qualified pursuant to 26 USCS § 408(k), in order to recover judgment for plan benefits owed to her because such plans were excepted, pursuant to 29 USCS § 1051(6) from anti-alienation provision of ERISA, 29 USCS § 1056(d)(1), Lampkins v Golden (2002, CA6 Mich) 28 Fed Appx 409, 27 EBC 1587, 2002-1 USTC P 50216, 90 AFTR 2d 5303.

State statute, which prohibited garnishment of individual retirement account or individual retirement annuity as defined in 26 USCS § 408, was preempted pursuant to 29 USCS § 1144(a), even though state statute did not expressly use term "ERISA," because state statute actually imposed requirement on ERISA plans, exception from garnishment, that federal statute did not allow. Lampkins v Golden (2002, CA6 Mich) 28 Fed Appx 409, 27 EBC 1587, 2002-1 USTC P 50216, 90 AFTR 2d 5303.

Under Employee Retirement Income Security Act of 1974, "nonforfeitable," as defined in 29 USCS § 1002(19), is synonymous with "vested;" therefore, 26 USCS § 408(a)(4), which provides that individual's interest in Individual Retirement Account is "nonforfeitable," merely establishes that individual has vested interest in balance of his IRA and does not address question of whether IRA is subject to criminal forfeiture under 21 USCS § 853(a). United States v Vondette (2003, CA2 NY) 352 F3d 772, 32 EBC 1740, vacated, remanded, motion gr (2005, US) 160 L Ed 2d 1035, 125 S Ct 1010, reh den (2005, US) 161 L Ed 2d 294, 125 S Ct 1607.

Because neither 26 USCS § 408(a)(4) nor 29 USCS § 1056(d)(1) protected Individual Retirement Accounts (IRAs) from criminal forfeiture actions, district court properly concluded that defendant's IRAs were subject to forfeiture pursuant to 21 USCS § 853(a) following his conviction for conspiracy to distribute hashish, marijuana, and methaqualone and conspiracy to launder money. United States v Vondette (2003, CA2 NY) 352 F3d 772, 32 EBC 1740, vacated, remanded, motion gr (2005, US) 160 L Ed 2d 1035, 125 S Ct 1010, reh den (2005, US) 161 L Ed 2d 294, 125 S Ct 1607.

Contrary to position of surviving spouse, funds in individual retirement account (IRA) established by decedent were not subject to automatic surviving spouse requirements under 26 USCS § 401(a)(11); in arguing that § 401(a)(11) applied, surviving spouse relied on fractured reading of 26 USCS § 408(a)(6)-statute governing IRAs-and omitted regulatory authority of Secretary of Treasury, who had not imposed on IRAs any automatic surviving spouse rights. Charles Schwab & Co. v Debickero (2010, CA9 Ariz) 593 F.3d 916, 48 EBC 1705, 2010-1 USTC ¶ 50180, 105 AFTR 2d 692.

After defendant was convicted under 18 USCS § 1956(h) for money laundering conspiracy, court held that defendant's pension plan account, assigned to defendant's wife in divorce, was not subject to criminal forfeiture under 18 USCS § 982 because IRC § 408(k), 29 USCS § 1056(d)(1), (3), IRC § 401(a)(13), and Treas. Reg. § 1.401(a)-13(b)(1) protected pension plan account; defendant's simplified employee pension (SEP) account was subject to forfeiture because Employee Retirement Income Security Act of 1974's anti-alienation provisions did not apply to SEP account; further, because divorce decree was entered after indictment and after prior protective order that specified that SEP account was subject to forfeiture, and as division of marital property under TCA § 36-4-121 did not determine property ownership, wife, who petitioned court under 21 USCS § 853(n), took her interest subject to forfeiture. United States v Norton (2002, WD Va) 29 EBC 1255, subsequent app (2003, CA4 Va) 64 Fed Appx 411, post-conviction relief den (2004, CA4 Va) 102 Fed Appx 820.

Where debtor's Individual Retirement Account (IRA) did not qualify as trust within meaning of 11 USCS § 541(c)(2) under either 26 USCS § 408(a) or state law, debtor's IRA, which court found was custodial account, was not excluded under 11 USCS § 541(c)(2) and was property of estate. Walsh v Benson (2006, WD Pa) 56 CBC2d 869.

In bankruptcy case, because funds in inherited individual retirement account (IRA) were "retirement funds" within meaning of 11 USCS § 522(d)(12), and inherited IRA was tax-exempt under 26 USCS § 408(e), inherited IRA was exempted under 11 USCS § 522(d)(12). Chilton v Moser (2011, ED Tex) 444 BR 548, 2011-1 USTC ¶ 50318, 107 AFTR 2d 1391.

Actions for breach of fiduciary duty involving Individual Retirement Account are traditionally matters of state law, and there is no implied cause of action for violations of 26 USCS § 408, which sets forth series of statutory guidelines for Individual Retirement Accounts seeking tax-deferred status. Grund v Del. Charter Guar. & Trust Co. (2011, SD NY) 788 F Supp 2d 226.

Although amended complaint based its breach of fiduciary duty claim exclusively on allegations that trust company and financial group violated "federal" duties rooted in 26 USCS § 408 of Internal Revenue Code and regulations thereunder, § 408 did not give rise to any independent cause of action or actionable duties, and any claim that it did was frivolous; therefore, investors' breach of fiduciary duty claim failed as matter of law. Burns v Del. Charter Guar. & Trust Co. (2011, SD NY) 805 F Supp 2d 12, 107 AFTR 2d 2524.

Provision of 26 USCS § 408 that interest of beneficiary in balance of Individual Retirement Account is not forfeitable is codification of common law prohibition upon trustee asserting any claim in trust which is antagonistic to beneficiary; § 408 does not necessarily mean beneficiary cannot assign account to third person, or that beneficiary may not withdraw moneys, although there is penalty imposed for any such withdrawal, but it does mean trust fund cannot be forfeited to trustee, who, as custodian, is precluded from asserting any claim to assets in Individual Retirement Account. In re Dunn (1980, BC ND Tex) 5 BR 156, 23 CBC 580.

Under 26 USCS § 408(h), custodial account IRA is not true trust. Walsh v Galloway (In re Galloway) (2001, BC WD Pa) 308 BR 709.

Language of 26 USCS § 408(a) does not compel conclusion that every IRA necessarily constitutes trust for purposes of 11 USCS § 541(c)(2) under applicable nonbankruptcy law. Walsh v Galloway (In re Galloway) (2001, BC WD Pa) 308 BR 709.

Court examined Employee Retirement Income Security Act of 1974 (ERISA), 29 USCS § 1001 et seq., and its relation to federal bankruptcy law and found that (1) ERISA did not preempt Ohio Rev. Code Ann. § 2329.66(A)(10)(c); and (2) debtors were entitled to related state bankruptcy exemptions claimed in their individual retirement accounts. In re Buzza (2002, BC SD Ohio) 287 BR 417, 49 CBC2d 1651, 29 EBC 2948.

Bankruptcy trustee's objection to debtor's claim of exemption in certain IRA accounts administered by third party that were rolled over pre-petition from ERISA plan established by debtor's former employer, was overruled when state law, Ohio Rev. Code Ann. § 2329.66(A)(10)(c), exempting IRA's was not preempted by ERISA since it did not relate to employee benefit plan; because I.R.C. § 408(a) encompassed rollover IRA's, accounts which debtor was seeking to exempt were not employee benefit plans and were therefore not subject to ERISA or its preemption clause. In re Rayl (2003, BC SD Ohio) 299 BR 465.

Where there was absence of disqualified person in connection with withdrawal of funds from individual retirement account (IRA), account did not lose its status as IRA; notwithstanding Trustee's contention to the contrary, debtor who set up IRA for his own benefit was not disqualified person. In re Howard (2004, BC MD Ga) 312 BR 713.

In determining whether debtors' individual retirement accounts were excluded from bankruptcy estate under 11 USCS § 541(c)(2) as "trust," bankruptcy court held that debtors could not rely on 26 USCS § 408 as that section was limited in its effect to tax implications and could not be read to create "trust" within meaning of 11 USCS § 541(c)(2). In re Haney (2004, BC ED Pa) 316 BR 827.

Under 26 USCS § 408, pledge of funds in individual retirement account constitutes distribution of funds to individual, and funds are no longer considered as funds saved for retirement. In re Roberts (2004, BC SD Ohio) 326 BR 424, 95 AFTR 2d 2972.

Debtor's Individual Retirement Account did not qualify as genuine trust for purposes of 26 USCS § 408(a), part of Internal Revenue Code; it merely was treated as though it were trust. Unlike 26 USCS § 408(a), there was no indication in 11 USCS § 541(c)(2) that anything which was not genuine trust nonetheless could qualify as trust for purposes of that provision of Bankruptcy Code. Walsh v Benson (In re Benson) (2005, BC WD Pa) 2005 Bankr LEXIS 2760 (criticized in Frank v Wiggins (In re Wiggins) (2006, MD Pa) 341 BR 506, 97 AFTR 2d 2241).

Both 26 USCS § 408(a), (h) begin with phrase "For purposes of this section," and this limiting phrase invites question whether what § 408(a) has to say about individual retirement accounts (IRAs) being trusts has any application outside of 26 USCS § 408(a), e.g., to 11 USCS § 541(c)(2). Debtor failed to show that phrase "for purposes of this section" did not limit characterization of IRAs as trusts to 26 USCS § 408 only; put another way, debtor had not made case that 26 USCS § 408(a) qualified as "applicable nonbankruptcy law" for purposes of 11 USCS § 541(c)(2). Walsh v Benson (In re Benson) (2005, BC WD Pa) 2005 Bankr LEXIS 2760 (criticized in Frank v Wiggins (In re Wiggins) (2006, MD Pa) 341 BR 506, 97 AFTR 2d 2241).

Individual Retirement Account (IRA) which qualifies as trust for purposes of 26 USCS § 408(a) does not necessarily qualify as trust within meaning of 11 USCS § 541(c)(2). To begin with, not every IRA which qualifies as trust for purposes of § 408(a) need be genuine trust; other subsections of § 408 make this abundantly clear. Walsh v Benson (In re Benson) (2005, BC WD Pa) 2005 Bankr LEXIS 2760 (criticized in Frank v Wiggins (In re Wiggins) (2006, MD Pa) 341 BR 506, 97 AFTR 2d 2241).

Because annuity contract clearly permitted debtor to "change ownership" or "assign" his rights to another party, annuity did not meet non-transferability requirement for individual retirement annuity under IRC § 408(b)(1) and thus, was not exempt under Colo. Rev. Stat. § 13-54-102(1)(5). In re Ludwig (2006, BC DC Colo) 345 BR 310.

Because lump sum payment of $ 33,000.00 that debtor paid for his annuity exceeded statutory limit of $ 4,000 set for taxable years in question under IRC § 219(b)(1)(A)-(5)(A), it was not "individual retirement account" under IRC § 408(a) and thus, was not exempt under Colo. Rev. Stat. § 13-54-102(1)(5). In re Ludwig (2006, BC DC Colo) 345 BR 310.

Chapter 7 debtors were not allowed exemption under 11 USCS § 522(b)(3)(C) for inherited IRA because, after funds passed to debtor/beneficiary, they could no longer be classified as anyone's retirement funds; in absence of direct legal authority, court could not conclude that debtors' inherited IRA was governed by I.R.C. § 408 or was exempt under that section. In re Clark (2011, BC WD Wis) 450 BR 858.

Bankruptcy court disallowed Chapter 7 debtor's claim that $61,646 he had in individual retirement account ("IRA") was exempt from creditors' claims under Tenn. Code Ann. § 26-2-105(b) and 11 USCS § 522(b)(3)(C); although debtor offered letter Internal Revenue Service issued pursuant to I.R.C. § 7805 before he declared bankruptcy, which stated that his IRA satisfied requirements of I.R.C. § 408(a), Chapter 7 trustee rebutted presumption set forth in 11 USCS § 522(b)(4)(A) that debtor's IRA was exempt from creditors' claims by showing that debtor engaged in prohibited transaction under I.R.C. § 4975(c)(1)(B) when he gave broker who held funds in his IRA lien on all of his accounts. In re Daley (2011, BC ED Tenn) 459 BR 270.

Early distribution from IRC § 401(k) account, which was qualified retirement plan, was not from individual retirement account under IRC § 408 or IRC § 7701(a)(37) and, thus, did not qualify for exception to 10-percent additional tax under IRC § 72(t)(2)(E) for higher education expenses, even if it were used for higher education expenses Uscinski v Comm'r (2005) TC Memo 2005-124, 89 CCH TCM 1337.

Self-employed taxpayer was not entitled to claimed deduction for contributions to simplified employee pension plan (SEP) pursuant to 26 USCS §§ 401(c)(4) and 408(k)(7) where he failed to submit any substantiation of amount claimed. Karkour v Comm'r (2010) TC Memo 2010-124, 99 CCH TCM 1521.

Taxpayer was subject to 10-percent additional tax under 26 USCS § 72(t)(1) where Commissioner of Internal Revenue introduced evidence from third-party payers that established that she received gross distributions from individual retirement account (IRA) and that certain amount of that was taxable to her, as taxpayer did not assert any reasonable dispute with regard to her receipt of early distribution as required by 26 USCS § 6201(d) and did not establish her entitlement to any of 26 USCS § 72(t)(2)(A) exceptions; IRA was qualified retirement plan to which § 72(t)(1) applied pursuant to 26 USCS §§ 408(a) and 4974(c)(4). Hyde v Comm'r (2011) TC Memo 2011-104, 101 CCH TCM 1502.

Portion of lump sum equal to balance in IRA at date of death, including unrealized appreciation accrued to that date, is income under § 408(d)(1), and if paid in lump sum to non-spouse beneficiary after death of owner, is income in respect of decedent; portion of lump sum distribution in excess of balance of IRA at date of death is not income in respect of descendent. Rev Rul 92-47 (1992) 1992-1 CB 198.

IRA is subject to tax on unrelated business income, and is therefore subject to tax on allocable share of income of limited partnership in which IRA invested as limited partner. Private Letter Ruling 9703026.

Minn. Stat. § 550.37, subd. 24, exempted funds in Individual Retirement Account or Individual Retirement Annuity, each as defined in I.R.C. § 408, whether or not debtor had unlimited access to account balance; IRA, as defined by I.R.C. § 408, was exempt property under Minn. Stat. § 550.37, subd. 24, as limited by terms of Minn. Stat. § 550.37, subd. 24(a), to indexed present value and sums reasonably necessary for support of debtor and debtor's spouse or dependents, as Minnesota Legislature clearly intended that IRAs generally be exempt by expressly listing them, in contrast to 11 USCS § 522(d)(10)(E), which did not mention them by name. Clark v Lindquist (2004, Minn) 683 NW2d 784.

Unpublished Opinion

IRAs received by Chapter 7 debtor as non-spouse beneficiary were exempt under 11 USCS § 522(d)(12); debtor's interest in funds was as inherited IRA that was transferred via trustee-to-trustee transfers in compliance with 26 USCS § 408(d)(3) and was still exempt under 26 USCS § 408(e). In re Palzer-Johnson (2011, BC WD Wash) 2011-1 USTC ¶ 50411, 107 AFTR 2d 2086.

2. Employees under other plans

In chapter 7 liquidation case, debtors' pension plan established pursuant to § 457 of Internal Revenue Code, 26 USCS § 457, was not exempt from creditors' claims; pension plan was not ERISA-based plan, nor was it qualified plan under § 501(a), 403(a), (b) or 408 of Internal Revenue Code of 1986. In re Madia (2003, BC MD Fla) 294 BR 177, 16 FLW Fed B 121.

Employee was still considered active participant in retirement plan for year in which plan was terminated even though his rights to benefits were all forfeited upon such termination, and thus was not eligible to establish individual retirement account on December 31 of year prior to 1982 when he was participant in employer's plan earlier in year despite fact that plan was terminated on September 1 of same year and he received nothing on termination since his rights were not vested. Cooper v Commissioner (1979) TC Memo 1979-256, RIA TC Memo P 79256, 38 CCH TCM 1023.

Taxpayer was considered active participant in former employer's retirement plan under pre-1982 prohibition against deductions by employer-covered IRA participant although employer deposited annual contribution with plan trustee after taxpayer employee's termination where, under terms of plan, taxpayer accrued benefits for each calendar month that he worked; it did not matter that taxpayer received nothing on termination since his rights were not vested. Pizor v Commissioner (1979) TC Memo 1979-487, RIA TC Memo P 79487, 39 CCH TCM 633.

Employee who was employed from January through October of year prior to 1982 by corporation A and was covered by A's qualified profit-sharing plan and was employed in November and December by corporation B which had no qualified plan could not contribute to Individual Retirement Account for year in question based upon her earnings with corporation B since she was covered by A's plan during year; any contributions made by employee for year in question were excess, were not deductible, and were subject to 6 percent excise tax on excess contributions. Barret v Commissioner (1980) TC Memo 1980-5, RIA TC Memo P 80005, 39 CCH TCM 844.

Taxpayer who terminated federal employment in 1975 and opened IRA later in same year was not entitled to IRA deductions since he was active participant in Civil Service Retirement program. Alexander v Commissioner (1980) TC Memo 1980-71, RIA TC Memo P 80071, 39 CCH TCM 1231.

3. What constitutes distribution; early withdrawal

Sole shareholder testified that he did not make any contributions to TD Ameritrade Individual retirement account (IRA) in 1990, evidence showed that sole shareholder did not make contribution of stock to IRA in 1990, but rather account statements revealed that principal purchases of stock were made which became assets of account; moreover, shareholder testified that accounting error resulted in account being valued at $0.19, and evidence revealed no distributions or withdrawals from account since its inception in 1986 and, therefore, supported shareholder's explanation that $0.19 valuation of account in late 1989 was error; therefore, TD Ameritrade IRA was provided for under 26 USCS § 408(a) for purposes of 42 Pa. Cons. Stat. § 8124(b)(1)(ix) and was exempt from execution under § 8124(b)(1)(ix). State Farm Mut. Auto. Ins. Co. v Lincow (2010, ED Pa) 106 AFTR 2d 7216, objection sustained, in part, objection overruled, in part, vacated, in part, remanded (2011, ED Pa) 107 AFTR 2d 2681.

Account was not Individual Retirement Account (IRA) exempt from bankruptcy administration, because prohibited removal of funds from account disqualified account as IRA under 26 USCS § 408(e)(2)(A), and repayment of funds into account did not operate to reinstate account as IRA. In re Hughes (2003, BC MD Fla) 293 BR 528, 16 FLW Fed B 123.

Account was not Individual Retirement Account (IRA) exempt from bankruptcy administration under Fla. Stat. Ann.§ 222.21, because prohibited removal of funds from account disqualified account as IRA under 26 USCS § 408(e)(2)(A), and repayment of funds into account did not operate to reinstate account as IRA. In re Hughes (2003, BC MD Fla) 293 BR 528, 16 FLW Fed B 123.

Where trustee of rollover IRA has not obtained approval to be IRA trustee, rollovers made to trustee are treated as distributions subject to penalty, even though trustee falsely represented to taxpayers that investments were qualified IRA trusts. Schoof v Commissioner (1998) 110 TC 1, 21 EBC 2773.

Taxpayer's use of IRA funds to purchase retirement home is taxable distribution subject to early withdrawal penalty; it is immaterial whether taxpayers or trust itself purchased home since, if trust used assets to acquire personal residence, trust would have engaged in prohibited transaction. Harris v Commissioner (1994) TC Memo 1994-22, RIA TC Memo P 94022, 67 CCH TCM 1983, 94 TNT 13-7.

In order for beneficiary of IRA to transfer interest in IRA to spouse tax free, there must be transfer of interest in IRA to spouse made under divorce or separation decree; where taxpayer receives check made to taxpayer personally and endorses check over to spouse pursuant to divorce decree, form of transfer is taxable, since transfer is first to taxpayer, rather than to his spouse. Jones v Commissioner (2000) TC Memo 2000-219, RIA TC Memo P 53957, 80 CCH TCM 76.

Taxpayers were liable under 26 USCS § 72(t)(1) for 10-percent additional tax on early distributions from qualified retirement plans neither taxpayer had attained age 59-1/2 and distributions were not attributable to disability, or otherwise qualified for exception to 10-percent additional tax. Bhattacharyya v Comm'r (2007) TC Memo 2007-19, 93 CCH TCM 711.

Reimbursement of IRA depositor for payment of brokerage commission which was initially paid by IRA depositor is distribution includible in gross income of depositor even though IRA was initially liable to pay brokerage commission. Private Letter Ruling 8830061.

Taxpayer's withdrawal of funds from individual retirement account to pay cash to ex-spouse pursuant to divorce decree has taxable distribution since withdrawal and payment is not transfer of interest in IRA but is withdrawal. Harris v Commissioner (1991) 14 EBC 1274, TC Memo 1991-375, RIA TC Memo P 91375, 62 CCH TCM 406.

Individual receiving cash surrender value of IRA annuity purchased 3 months earlier, as total distribution under 26 USCS § 408 that is less than individual's cost of annuity, is not entitled to claim ordinary loss deduction on difference between cost and cash surrender value. Rev Rul 80-268 (1980) 1980-2 CB 141.

Although spouse can have community property interest in IRA, and classification of husband's IRA as marital property in agreement is not taxable distribution, proposed transfer of portion of husband's IRA to fund wife's IRA would be taxable distribution. Private Letter Ruling 199937055.

4. When distribution taxable

Bank and one of its employees should have been granted judgment as matter of law pursuant to Fed. R. Civ. P. 50 on investor's breach of contract and fraudulent inducement claims arising from bank's deposit of holdings from investor's defined benefit plans into non-IRA CDs instead of tax-deferred IRA CDs where investor failed to present any evidence of damages because deposit of funds into IRA account would have created same tax consequences pursuant to 26 USCS § 408(e)(4) as alleged breach. Lewis v Bank of Am. NA (2003, CA5 Tex) 343 F3d 540, 30 EBC 2958, reh den, reh, en banc, den (2003, CA5 Tex) 347 F3d 587 and cert den (2004) 540 US 1213, 158 L Ed 2d 141, 124 S Ct 1426.

Although debtor argued bankruptcy court erred by considering federal law outside of bankruptcy law, specifically, tax law, in determining whether his individual retirement accounts (IRAs) had lost their tax-exempt status, court found that 11 USCS § 522(b)(4)(D)(ii) clearly and succinctly required court to evaluate IRAs using non-bankruptcy law; thus, bankruptcy court was bound to evaluate debtor's three IRAs through lens of Internal Revenue Code, and especially under I.R.C. § 408 because of multiple distributions debtor made from IRA; because debtor exercised discretionary authority and responsibility over administration of his IRA, court properly determined debtor to be fiduciary and thus, disqualified person under I.R.C. § 4975(e)(2); moreover, bankruptcy court then evaluated IRA account activity for prohibited transactions under I.R.C. § 4975(c)(1) and correctly found debtor had engaged in two such transactions: direct or indirect transfer to, or use by or for benefit of, disqualified person of income or assets of plan, under I.R.C. § 4975(c)(1)(D), and lending of money or other extension of credit between plan and disqualified person, under I.R.C. § 4975(c)(1)(B). Willis v Menotte (2010, SD Fla) 105 AFTR 2d 1877.

Distributions are taxable in year received, not in year in which rollover period ends; thus when taxpayer in last month of year receives distribution and fails to rollover within 60-day period ending in following year, distribution is taxable in year received rather than in year in which rollover period ends. Welander v Commissioner (1989) 92 TC 866.

Special trial judge found that transaction that involved purchase of stock did not constitute distribution to taxpayer from his IRA where at all times IRA was owner of shares of stock at issue and taxpayer was merely conduit for transaction. Ancira v Comm'r (2002) 119 TC 135.

Commissioner of Internal Revenue was granted summary judgment on estate's challenge to disallowance of reduction in value of IRAs by anticipated income tax liability incurred by beneficiaries upon distribution under I.R.C. § 408(d)(1) because subject matter of hypothetical sale between willing buyer and seller was underlying assets of IRAs, marketable securities, not IRAs themselves; discount for lack of marketability was not warranted, and I.R.C. § 691(c) provided relief from double taxation imposed on beneficiaries. Estate of Kahn v Comm'r (2005) 125 TC 227, 37 EBC 1396.

Because taxpayer admitted that he lacked complete paper trail for his IRAs and relied on his own testimony to establish that portion of IRA distributions in 2001 was not taxable, and court found his testimony to be general, vague, conclusory, and/or questionable in certain material respects, court sustained Commissioner of Internal

Revenue's determination regarding taxpayer's IRA distributions. Hoang v Comm'r (2006) TC Memo 2006-47, 91 CCH TCM 899.

Taxpayer was liable for income tax on early distribution from his qualified retirement plan for year in which distribution was actually received under 26 USCS §§ 72 and 408, plus ten percent additional tax under 26 USCS § 72(t), and accuracy related penalty under 26 USCS § 6662(a) for under reporting his income. Thompson v Comm'r (2007) TC Memo 2007-327, 94 CCH TCM 430.

Commissioner of Internal Revenue was granted summary judgment under U.S. Tax Ct. R. 121(a) on taxpayer's challenge to determination of income tax deficiency because lump-sum distributions received by taxpayer as beneficiary of his decedent father's individual retirement accounts (IRAs) were taxable under I.R.C. § 408(d)(1), I.R.C. § 691(a)(1), and I.R.C. § 72 where no nondeductible contributions were made to IRAs. Cutler v Comm'r (2007) TC Memo 2007-348, 94 CCH TCM 497.

Taxpayer's receipt of distributions as beneficiary from decedent's IRA were taxable under 26 USCS § 408(d)(1) where taxpayer did not take steps to substantially comply with trustee-to-trustee transfer provisions under Rev. Rul. 78-406, 1978-2 C.B. 157; funds at issue were transferred to nonqualified account, without any instructions to transferee bank regarding establishment of IRA account to hold them, and remained there for three years. Jankelovits v Comm'r (2008) TC Memo 2008-285, 96 CCH TCM 460.

Pursuant to 26 USCS § 72(t)(2)(E), taxpayers were not subject to 10-percent additional tax imposed on early distribution from their qualified retirement plans to extent that amounts they expended for daughter's off-campus room and board did not exceed amount included by her university in cost of attendance for that year; under 26 USCS § 529(e)(3)(B)(ii) and 20 USCS § 1087ll(d), "cost of attendance" for eligible student included allowance, as determined by institution, for room and board costs. Venet v Comm'r (2009) TC Memo 2009-268, 98 CCH TCM 486.

Distributions from taxpayer's retirement accounts did not qualify for exception to 10-percent additional tax on early distributions under 26 USCS § 72(t)(2)(A)(iv), as distribution amounts did not conform to one of approved methods in IRS Notice 89-25, Q&A-12, 1989-1 C.B. 662, 666 and taxpayer did not explain how distributions were calculated; given annuity account balances and his age and life expectancy in year when withdrawals began, it was unclear how distributions could have been substantially equal periodic payments made for taxpayer's life expectancy. Prough v Comm'r (2010) TC Memo 2010-20, 99 CCH TCM 1093.

At trial, taxpayers failed to present any evidence regarding nondeductible contributions to husband's Individual Retirement Account; accordingly, they failed to show that any of seized funds were improperly included in gross income for their 2004 tax year. Swanton v Comm'r (2010) TC Memo 2010-140, 99 CCH TCM 1578.

Taxpayers were not liable for excise tax on excess contributions to their Roth individual retirement accounts under 26 USCS §§ 4973 and 408; accordingly, they were not liable for additions to tax under 26 USCS § 6651(a)(1) or accuracy-related penalties under 26 USCS § 6662(a). Hellweg v Comm'r (2011) TC Memo 2011-58, 101 CCH TCM 1261.

Debtors were not permitted to claim that interpreting "benefits" under Mont. Code Ann. § 25-13-608(1)(f) to include stock proceeds at issue would have been consistent with exemptions such as those in 11 USCS § 522(d)(10)(E); agreement, guarantee, and promissory note contained no direction or indication that monthly payments one debtor received from sale of stock, which then paid for debtor's end-of-life medical care and medications, were intended as benefits that qualified under specific sections of 26 USCS §§ 401(a), 403(a), (b), 408, and federal exemptions, which in any event, did not apply in opt-out state like Montana, provided no support for debtors' claim that exemption they claimed was reasonable. In re Archer (2006) 2006 MT 82, 332 Mont 1, 136 P3d 563.

Unpublished Opinion

Unpublished: Taxpayers' flexible premium retirement annuity (FPRA) did not meet definition of individual retirement qualified annuity under I.R.C. § 408(b) to be entitled to tax-free rollover because FPRA in order to qualify had to have limited annual contribution or premium and FPRA at issue did not so limit its annual premiums. Sadberry v Comm'r (2005, CA5 Tex) 153 Fed Appx 336, 2005-2 USTC P 50644, 96 AFTR 2d 7119.

5. Contribution after filing return

Taxpayer who has not made contribution before he files return is nevertheless free to claim deduction on that return as long as he makes contribution before due date of return. Rev Rul 84-18 (1984) 1984-1 CB 88.

Taxpayer may be subject to negligence penalty if he files return claiming IRA deduction he has not yet made and fails to make IRA contribution by due date of return. Rev Rul 84-18 (1984) 1984-1 CB 88.

Where taxpayer mistakenly directed bank to close his individual retirement account (IRA) and then waited more than 60 days to deposit or redeposit those funds in IRA, taxpayer could not claim tax benefit of rollover contribution, IRC § 408(d)(3), to IRA; thus, taxpayer had not overpaid his 1996 federal income taxes. Metcalf v Comm'r (2002) 28 EBC 2161, TC Memo 2002-123, RIA TC Memo P 54749, 83 CCH TCM 1672, affd (2003, CA9) 62 Fed Appx 811, 2003-1 USTC P 50444, 91 AFTR 2d 1910.

Distribution of funds from IRA was taxable income where taxpayers did not satisfy any of necessary requirements to properly roll over IRA funds into another IRA account. Anderson v Comm'r (2002) 28 EBC 2917, TC Memo 2002-171, RIA TC Memo P 54810, 83 CCH TCM 48.

Taxpayer's distribution from IRA was includable in taxpayer's gross income despite fact that bank's error caused distribution, but taxpayer was not liable for accuracy-related penalty due to substantial understatement of income tax. Crow v Comm'r (2002) 28 EBC 2558, TC Memo 2002-178, RIA TC Memo P 54817, 84 CCH TCM 91.

6. Rollovers

Proceeds from individual retirement account must be rolled over within 60 days of receipt even where judicial constraints are imposed upon disposition of funds; order of court in which taxpayer's divorce proceedings were pending does not suspend 60 day rollover period, and taxpayer is required to include in gross income funds he failed to roll over within 60 day period following withdrawal from annuity fund. Rini v Commissioner (1992, CA6) 1992 US App LEXIS 3485.

Taxpayer's withdrawal of funds from one IRA and redeposit into another IRA is nontaxable rollover, not trustee-to-trustee transfer, so that two subsequent withdrawals in same year were taxable distributions. Martin v Commissioner (1994, CA5) 73 AFTR 2d 1722, 94 TNT 79-19.

Taxpayer who incorrectly treated IRA transaction in closed year as complete rollover is bound by duty of consistency to treat distribution 2 years later from account as not eligible for rollover treatment as distribution from IRA taxable in its entirety. Estate of Ashman v Commissioner (2000, CA9) 231 F3d 541, 2000 CDOS 8573, 2000 Daily Journal DAR 11431, 25 EBC 1586, 2000-2 USTC P 50806, 86 AFTR 2d 6722.

Judgment in favor of claimant on his claim brought under 29 USCS § 1132 was affirmed because claimant had same type of possession and control of funds once transferred into individual retirement account pursuant to trustee-to-trustee transfer that he would have had were funds left with employer; therefore, he did not "receive" funds for purposes of offset under disability plan. Blankenship v Liberty Life Assur. Co. (2007, CA9 Cal) 486 F3d 620, 40 EBC 2239.

Chapter 7 debtor was not entitled to exemption under Ind. Code § 34-55-10-2(c)(6) in individual retirement account (IRA) that he inherited from his father, as pursuant to 26 USCS § 408(d)(3)(C)(i)(II), his rollover of inherited IRA into traditional IRA in his name destroyed its status as IRA; Indiana's definition of retirement plan in Ind. Code § 34-6-2-131 directly hinged on Internal Revenue Code characterization. In re Klipsch (2010, BC SD Ind) 435 BR 586.

Money in individual retirement account (IRA) which Chapter 7 bankruptcy debtor inherited from her father was not exempt from creditors' claims under Fla. Stat. § 222.21(2) because debtor was not transferor's spouse; under 26 USCS § 408(d)(3), debtor's interest in IRA no longer qualified for same exemptions from taxation enjoyed by her father, and tax consequences of inherited IRA made it different "fund or account" from original IRA and put it outside scope of Fla. Stat. § 222.21(2)(a). In re Ard (2010, BC MD Fla) 435 BR 719.

Rollover of husband's lump sum distribution to wife's IRA does not qualify as tax-free rollover since spouse's IRA does not qualify as eligible retirement plan for benefit of distributee. Rodoni v Commissioner (1995) 105 TC 29, 19 EBC 1733, 95 TNT 144-11.

Cash distribution from Keogh or IRA must be contributed in cash to IRA to qualify as tax-free rollover; where taxpayer received cash distribution, then purchased securities which were contributed in kind to IRA, taxpayer did not qualify for rollover treatment. Lemishow v Commissioner (1998) 110 TC 110, 21 EBC 2742.

Where taxpayer receives complete distribution from IRA and on same day personally deposits distribution with another trustee to establish new IRA account, and 3 months later transfers balance in new IRA into non-IRA account, but within 60 days transfers amount back into IRA account, second transfer is not rollover since it is made within one year of previous rollover; trustee-to-trustee transfer is not made where beneficiary of IRA receives distribution and personally delivers it to successor custodian. Martin (1992) TC Memo 1992-331, RIA

TC Memo P 92331, 63 CCH TCM 3122, affd (1993, CA5 Tex) 1993 US App LEXIS 5309, reported in full (1993, CA5) 1993 US App LEXIS 4505.

Taxpayer offered inconsistent explanations as to why IRA contribution was made 4 days after expiration of rollover period; only facts in record showed contribution was made more than 60 days after date of contribution; thus, distribution did not qualify as rollover distribution, and, per I.R.C. § 408(d), had to be included in taxpayer's gross income. Mostafa v Comm'r (2006) TC Memo 2006-106, 91 CCH TCM 1187.

Where taxpayers contended that distribution of stock from employee stock option plan (ESOP) was only placed with depository agent for safekeeping until stock was registered and could be sold, with eventual establishment of individual retirement account (IRA), and that distributions from depository account were not subject to tax because stock deposit was not valid rollover and thus account was not IRA, valid rollover of stock distribution from ESOP nonetheless occurred within 60 days of stock distribution under I.R.C. § 408(d); taxpayers physically transferred stock to agent which issued receipt indicating deposit to rollover account established by taxpayers, taxpayers never advised agent that deposit was mistake, deposit was designated rollover contribution, and form designating rollover was executed before paperwork for registration of stock was sent by taxpayers. Kopty v Comm'r (2007) TC Memo 2007-343, 94 CCH TCM 480.

Taxpayers who claimed to have received inaccurate information from IRS agent to effect that they could do nothing to correct failed rollover of distribution from Individual Retirement Account (IRA) when in fact they could have petitioned Secretary of Treasury to waive 60-day rollover requirement as permitted by 26 USCS § 408(d)(3)(I) because it was statute that governed taxpayers' substantive tax liability and that statement of agent did not alter that rule. Atkin v Comm'r (2008) TC Memo 2008-93, 95 CCH TCM 1364.

Although lump-sum distribution which taxpayer received from his employer's qualified pension plan in 1978 would have been eligible for 10-year averaging under 26 USCS § 402 in 1978, taxpayer lost benefits of 10-year averaging by rolling over this distribution into individual retirement account with his bank and then withdrawing all funds in that account in 1980 when he was over 59 and one-half years of age. Costanza v Commissioner (1985) 6 EBC 1958, TC Memo 1985-317, RIA TC Memo P 85317, 50 CCH TCM 280.

Total distribution on account of termination of service with former employer may be rolled over into IRA within 60 days after receipt where there is no liquidation, merger or consolidation between former employer and new employer; merely because employee performs same work for new employer that he did for former employer does not deprive him of benefits of lump-sum distribution. Devinaspre v Commissioner (1985) 6 EBC 2156, TC Memo 1985-435, RIA TC Memo P 85435, 50 CCH TCM 846.

IRA whose trust instrument fulfills requirements of section 408(a) is valid despite fact that contribution was not qualified for rollover and was therefore subject to excise tax penalty on excess contributions. Michel v Commissioner (1989) 11 EBC 2473, TC Memo 1989-670, RIA TC Memo P 89670, 58 CCH TCM 1019.

Transfer of one-half interest in individual retirement account to spouse is taxable because, under rollover rules, only transfer incident to divorce is tax-free. Private Letter Ruling 8820086.

Taxpayer's temporary withdrawal of funds from IRA for personal use can qualify for tax-free rollover treatment where funds are redeposited into same IRA account within 60 day period; taxpayer is limited to one tax-free rollover per year. Private Letter Ruling 9010007.

Decedent's second wife and sole beneficiary of residuary estate may roll over individual retirement account which is part of residuary estate to her own individual retirement account where first wife, who had been designated as primary beneficiary, died prior to decedent's death, and as consequence IRA was payable to decedent's estate. Private Letter Ruling 9034046.

Upon termination of qualified profit-sharing plan that meets requirements of 26 USCS § 401, participating owner-employee, who is under 59 1/2 and not disabled, may rollover his funds tax-free from qualified plan into IRA that meets requirements of 26 USCS § 408. Rev Rul 78-404 (1978) 1978-2 CB 156.

Transfer of participant's individual retirement account funds from one trustee bank to another that occurs within three year period following rollover contribution within meaning of 26 USCS § 408(d)(3) but involves no payment or distribution of funds to participant, is not another rollover contribution and does not result in distribution includible in gross income of participant. Rev Rul 78-406 (1978) 1978-2 CB 157.

Taxpayer is not required to include in gross income amounts distributed from deceased spouse's IRA where proceeds were placed into trust created by deceased spouse and then distributed from trust to taxpayer, who rolled distributions over into IRA within 60 days of date of distribution. Private Letter Ruling 9350040.

Surviving spouse is treated as having acquired IRA proceeds from decedent, and not through trust, where IRA beneficiary is trust, surviving spouse is trust's settlor and trustee with right to demand payment of trust principal

for any reason, and proceeds from IRA's that constitute trust principal are actually paid to surviving spouse as settlor of trust. Private Letter Ruling 9611057.

Surviving spouse may roll over IRA into own IRA despite beneficiary designation on IRA "as per the estate" where probate court issues order that designation means that proceeds were to be paid to surviving spouse. Private Letter Ruling 9620038.

Surviving spouse can rollover IRA distributions from deceased husband's IRA where IRA distributions first passed through trust of which surviving spouse was beneficiary, even though trust instrument limited annual withdrawal rights; surviving spouse can rollover annual distributions from IRA through trust. Private Letter Ruling 9649045.

Despite bar against rollover of IRA to nonspousal beneficiary, nonspousal beneficiary can, following death of original beneficiary, organize new IRA in original beneficiary's name and fund new IRA with trustee to trustee transfers, thereby consolidating IRA's of original beneficiary and changing investment thereof. Private Letter Ruling 9737030.

7. Excess contribution tax

Six percent tax on excess contributions to individual retirement accounts is to be paid by individual to whom deduction is allowed; although bank gave taxpayer erroneous advice as to taxability of such contributions, taxpayer, not bank is liable for 6 percent tax and fact that erroneous advice was given is immaterial. Goetz v Commissioner (1978) TC Memo 1978-365, RIA TC Memo P 78365, 37 CCH TCM 1510.

Taxpayer is disallowed deduction and assessed 6% excise tax where taxpayer opened individual retirement account, taxpayer's employer later adopted qualified pension plan, and Internal Revenue Service advised taxpayer to hold onto individual retirement account, erroneous advice regarding maintaining account is not binding on Internal Revenue Service. Goldstein v Commissioner (1978) TC Memo 1978-480, RIA TC Memo P 78480, 37 CCH TCM 1849-43.

Taxpayer is liable for 6 percent excise tax on inadvertent excess contributions to Individual Retirement Account; law makes no distinction between excess contributions made willfully and those made inadvertently, nor does it matter that taxpayer was given incorrect advice both from IRS and insurance company offering account. Tallon v Commissioner (1979) TC Memo 1979-423, RIA TC Memo P 79423, 39 CCH TCM 352.

Employee who was employed from January through October of year prior to 1982 by corporation A and was covered by A's qualified profit-sharing plan and was employed in November and December by corporation B which had no qualified plan could not contribute to Individual Retirement Account for year in question based upon her earnings with corporation B since she was covered by A's plan during year; any contributions made by employee for year in question were excess, were not deductible, and were subject to 6 percent excise tax on excess contributions. Barret v Commissioner (1980) TC Memo 1980-5, RIA TC Memo P 80005, 39 CCH TCM 844.

Earnings credited to IRA, which are attributable to non-IRA companion account maintained at same financial institution, are deemed to be interest earned by taxpayer on companion account, and when credited to IRA, these earnings are treated as received by taxpayer, includible in his income, and as contributions to IRA, regardless of whether companion account is credited with little or no interest or maximum interest allowable under applicable law and regulations, or whether companion account deposit required is not equal to IRA contribution. Rev Rul 85-62 (1985) 1985-1 CB 153.

8. Setoff

Bank, as fiduciary of debtor who maintained Individual Retirement Account, is prohibited by common law and Internal Revenue Code from asserting right of set-off against Individual Retirement Account. In re McDaniel (1984, BC WD Tex) 41 BR 132.

§ 414. Definitions and special rules

(a) Service for predecessor employer. For purposes of this part [26 USCS §§ 401 et seq.]—

(1) in any case in which the employer maintains a plan of a predecessor employer, service for such predecessor shall be treated as service for the employer, and

(2) in any case in which the employer maintains a plan which is not the plan maintained by a predecessor employer, service for such predecessor shall, to the extent provided in regulations prescribed by the Secretary, be treated as service for the employer.

(b) Employees of controlled group of corporations. For purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416 [26 USCS §§ 401, 408(k), 408(p), 410, 411, 415, and 416], all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a) [26 USCS § 1563(a)], determined without regard to section 1563(a)(4) and (e)(3)(C) [26 USCS § 1563(a)(4), (e)(3)(C)]) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the applicable limitations provided by section 404(a) [26 USCS § 404(a)] shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary.

(c) Employees of partnerships, proprietorships, etc., which are under common control. For purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416 [26 USCS §§ 401, 408(k), 408(p), 410, 411, 415, and 416] under regulations prescribed by the Secretary, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

(d) Governmental plan. For purposes of this part [26 USCS §§ 401 et seq.], 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. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act (59 Stat. 669). The term 'governmental plan' includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) [26 USCS § 7701(a)(40)]), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) [26 USCS § 7871(d)]), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function).

(e) Church plan.

(1) In general. For purposes of this part [26 USCS §§ 401 et seq.], the term "church plan" means a plan established and maintained (to the extent required in paragraph (2)(B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 [26 USCS § 501].

(2) Certain plans excluded. The term "church plan" does not include a plan—

(A) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 [26 USCS § 513]); or

(B) if less than substantially all of the individuals included in the plan are individuals described in paragraph (1) or (3)(B) (or their beneficiaries).

(3) Definitions and other provisions. For purposes of this subsection—

(A) Treatment as church plan. A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(B) Employee defined. The term employee of a church or a convention or association of churches shall include—

(i) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(ii) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 [26 USCS § 501] and which is controlled by or associated with a church or a convention or association of churches; and

(iii) an individual described in subparagraph (E).

(C) Church treated as employer. A church or a convention or association of churches which is exempt from tax under section 501 [26 USCS § 501] shall be deemed the employer of any individual included as an employee under subparagraph (B).

(D) Association with church. An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(E) Special rule in case of separation from plan. If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization described in clause (ii) of paragraph (3)(B), the church plan shall not fail to meet the requirements of this subsection merely because the plan—

(i) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(ii) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7) [26 USCS § 72(m)(7)]) at the time of such separation from service.

(4) Correction of failure to meet church plan requirements.

(A) In general. If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 [26 USCS § 501] fails to meet one or more of the requirements of this subsection and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this subsection for the year in which the correction was made and for all prior years.

(B) Failure to correct. If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this subsection beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(C) Correction period defined. The term "correction period" means—

(i) the period ending 270 days after the date of mailing by the Secretary of a notice of default with respect to the plan's failure to meet one or more of the requirements of this subsection;

(ii) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(iii) any additional period which the Secretary determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

(5) Special rules for chaplains and self-employed ministers.

(A) Certain ministers may participate. For purposes of this part—

(i) In general. A duly ordained, commissioned, or licensed minister of a church is described in paragraph (3)(B) if, in connection with the exercise of their ministry, the minister—

(I) is a self-employed individual (within the meaning of section 401(c)(1)(B) [26 USCS § 401(c)(1)(B)], or

(II) is employed by an organization other than an organization which is described in section 501(c)(3) [26 USCS § 501(c)(3)] and with respect to which the minister shares common religious bonds.

(ii) Treatment as employer and employee. For purposes of sections 403(b)(1)(A) and 404(a)(10) [26 USCS §§ 403(b)(1)(A) and 404(a)(10)], a minister described in clause (i)(I) shall be treated as employed by the minister's own employer which is an organization described in section 501(c)(3) [26 USCS § 501(c)(3)] and exempt from tax under section 501(a) [26 USCS § 501(a)].

(B) Special rules for applying section 403(b) [26 USCS § 403(b)] to self-employed ministers. In the case of a minister described in subparagraph (A)(i)(I)—

(i) the minister's includible compensation under section 403(b)(3) [26 USCS § 403(b)(3)] shall be determined by reference to the minister's earned income (within the meaning of section 401(c)(2) [26 USCS § 401(c)(2)]) from such ministry rather than the amount of compensation which is received from an employer, and

(ii) the years (and portions of years) in which such minister was a self-employed individual (within the meaning of section 401(c)(1)(B) [26 USCS § 401(c)(1)(B)]) with respect to such ministry shall be included for purposes of section 403(b)(4) [26 USCS § 403(b)(4)].

(C) Effect on non-denominational plans. If a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry participates in a church plan (within the meaning of this section) and in the exercise of such ministry is employed by an employer not otherwise participating in such church plan, then such employer may exclude such minister from being treated as an employee of such employer for purposes of applying sections 401(a)(3), 401(a)(4), and 401(a)(5) [26 USCS §§ 401(a)(3), 401(a)(4), and 401(a)(5)], as in effect on September 1, 1974, and sections 401(a)(4), 401(a)(5), 401(a)(26), 401(k)(3), 401(m), 403(b)(1)(D) [26 USCS §§ 401(a)(4), 401(a)(5), 401(a)(26), 401(k)(3), 401(m), 403(b)(1)(D)] (including section 403(b)(12) [26 USCS § 403(b)(12)]), and 410 [26 USCS § 410] to any stock bonus, pension, profit-sharing, or annuity plan (including an annuity described in section 403(b) [26 USCS § 403(b)] or a retirement income account described in section 403(b)(9) [26 USCS § 403(b)(9)]). The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purpose of, and prevent the abuse of, this subparagraph.

(D) Compensation taken into account only once. If any compensation is taken into account in determining the amount of any contributions made to, or benefits to be provided under, any church plan, such compensation shall not also be taken into account in determining the amount of any contributions made to, or benefits to be provided under, any other stock bonus, pension, profit-sharing, or annuity plan which is not a church plan.

(E) Exclusion. In the case of a contribution to a church plan made on behalf of a minister described in subparagraph (A)(i)(II), such contribution shall not be included in the gross income of the minister to the extent that such contribution would not be so included if the minister was an employee of a church.

(f) Multiemployer plan.

(1) Definition. For purposes of this part [26 USCS §§ 401 et seq.], the term "multiemployer plan" means a plan—

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation.

(2) Cases of common control. For purposes of this subsection, all trades or businesses (whether or not incorporated) which are under common control within the meaning of subsection (c) are considered a single employer.

(3) Continuation of status after termination. Notwithstanding paragraph (1), a plan is a multiemployer plan on and after its termination date under title IV of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1301 et seq.] if the plan was a multiemployer plan under this subsection for the plan year preceding its termination date.

(4) Transitional rule. For any plan year which began before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980], the term "multiemployer plan" means a plan described in this subsection as in effect immediately before that date.

(5) Special election. Within one year after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980], a multiemployer plan may irrevocably elect, pursuant to procedures established by the Pension Benefit Guaranty Corporation and subject to the provisions of section 4403 [4303] (b) and (c) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1453(b) and (c)], that the plan shall not be treated as a multiemployer plan for any purpose under such Act or this title, if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980—

(A) the plan was not a multiemployer plan because the plan was not a plan described in section 3(37)(A)(iii) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(37)(A)(iii)] and section 414(f)(1)(C) [26 USCS § 414(f)(1)(C)] (as such provisions were in effect on the day before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980]); and

(B) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the Pension Benefit Guaranty Corporation, the Secretary of Labor and the Secretary.

(6) Election with regard to multiemployer status.

(A) Within 1 year after the enactment of the Pension Protection Act of 2006 [enacted Aug. 17, 2006]—

(i) An election under paragraph (5) may be revoked, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, if, for each of the 3 plan years prior to the date of the enactment of that Act, the plan would have been a multiemployer plan but for the election under paragraph (5), and

(ii) a plan that meets the criteria in subparagraph (A) and (B) of paragraph (1) of this subsection or that is described in subparagraph (E) may, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, elect to be a multiemployer plan, if—

(I) for each of the 3 plan years immediately preceding the first plan year for which the election under this paragraph is effective with respect to the plan, the plan has met those criteria or is so described,

(II) substantially all of the plan's employer contributions for each of those plan years were made or required to be made by organizations that were exempt from tax under section 501 [26 USCS § 501], and

(III) the plan was established prior to September 2, 1974.

(B) An election under this paragraph shall be effective for all purposes under this Act and under the Employee Retirement Income Security Act of 1974, starting with any plan year beginning on or after January 1, 1999, and ending before January 1, 2008, as designated by the plan in the election made under subparagraph (A)(ii).

(C) Once made, an election under this paragraph shall be irrevocable, except that a plan described in subparagraph (A)(ii) shall cease to be a multiemployer plan as of the plan year beginning immediately after the first plan year for which the majority of its employer contributions were made or required to be made by organizations that were not exempt from tax under section 501 [26 USCS § 501].

(D) The fact that a plan makes an election under subparagraph (A)(ii) does not imply that the plan was not a multiemployer plan prior to the date of the election or would not be a multiemployer plan without regard to the election.

(E) A plan is described in this subparagraph if it is a plan sponsored by an organization which is described in section 501(c)(5) [26 USCS § 501(c)(5)] and exempt from tax under section 501(a) [26 USCS § 501(a)] and which was established in Chicago, Illinois, on August 12, 1881.

(F) Maintenance under collective bargaining agreement. For purposes of this title and the Employee Retirement Income Security Act of 1974, a plan making an election under this paragraph shall be treated as maintained pursuant to a collective bargaining agreement if a collective bargaining agreement, expressly or otherwise, provides for or permits employer contributions to the plan by one or more employers that are signatory to such agreement, or participation in the plan by one or more employees of an employer that is signatory to such agreement, regardless of whether the plan was

created, established, or maintained for such employees by virtue of another document that is not a collective bargaining agreement.

(g) Plan administrator. For purposes of this part [26 USCS §§ 401 et seq.], the term "plan administrator" means—

(1) the person specifically so designated by the terms of the instrument under which the plan is operated;

(2) in the absence of a designation referred to in paragraph (1)—

(A) in the case of a plan maintained by a single employer, such employer,

(B) in the case of a plan maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who maintained the plan, or

(C) in any case to which subparagraph (A) or (B) does not apply, such other person as the Secretary may by regulation, prescribe.

(h) Tax treatment of certain contributions.

(1) In general. Effective with respect to taxable years beginning after December 31, 1973, for purposes of this title, any amount contributed—

(A) to an employees' trust described in section 401(a) [26 USCS § 401(a)], or

(B) under a plan described in section 403(a) [26 USCS § 403(a)], shall not be treated as having been made by the employer if it is designated as an employee contribution.

(2) Designation by units of government. For purposes of paragraph (1), in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, or a governmental plan described in the last sentence of section 414(d) [subsec. (d) of this section] (relating to plans of Indian tribal governments), where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions.

(i) Defined contribution plan. For purposes of this part [26 USCS §§ 401 et seq.], the term "defined contribution plan" means a plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(j) Defined benefit plan. For purposes of this part [26 USCS §§ 401 et seq.], the term "defined benefit plan" means any plan which is not a defined contribution plan.

(k) Certain plans. A defined benefit plan which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant shall—

(1) for purposes of section 410 [26 USCS § 410] (relating to minimum participation standards), be treated as a defined contribution plan,

(2) for purposes of sections 72(d) [26 USCS § 72(d)] (relating to treatment of employee contributions as separate contract), 411(a)(7)(A) [26 USCS § 411(a)(7)(A)] (relating to minimum vesting standards), 415 [26 USCS § 415] (relating to limitations on benefits and contributions under qualified plans), and 401(m) [26 USCS § 410(m)] (relating to nondiscrimination tests for matching requirements and employee contributions), be treated as consisting of a defined contribution plan to the extent benefits are based on the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan, and

(3) for purposes of section 4975 [26 USCS § 4975] (relating to tax on prohibited transactions), be treated as a defined benefit plan.

(l) Merger and consolidations of plans or transfers of plan assets.

(1) In general. A trust which forms a part of a plan shall not constitute a qualified trust under section 401 [26 USCS § 401] and a plan shall be treated as not described in section 403(a) [26 USCS § 403(a)] unless in the case of any merger or consolidation of the plan with, or in the case of any transfer of assets or liabilities of such plan to, any other trust plan after September 2, 1974, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consoli-

dation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence does not apply to any multiemployer plan with respect to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1301 et seq.] applies.

(2) Allocation of assets in plan spin-offs, etc.

(A) In general. In the case of a plan spin-off of a defined benefit plan, a trust which forms part of—

(i) the original plan, or

(ii) any plan spun off from such plan, shall not constitute a qualified trust under this section unless the applicable percentage of excess assets are allocated to each of such plans.

(B) Applicable percentage. For purposes of subparagraph (A), the term "applicable percentage" means, with respect to each of the plans described in clauses (i) and (ii) of subparagraph (A), the percentage determined by dividing—

(i) the excess (if any) of—

(I) the sum of the funding target and target normal cost determined under section 430 [26 USCS § 430], over

(II) the amount of the assets required to be allocated to the plan after the spin-off (without regard to this paragraph), by

(ii) the sum of the excess amounts determined separately under clause (i) for all such plans.

(C) Excess assets. For purposes of subparagraph (A), the term "excess assets" means an amount equal to the excess (if any) of—

(i) the fair market value of the assets of the original plan immediately before the spin-off, over

(ii) the amount of assets required to be allocated after the spin-off to all plans (determined without regard to this paragraph).

(D) Certain spun-off plans not taken into account.

(i) In general. A plan involved in a spin-off which is described in clause (ii), (iii), or (iv) shall not be taken into account for purposes of this paragraph, except that the amount determined under subparagraph (C)(ii) shall be increased by the amount of assets allocated to such plan.

(ii) Plans transferred out of controlled groups. A plan is described in this clause if, after such spin-off, such plan is maintained by an employer who is not a member of the same controlled group as the employer maintaining the original plan.

(iii) Plans transferred out of multiple employer plans. A plan as described in this clause if, after the spin-off, any employer maintaining such plan (and any member of the same controlled group as such employer) does not maintain any other plan remaining after the spin-off which is also maintained by another employer (or member of the same controlled group as such other employer) which maintained the plan in existence before the spin-off.

(iv) Terminated plans. A plan is described in this clause if, pursuant to the transaction involving the spin-off, the plan is terminated.

(v) Controlled group. For purposes of this subparagraph, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m), or (o).

(E) Paragraph not to apply to multiemployer plans. This paragraph does not apply to any multiemployer plan with respect to any spin-off to the extent that participants either before or after the spin-off are covered under a multiemployer plan to which title IV of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1301 et seq.] applies.

(F) Application to similar transaction. Except as provided by the Secretary, rules similar to the rules of this paragraph shall apply to transactions similar to spin-offs.

(G) Special rules for bridge banks. For purposes of this paragraph, in the case of a bridge depository institution established under section 11(i) of the Federal Deposit Insurance Act (12 U.S.C. 1821(i))—

(i) such bank shall be treated as a member of any controlled group which includes any insured bank (as defined in section 3(h) of such Act (12 U.S.C. 1813(h))—

(I) which maintains a defined benefit plan,

(II) which is closed by the appropriate bank regulatory authorities, and

(III) any asset and liabilities of which are received by the bridge depository institution, and

(ii) the requirements of this paragraph shall not be treated as met with respect to such plan unless during the 180-day period beginning on the date such insured bank is closed—

(I) the bridge depository institution has the right to require the plan to transfer (subject to the provisions of this paragraph) not more than 50 percent of the excess assets (as defined in subparagraph (C)) to a defined benefit plan maintained by the bridge depository institution with respect to participants or former participants (including retirees and beneficiaries) in the original plan employed by the bridge depository institution or formerly employed by the closed bank, and

(II) no other merger, spin-off, termination, or similar transaction involving the portion of the excess assets described in subclause (I) may occur without the prior written consent of the bridge depository institution.

(m) Employees of an affiliated service group.

(1) In general. For purposes of the employee benefit requirements listed in paragraph (4), except to the extent otherwise provided in regulations, all employees of the members of an affiliated service group shall be treated as employed by a single employer.

(2) Affiliated service group. For purposes of this subsection, the term "affiliated service group" means a group consisting of a service organization (hereinafter in this paragraph referred to as the "first organization") and one or more of the following:

(A) any service organization which—

(i) is a shareholder or partner in the first organization, and

(ii) regularly performs services for the first organization or is regularly associated with the first organization in performing services for third persons, and

(B) any other organization if—

(i) a significant portion of the business of such organization is the performance of services (for the first organization, for organizations described in subparagraph (A), or for both) of a type historically performed in such service field by employees, and

(ii) 10 percent or more of the interests in such organization is held by persons who are highly compensated employees (within the meaning of section 414(q) [26 USCS § 414(q)]) of the first organization or an organization described in subparagraph (A).

(3) Service organizations. For purposes of this subsection, the term "service organization" means an organization the principal business of which is the performance of services.

(4) Employee benefit requirements. For purposes of this subsection, the employee benefit requirements listed in this paragraph are—

(A) paragraphs (3), (4), (7), (16), (17), and (26) of section 401(a) [26 USCS § 401(a)], and

(B) sections 408(k), 408(p), 410, 411, 415, and 416 [26 USCS §§ 408(k), 408(p), 410, 411, 415, and 416].

(5) Certain organizations performing management functions. For purposes of this subsection, the term "affiliated service group" also includes a group consisting of—

(A) an organization the principal business of which is performing, on a regular and continuing basis, management functions for 1 organization (or for 1 organization and other organizations related to such 1 organization), and

(B) the organization (and related organizations) for which such functions are so performed by the organization described in subparagraph (A).

For purposes of this paragraph, the term "related organizations" has the same meaning as the term "related persons" when used in section 144(a)(3) [26 USCS § 144(a)(3)].

(6) Other definitions. For purposes of this subsection—

(A) Organization defined. The term "organization" means a corporation, partnership, or other organization.

(B) Ownership. In determining ownership, the principles of section 318(a) [26 USCS § 318(a)] shall apply.

(n) Employee leasing.

(1) In general. For purposes of the requirements listed in paragraph (3), with respect to any person (hereinafter in this subsection referred to as the "recipient") for whom a leased employee performs services—

(A) the leased employee shall be treated as an employee of the recipient, but

(B) contributions or benefits provided by the leasing organization which are attributable to services performed for the recipient shall be treated as provided by the recipient.

(2) Leased employee. For purposes of paragraph (1), the term "leased employee" means any person who is not an employee of the recipient and who provides services to the recipient if—

(A) such services are provided pursuant to an agreement between the recipient and any other person (in this subsection referred to as the "leasing organization"),

(B) such person has performed such services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, and

(C) such services are performed under primary direction or control by the recipient.

(3) Requirements. For purposes of this subsection, the requirements listed in this paragraph are—

(A) paragraphs (3), (4), (7), (16), (17), and (26) of section 401(a) [26 USCS § 401(a)],

(B) sections 408(k), 408(p), 410, 411, 415, and 416 [26 USCS §§ 408(k), 408(p), 410, 411, 415, and 416], and

(C) sections 79, 106, 117(d), 120, 125, 127, 129, 132, 137, 274(j), 505, and 4980B [26 USCS §§ 79, 106, 117(d), 120, 125, 127, 129, 132, 137, 274(j), 505, and 4980B].

(4) Time when first considered as employee.

(A) In general. In the case of any leased employee, paragraph (1) shall apply only for purposes of determining whether the requirements listed in paragraph (3) are met for periods after the close of the period referred to in paragraph (2)(B).

(B) Years of service. In the case of a person who is an employee of the recipient (whether by reason of this subsection or otherwise), for purposes of the requirements listed in paragraph (3), years of service for the recipient shall be determined by taking into account any period for which such employee would have been a leased employee but for the requirements of paragraph (2)(B).

(5) Safe harbor.

(A) In general. In the case of requirements described in subparagraphs (A) and (B) of paragraph (3), this subsection shall not apply to any leased employee with respect to services performed for a recipient if—

(i) such employee is covered by a plan which is maintained by the leasing organization and meets the requirements of subparagraph (B), and

(ii) leased employees (determined without regard to this paragraph) do not constitute more than 20 percent of the recipient's nonhighly compensated work force.

(B) Plan requirements. A plan meets the requirements of this subparagraph if—

(i) such plan is a money purchase pension plan with a nonintegrated employer contribution rate for each participant of at least 10 percent of compensation,

(ii) such plan provides for full and immediate vesting, and

(iii) each employee of the leasing organization (other than employees who perform substantially all of their services for the leasing organization) immediately participates in such plan.

Clause (iii) shall not apply to any individual whose compensation from the leasing organization in each plan year during the 4-year period ending with the plan year is less than $ 1,000.

(C) Definitions. For purposes of this paragraph—

(i) Highly compensated employee. The term "highly compensated employee" has the meaning given such term by section 414(q) [26 USCS § 414(q)].

(ii) Nonhighly compensated work force. The term "nonhighly compensated work force" means the aggregate number of individuals (other than highly compensated employees)—

(I) who are employees of the recipient (without regard to this subsection) and have performed services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, or

(II) who are leased employees with respect to the recipient (determined without regard to this paragraph).

(iii) Compensation. The term "compensation" has the same meaning as when used in section 415 [26 USCS § 415]; except that such term shall include—

(I) any employer contribution under a qualified cash or deferred arrangement to the extent not included in gross income under section 402(e)(3) or 402(h)(1)(B) [26 USCS § 402(e)(3) or 402(h)(1)(B)],

(II) any amount which the employee would have received in cash but for an election under a cafeteria plan (within the meaning of section 125 [26 USCS § 125]), and

(III) any amount contributed to an annuity contract described in section 403(b) [26 USCS § 402(b)] pursuant to a salary reduction agreement (within the meaning of section 3121(a)(5)(D) [26 USCS § 3121(a)(5)(D)]).

(6) Other rules. For purposes of this subsection—

(A) Related persons. The term "related persons" has the same meaning as when used in section 144(a)(3) [26 USCS § 144(a)(3)].

(B) Employees of entities under common control. The rules of subsections (b), (c), (m), and (o) shall apply.

(o) Regulations. The Secretary shall prescribe such regulations (which may provide rules in addition to the rules contained in subsections (m) and (n)) as may be necessary to prevent the avoidance of any employee benefit requirement listed in subsection (m)(4) or (n)(3) or any requirement under section 457 [26 USCS § 457] through the use of—

(1) separate organizations,

(2) employee leasing, or

(3) other arrangements.

The regulations prescribed under subsection (n) shall include provisions to minimize the recordkeeping requirements of subsection (n) in the case of an employer which has no top-heavy plans (within the meaning of section 416(g) [26 USCS § 416(g)]) and which uses the services of persons (other than employees) for an insignificant percentage of the employer's total workload.

(p) Qualified domestic relations order defined. For purposes of this subsection and section 401(a)(13) [26 USCS § 401(a)(13)]—

(1) In general.

(A) Qualified domestic relations order. The term "qualified domestic relations order" means a domestic relations order—

(i) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(ii) with respect to which the requirements of paragraphs (2) and (3) are met.

(B) Domestic relations order. The term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which—

(i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(ii) is made pursuant to a State domestic relations law (including a community property law).

(2) Order must clearly specify certain facts. A domestic relations order meets the requirements of this paragraph only if such order clearly specifies—

(A) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(B) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(C) the number of payments or period to which such order applies, and

(D) each plan to which such order applies.

(3) Order may not alter amount, form, etc., of benefits. A domestic relations order meets the requirements of this paragraph only if such order—

(A) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(B) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(C) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(4) Exception for certain payments made after earliest retirement age.

(A) In general. A domestic relations order shall not be treated as failing to meet the requirements of subparagraph (A) of paragraph (3) solely because such order requires that payment of benefits be made to an alternate payee—

(i) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(ii) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of the benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(iii) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of clause (ii), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(B) Earliest retirement age. For purposes of this paragraph, the term "earliest retirement age" means the earlier of—

(i) the date on which the participant is entitled to a distribution under the plan, or

(ii) the later of—

(I) the date the participant attains age 50, or

(II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(5) Treatment of former spouse as surviving spouse for purposes of determining survivor benefits. To the extent provided in any qualified domestic relations order—

(A) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of sections 401(a)(11) and 417 [26 USCS § 401(a)(11) and 417] (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(B) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 417(d) [26 USCS § 417(d)].

(6) Plan procedures with respect to orders.

(A) Notice and determination by administrator. In the case of any domestic relations order received by a plan—

(i) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(ii) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(B) Plan to establish reasonable procedures. Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders.

(7) Procedures for period during which determination is being made.

(A) In general. During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this paragraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(B) Payment to alternate payee if order determined to be qualified domestic relations order. If within the 18-month period described in subparagraph (E) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(C) Payment to plan participant in certain cases. If within the 18-month period described in subparagraph (E)—

(i) it is determined that the order is not a qualified domestic relations order, or

(ii) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(D) Subsequent determination or order to be applied prospectively only. Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in subparagraph (E) shall be applied prospectively only.

(E) Determination of 18-month period. For purposes of this paragraph, the 18-month period described in this subparagraph is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(8) Alternate payee defined. The term "alternate payee" means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(9) Subsection not to apply to plans to which section 401(a)(13) does not apply. This subsection shall not apply to any plan to which section 401(a)(13) [26 USCS § 401(a)(13)] does not apply. For purposes of this title, except as provided in regulations, any distribution from an annuity contract under section 403(b) [26 USCS § 403(b)] pursuant to a qualified domestic relations order shall be treated in the same manner as a distribution from a plan to which section 401(a)(13) [26 USCS § 401(a)(13)] applies.

(10) Waiver of certain distribution requirements. With respect to the requirements of subsections (a) and (k) of section 401 [26 USCS § 401], section 403(b) [26 USCS § 403(b)], section 409(d) [26 USCS § 409(d)], and section 457(d) [26 USCS § 457(d)], a plan shall not be treated as failing to meet such requirements solely by reason of payments to an alternative payee pursuant to a qualified domestic relations order.

(11) Application of rules to certain other plans. For purposes of this title, a distribution or payment from a governmental plan (as defined in subsection (d)) or a church plan (as described in subsection (e)) or an eligible deferred compensation plan (within the meaning of section 457(b) [26 USCS § 457(b)]) shall be treated as made pursuant to a qualified domestic relations order if it is made pursuant to a domestic relations order which meets the requirement of clause (i) of paragraph (1)(A).

(12) Tax treatment of payments from a section 457 plan. If a distribution or payment from an eligible deferred compensation plan described in section 457(b) [26 USCS § 457(b)] is made pursuant to a qualified domestic relations order, rules similar to the rules of section 402(e)(1)(A) [26 USCS § 402(e)(1)(A)] shall apply to such distribution or payment.

(13) Consultation with the Secretary. In prescribing regulations under this subsection and section 401(a)(13) [26 USCS § 401(a)(13)], the Secretary of Labor shall consult with the Secretary.

(q) Highly compensated employee.

(1) In general. The term "highly compensated employee" means any employee who—

(A) was a 5-percent owner at any time during the year or the preceding year, or

(B) for the preceding year—

(i) had compensation from the employer in excess of $ 80,000, and

(ii) if the employer elects the application of this clause for such preceding year, was in the top-paid group of employees for such preceding year.

The Secretary shall adjust the $ 80,000 amount under subparagraph (B) at the same time and in the same manner as under section 415(d) [26 USCS § 415(d)], except that the base period shall be the calendar quarter ending September 30, 1996.

(2) 5-percent owner. An employee shall be treated as a 5-percent owner for any year if at any time during such year such employee was a 5-percent owner (as defined in section 416(i)(1) [26 USCS § 416(i)(1)]) of the employer.

(3) Top-paid group. An employee is in the top-paid group of employees for any year if such employee is in the group consisting of the top 20 percent of the employees when ranked on the basis of compensation paid during such year.

(4) Compensation. For purposes of this subsection, the term "compensation" has the meaning given such term by section 415(c)(3) [26 USCS § 415(c)(3)].

(5) Excluded employees. For purposes of subsection (r) and for purposes of determining the number of employees in the top-paid group, the following employees shall be excluded—

(A) employees who have not completed 6 months of service,

(B) employees who normally work less than 17 1/2 hours per week,

(C) employees who normally work during not more than 6 months during any year,

(D) employees who have not attained age 21, and

(E) except to the extent provided in regulations, employees who are included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and the employer.

Except as provided by the Secretary, the employer may elect to apply subparagraph (A), (B), (C), or (D) by substituting a shorter period of service, smaller number of hours or months, or lower age for the period of service, number of hours or months, or age (as the case may be) than that specified in such subparagraph.

(6) Former employees. A former employee shall be treated as a highly compensated employee if—

(A) such employee was a highly compensated employee when such employee separated from service, or

(B) such employee was a highly compensated employee at any time after attaining age 55.

(7) Coordination with other provisions. Subsections (b), (c), (m), (n), and (o) shall be applied before the application of this subsection.

(8) Special rule for nonresident aliens. For purposes of this subsection and subsection (r), employees who are nonresident aliens and who receive no earned income (within the meaning of section 911(d)(2) [26 USCS § 911(d)(2)]) from the employer which constitutes income from sources within the United States (within the meaning of section 861(a)(3) [26 USCS § 861(a)(3)]) shall not be treated as employees.

(9) Certain employees not considered highly compensated and excluded employees under pre-ERISA rules for church plans. In the case of a church plan (as defined in subsection (e)), no employee shall be considered an officer, a person whose principal duties consist of supervising the work of other employees, or a highly compensated employee for any year unless such employee is a highly compensated employee under paragraph (1) for such year.

(r) Special rules for separate line of business.

(1) In general. For purposes of sections 129(d)(8) and 410(b) [26 USCS §§ 129(d)(8) and 410(b)], an employer shall be treated as operating separate lines of business during any year if the employer for bona fide business reasons operates separate lines of business.

(2) Line of business must have 50 employees, etc. A line of business shall not be treated as separate under paragraph (1) unless—

(A) such line of business has at least 50 employees who are not excluded under subsection (q)(5),

(B) the employer notifies the Secretary that such line of business is being treated as separate for purpose of paragraph (1), and

(C) such line of business meets guidelines prescribed by the Secretary or the employer receives a determination from the Secretary that such line of business may be treated as separate for purposes of paragraph (1).

(3) Safe harbor rule.

(A) In general. The requirements of subparagraph (C) of paragraph (2) shall not apply to any line of business if the highly compensated employee percentage with respect to such line of business is—

(i) not less than one-half, and

(ii) not more than twice, the percentage which highly compensated employees are of all employees of the employer. An employer shall be treated as meeting the requirements of clause (i) if at least 10 percent of all highly compensated employees of the employer perform services solely for such line of business.

(B) Determination may be based on preceding year. The requirements of subparagraph (A) shall be treated as met with respect to any line of business if such requirements were met with respect to such line of business for the preceding year and if—

(i) no more than a de minimis number of employees were shifted to or from the line of business after the close of the preceding year, or

(ii) the employees shifted to or from the line of business after the close of the preceding year contained a substantially proportional number of highly compensated employees.

(4) Highly compensated employee percentage defined. For purposes of this subsection, the term "highly compensated employee percentage" means the percentage which highly compensated employees performing services for the line of business are of all employees performing services for the line of business.

(5) Allocation of benefits to line of business. For purposes of this subsection, benefits which are attributable to services provided to a line of business shall be treated as provided by such line of business.

(6) Headquarters personnel, etc. The Secretary shall prescribe rules providing for—

(A) the allocation of headquarters personnel among the lines of business of the employer, and

(B) the treatment of other employees providing services for more than 1 line of business of the employer or not in lines of business meeting the requirements of paragraph (2).

(7) Separate operating units. For purposes of this subsection, the term "separate line of business" includes an operating unit in a separate geographic area separately operated for a bona fide business reason.

(8) Affiliated service groups. This subsection shall not apply in the case of any affiliated service group (within the meaning of section 414(m) [26 USCS § 414(m)]).

(s) Compensation. For purposes of any applicable provision—

(1) In general. Except as provided in this subsection, the term "compensation" has the meaning given such term by section 415(c)(3) [26 USCS § 415(c)(3)].

(2) Employer may elect not to treat certain deferrals as compensation. An employer may elect not to include as compensation any amount which is contributed by the employer pursuant to a salary reduction agreement and which is not includible in the gross income of an employee under section 125, 132(f)(4), 402(e)(3), 402(h), or 403(b) [26 USCS § 125, 132(f)(4), 402(e)(3), 402(h), or 403(b)].

(3) Alternative determination of compensation. The Secretary shall by regulation provide for alternative methods of determining compensation which may be used by an employer, except that such regulations shall provide that an employer may not use an alternative method if the use of such method discriminates in favor of highly compensated employees (within the meaning of subsection (q)).

(4) Applicable provision. For purposes of this subsection, the term "applicable provision" means any provision which specifically refers to this subsection.

(t) Application of controlled group rules to certain employee benefits.

(1) In general. All employees who are treated as employed by a single employer under subsection (b), (c), or (m) shall be treated as employed by a single employer for purposes of an applicable section. The provisions of subsection (o) shall apply with respect to the requirements of an applicable section.

(2) Applicable section. For purposes of this subsection, the term "applicable section" means section 79, 106, 117(d), 120, 125, 127, 129, 132, 137, 274(j), 505, or 4980B [26 USCS § 79, 106, 117(d), 120, 125, 127, 129, 137, 274(j), 505, or 4980B].

(u) Special rules relating to veterans' reemployment rights under USERRA and to differential wage payments to members on active duty.

(1) Treatment of certain contributions made pursuant to veterans' reemployment rights. If any contribution is made by an employer or an employee under an individual account plan with respect to an employee, or by an employee to a defined benefit plan that provides for employee contributions, and such contribution is required by reason of such employee's rights under chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], resulting from qualified military service, then—

(A) such contribution shall not be subject to any otherwise applicable limitation contained in section 402(g), 402(h), 403(b), 404(a), 404(h), 408, 415, or 457 [26 USCS § 402(g), 402(h), 403(h), 403(b), 404(a), 404(h), 408, 415, or 457], and shall not be taken into account in applying such limitations to other contributions or benefits under such plan or any other plan, with respect to the year in which the contribution is made,

(B) such contribution shall be subject to the limitations referred to in subparagraph (A) with respect to the year to which the contribution relates (in accordance with rules prescribed by the Secretary), and

(C) such plan shall not be treated as failing to meet the requirements of section 401(a)(4), 401(a)(26), 401(k)(3), 401(k)(11), 401(k)(12), 401(m), 403(b)(12), 408(k)(3), 408(k)(6), 408(p), 410(b), or 416 [26 USCS § 401(a)(4), 401(a)(26), 401(k)(3), 401(k)(11), 401(k)(12), 401(m), 403(b)(12), 408(k)(3), 408(k)(6), 408(p), 410(b), or 416] by reason of the making of (or the right to make) such contribution.

For purposes of the preceding sentence, any elective deferral or employee contribution made under paragraph (2) shall be treated as required by reason of the employee's rights under such chapter 43.

(2) Reemployment rights under USERRA with respect to elective deferrals.

(A) In general. For purposes of this subchapter and section 457 [26 USCS § 457], if an employee is entitled to the benefits of chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], with respect to any plan which provides for elective deferrals, the employer sponsoring the plan shall be treated as meeting the requirements of such chapter 43 with respect to such elective deferrals only if such employer—

(i) permits such employee to make additional elective deferrals under such plan (in the amount determined under subparagraph (B) or such lesser amount as is elected by the employee) during the period which begins on the date of the reemployment of such employee with such employer and has the same length as the lesser of—

(I) the product of 3 and the period of qualified military service which resulted in such rights, and

(II) 5 years, and

(ii) makes a matching contribution with respect to any additional elective deferral made pursuant to clause (i) which would have been required had such deferral actually been made during the period of such qualified military service.

(B) Amount of makeup required. The amount determined under this subparagraph with respect to any plan is the maximum amount of the elective deferrals that the individual would have been permitted to make under the plan in accordance with the limitations referred to in paragraph (1)(A) during the period of qualified military service if the individual had continued to be employed by the employer during such period and received compensation as determined under paragraph (7). Proper adjustment shall be made to the amount determined under the preceding sentence for any elective deferrals actually made during the period of such qualified military service.

(C) Elective deferral. For purposes of this paragraph, the term "elective deferral" has the meaning given such term by section 402(g)(3) [26 USCS § 402(g)(3)]; except that such term shall include any

deferral of compensation under an eligible deferred compensation plan (as defined in section 457(b) [26 USCS § 457(b)]).

(D) After-tax employee contributions. References in subparagraphs (A) and (B) to elective deferrals shall be treated as including references to employee contributions.

(3) Certain retroactive adjustments not required. For purposes of this subchapter and subchapter E [26 USCS §§ 401 et seq. and 441 et seq.], no provision of chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], shall be construed as requiring—

(A) any crediting of earnings to an employee with respect to any contribution before such contribution is actually made, or

(B) any allocation of any forfeiture with respect to the period of qualified military service.

(4) Loan repayment suspensions permitted. If any plan suspends the obligation to repay any loan made to an employee from such plan for any part of any period during which such employee is performing service in the uniformed services (as defined in chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.]), whether or not qualified military service, such suspension shall not be taken into account for purposes of section 72(p), 401(a), or 4975(d)(1) [26 USCS § 72(p), 401(a), or 4975(d)(1)].

(5) Qualified military service. For purposes of this subsection, the term "qualified military service" means any service in the uniformed services (as defined in chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.]) by any individual if such individual is entitled to reemployment rights under such chapter with respect to such service.

(6) Individual account plan. For purposes of this subsection, the term "individual account plan" means any defined contribution plan (including any tax-sheltered annuity plan under section 403(b) [26 USCS § 403(b)], any simplified employee pension under section 408(k) [26 USCS § 408(k)], any qualified salary reduction arrangement under section 408(p) [26 USCS § 408(p)], and any eligible deferred compensation plan (as defined in section 457(b) [26 USCS § 457(b)]).

(7) Compensation. For purposes of sections 403(b)(3), 415(c)(3), and 457(e)(5) [26 USCS §§ 403(b)(3), 415(c)(3), and 457(e)(5)], an employee who is in qualified military service shall be treated as receiving compensation from the employer during such period of qualified military service equal to—

(A) the compensation the employee would have received during such period if the employee were not in qualified military service, determined based on the rate of pay the employee would have received from the employer but for absence during the period of qualified military service, or

(B) if the compensation the employee would have received during such period was not reasonably certain, the employee's average compensation from the employer during the 12-month period immediately preceding the qualified military service (or, if shorter, the period of employment immediately preceding the qualified military service).

(8) USERRA requirements for qualified retirement plans. For purposes of this subchapter [26 USCS §§ 401 et seq.] and section 457 [26 USCS § 457], an employer sponsoring a retirement plan shall be treated as meeting the requirements of chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], only if each of the following requirements is met:

(A) An individual reemployed under such chapter is treated with respect to such plan as not having incurred a break in service with the employer maintaining the plan by reason of such individual's period of qualified military service.

(B) Each period of qualified military service served by an individual is, upon reemployment under such chapter, deemed with respect to such plan to constitute service with the employer maintaining the plan for the purpose of determining the nonforfeitability of the individual's accrued benefits under such plan and for the purpose of determining the accrual of benefits under such plan.

(C) An individual reemployed under such chapter is entitled to accrued benefits that are contingent on the making of, or derived from, employee contributions or elective deferrals only to the extent the individual makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the individual would have been permitted or required to contribute had the

individual remained continuously employed by the employer throughout the period of qualified military service. Any payment to such plan shall be made during the period beginning with the date of reemployment and whose duration is 3 times the period of the qualified military service (but not greater than 5 years).

(9) Treatment in the case of death or disability resulting from active military service.

(A) In general. For benefit accrual purposes, an employer sponsoring a retirement plan may treat an individual who dies or becomes disabled (as defined under the terms of the plan) while performing qualified military service with respect to the employer maintaining the plan as if the individual has resumed employment in accordance with the individual's reemployment rights under chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], on the day preceding death or disability (as the case may be) and terminated employment on the actual date of death or disability. In the case of any such treatment, and subject to subparagraphs (B) and (C), any full or partial compliance by such plan with respect to the benefit accrual requirements of paragraph (8) with respect to such individual shall be treated for purposes of paragraph (1) as if such compliance were required under such chapter 43.

(B) Nondiscrimination requirement. Subparagraph (A) shall apply only if all individuals performing qualified military service with respect to the employer maintaining the plan (as determined under subsections (b), (c), (m), and (o)) who die or became disabled as a result of performing qualified military service prior to reemployment by the employer are credited with service and benefits on reasonably equivalent terms.

(C) Determination of benefits. The amount of employee contributions and the amount of elective deferrals of an individual treated as reemployed under subparagraph (A) for purposes of applying paragraph (8)(C) shall be determined on the basis of the individual's average actual employee contributions or elective deferrals for the lesser of—

(i) the 12-month period of service with the employer immediately prior to qualified military service, or

(ii) if service with the employer is less than such 12-month period, the actual length of continuous service with the employer.

(10) Plans not subject to title 38. This subsection shall not apply to any retirement plan to which chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], does not apply.

(11) References. For purposes of this section, any reference to chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.], shall be treated as a reference to such chapter as in effect on December 12, 1994 (without regard to any subsequent amendment).

(12) Treatment of differential wage payments.

(A) In general. Except as provided in this paragraph, for purposes of applying this title to a retirement plan to which this subsection applies—

(i) an individual receiving a differential wage payment shall be treated as an employee of the employer making the payment,

(ii) the differential wage payment shall be treated as compensation, and

(iii) the plan shall not be treated as failing to meet the requirements of any provision described in paragraph (1)(C) by reason of any contribution or benefit which is based on the differential wage payment.

(B) Special rule for distributions.

(i) In general. Notwithstanding subparagraph (A)(i), for purposes of section 401(k)(2)(B)(i)(I), 403(b)(7)(A)(ii), 403(b)(11)(A), or 457(d)(1)(A)(ii) [26 USCS § 401(k)(2)(B)(i)(I), 403(b)(7)(A)(ii), 403(b)(11)(A), or 457(d)(1)(A)(ii)], an individual shall be treated as having been severed from employment during any period the individual is performing service in the uniformed services described in section 3401(h)(2)(A) [26 USCS § 3401(h)(2)(A)].

(ii) Limitation. If an individual elects to receive a distribution by reason of clause (i), the plan shall provide that the individual may not make an elective deferral or employee contribution during the 6-month period beginning on the date of the distribution.

(C) Nondiscrimination requirement. Subparagraph (A)(iii) shall apply only if all employees of an employer (as determined under subsections (b), (c), (m), and (o)) performing service in the uniformed services described in section 3401(h)(2)(A) [26 USCS § 3401(h)(2)(A)] are entitled to receive differential wage payments on reasonably equivalent terms and, if eligible to participate in a retirement plan maintained by the employer, to make contributions based on the payments on reasonably equivalent terms. For purposes of applying this subparagraph, the provisions of paragraphs (3), (4), and (5) of section 410(b) [26 USCS § 410(b)] shall apply.

(D) Differential wage payment. For purposes of this paragraph, the term "differential wage payment" has the meaning given such term by section 3401(h)(2) [26 USCS § 3401(h)(2)].

(v) Catch-up contributions for individuals age 50 or over.

(1) In general. An applicable employer plan shall not be treated as failing to meet any requirement of this title solely because the plan permits an eligible participant to make additional elective deferrals in any plan year.

(2) Limitation on amount of additional deferrals.

(A) In general. A plan shall not permit additional elective deferrals under paragraph (1) for any year in an amount greater than the lesser of—

(i) the applicable dollar amount, or

(ii) the excess (if any) of—

(I) the participant's compensation (as defined in section 415(c)(3) [26 USCS § 415(c)(3)]) for the year, over

(II) any other elective deferrals of the participant for such year which are made without regard to this subsection.

(B) Applicable dollar amount. For purposes of this paragraph—

(i) In the case of an applicable employer plan other than a plan described in section 401(k)(11) or 408(p) [26 USCS § 401(k)(11) or 408(p)], the applicable dollar amount shall be determined in accordance with the following table:

For taxable years beginning in:	the applicable dollar amount is:
2002	$ 1,000
2003	$ 2,000
2004	$ 3,000
2005	$ 4,000
2006 or thereafter	$ 5,000.

(ii) In the case of an applicable employer plan described in section 401(k)(11) or 408(p) [26 USCS § 401(k)(11) or 408(p)], the applicable dollar amount shall be determined in accordance with the following table:

For taxable years beginning in:	the applicable dollar amount is:
2002	$ 500
2003	$ 1,000
2004	$ 1,500
2005	$ 2,000
2006 or thereafter	$ 2,500.

(C) Cost-of-living adjustment. In the case of a year beginning after December 31, 2006, the Secretary shall adjust annually the $ 5,000 amount in subparagraph (B)(i) and the $ 2,500 amount in subparagraph (B)(ii) for increases in the cost-of-living at the same time and in the same manner as adjustments under section 415(d) [26 USCS § 415(d)]; except that the base period taken into account shall

be the calendar quarter beginning July 1, 2005, and any increase under this subparagraph which is not a multiple of $ 500 shall be rounded to the next lower multiple of $ 500.

(D) Aggregation of plans. For purposes of this paragraph, plans described in clauses (i), (ii), and (iv) of paragraph (6)(A) that are maintained by the same employer (as determined under subsection (b), (c), (m) or (o)) shall be treated as a single plan, and plans described in clause (iii) of paragraph (6)(A) that are maintained by the same employer shall be treated as a single plan.

(3) Treatment of contributions. In the case of any contribution to a plan under paragraph (1)—

(A) such contribution shall not, with respect to the year in which the contribution is made—

(i) be subject to any otherwise applicable limitation contained in sections 401(a)(30), 402(h), 403(b), 408, 415(c), and 457(b)(2) [26 USCS §§ 401(a)(30), 402(h), 403(b), 408, 415(c), and 457(b)(2)] (determined without regard to section 457(b)(3) [26 USCS § 457(b)(3)]), or

(ii) be taken into account in applying such limitations to other contributions or benefits under such plan or any other such plan, and

(B) except as provided in paragraph (4), such plan shall not be treated as failing to meet the requirements of section 401(a)(4), 401(k)(3), 401(k)(11), 403(b)(12), 408(k), 410(b), or 416 [26 USCS § 401(a)(4), 401(k)(3), 401(k)(11), 403(b)(12), 408(k), 410(b), or 416] by reason of the making of (or the right to make) such contribution.

(4) Application of nondiscrimination rules.

(A) In general. An applicable employer plan shall be treated as failing to meet the nondiscrimination requirements under section 401(a)(4) [26 USCS § 401(a)(4)] with respect to benefits, rights, and features unless the plan allows all eligible participants to make the same election with respect to the additional elective deferrals under this subsection.

(B) Aggregation. For purposes of subparagraph (A), all plans maintained by employers who are treated as a single employer under subsection (b), (c), (m), or (o) of section 414 [26 USCS § 414] shall be treated as 1 plan, except that a plan described in clause (i) of section 410(b)(6)(C) [26 USCS § 410(b)(6)(C)] shall not be treated as a plan of the employer until the expiration of the transition period with respect to such plan (as determined under clause (ii) of such section).

(5) Eligible participant. For purposes of this subsection, the term 'eligible participant' means a participant in a plan—

(A) who would attain age 50 by the end of the taxable year,

(B) with respect to whom no other elective deferrals may (without regard to this subsection) be made to the plan for the plan (or other applicable) year by reason of the application of any limitation or other restriction described in paragraph (3) or comparable limitation or restriction contained in the terms of the plan.

(6) Other definitions and rules. For purposes of this subsection—

(A) Applicable employer plan. The term "applicable employer plan" means—

(i) an employees' trust described in section 401(a) [26 USCS § 401(a)] which is exempt from tax under section 501(a) [26 USCS § 501(a)],

(ii) a plan under which amounts are contributed by an individual's employer for an annuity contract described in section 403(b) [26 USCS § 403(b)],

(iii) an eligible deferred compensation plan under section 457 [26 USCS § 457] of an eligible employer described in section 457(e)(1)(A) [26 USCS § 457(e)(1)(A)], and

(iv) an arrangement meeting the requirements of section 408 (k) or (p) [26 USCS § 408(k) or (p)].

(B) Elective deferral. The term "elective deferral" has the meaning given such term by subsection (u)(2)(C).

(C) Exception for section 457 [26 USCS § 457] plans. This subsection shall not apply to a participant for any year for which a higher limitation applies to the participant under section 457(b)(3) [26 USCS § 457(b)(3)].

(w) Special rules for certain withdrawals from eligible automatic contribution arrangements.

(1) In general. If an eligible automatic contribution arrangement allows an employee to elect to make permissible withdrawals—

(A) the amount of any such withdrawal shall be includible in the gross income of the employee for the taxable year of the employee in which the distribution is made,

(B) no tax shall be imposed under section 72(t) [26 USCS § 72(t)] with respect to the distribution, and

(C) the arrangement shall not be treated as violating any restriction on distributions under this title solely by reason of allowing the withdrawal.

In the case of any distribution to an employee by reason of an election under this paragraph, employer matching contributions shall be forfeited or subject to such other treatment as the Secretary may prescribe.

(2) Permissible withdrawal. For purposes of this subsection—

(A) In general. The term "permissible withdrawal" means any withdrawal from an eligible automatic contribution arrangement meeting the requirements of this paragraph which—

(i) is made pursuant to an election by an employee, and

(ii) consists of elective contributions described in paragraph (3)(B) (and earnings attributable thereto).

(B) Time for making election. Subparagraph (A) shall not apply to an election by an employee unless the election is made no later than the date which is 90 days after the date of the first elective contribution with respect to the employee under the arrangement.

(C) Amount of distribution. Subparagraph (A) shall not apply to any election by an employee unless the amount of any distribution by reason of the election is equal to the amount of elective contributions made with respect to the first payroll period to which the eligible automatic contribution arrangement applies to the employee and any succeeding payroll period beginning before the effective date of the election (and earnings attributable thereto).

(3) Eligible automatic contribution arrangement. For purposes of this subsection, the term "eligible automatic contribution arrangement" means an arrangement under an applicable employer plan—

(A) under which a participant may elect to have the employer make payments as contributions under the plan on behalf of the participant, or to the participant directly in cash,

(B) under which the participant is treated as having elected to have the employer make such contributions in an amount equal to a uniform percentage of compensation provided under the plan until the participant specifically elects not to have such contributions made (or specifically elects to have such contributions made at a different percentage), and

(C) which meets the requirements of paragraph (4).

(4) Notice requirements.

(A) In general. The administrator of a plan containing an arrangement described in paragraph (3) shall, within a reasonable period before each plan year, give to each employee to whom an arrangement described in paragraph (3) applies for such plan year notice of the employee's rights and obligations under the arrangement which—

(i) is sufficiently accurate and comprehensive to apprise the employee of such rights and obligations, and

(ii) is written in a manner calculated to be understood by the average employee to whom the arrangement applies.

(B) Time and form of notice. A notice shall not be treated as meeting the requirements of subparagraph (A) with respect to an employee unless—

(i) the notice includes an explanation of the employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf (or to elect to have such contributions made at a different percentage),

(ii) the employee has a reasonable period of time after receipt of the notice described in clause (i) and before the first elective contribution is made to make such election, and

(iii) the notice explains how contributions made under the arrangement will be invested in the absence of any investment election by the employee.

(5) Applicable employer plan. For purposes of this subsection, the term "applicable employer plan" means—

(A) an employees' trust described in section 401(a) [26 USCS § 401(a)] which is exempt from tax under section 501(a) [26 USCS § 501(a)],

(B) a plan under which amounts are contributed by an individual's employer for an annuity contract described in section 403(b) [26 USCS § 403(b)],

(C) an eligible deferred compensation plan described in section 457(b) [26 USCS § 457(b)] which is maintained by an eligible employer described in section 457(e)(1)(A) [26 USCS § 457(e)(1)(A)],

(D) a simplified employee pension the terms of which provide for a salary reduction arrangement described in section 408(k)(6) [26 USCS § 408(k)(6)], and

(E) a simple retirement account (as defined in section 408(p) [26 USCS § 408(p)]).

(6) Special rule. A withdrawal described in paragraph (1) (subject to the limitation of paragraph (2)(C)) shall not be taken into account for purposes of section 401(k)(3) [26 USCS § 401(k)(3)] or for purposes of applying the limitation under section 402(g)(1) [26 USCS § 402(g)(1)].

(x) Special rules for eligible combined defined benefit plans and qualified cash or deferred arrangements **[Caution: This subsection applies to plan years beginning after Dec. 31, 2009, as provided by § 903(c) of Act Aug. 17, 2006, P.L. 109-280, which appears as a note to this section.]**.

(1) General rule. Except as provided in this subsection, the requirements of this title shall be applied to any defined benefit plan or applicable defined contribution plan which are part of an eligible combined plan in the same manner as if each such plan were not a part of the eligible combined plan. In the case of a termination of the defined benefit plan and the applicable defined contribution plan forming part of an eligible combined plan, the plan administrator shall terminate each such plan separately.

(2) Eligible combined plan. For purposes of this subsection—

(A) In general. The term "eligible combined plan" means a plan—

(i) which is maintained by an employer which, at the time the plan is established, is a small employer,

(ii) which consists of a defined benefit plan and an applicable defined contribution plan,

(iii) the assets of which are held in a single trust forming part of the plan and are clearly identified and allocated to the defined benefit plan and the applicable defined contribution plan to the extent necessary for the separate application of this title under paragraph (1), and

(iv) with respect to which the benefit, contribution, vesting, and nondiscrimination requirements of subparagraphs (B), (C), (D), (E), and (F) are met.

For purposes of this subparagraph, the term "small employer" has the meaning given such term by section 4980D(d)(2) [26 USCS § 4980D(d)(2)], except that such section shall be applied by substituting "500" for "50" each place it appears.

(B) Benefit requirements.

(i) In general. The benefit requirements of this subparagraph are met with respect to the defined benefit plan forming part of the eligible combined plan if the accrued benefit of each participant derived from employer contributions, when expressed as an annual retirement benefit, is not less than the applicable percentage of the participant's final average pay. For purposes of this clause, final average pay shall be determined using the period of consecutive years (not exceeding 5) during which the participant had the greatest aggregate compensation from the employer.

(ii) Applicable percentage. For purposes of clause (i), the applicable percentage is the lesser of—

(I) 1 percent multiplied by the number of years of service with the employer, or

(II) 20 percent.

(iii) Special rule for applicable defined benefit plans. If the defined benefit plan under clause (i) is an applicable defined benefit plan as defined in section 411(a)(13)(B) [26 USCS § 411(a)(13)(B)] which meets the interest credit requirements of section 411(b)(5)(B)(i) [26 USCS § 411(b)(5)(B)(i)], the plan shall be treated as meeting the requirements of clause (i) with respect to any plan year if each participant receives a pay credit for the year which is not less than the percentage of compensation determined in accordance with the following table:

If the participant's age as of the beginning of the year is—	The percentage is—
30 or less	2
Over 30 but less than 40	4
40 or over but less than 50	6
50 or over	8.

(iv) Years of service. For purposes of this subparagraph, years of service shall be determined under the rules of paragraphs (4), (5), and (6) of section 411(a) [26 USCS § 411(a)], except that the plan may not disregard any year of service because of a participant making, or failing to make, any elective deferral with respect to the qualified cash or deferred arrangement to which subparagraph (C) applies.

(C) Contribution requirements.

(i) In general. The contribution requirements of this subparagraph with respect to any applicable defined contribution plan forming part of an eligible combined plan are met if—

(I) the qualified cash or deferred arrangement included in such plan constitutes an automatic contribution arrangement, and

(II) the employer is required to make matching contributions on behalf of each employee eligible to participate in the arrangement in an amount equal to 50 percent of the elective contributions of the employee to the extent such elective contributions do not exceed 4 percent of compensation. Rules similar to the rules of clauses (ii) and (iii) of section 401(k)(12)(B) [26 USCS § 401(k)(12)(B)] shall apply for purposes of this clause.

(ii) Nonelective contributions. An applicable defined contribution plan shall not be treated as failing to meet the requirements of clause (i) because the employer makes nonelective contributions under the plan but such contributions shall not be taken into account in determining whether the requirements of clause (i)(II) are met.

(D) Vesting requirements. The vesting requirements of this subparagraph are met if—

(i) in the case of a defined benefit plan forming part of an eligible combined plan an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit under the plan derived from employer contributions, and

(ii) in the case of an applicable defined contribution plan forming part of eligible combined plan—

(I) an employee has a nonforfeitable right to any matching contribution made under the qualified cash or deferred arrangement included in such plan by an employer with respect to any elective contribution, including matching contributions in excess of the contributions required under subparagraph (C)(i)(II), and

(II) an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived under the arrangement from nonelective contributions of the employer. For purposes of this subparagraph, the rules of section 411 shall apply to the extent not inconsistent with this subparagraph.

(E) Uniform provision of contributions and benefits. In the case of a defined benefit plan or applicable defined contribution plan forming part of an eligible combined plan, the requirements of this subparagraph are met if all contributions and benefits under each such plan, and all rights and features under each such plan, must be provided uniformly to all participants.

(F) Requirements must be met without taking into account social security and similar contributions and benefits or other plans.

(i) In general. The requirements of this subparagraph are met if the requirements of clauses (ii) and (iii) are met.

(ii) Social security and similar contributions. The requirements of this clause are met if—

(I) the requirements of subparagraphs (B) and (C) are met without regard to section 401(l) [26 USCS § 401(l)], and

(II) the requirements of sections 401(a)(4) and 410(b) [26 USCS §§ 401(a)(4) and 410(b)] are met with respect to both the applicable defined contribution plan and defined benefit plan forming part of an eligible combined plan without regard to section 401(l) [26 USCS § 401(l)].

(iii) Other plans and arrangements. The requirements of this clause are met if the applicable defined contribution plan and defined benefit plan forming part of an eligible combined plan meet the requirements of sections 401(a)(4) and 410(b) [26 USCS §§ 401(a)(4) and 410(b)] without being combined with any other plan.

(3) Nondiscrimination requirements for qualified cash or deferred arrangement.

(A) In general. A qualified cash or deferred arrangement which is included in an applicable defined contribution plan forming part of an eligible combined plan shall be treated as meeting the requirements of section 401(k)(3)(A)(ii) [26 USCS § 401(k)(3)(A)(ii)] if the requirements of paragraph (2)(C) are met with respect to such arrangement.

(B) Matching contributions. In applying section 401(m)(11) [26 USCS § 401(m)(11)] to any matching contribution with respect to a contribution to which paragraph (2)(C) applies, the contribution requirement of paragraph (2)(C) and the notice requirements of paragraph (5)(B) shall be substituted for the requirements otherwise applicable under clauses (i) and (ii) of section 401(m)(11)(A) [26 USCS § 401(m)(11)(A)].

(4) Satisfaction of top-heavy rules. A defined benefit plan and applicable defined contribution plan forming part of an eligible combined plan for any plan year shall be treated as meeting the requirements of section 416 [26 USCS § 416] for the plan year.

(5) Automatic contribution arrangement. For purposes of this subsection—

(A) In general. A qualified cash or deferred arrangement shall be treated as an automatic contribution arrangement if the arrangement—

(i) provides that each employee eligible to participate in the arrangement is treated as having elected to have the employer make elective contributions in an amount equal to 4 percent of the employee's compensation unless the employee specifically elects not to have such contributions made or to have such contributions made at a different rate, and

(ii) meets the notice requirements under subparagraph (B).

(B) Notice requirements.

(i) In general. The requirements of this subparagraph are met if the requirements of clauses (ii) and (iii) are met.

(ii) Reasonable period to make election. The requirements of this clause are met if each employee to whom subparagraph (A)(i) applies—

(I) receives a notice explaining the employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf or to have the contributions made at a different rate, and

(II) has a reasonable period of time after receipt of such notice and before the first elective contribution is made to make such election.

(iii) Annual notice of rights and obligations. The requirements of this clause are met if each employee eligible to participate in the arrangement is, within a reasonable period before any year, given notice of the employee's rights and obligations under the arrangement.

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) [26 USCS § 401(k)(12)(D)] shall be met with respect to the notices described in clauses (ii) and (iii) of this subparagraph.

(6) Coordination with other requirements.

(A) Treatment of separate plans. Section 414(k) [26 USCS § 414(k)] shall not apply to an eligible combined plan.

(B) Reporting. An eligible combined plan shall be treated as a single plan for purposes of sections 6058 and 6059 [26 USCS §§ 6058 and 6059].

(7) Applicable defined contribution plan. For purposes of this subsection—

(A) In general. The term "applicable defined contribution plan" means a defined contribution plan which includes a qualified cash or deferred arrangement.

(B) Qualified cash or deferred arrangement. The term "qualified cash or deferred arrangement" has the meaning given such term by section 401(k)(2) [26 USCS § 401(k)(2)].

(Added Sept. 2, 1974, P. L. 93-406, Title II, § 1015, 88 Stat. 925; Oct. 4, 1976, P. L. 94-455, Title XIX, §§ 1901(a)(64), 1906(b)(13)(A), 90 Stat. 1775, 1834; Nov. 6, 1978, P. L. 95-600, Title I, § 152(d), 92 Stat. 2799; Sept. 26, 1980, P. L. 96-364, Title II, §§ 207, 208(a), Title IV, § 407(b), 94 Stat. 1288, 1289, 1305; Dec. 28, 1980, P. L. 96-605, Title II, § 201(a), 94 Stat. 3526; Dec. 28, 1980, P. L. 96-613, § 5(a), 94 Stat. 3580; Sept. 3, 1982, P. L. 97-248, Title II, §§ 240(c), 246(a), 248(a), 96 Stat. 520, 525, 526; July 18, 1984, P. L. 98-369, Div A, Title IV, § 491(d)(26), (27), Title V, § 526(a)(1), (b)(1), (d)(1), (2), Title VII, § 713(i), 98 Stat. 850, 874, 875, 960; Aug. 23, 1984, P. L. 98-397, Title II, § 204(b), 98 Stat. 1445; Oct. 22, 1986, P. L. 99-514, Title XI, §§ 1114(a), (b)(11), 1115(a), 1117(c), 1146(a), (b), 1151(e)(1), (i), Title XIII, § 1301(j)(4), Title XVIII, §§ 1852(f), 1898(c)(2)(A), (4)(A), (6)(A), (7)(A)(ii)-(vii), 1899A(12), 100 Stat. 2448, 2451, 2452, 2462, 2491, 2506, 2507, 2657, 2868, 2951, 2953, 2954, 2958; Dec. 22, 1987, P. L. 100-203, Title IX, § 9305(c), 101 Stat. 1330-352; Nov. 10, 1988, P. L. 100-647, Title I, §§ 1011(d)(8), (e)(4), (h)(5), (i)(1)-(4)(A), (j)(1), (2), 1011A(b)(3), 1011B(a)(16), (17), (19), (20), 1018(t)(8)(E)-(G), Title II, § 2005(c)(1), (2), Title III, §§ 3011(b)(4), (5), 3021(b)(1), (2)(A), Title VI, § 6067(a), 102 Stat. 3460, 3461, 3465, 3467, 3468, 3473, 3485, 3589, 3611, 3612, 3625, 3631, 3632, 3703; Nov. 8, 1989, P. L. 101-140, Title II, §§ 203(a)(6), 204(b)(2), 103 Stat. 831, 833; Dec. 19, 1989, P. L. 101-239, Title VII, §§ 7811(m)(5), 7813(b), 7841(a)(2), 103 Stat. 2412, 2413, 2427; Nov. 5, 1990, P. L. 101-508, Title XI, § 11703(b)(1), 104 Stat. 1388-517; July 3, 1992, P. L. 102-318, Title V, § 521(b)(20)-(22), 106 Stat. 311; (Aug. 20, 1996, P. L. 104-188, Title I, §§ 1421(b)(9)(C), 1431(a), (b)(1), (c)(1)(A), (D), (E), 1434(b), 1454(a), 1461(a), 1462(a), 1704(n)(1), 110 Stat. 1798, 1802, 1803, 1807, 1817, 1822, 1824, 1883; Aug. 5, 1997, P. L. 105-34, Title XV, § 1522(a), Title XVI, § 1601(d)(6)(A), (7), (h)(2)(D)(i), (ii), 111 Stat. 1070, 1089, 1090, 1092; July 22, 1998, P. L. 105-206, Title VI, § 6018(c), 112 Stat. 822; Dec. 21, 2000, P. L. 106-554, § 1(a)(7) (Title III, § 314(e)(2)), 114 Stat. 2763, 2763A-643; June 7, 2001, P. L. 107-16, Title VI, §§ 631(a), 635(a)-(c), 115 Stat. 111, 117; March 9, 2002, P. L. 107-147, Title IV, Subtitle B, § 411(o)(3)-(8), 116 Stat. 48, 49; Oct. 4, 2004, P. L. 108-311, Title IV, § 408(a)(15), 118 Stat. 1192; Aug. 17, 2006, P. L. 109-280, Title I, Subtitle B, § 114(c), Title IX, §§ 902(d)(1), 903(a), 906(a)(1), (b)(1)(C), Title XI, § 1106(b), 120 Stat. 853, 1036, 1040, 1051, 1052, 1062; May 25, 2007, P. L. 110-28, Title VI, Ch. 6, § 6611(a)(2), (b)(2), 121 Stat. 180, 181; June 17, 2008, P. L. 110-245, Title I, §§ 104(b), 105(b)(1), 122 Stat. 1626, 1628; July 30, 2008, P. L. 110-289, Div A, Title VI, § 1604(b)(4), 122 Stat. 2829; Dec. 23, 2008, P. L. 110-458, Title I, Subtitle A, §§ 101(d)(2)(E), 109(b)(4)-(6), (c)(1), 122 Stat. 5099, 5111.)

Notes of Decisions

1. Relation to other laws

Where defendant arranged tax shelter using employee stock ownership plan (ESOP) combined with S corporation acting as management company for C corporation, which was operating company, two corporations were part of controlled group because same people (numbering less than five) owned all of stock of both companies; so, for purposes of evaluating legitimacy of tax deferral claimed by ESOP, all employees of operating company were deemed to also be employees of management company; this ultimately becomes crucial in light of code provisions disqualifying plans that favor key employees, under IRC § 416; owners of corporations were deemed to be key employees, under IRC § 416(i), and ESOP favored them because other employees-i.e., operating company's employees other than owner-were not permitted to participate in plan; thus, without regard to how any particular client actually executed arrangement, tax shelter plan sold by defendant created invalid ESOP. United States v Stover (2010, WD Mo) 731 F Supp 2d 887, 106 AFTR 2d 5735.

Corporation was not entitled to deduction for any contributions made under its profit-sharing plan because its plan discriminated in favor of its sole stockholder, who was highly compensated employee as defined in 26 USCS § 414(q); further, plan did not constitute "qualified profit-sharing plan" under 26 USCS § 401(a); any contributions that corporation made under that plan and claimed as deductions for years at issue and that were

disallowed by court had to be included in sole stockholder's income as constructive dividends for her taxable years in which corporation made those contributions. DKD Enters. v Comm'r (2011) TC Memo 2011-29, 101 CCH TCM 1121.

Employee benefit plans of two employers related in manner described in 26 USCS § 414(b) or (c) that separately are fully integrated with social security and that may cover some of same employees do not satisfy integration rule of 26 USCS § 401(a)(5) and may violate §§ 401(a)(4) and 410(b). Rev Rul 79-236 (1979) 1979-2 CB 160, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Effective January 1, 2001, to operate in accordance with amendments enacted by section 314(e) of the Community Renewal Tax Relief Act of 2000, ("CRA") qualified plans must be amended within the GUST remedial amendment period to include within definition of compensation qualified transportation fringes excluded by § 132(f)(4) from an employee's gross income; because the CRA amendments are effective for years beginning after December 31, 1997, qualified plans that operated in accordance with these amendments must be retroactively amended; qualified plans that did not operate in accordance with the CRA amendments are to be amended for years beginning January 1, 2001. Notice 2001-37 (2001) 2001-1 CB 1340, 2001-25 IRB 1340.

Taxpayer's employee stock ownership plan (ESOP) was not qualified under I.R.C. §§ 401(a) and 501(a) because ESOP was not timely amended to include provisions required by I.R.C. §§ 402(c)(4)(C), 414(n)(2)(C), (q), and (u), and 415(c)(3), did not follow vesting schedule required by I.R.C. § 411(a)(2)(B), and failed to use independent appraiser to appraise employer securities as required by I.R.C. § 401(a)(28)(C). Hollen v Comm'r (2011) 50 EBC 1777, TC Memo 2011-2, 101 CCH TCM 1004.

2. Employees of affiliated service group

Because related company employer's principal was sole owner of, and had effective control of, employer and defendant related entities, three companies were brother-sister control group under I.R.C. § 414(b)-(c), 29 USCS § 1301(b)(1) for purposes of withdrawal liability under 29 USCS §§ 1381(b), 1383(a); further, entity was jointly and severally liable for purposes of withdrawal liability pursuant to 29 USCS § 1301(b)(1). I.A.M. Nat'l Pension Fund v TMR Realty Co (2006, DC Dist Col) 431 F Supp 2d 1.

Flight attendant was not entitled to long term disability (LTD) benefits under Employee Retirement income Security Act where 26 USCS §§ 410(b)(6)(C)(I) and 414(a) did not modify LTD benefit plan of predecessor airline to mandate inclusion of employees that it had permissibly excluded. Bellah v Am. Airlines, Inc. (2009, ED Cal) 656 F Supp 2d 1207.

Law partnership P consisting of corporate partners A, B, C and 10 individual partners which employs as common law employees some lawyers, paralegals, and clerical workers may be designated as first service organization and corporations A, B, and C as partners in that organization who regularly perform services for it; accordingly they are "any service organization" within meaning of 26 USCS § 414(n)(1) and therefore A, B, and C and first service organization P constitute affiliated service group and all employees of corporations A, B, C, common law employees of P and partners of P are considered as employed by single employer. Rev Rul 81-105 (1981) 1981-1 CB 256.

3. Employees or independent contractors

Qualified plans must be for exclusive benefit of employees or their beneficiaries, and leasing organization's pension plans do not qualify where organization's workers do not qualify as its employees; common-law factors are used to distinguish employees from independent contractors. Professional & Executive Leasing v Commissioner (1987) 89 TC 225, 8 EBC 2153, affd (1988, CA9) 862 F2d 751, 10 EBC 1627, 88-2 USTC P 9622, 63 AFTR 2d 427.

In determining whether workers are employees of employee-leasing company, common-law factors are used to distinguish employee from independent contractor; although no one factor is controlling, test considered fundamental is whether person for whom work is performed has right to control activities of individuals whose status is in question not only as to results but also as to means and methods used for accomplishing result; workers are not employees of leasing company where leasing company exercises minimal control, leasing company has no investment in work facilities and no opportunity for profit or loss except for amounts received as fees and monthly service rate payments. Professional & Executive Leasing v Commissioner (1987) 89 TC 225, 8 EBC 2153, affd (1988, CA9) 862 F2d 751, 10 EBC 1627, 88-2 USTC P 9622, 63 AFTR 2d 427.

4. Church plan

Definition of church plan under 26 USCS § 414(e)(3)(A) is virtually identical to definition of church plan under § 1002(33) of Employee Retirement Income Security Act of 1974, 29 USCS § 1001 et seq. Catholic Charities of Me., Inc. v City of Portland (2004, DC Me) 304 F Supp 2d 77, 32 EBC 1021.

Welfare benefit plans established to benefit clerical and lay employees of church-associated homes for elderly are church plans where those benefited are church employees and plan are controlled by or associated with church. Private Letter Ruling 9332045.

Unpublished Opinions

Under 29 USCS § 1003(b)(2) and 26 CFR § 54.4980B-2, requirements of Employment Retirement Income Security Act and Consolidated Omnibus Reconciliation Act did not apply to church's health and pension plans because those plans were church plans within meaning of 29 USCS § 1002(33) and 26 USCS § 414(e) given that plans were established by church and church possessed tax exempt status. Coleman-Edwards v Simpson (2009, CA2 NY) 2009 US App LEXIS 10213.

Meaning of "maintenance" as used in 26 USCS § 414(e) is unsettled given few published cases discussing issue; circumstances surrounding termination of pension plan and considerations in Hightower v. Texas Hosp. Ass'n, 65 F.3d 443 (5th Cir. 1995) and factors set forth in Lown v. Cont'l Cas. Co., 238 F.3d 543 (4th Cir. 2001) would guide decision of issue of maintenance and control. Neale v Healthcare Mgmt. Sevs. Group, LLC (In re Northeastern Conf. Nursing Home, Inc.) (2006, BC SD NY) 2006 Bankr LEXIS 481.

5. Collectively-bargained plan

Plan can qualify as collectively bargained plan even though it is instituted by Bankruptcy Court as part of Chapter 11 reorganization. Private Letter Ruling 9113036.

6. Governmental plan

Retirement plan maintained by organization was not governmental plan within meaning of 26 USCS § 414(d), where governmental unit did not have sufficient control over organization. Rev Rul 89-49 (1989) 1989-1 CB 117.

7. Volunteer fire company

In determining whether retirement plan is governmental plan within meaning of § 414(d), factfinder considers whether organization is government agency or instrumentality, and factors include degree of control that federal or state government has over everyday operations, law creating organization, source of its funds, manner in which trustees or operating board are selected, and whether other governmental units consider organization's employees to be government employees; plan adopted by volunteer fire company incorporated under state nonprofit corporation law is not governmental plan where municipalities do not exercise control over fire company, expenses are paid largely by community donations, and trustees who control operations are elected by volunteer firefighters. Rev Rul 89-49 (1989) 1989-1 CB 117.

Where degree of control exerted by governmental entity over organization's plan is minimal, plan is not governmental plan; where volunteer fire department, organized by citizens of municipality to provide fire protection services, establishes retirement plan, but there is no specific legislation affiliating company with state, and state does not treat employees as employees of state or political subdivision, plan is not governmental plan. Rev Rul 89-49 (1989) 1989-1 CB 117.

8. Merger or consolidation of plans

Moving funds from pension plan to profit-sharing plan through merger results in loss of qualified status since profit-sharing plan, unlike pension plan, can provide for distribution of benefits after fixed number of years; direct rollover from terminated pension plan to profit-sharing plan does not result in disqualification. Rev Rul 94-76 (1994) 1994-2 CB 46, 94 TNT 233-5, amplified (2002) 2002-28 IRB 76.

9. Pickup of employee contributions

Employer's designation of contributions controls, and contributions constitute taxable income, where state law does not avail itself of 26 USCS § 414(h)(2) proviso allowing employers to "pick-up" employees contribu-

tions as employer contributions. Howell v United States (1985, CA7 Ill) 775 F2d 887, 6 EBC 2493, 85-2 USTC P 9773, 57 AFTR 2d 768.

Statute authorizing state retirement plans to establish "pickup" arrangements is not in itself sufficient to effectuate "pickup" of employee contributions, and accordingly state judge who agreed to have state deduct 11 percent of salary and deposit it with state retirement funds cannot exclude contributed amount from his income. Foil v Commissioner (1989) 92 TC 376, affd (1990, CA5) 920 F2d 1196, 13 EBC 1495, 91-1 USTC P 50016, 67 AFTR 2d 407.

Employee contributions to governmental plan are not "picked up" by employer within meaning of 26 USCS § 414(h)(2) and are not excludable from employee's gross income where employee voluntarily agreed that employer would make required contributions directly to state pension plan rather than including amount in employee's salary. Rev Rul 81-34 (1981) 1981-1 CB 173, obsoleted (1993) 1993-2 CB 125, 93 TNT 24-6.

Employee contributions to government plan are "picked up" by employer within meaning of 26 USCS § 414(h)(2) and excludable from gross income of employee where employer specifies that contributions are paid by employer in lieu of contributions by employee and employee, pursuant to union negotiating agreement, has no option to receive contributed amounts directly instead of having them paid in to pension plan. Rev Rul 81-36 (1981) 1981-1 CB 255.

10. Timing

"Pick up" is effective when employer adopts resolution approving "pick up" of contributions to pension fund, and court does not accept IRS contention that effective date is ruling date rather than resolution date since such would allow IRS, rather than employer, to control when pick up begins contrary to legislative intent of § 414(h)(2). Slechter v Commissioner (1987) TC Memo 1987-528, RIA TC Memo P 87528, 54 CCH TCM 897.

It is not effective for federal income tax purposes to retroactively designate taxpayer's prior year employee contributions as employer contributions. Alderman v Commissioner (1988) 9 EBC 1562, TC Memo 1988-49, RIA TC Memo P 88049, 55 CCH TCM 86.

Mandatory contributions by state employee were not "picked up" until year when state designated those contributions as employee contributions. Mettler v Commissioner (1989) 11 EBC 1192, TC Memo 1989-301, RIA TC Memo P 89301, 57 CCH TCM 775.

11. Qualified domestic relations order

Divorce decree and settlement agreement can constitute QDRO if statutory criteria are satisfied in substance, and it is not necessary that settlement agreement track statutory language; agreement that provides for spouse to receive payment from plan is not required to explicitly designate spouse as alternate payee where such intent is clear from agreement. Hawkins v Commissioner (1996, CA10) 86 F3d 982, 20 EBC 1513, 96-1 USTC P 50316, 78 AFTR 2d 5114.

State domestic relations order was valid qualified domestic relations order (QDRO) because state explicitly recognized quasi-marital relationships for purpose of determining property rights and plaintiff qualified as "alternate payee" under 29 USCS § 1056(d)(3)(K) because she was "dependent" under 26 USCS § 152(d)(2)(H). Owens v Auto. Machinists Pension Trust (2009, CA9 Wash) 551 F3d 1138, 45 EBC 2153.

Deferred retirement option plan (DROP) retirement benefits from Baltimore City Fire and Police Employees' Retirement System were adjudged pension payments within meaning of Qualified Domestic Relations Orders (QDROs) entered in two retirees' divorces thereby entitling their former spouses to portion of DROP payments; in declaratory judgment action brought by two retirees against their former spouses, Retirement System, city's mayor, and its council, reviewing court affirmed decision of Board of Trustees of Retirement System that former spouses were entitled to portion of DROP payments because plain language of QDROs in each case unambiguously made scope of pension benefits coextensive with scope of benefits offered by Retirement System, which treated DROP benefits as pension benefits under I.R.C. 401(a). Dennis v Fire & Police Emples. Ret. Sys. (2006, Md) 890 A2d 737.

Consent agreement entered into between spouses does not qualify as qualified domestic relations order where agreement requires drafting of order with respect to future payments and is rendered by court more than one year after date of actual distribution. Karem v Commissioner (1993) 100 TC 521, 16 EBC 2728, 93 TNT 126-18.

Taxpayer is collaterally estopped from denying that order under which payment was made from ex-husband's profit-sharing plan was QDRO where district court found that payment met ERISA § 206(d)(3) definition of QDRO. Brotman v Commissioner (1995) 105 TC 141, 19 EBC 1850, 95 TNT 167-9.

Where taxpayer received from her husband's retirement plan entire balance of $ 77,000 less taxes withheld of $ 16,940, for net of $ 60,060, but under qualified domestic relations order, taxpayer was alternate payee of only portion of distribution, specifically, $ 51,497, with amount of $ 25,503 being attributable to taxpayer's former husband, taxpayer was liable for tax on additional portion of distribution; however, as alternate payee of distribution from her former husband's retirement plan, she was not liable for additional tax pursuant to 26 USCS § 72(t). Seidel v Comm'r (2005) TC Memo 2005-67, 89 CCH TCM 972.

Domestic relations order (DRO) was not qualified domestic relations order (QDRO) under 26 USCS § 414(p)(1) where it did not give taxpayer right to receive distribution directly from plan, so exception in 26 USCS § 402(e)(1) did not apply; fact that taxpayer's former husband was ordered to pay amount to her and "end result" was that taxpayer received funds originating from plan did not help because this argument ignored statutory requirement that to be qualified, DRO was required to create or recognize in alternate payee right to receive all or portion of benefits payable with respect to participant under plan. Amarasinghe v Comm'r (2007) TC Memo 2007-333, 94 CCH TCM 447.

Payments that were made to taxpayer's former spouse from his government pension plan were not made pursuant to QDRO because QDRO provisions that were in effect in 1984 did not apply to governmental plans, and state court issued its divorce decree on March 2, 1983; thus, contrary to taxpayer's argument, monthly payments were not deductible or excludable from taxpayer's income and were not includible in former spouse's income for year at issue. Platt v Comm'r (2008) TC Memo 2008-17, 95 CCH TCM 1084.

Although taxpayer withdrew funds from IRA to satisfy obligations under divorce judgment, because there was no provision in divorce judgment that required taxpayer to pay ordered obligations from IRA account, judgment made no mention of ex-spouse as alternate payee, and taxpayer never submitted copy of divorce judgment to plan administrator for determination as to whether judgment may have been QDRO, distribution did not meet requirements of QDRO and was subject to 10-percent additional tax under 26 USCS § 72(t) for early distribution. Bougas v Comm'r (2003) 31 EBC 1175, TC Memo 2003-194, 86 CCH TCM 9.

Fact that taxpayer used funds received from distribution from taxpayer's qualified retirement plan to satisfy property distribution to taxpayer's former spouse pursuant to divorce decree did not shift burden of additional tax for early distribution under 26 USCS § 72(t)(1) to spouse, as payment was not made pursuant to qualified domestic relations order—distribution was made directly to taxpayer and former spouse was not designated as alternate payee. Simpson v Comm'r (2003) 32 EBC 1083, TC Memo 2003-294, 86 CCH TCM 470.

12. Section 414(k) plans

Defined benefit plan that is funded by group deferred annuity and that provides for mandatory employee contributions, experience dividends, offsetting of employer contributions by mandatory employee contributions, and, on separation from service, computation of lump sum attributable to employee contributions as these contributions with 3 1/2 percent interest is not a plan described in 26 USCS § 414(k). Rev Rul 79-259 (1979) 1979-2 CB 197.

13. Partial termination of plan

Conversion of money-purchase plan into profit sharing plan is not partial termination where all employers covered under money-purchase plan remained covered under profit sharing plan and assets and liabilities transferred to profit sharing plan maintained same characteristics and vesting schedules were unchanged; where benefit accruals are reduced by conversion, notice to participants is required under § 4980F. Rev Rul 2002-42 (2002) 2002-28 IRB 76.

§ 415. Limitations on benefits and contributions under qualified plans

(a) General rule.

(1) Trusts. A trust which is a part of a pension, profit- sharing, or stock bonus plan shall not constitute a qualified trust under section 401(a) [26 USCS § 401(a)] if—

(A) in the case of a defined benefit plan, the plan provides for the payment of benefits with respect to a participant which exceed the limitation of subsection (b), or

(B) in the case of a defined contribution plan, contributions and other additions under the plan with respect to any participant for any taxable year exceed the limitation of subsection (c).

(2) Section applies to certain annuities and accounts. In the case of—

(A) an employee annuity plan described in section 403(a) [26 USCS § 403(a)],

(B) an annuity contract described in section 403(b) [26 USCS § 403(b)], or

(C) a simplified employee pension described in section 408(k) [26 USCS § 408(k)],

such a contract, plan, or pension shall not be considered to be described in section 403(a), 403(b), or 408(k) [26 USCS § 403(a), 403(b), or 408(k)], as the case may be, unless it satisfies the requirements of subparagraph (A) or subparagraph (B) of paragraph (1), whichever is appropriate, and has not been disqualified under subsection (g). In the case of an annuity contract described in section 403(b) [26 USCS § 403(b)], the preceding sentence shall apply only to the portion of the annuity contract which exceeds the limitation of subsection (b) or the limitation of subsection (c), whichever is appropriate.

(b) Limitation for defined benefit plans.

(1) In general. Benefits with respect to a participant exceed the limitation of this subsection if, when expressed as an annual benefit (within the meaning of paragraph (2)), such annual benefit is greater than the lesser of—

(A) $ 160,000, or

(B) 100 percent of the participant's average compensation for his high 3 years.

(2) Annual benefit.

(A) In general. For purposes of paragraph (1), the term "annual benefit" means a benefit payable annually in the form of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions (as defined in sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16) [26 USCS §§ 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16)]) are made.

(B) Adjustment for certain other forms of benefit. If the benefit under the plan is payable in any form other than the form described in subparagraph (A), or if the employees contribute to the plan or make rollover contributions (as defined in sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16) [26 USCS §§ 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16)]), the determinations as to whether the limitation described in paragraph (1) has been satisfied shall be made, in accordance with regulations prescribed by the Secretary, by adjusting such benefit so that it is equivalent to the benefit described in subparagraph (A). For purposes of this subparagraph, any ancillary benefit which is not directly related to retirement income benefits shall not be taken into account; and that portion of any joint and survivor annuity which constitutes a qualified joint and survivor annuity (as defined in section 417 [26 USCS § 417]) shall not be taken into account.

(C) Adjustment to $ 160,000 limit where benefit begins before age 62. If the retirement income benefit under the plan begins before age 62, the determination as to whether the $ 160,000 limitation set forth in paragraph (1)(A) has been satisfied shall be made, in accordance with regulations prescribed by the Secretary, by reducing the limitation of paragraph (1)(A) so that such limitation (as so reduced) equals an annual benefit (beginning when such retirement income benefit begins) which is equivalent to a $ 160,000 annual benefit beginning at age 62.

(D) Adjustment to $ 160,000 limit where benefit begins after age 65. If the retirement income benefit under the plan begins after age 65, the determination as to whether the $ 160,000 limitation set forth in paragraph (1)(A) has been satisfied shall be made, in accordance with regulations prescribed by the Secretary, by increasing the limitation of paragraph (1)(A) so that such limitation (as so increased) equals an annual benefit (beginning when such retirement income benefit begins) which is equivalent to a $ 160,000 annual benefit beginning at age 65.

(E) Limitation on certain assumptions.

(i) For purposes of adjusting any limitation under subparagraph (C) and, except as provided in clause (ii), for purposes of adjusting any benefit under subparagraph (B), the interest rate assumption shall not be less than the greater of 5 percent or the rate specified in the plan.

(ii) For purposes of adjusting any benefit under subparagraph (B) for any form of benefit subject to section 417(e)(3) [26 USCS § 417(e)(3)], the interest rate assumption shall not be less than the greatest of—

(I) 5.5 percent,

(II) the rate that provides a benefit of not more than 105 percent of the benefit that would be provided if the applicable interest rate (as defined in section 417(e)(3) [26 USCS § 417(e)(3)]) were the interest rate assumption, or

(III) the rate specified under the plan.

(iii) For purposes of adjusting any limitation under subparagraph (D), the interest rate assumption shall not be greater than the lesser of 5 percent or the rate specified in the plan.

(iv) For purposes of this subsection, no adjustments under subsection (d)(1) shall be taken into account before the year for which such adjustment first takes effect.

(v) For purposes of adjusting any benefit or limitation under subparagraph (B), (C), or (D), the mortality table used shall be the applicable mortality table (within the meaning of section 417(e)(3)(B) [26 USCS § 417(e)(3)(B)]).

(vi) In the case of a plan maintained by an eligible employer (as defined in section 408(p)(2)(C)(i) [26 USCS § 408(p)(2)(C)(i)]), clause (ii) shall be applied without regard to subclause (II) thereof.

(F) [Deleted]

(G) Special limitation for qualified police or firefighters. In the case of a qualified participant, subparagraph (C) of this paragraph shall not apply.

(H) Qualified participant defined. For purposes of subparagraph (G), the term "qualified participant" means a participant—

(i) in a defined benefit plan which is maintained by a State, Indian tribal government (as defined in section 7701(a)(40) [26 USCS § 7701(a)(40)]), or any political subdivision thereof,

(ii) with respect to whom the period of service taken into account in determining the amount of the benefit under such defined benefit plan includes at least 15 years of service of the participant—

(I) as a full-time employee of any police department or fire department which is organized and operated by the State, Indian tribal government (as so defined), or any political subdivision maintaining such defined benefit plan to provide police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State, Indian tribal government (as so defined), or any political subdivision, or

(II) as a member of the Armed Forces of the United States.

(I) Exemption for survivor and disability benefits provided under governmental plans. Subparagraph (C) of this paragraph and paragraph (5) shall not apply to—

(i) income received from a governmental plan (as defined in section 414(d) [26 USCS § 414(d)]) as a pension, annuity, or similar allowance as the result of the recipient becoming disabled by reason of personal injuries or sickness, or

(ii) amounts received from a governmental plan by the beneficiaries, survivors, or the estate of an employee as the result of the death of the employee.

(3) Average compensation for high 3 years. For purposes of paragraph (1), a participant's high 3 years shall be the period of consecutive calendar years (not more than 3) during which the participant had the greatest aggregate compensation from the employer. In the case of an employee within the meaning of section 401(c)(1) [26 USCS § 401(c)(1)], the preceding sentence shall be applied by substituting for "compensation from the employer" the following: "the participant's earned income (within the meaning of section 401(c)(2) [26 USCS § 401(c)(2)] but determined without regard to any exclusion under section 911 [26 USCS § 911])".

(4) Total annual benefits not in excess of $ 10,000. Notwithstanding the preceding provisions of this subsection, the benefits payable with respect to a participant under any defined benefit plan shall be deemed not to exceed the limitation of this subsection if—

(A) the retirement benefits payable with respect to such participant under such plan and under all other defined benefit plans of the employer do not exceed $ 10,000 for the plan year, or for any prior plan year, and

(B) the employer has not at any time maintained a defined contribution plan in which the participant participated.

(5) Reduction for participation or service of less than 10 years.

(A) Dollar limitation. In the case of an employee who has less than 10 years of participation in a defined benefit plan, the limitation referred to in paragraph (1)(A) shall be the limitation determined under such paragraph (without regard to this paragraph) multiplied by a fraction—

(i) the numerator of which is the number of years (or part thereof) of participation in the defined benefit plan of the employer, and

(ii) the denominator of which is 10.

(B) Compensation and benefits limitations. The provisions of subparagraph (A) shall apply to the limitations under paragraphs (1)(B) and (4), except that such subparagraph shall be applied with respect to years of service with an employer rather than years of participation in a plan.

(C) Limitation on reduction. In no event shall subparagraph (A) or (B) reduce the limitations referred to in paragraphs (1) and (4) to an amount less than 1/10 of such limitation (determined without regard to this paragraph).

(D) Application to changes in benefit structure. To the extent provided in regulations, subparagraph (A) shall be applied separately with respect to each change in the benefit structure of a plan.

(6) Computation of benefits and contributions. The computation of—

(A) benefits under a defined contribution plan, for purposes of section 401(a)(4) [26 USCS § 401(a)(4)],

(B) contributions made on behalf of a participant in a defined benefit plan, for purposes of section 401(a)(4) [26 USCS § 401(a)(4)], and

(C) contributions and benefits provided for a participant in a plan described in section 414(k) [26 USCS § 414(k)], for purposes of this section

shall not be made on a basis inconsistent with regulations prescribed by the Secretary.

(7) Benefits under certain collectively bargained plans. For a year, the limitation referred to in paragraph (1)(B) shall not apply to benefits with respect to a participant under a defined benefit plan (other than a multiemployer plan)—

(A) which is maintained for such year pursuant to a collective bargaining agreement between employee representatives and one or more employers,

(B) which, at all times during such year, has at least 100 participants,

(C) under which benefits are determined solely by reference to length of service, the particular years during which service was rendered, age at retirement, and date of retirement,

(D) which provides that an employee who has at least 4 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions, and

(E) which requires, as a condition of participation in the plan, that an employee complete a period of not more than 60 consecutive days of service with the employer or employers maintaining the plan.

This paragraph shall not apply to a participant whose compensation for any 3 years during the 10-year period immediately preceding the year in which he separates from service exceeded the average compensation for such 3 years of all participants in such plan. This paragraph shall not apply to a participant for any period for which he is a participant under another plan to which this section applies which is maintained by an employer maintaining this plan. For any year for which the paragraph applies to benefits with respect to a participant, paragraph (1)(A) and subsection (d)(1)(A) shall be applied with respect to such participant by substituting one-half the amount otherwise applicable for such year under paragraph (1)(A) for "$ 160,000".

(8) Social security retirement age defined. For purposes of this subsection, the term "social security retirement age" means the age used as the retirement age under section 216(l) of the Social Security Act [42 USCS § 416(l)], except that such section shall be applied—

(A) without regard to the age increase factor, and

(B) as if the early retirement age under section 216(l)(2) of such Act [42 USCS § 416(l)(2)] were 62.

(9) Special rule for commercial airline pilots.

(A) In general. Except as provided in subparagraph (B), in the case of any participant who is a commercial airline pilot, if, as of the time of the participant's retirement, regulations prescribed by the

Federal Aviation Administration require an individual to separate from service as a commercial airline pilot after attaining any age occurring on or after age 60 and before age 62, paragraph (2)(C) shall be applied by substituting such age for age 62.

(B) Individuals who separate from service before age 60. If a participant described in subparagraph (A) separates from service before age 60, the rules of paragraph (2)(C) shall apply.

(10) Special rule for State, Indian tribal, and local government plans.

(A) Limitation to equal accrued benefit. In the case of a plan maintained for its employees by any State or political subdivision thereof, or by any agency or instrumentality of the foregoing, or a governmental plan described in the last sentence of section 414(d) [26 USCS § 414(d)] (relating to plans of Indian tribal governments), the limitation with respect to a qualified participant under this subsection shall not be less than the accrued benefit of the participant under the plan (determined without regard to any amendment of the plan made after October 14, 1987).

(B) Qualified participant. For purposes of this paragraph, the term "qualified participant" means a participant who first became a participant in the plan maintained by the employer before January 1, 1990.

(C) Election.

(i) In general. This paragraph shall not apply to any plan unless each employer maintaining the plan elects before the close of the 1st plan year beginning after December 31, 1989, to have this subsection (other than paragraph (2)(G)) [sic].

(ii) Revocation of election. An election under clause (i) may be revoked not later than the last day of the third plan year beginning after the date of the enactment of this clause [enacted Aug. 20, 1996]. The revocation shall apply to all plan years to which the election applied and to all subsequent plan years. Any amount paid by a plan in a taxable year ending after the revocation shall be includible in income in such taxable year under the rules of this chapter [26 USCS §§ 1 et seq.] in effect for such taxable year, except that, for purposes of applying the limitations imposed by this section, any portion of such amount which is attributable to any taxable year during which the election was in effect shall be treated as received in such taxable year.

(11) Special limitation rule for governmental and multiemployer plans. In the case of a governmental plan (as defined in section 414(d) [26 USCS § 414(d)]) or a multiemployer plan (as defined in section 414(f) [26 USCS § 414(f)]), subparagraph (B) of paragraph (1) shall not apply. Subparagraph (B) of paragraph (1) shall not apply to a plan maintained by an organization described in section 3121(w)(3)(A) [26 USCS § 3121(w)(3)(A)] except with respect to highly compensated benefits. For purposes of this paragraph, the term "highly compensated benefits" means any benefits accrued for an employee in any year on or after the first year in which such employee is a highly compensated employee (as defined in section 414(q) [26 USCS § 414(q)]) of the organization described in section 3121(w)(3)(A) [26 USCS § 3121(w)(3)(A)]. For purposes of applying paragraph (1)(B) to highly compensated benefits, all benefits of the employee otherwise taken into account (without regard to this paragraph) shall be taken into account.

(c) Limitation for defined contribution plans.

(1) In general. Contributions and other additions with respect to a participant exceed the limitation of this subsection if, when expressed as an annual addition (within the meaning of paragraph (2)) to the participant's account, such annual addition is greater than the lesser of—

(A) $ 40,000, or

(B) 100 percent of the participant's compensation.

(2) Annual addition. For purposes of paragraph (1), the term "annual addition" means the sum for any year of—

(A) employer contributions,

(B) the employee contributions, and

(C) forfeitures.

For the purposes of this paragraph, employee contributions under subparagraph (B) are determined without regard to any rollover contributions (as defined in sections 402(c), 403(a)(4), 403(b)(8),

408(d)(3), and 457(e)(16) [26 USCS §§ 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16)]) without regard to employee contributions to a simplified employee pension which are excludable from gross income under section 408(k)(6) [26 USCS § 408(k)(6)]. Subparagraph (B) of paragraph (1) shall not apply to any contribution for medical benefits (within the meaning of section 419A(f)(2) [26 USCS § 419A(f)(2)]) after separation from service which is treated as an annual addition.

(3) Participant's compensation. For purposes of paragraph (1)—

(A) In general. The term "participant's compensation" means the compensation of the participant from the employer for the year.

(B) Special rule for self- employed individuals. In the case of an employee within the meaning of section 401(c)(1) [26 USCS § 401(c)(1)], subparagraph (A) shall be applied by substituting "the participant's earned income (within the meaning of section 401(c)(2) [26 USCS § 401(c)(2)] but determined without regard to any exclusion under section 911 [26 USCS § 911])" for "compensation of the participant from the employer".

(C) Special rules for permanent and total disability. In the case of a participant in any defined contribution plan—

(i) who is permanently and totally disabled (as defined in section 22(e)(3) [26 USCS § 22(e)(3)]),

(ii) who is not a highly compensated employee (within the meaning of section 414(q) [26 USCS § 414(q)]), and

(iii) with respect to whom the employer elects, at such time and in such manner as the Secretary may prescribe, to have this subparagraph apply,

the term "participant's compensation" means the compensation the participant would have received for the year if the participant was paid at the rate of compensation paid immediately before becoming permanently and totally disabled. This subparagraph shall apply only if contributions made with respect to amounts treated as compensation under this subparagraph are nonforfeitable when made. If a defined contribution plan provides for the continuation of contributions on behalf of all participants described in clause (i) for a fixed or determinable period, this subparagraph shall be applied without regard to clauses (ii) and (iii).

(D) Certain deferrals included. The term "participant's compensation" shall include—

(i) any elective deferral (as defined in section 402(g)(3) [26 USCS § 402(g)(3)]), and

(ii) any amount which is contributed or deferred by the employer at the election of the employee and which is not includible in the gross income of the employee by reason of section 125, 132(f)(4), or 457 [26 USCS § 125, 132(f)(4), or 457].

(E) Annuity contracts. In the case of an annuity contract described in section 403(b) [26 USCS § 403(b)], the term "participant's compensation" means the participant's includible compensation determined under section 403(b)(3) [26 USCS § 403(b)(3)].

(4) [Deleted]

(5) [Repealed.]

(6) Special rule for employee stock ownership plans. If no more than one-third of the employer contributions to an employee stock ownership plan (as described in section 4975(e)(7) [26 USCS § 4975(e)(7)]) for a year which are deductible under paragraph (9) of section 404(a) [26 USCS § 404(a)] are allocated to highly compensated employees (within the meaning of section 414(q) [26 USCS § 414(q)]), the limitations imposed by this section shall not apply to—

(A) forfeitures of employer securities (within the meaning of section 409 [26 USCS § 409]) under such an employee stock ownership plan if such securities were acquired with the proceeds of a loan (as described in section 404(a)(9)(A) [26 USCS § 404(a)(9)(A)]), or

(B) employer contributions to such an employee stock ownership plan which are deductible under section 404(a)(9)(B) [26 USCS § 404(a)(9)(B)] and charged against the participant's account.

The amount of any qualified gratuitous transfer (as defined in section 664(g)(1) [26 USCS § 664(g)(1)]) allocated to a participant for any limitation year shall not exceed the limitations imposed by this section, but such amount shall not be taken into account in determining whether any other amount exceeds the limitations imposed by this section.

(7) Special rules relating to church plans.

(A) Alternative contribution limitation.

(i) In general. Notwithstanding any other provision of this subsection, at the election of a participant who is an employee of a church or a convention or association of churches, including an organization described in section 414(e)(3)(B)(ii) [26 USCS § 414(e)(3)(B)(ii)], contributions and other additions for an annuity contract or retirement income account described in section 403(b) [26 USCS § 403(b)] with respect to such participant, when expressed as an annual addition to such participant's account, shall be treated as not exceeding the limitation of paragraph (1) if such annual addition is not in excess of $ 10,000.

(ii) $ 40,000 aggregate limitation. The total amount of additions with respect to any participant which may be taken into account for purposes of this subparagraph for all years may not exceed $ 40,000.

(B) Number of years of service for duly ordained, commissioned, or licensed ministers or lay employees. For purposes of this paragraph—

(i) all years of service by—

(I) a duly ordained, commissioned, or licensed minister of a church, or

(II) a lay person,

as an employee of a church, a convention or association of churches, including an organization described in section 414(e)(3)(B)(ii) [26 USCS § 414(e)(3)(B)(ii)], shall be considered as years of service for 1 employer, and

(ii) all amounts contributed for annuity contracts by each such church (or convention or association of churches) or such organization during such years for such minister or lay person shall be considered to have been contributed by 1 employer.

(C) Foreign missionaries. In the case of any individual described in subparagraph (B) performing services outside the United States, contributions and other additions for an annuity contract or retirement income account described in section 403(b) [26 USCS § 403(b)] with respect to such employee, when expressed as an annual addition to such employee's account, shall not be treated as exceeding the limitation of paragraph (1) if such annual addition is not in excess of $ 3,000. This subparagraph shall not apply with respect to any taxable year to any individual whose adjusted gross income for such taxable year (determined separately and without regard to community property laws) exceeds $ 17,000.

(D) Annual addition. For purposes of this paragraph, the term "annual addition" has the meaning given such term by paragraph (2).

(E) Church, convention or association of churches. For purposes of this paragraph, the terms "church" and "convention or association of churches" have the same meaning as when used in section 414(e) [26 USCS § 414(e)].

(d) Cost-of-living adjustments.

(1) In general. The Secretary shall adjust annually—

(A) the $ 160,000 amount in subsection (b)(1)(A),

(B) in the case of a participant who separated from service, the amount taken into account under subsection (b)(1)(B), and

(C) the $ 40,000 amount in subsection (c)(1)(A),

for increases in the cost-of-living in accordance with regulations prescribed by the Secretary.

(2) Method. The regulations prescribed under paragraph (1) shall provide for—

(A) an adjustment with respect to any calendar year based on the increase in the applicable index for the calendar quarter ending September 30 of the preceding calendar year over such index for the base period, and

(B) adjustment procedures which are similar to the procedures used to adjust benefit amounts under section 215(i)(2)(A) of the Social Security Act [42 USCS § 415(i)(2)(A)].

(3) Base period. For purposes of paragraph (2)—

(A) $ 160,000 amount. The base period taken into account for purposes of paragraph (1)(A) is the calendar quarter beginning July 1, 2001.

(B) Separations after December 31, 1994. The base period taken into account for purposes of paragraph (1)(B) with respect to individuals separating from service with the employer after December 31, 1994, is the calendar quarter beginning July 1 of the calendar year preceding the calendar year in which such separation occurs.

(C) Separations before January 1, 1995. The base period taken into account for purposes of paragraph (1)(B) with respect to individuals separating from service with the employer before January 1, 1995, is the calendar quarter beginning October 1 of the calendar year preceding the calendar year in which such separation occurs.

(D) $ 40,000 amount. The base period taken into account for purposes of paragraph (1)(C) is the calendar quarter beginning July 1, 2001.

(4) Rounding.

(A) $ 160,000 amount. Any increase under subparagraph (A) of paragraph (1) which is not a multiple of $ 5,000 shall be rounded to the next lowest multiple of $ 5,000. This subparagraph shall also apply for purposes of any provision of this title that provides for adjustments in accordance with the method contained in this subsection, except to the extent provided in such provision.

(B) $ 40,000 amount. Any increase under subparagraph (C) of paragraph (1) which is not a multiple of $ 1,000 shall be rounded to the next lowest multiple of $ 1,000.

(e) [Repealed]

(f) Combining of plans.

(1) In general. For purposes of applying the limitations of subsections (b) and (c)—

(A) all defined benefit plans (whether or not terminated) of an employer are to be treated as one defined benefit plan, and

(B) all defined contribution plans (whether or not terminated) of an employer are to be treated as one defined contribution plan.

(2) Exception for multiemployer plans. Notwithstanding paragraph (1) and subsection (g), a multiemployer plan (as defined in section 414(f) [26 USCS § 414(f)]) shall not be combined or aggregated—

(A) with any other plan which is not a multiemployer plan for purposes of applying subsection (b)(1)(B) to such other plan, or

(B) with any other multiemployer plan for purposes of applying the limitations established in this section.

(g) Aggregation of plans. Except as provided in subsection (f)(3), the Secretary, in applying the provisions of this section to benefits or contributions under more than one plan maintained by the same employer, and to any trusts, contracts, accounts, or bonds referred to in subsection (a)(2), with respect to which the participant has the control required under section 414(b) or (c), as modified by subsection (h), shall, under regulations prescribed by the Secretary, disqualify one or more trusts, plans, contracts, accounts, or bonds, or any combination thereof until such benefits or contributions do not exceed the limitations contained in this section. In addition to taking into account such other factors as may be necessary to carry out the purposes of subsection (f), the regulations prescribed under this paragraph shall provide that no plan which has been terminated shall be disqualified until all other trusts, plans, contracts, accounts, or bonds have been disqualified.

(h) 50 percent control. For purposes of applying subsections (b) and (c) of section 414 [26 USCS § 414] to this section, the phrase "more than 50 percent" shall be substituted for the phrase "at least 80 percent" each place it appears in section 1563(a)(1) [26 USCS § 1563(a)(1)].

(i) Records not available for past periods. Where for the period before January 1, 1976, or (if later) the first day of the first plan year of the plan, the records necessary for the application of this section are not available, the Secretary may by regulations prescribe alternative methods for determining the amounts to be taken into account for such period.

(j) Regulations; definition of year. The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this section, including, but not limited to, regulations defining the term "year" for purposes of any provision of this section.

(k) Special rules.

(1) Defined benefit plan and defined contribution plan. For purposes of this title, the term "defined contribution plan" or "defined benefit plan" means a defined contribution plan (within the meaning of section 414(i) [26 USCS § 414(i)]) or a defined benefit plan (within the meaning of section 414(j) [26 USCS § 414(j)]), whichever applies, which is—

(A) a plan described in section 401(a) [26 USCS § 401(a)] which includes a trust which is exempt from tax under section 501(a) [26 USCS § 501(a)],

(B) an annuity plan described in section 403(a) [26 USCS § 403(a)],

(C) an annuity contract described in section 403(b) [26 USCS § 403(b)], or

(D) a simplified employee pension.

(2) Contributions to provide cost-of-living protection under defined benefit plans.

(A) In general. In the case of a defined benefit plan which maintains a qualified cost-of-living arrangement—

(i) any contribution made directly by an employee under such an arrangement shall not be treated as an annual addition for purposes of subsection (c), and

(ii) any benefit under such arrangement which is allocable to an employer contribution which was transferred from a defined contribution plan and to which the requirements of subsection (c) were applied shall, for purposes of subsection (b), be treated as a benefit derived from an employee contribution (and subsection (c) shall not again apply to such contribution by reason of such transfer).

(B) Qualified cost-of-living arrangement defined. For purposes of this paragraph, the term "qualified cost-of-living arrangement" means an arrangement under a defined benefit plan which—

(i) provides a cost-of-living adjustment to a benefit provided under such plan or a separate plan subject to the requirements of section 412, and

(ii) meets the requirements of subparagraphs (C), (D), (E), and (F) and such other requirements as the Secretary may prescribe.

(C) Determination of amount of benefit. An arrangement meets the requirement of this subparagraph only if the cost-of-living adjustment of participants is based—

(i) on increases in the cost-of-living after the annuity starting date, and

(ii) on average cost-of-living increases determined by reference to 1 or more indexes prescribed by the Secretary, except that the arrangement may provide that the increase for any year will not be less than 3 percent of the retirement benefit (determined without regard to such increase).

(D) Arrangement elective; time for election. An arrangement meets the requirements of this subparagraph only if it is elective, it is available under the same terms to all participants, and it provides that such election may at least be made in the year in which the participant—

(i) attains the earliest retirement age under the defined benefit plan (determined without regard to any requirement of separation from service), or

(ii) separates from service.

(E) Nondiscrimination requirements. An arrangement shall not meet the requirements of this subparagraph if the Secretary finds that a pattern of discrimination exists with respect to participation.

(F) Special rules for key employees.

(i) In general. An arrangement shall not meet the requirements of this paragraph if any key employee is eligible to participate.

(ii) Key employee. For purposes of this subparagraph, the term "key employee" has the meaning given such term by section 416(i)(1) [26 USCS § 416(i)(1)], except that in the case of a plan other than a top-heavy plan (within the meaning of section 416(g) [26 USCS § 416(g)]), such term shall not include an individual who is a key employee solely by reason of section 416(i)(1)(A)(i) [26 USCS § 416(i)(1)(A)(i)].

(3) Repayments of cashouts under governmental plans. In the case of any repayment of contributions (including interest thereon) to the governmental plan with respect to an amount previously refunded upon a forfeiture of service credit under the plan or under another governmental plan maintained by a State or local government employer within the same State, any such repayment shall not be taken into account for purposes of this section.

(4) Special rules for sections 403(b) and 408. For purposes of this section, any annuity contract described in section 403(b) [26 USCS § 403(b)] for the benefit of a participant shall be treated as a defined contribution plan maintained by each employer with respect to which the participant has the control required under subsection (b) or (c) of section 414 [26 USCS § 414] (as modified by subsection (h)). For purposes of this section, any contribution by an employer to a simplified employee pension plan for an individual for a taxable year shall be treated as an employer contribution to a defined contribution plan for such individual for such year.

(l) Treatment of certain medical benefits.

(1) In general. For purposes of this section, contributions allocated to any individual medical benefit account which is part of a pension or annuity plan shall be treated as an annual addition to a defined contribution plan for purposes of subsection (c). Subparagraph (B) of subsection (c)(1) shall not apply to any amount treated as an annual addition under the preceding sentence.

(2) Individual medical benefit account. For purposes of paragraph (1), the term "individual medical benefit account" means any separate account—

(A) which is established for a participant under a pension or annuity plan, and

(B) from which benefits described in section 401(h) [26 USCS § 401(h)] are payable solely to such participant, his spouse, or his dependents.

(m) Treatment of qualified governmental excess benefit arrangements.

(1) Governmental plan not affected. In determining whether a governmental plan (as defined in section 414(d) [26 USCS § 414(d)]) meets the requirements of this section, benefits provided under a qualified governmental excess benefit arrangement shall not be taken into account. Income accruing to a governmental plan (or to a trust that is maintained solely for the purpose of providing benefits under a qualified governmental excess benefit arrangement) in respect of a qualified governmental excess benefit arrangement shall constitute income derived from the exercise of an essential governmental function upon which such governmental plan (or trust) shall be exempt from tax under section 115 [26 USCS § 115].

(2) Taxation of participant. For purposes of this chapter [26 USCS §§ 1 et seq.]—

(A) the taxable year or years for which amounts in respect of a qualified governmental excess benefit arrangement are includible in gross income by a participant, and

(B) the treatment of such amounts when so includible by the participant,

shall be determined as if such qualified governmental excess benefit arrangement were treated as a plan for the deferral of compensation which is maintained by a corporation not exempt from tax under this chapter [26 USCS §§ 1 et seq.] and which does not meet the requirements for qualification under section 401 [26 USCS § 401].

(3) Qualified governmental excess benefit arrangement. For purposes of this subsection, the term "qualified governmental excess benefit arrangement" means a portion of a governmental plan if—

(A) such portion is maintained solely for the purpose of providing to participants in the plan that part of the participant's annual benefit otherwise payable under the terms of the plan that exceeds the limitations on benefits imposed by this section,

(B) under such portion no election is provided at any time to the participant (directly or indirectly) to defer compensation, and

(C) benefits described in subparagraph (A) are not paid from a trust forming a part of such governmental plan unless such trust is maintained solely for the purpose of providing such benefits.

(n) Special rules relating to purchase of permissive service credit.

(1) In general. If a participant makes 1 or more contributions to a defined benefit governmental plan (within the meaning of section 414(d) [26 USCS § 414(d)]) to purchase permissive service credit under such plan, then the requirements of this section shall be treated as met only if—

(A) the requirements of subsection (b) are met, determined by treating the accrued benefit derived from all such contributions as an annual benefit for purposes of subsection (b), or

(B) the requirements of subsection (c) are met, determined by treating all such contributions as annual additions for purposes of subsection (c).

(2) Application of limit. For purposes of—

(A) applying paragraph (1)(A), the plan shall not fail to meet the reduced limit under subsection (b)(2)(C) solely by reason of this subsection, and

(B) applying paragraph (1)(B), the plan shall not fail to meet the percentage limitation under subsection (c)(1)(B) solely by reason of this subsection.

(3) Permissive service credit. For purposes of this subsection—

(A) In general. The term "permissive service credit" means service credit—

(i) recognized by the governmental plan for purposes of calculating a participant's benefit under the plan,

(ii) which such participant has not received under such governmental plan, and

(iii) which such participant may receive only by making a voluntary additional contribution, in an amount determined under such governmental plan, which does not exceed the amount necessary to fund the benefit attributable to such service credit.

Such term may include service credit for periods for which there is no performance of service, and, notwithstanding clause (ii), may include service credited in order to provide an increased benefit for service credit which a participant is receiving under the plan.

(B) Limitation on nonqualified service credit. A plan shall fail to meet the requirements of this section if—

(i) more than 5 years of nonqualified service credit are taken into account for purposes of this subsection, or

(ii) any nonqualified service credit is taken into account under this subsection before the employee has at least 5 years of participation under the plan.

(C) Nonqualified service credit. For purposes of subparagraph (B), the term "nonqualified service credit" means permissive service credit other than that allowed with respect to—

(i) service (including parental, medical, sabbatical, and similar leave) as an employee of the Government of the United States, any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing (other than military service or service for credit which was obtained as a result of a repayment described in subsection (k)(3)),

(ii) service (including parental, medical, sabbatical, and similar leave) as an employee (other than as an employee described in clause (i)) of an educational organization described in section 170(b)(1)(A)(ii) [26 USCS § 170(b)(1)(A)(ii)] which is a public, private, or sectarian school which provides elementary or secondary education (through grade 12), or a comparable level of education, as determined under the applicable law of the jurisdiction in which the service was performed,

(iii) service as an employee of an association of employees who are described in clause (i), or

(iv) military service (other than qualified military service under section 414(u) [26 USCS § 414(u)]) recognized by such governmental plan.

In the case of service described in clause (i), (ii), or (iii), such service will be nonqualified service if recognition of such service would cause a participant to receive a retirement benefit for the same service under more than one plan.

(D) Special rules for trustee-to-trustee transfers. In the case of a trustee-to-trustee transfer to which section 403(b)(13)(A) or 457(e)(17)(A) [26 USCS § 403(b)(13)(A) or 457(e)(17)(A)] applies (without regard to whether the transfer is made between plans maintained by the same employer)—

(i) the limitations of subparagraph (B) shall not apply in determining whether the transfer is for the purchase of permissive service credit, and

(ii) the distribution rules applicable under this title to the defined benefit governmental plan to which any amounts are so transferred shall apply to such amounts and any benefits attributable to such amounts.

(Added Sept. 2, 1974, P. L. 93-406, Title II, § 2004(a)(2), 88 Stat. 979; Oct. 4, 1976, P. L. 94-455, Title VIII, § 803(b)(4), (f), Title XV, §§ 1501(b)(3), 1502(a)(1), 1511(a), Title XIX, §§ 1901(a)(65), (b)(8)(D), 1906(b)(13)(A), 90 Stat. 1584, 1589, 1735-1737, 1741, 1775, 1794, 1834; Nov. 6, 1978, P. L. 95-600, Title I, §§ 141(f)(7), 152(g), 153(a), 92 Stat. 2795, 2800; April 1, 1980, P. L. 96-222, Title I, § 101(a)(7)(L)(i)(VII), (iv)(I), (10)(I), (J)(iii), (11), 94 Stat. 199, 200, 203, 204; Dec. 28, 1980, P. L. 96-605, Title II, § 222(a), 94 Stat. 3528; Aug. 13, 1981, P. L. 97-34, Title III, §§ 311(g)(4), (h)(3), 333(b)(1), 95 Stat. 281, 282, 297; Sept. 3, 1982, P. L. 97-248, Title II, §§ 235(a)-(e), 238(d)(5), 251(c)(1), (2), 253(a), 96 Stat. 505-507, 513, 530, 532; April 20, 1983, P. L. 98-21, Title I, § 122(c)(5), 97 Stat. 87; July 18, 1984, P. L. 98-369, Div A, Title I, § 15, Title IV, § 491(d)(28)-(32), (e)(6), Title (V), § 528(a), Title VII, § 713(a)(1), (3), (d)(4)(B), (7), (k), 98 Stat. 505, 850, 853, 876, 955, 956, 958, 960; Oct. 22, 1986, P. L. 99-514, Title XI, §§ 1106(a)-(c)(1), (e)-(g), 1108(g)(5), 1114(b)(12), 1174(d)(1), (2), Title XVIII, §§ 1847(b)(4), 1852(h)(2), (3), 1875(c)(9), (11), 1898(b)(15)(C), 1899A(13), 100 Stat. 2420, 2422, 2424, 2425, 2434, 2451, 2518, 2856, 2869, 2895, 2951, 2958; Nov. 10, 1988, P. L. 100-647, Title I, §§ 1011(d)(2), (3), (6), (7), 1018(t)(3)(B), (8)(D), Title VI, §§ 6054(a), 6059(a), 102 Stat. 3459, 3460, 3588, 3589, 3696, 3699; Dec. 19, 1989, P. L. 101-239, Title VII, § 7304(c)(1), 103 Stat. 2353; July 3, 1992, P. L. 102-318, Title V, § 521(b)(23)-(25), 106 Stat. 311, 312; Dec. 8, 1994, P. L. 103-465, Title VII, §§ 732(b), 767(b), 108 Stat. 5004, 5038; Aug. 20, 1996, P. L. 104-188, Title I, §§ 1434(a), 1444(a), (b)(1), (c), (d), 1446(a), 1449(b), 1452(a), (c)(1)-(6), 1704(t)(75), 110 Stat. 1807, 1809-1811, 1814, 1816, 1891; Aug. 5, 1997, P. L. 105-34, Title XV, §§ 1526(a), (b), 1527(a), 1530(c)(3), (4), 111 Stat. 1072-1074, 1078; Dec. 21, 2000, P. L. 106-554, § 1(a)(7) (Title III, § 314(e)(1)), 114 Stat. 2763, 2763A-643; June 7, 2001, P. L. 107-16, Title VI, §§ 611(a), (b), (h), 632(a)(1), (3)(C)-(F), (b)(1), 641(e)(9), (10), 654(a), (b), 115 Stat. 96, 97, 100, 113-115, 121, 130, 131; March 9, 2002, P. L. 107-147, Title IV, Subtitle B, § 411(p)(4), 116 Stat. 50; April 10, 2004, P. L. 108-218, Title I, § 101(b)(4), 118 Stat. 598; Oct. 4, 2004, P. L. 108-311, Title IV, §§ 404(b)(2), 408(a)(17), 118 Stat. 1188, 1192; Dec. 21, 2005, P. L. 109-135, Title IV, Subtitle A, §§ 407(b), 412(y), (z), 119 Stat. 2635, 2638; Aug. 17, 2006, P. L. 109-280, Title III, § 303(a), Title VIII, Subtitle C, §§ 821(a)-(c), 832(a), Subtitle F, § 867(a), Title IX, § 906(b)(1)(A), (B), 120 Stat. 921, 997, 1003, 1025, 1051; Dec. 23, 2008, P. L. 110-458, Title I, Subtitle A, §§ 103(b)(2)(B)(i), 108(g), 109(d)(1), Subtitle B, § 122(a), 122 Stat. 5103, 5109, 5112, 5114.)

Notes of Decisions

1. Generally

Simplified employee pension that accepted contributions exceeding amount applicable to individual retirement account pursuant to 26 USCS § 408(a), but did not accept contributions exceeding those stated in 26 USCS § 415(c)(1)(a) was qualified retirement plan pursuant to 26 USCS § 408(k); plan did not have to meet definition of individual retirement account under § 408(a) to qualify under § 408(k). Lampkins v Golden (2002, CA6 Mich) 28 Fed Appx 409, 27 EBC 1587, 2002-1 USTC P 50216, 90 AFTR 2d 5303.

Decision of benefits plan administrator under Employee Retirement Income Security Act of 1974, 29 USCS § 1001 et seq., to exclude proceeds of one-time stock transaction as earnings in calculation of employee's retirement benefits was not unreasonable under circumstances and was upheld on summary judgment. Scipio v United Nat'l Bankshares, Inc. (2003, ND W Va) 284 F Supp 2d 411, 31 EBC 3027, affd (2004, CA4 W Va) 119 Fed Appx 431, 34 EBC 1138.

In action by former managers of insurance agencies against pension plan administrator for "Top Hat Plan" based on allegations that administrator improperly calculated pension benefits, managers' state law claims for breach of contract, for unjust enrichment, and for common law breach of fiduciary duty were preempted under 29 USCS § 1144(a), part of Employee Retirement Income Security Act (ERISA), 29 USCS § 1001 et seq., because claims "related to" "Top Hat Plan" within meaning of ERISA's preemption clause; further, "Top Hat

Plan" was not exempt excess benefit plan under 29 USCS §§ 1002(36), 1003(b)(5) because it was not maintained "solely" to evade limitations of 26 USCS § 415. Lawson v Nationwide Mut. Ins. Co. (2005, ED Pa) 35 EBC 1455.

IRS will not issue letter rulings regarding excess benefits deferred compensation agreements where employer has discretion to pay benefits to its participants in either lump sum or in periodic payments not to exceed 10 years. Private Letter Ruling 8830069.

Allocation of liabilities under unit credit (accrued benefit) method to past and future service must take into account requirements of 26 USCS § 415; version of unit credit method that does not take into account § 415 is not reasonable funding method. Rev Rul 85-131 (1985) 1985-2 CB 138.

Effective January 1, 2001, to operate in accordance with amendments enacted by section 314(e) of the Community Renewal Tax Relief Act of 2000, ("CRA") qualified plans must be amended within the GUST remedial amendment period to include within definition of compensation qualified transportation fringes excluded by § 132(f)(4) from an employee's gross income; because the CRA amendments are effective for years beginning after December 31, 1997, qualified plans that operated in accordance with these amendments must be retroactively amended; qualified plans that did not operate in accordance with the CRA amendments are to be amended for years beginning January 1, 2001. Notice 2001-37 (2001) 2001-1 CB 1340, 2001 IRB 1340.

IRS allows all three methods as described in Q & A 14 of Rev Rul 98-1 (1998) 1998-2 IRB 5 concerning benefits accruing prior to certain revisions to § 415; different dates for determining pre-revision accruals and the plan's § 417(e) effective date are permitted. Announcement 2001-63 (2001) 2001-1 CB 1344, 2001-25 IRB 1344.

2. Applicability

Portion of plan which provides both defined benefit specified by plan and balance of participant's individual account deemed defined benefit plan is subject to 26 USCS § 415(b), portion deemed defined contribution plan is subject to § 415(c), and both portions are subject to coordination provision of § 415(e). Rev Rul 78-405 (1978) 1978-2 CB 161.

3. Computation of limit on deduction

Under company definition defining seasonable employment as less than 5 months, compensation paid to individuals employed for less than 5 months may not be included in computing limitation on deduction for contribution to plan; compensation to employees who were employed less than year and whose employment was terminated prior to year's end could not be included in determining limitation. Dallas Dental Lab, Inc. v Commissioner (1979) 72 TC 117.

Where ESOP owns all of stock of corporation and makes further borrowings to acquire additional newly issued stock, dividends paid by corporation used to repay loans incurred for acquisition of stock can be recharacterized as contributions subject to § 415 limitations. Steel Balls, Inc. v Commissioner (1995) 19 EBC 1583, TC Memo 1995-266, RIA TC Memo P 95266, 69 CCH TCM 2912, 95 TNT 117-13, affd (1996, CA8) 96-1 USTC P 50309, 78 AFTR 2d 5177.

Employer can include within definition of § 415(c)(3) amounts used under cafeteria plan to purchase group health coverage even though employee does not choose coverage but is automatically enrolled if employee is unable to show any alternative coverage. Rev Rul 2002-27 (2002) 2002-20 IRB 925.

Payments made by employer to qualified plan which are made to restore some or all of plan's losses due to action, or failure to act, under circumstances which create reasonable risk of liability for breach of fiduciary obligations are not restorative payments and are not treated as contributions for purposes of nondiscrimination rules, rules for qualified matching contributions, § 415 limits on amount of contribution and excise tax imposed by § 4972 on nondeductible contributions. Rev Rul 2002-45 (2002) 2002-2 CB 116, 2002-29 IRB 116.

4. Years of service

Years of service with employer for purposes of § 415(b)(5) include years of service with businesses that antedate plan sponsor; years of service of physician with corporation include years that physician operated practice as proprietorship where medical practice and operations continued without change following incorporation of practice. Lear Eye Clinic v Commissioner (1996) 106 TC 418, 20 EBC 1345.

5. Disqualification of plan

IRS has authority to retroactively disqualify plan from date of plan's inception where plan provides benefits to participants in excess of § 415(c)(1) limitations. Buzzetta Constr. Corp. v Commissioner (1989) 92 TC 641, amd (1989, TC) 10 EBC 2145.

Taxpayer may not retroactively correct overpayment of amounts to individual account of company chairman where excess allocations resulted from plan's failure to take into account chairman's waiver of authorized salary and resolution directing allocations to be made on basis of annual salary rather than amounts actually received suggests intentional disregard of contribution allocation ceiling; disqualification of trust as result of excess allocation extends beyond years of excess allocations and continues until remedial action is taken to correct violation. Martin Fireproofing Profit-Sharing Plan & Trust v Commissioner (1989) 92 TC 1173, 10 EBC 2686.

When employee stock ownership plan is disqualified under 26 USCS § 415, disqualification continues until remedial action is taken, and corrective action of sort set forth in regulations is prerequisite to requalification of plan following such violation. Clendenen v Comm'r, TC Memo 2003-32, RIA TC Memo P 55036, 85 CCH TCM 825.

Taxpayer's employee stock ownership plan (ESOP) was not qualified under I.R.C. §§ 401(a) and 501(a) because ESOP was not timely amended to include provisions required by I.R.C. §§ 402(c)(4)(C), 414(n)(2)(C), (q), and (u), and 415(c)(3), did not follow vesting schedule required by I.R.C. § 411(a)(2)(B), and failed to use independent appraiser to appraise employer securities as required by I.R.C. § 401(a)(28)(C). Hollen v Comm'r (2011) 50 EBC 1777, TC Memo 2011-2, 101 CCH TCM 1004.

6. Miscellaneous

In case in which Pension Benefit Guaranty Corporation (PBGC) was acting as guarantor of Employee Retirement Income Security Act of 1974 defined benefit plan and (1) for entire five-year period prior to termination of plan, plan capped maximum benefits, tying maximum cap to level established 26 USCS § 415(b); (2) Congress amended § 415(b) two years before plan was terminated, increasing maximum cap in statute; and (3) because plan tied itself to § 415(b), maximum under plan for final two years was correspondingly raised, PBGC appropriately applied lower value because benefit "would be least" based on figure applied during first three years; PBGC's action on maximum cap was plainly consistent with statutory language. Davis v Pension Benefit Guar. Corp. (2009, App DC) 571 F.3d 1288.

In case brought pursuant to Employee Retirement Income Security Act of 1974, 29 USCS §§ 1001 et seq., that involved defined benefit plan that had been frozen in late 1998, plan administrator's decision to apply 1999 limitations in 26 USCS § 415(b) was reasonable, and former employee's motion for partial summary judgment regarding her claim for failure to pay benefits was denied. Becker v Weinberg Group, Inc. (2007, DC Dist Col) 473 F Supp 2d 48, 40 EBC 1462.

§ 457. Deferred compensation plans of State and local governments and tax-exempt organizations

(a) Year of inclusion in gross income.

(1) In general. Any amount of compensation deferred under an eligible deferred compensation plan, and any income attributable to the amounts so deferred, shall be includible in gross income only for the taxable year in which such compensation or other income—

(A) is paid to the participant or other beneficiary, in the case of a plan of an eligible employer described in subsection (e)(1)(A), and

(B) is paid or otherwise made available to the participant or other beneficiary, in the case of a plan of an eligible employer described in subsection (e)(1)(B).

(2) Special rule for rollover amounts. To the extent provided in section 72(t)(9) [26 USCS § 72(t)(9)], section 72(t) [26 USCS § 72(t)] shall apply to any amount includible in gross income under this subsection.

(3) Special rule for health and long-term care insurance. In the case of a plan of an eligible employer described in subsection (e)(1)(A), to the extent provided in section 402(l) [26 USCS § 402(l)], paragraph (1) shall not apply to amounts otherwise includible in gross income under this subsection.

(b) Eligible deferred compensation plan defined. For purposes of this section, the term "eligible deferred compensation plan" means a plan established and maintained by an eligible employer—

(1) in which only individuals who perform service for the employer may be participants,

(2) which provides that (except as provided in paragraph (3)) the maximum amount which may be deferred under the plan for the taxable year (other than rollover amounts) shall not exceed the lesser of—

(A) the applicable dollar amount, or

(B) 100 percent of the participant's includible compensation,

(3) which may provide that, for 1 or more of the participant's last 3 taxable years ending before he attains normal retirement age under the plan, the ceiling set forth in paragraph (2) shall be the lesser of—

(A) twice the dollar amount in effect under subsection (b)(2)(A), or

(B) the sum of—

(i) the plan ceiling established for purposes of paragraph (2) for the taxable year (determined without regard to this paragraph), plus

(ii) so much of the plan ceiling established for purposes of paragraph (2) for taxable years before the taxable year as has not previously been used under paragraph (2) or this paragraph,

(4) which provides that compensation will be deferred for any calendar month only if an agreement providing for such deferral has been entered into before the beginning of such month,

(5) which meets the distribution requirements of subsection (d), and

(6) except as provided in subsection (g), which provides that—

(A) all amounts of compensation deferred under the plan,

(B) all property and rights purchased with such amounts, and

(C) all income attributable to such amounts, property, or rights,

shall remain (until made available to the participant or other beneficiary) solely the property and rights of the employer (without being restricted to the provision of benefits under the plan), subject only to the claims of the employer's general creditors.

A plan which is established and maintained by an employer which is described in subsection (e)(1)(A) and which is administered in a manner which is inconsistent with the requirements of any of the preceding paragraphs shall be treated as not meeting the requirements of such paragraph as of the 1st plan year beginning more than 180 days after the date of notification by the Secretary of the inconsistency unless the employer corrects the inconsistency before the 1st day of such plan year.

(c) Limitation. The maximum amount of the compensation of any one individual which may be deferred under subsection (a) during any taxable year shall not exceed the amount in effect under subsection (b)(2)(A) (as modified by any adjustment provided under subsection (b)(3)).

(d) Distribution requirements.

(1) In general. For purposes of subsection (b)(5), a plan meets the distribution requirements of this subsection if—

(A) under the plan amounts will not be made available to participants or beneficiaries earlier than—

(i) the calendar year in which the participant attains age 70½,

(ii) when the participant has a severance from employment with the employer, or

(iii) when the participant is faced with an unforeseeable emergency (determined in the manner prescribed by the Secretary in regulations),

(B) the plan meets the minimum distribution requirements of paragraph (2), and

(C) in the case of a plan maintained by an employer described in subsection (e)(1)(A), the plan meets requirements similar to the requirements of section 401(a)(31) [26 USCS § 401(a)(31)].

Any amount transferred in a direct trustee-to-trustee transfer in accordance with section 401(a)(31) [26 USCS § 401(a)(31)] shall not be includible in gross income for the taxable year of transfer.

(2) Minimum distribution requirements. A plan meets the minimum distribution requirements of this paragraph if such plan meets the requirements of section 401(a)(9) [26 USCS § 401(a)(9)].

(3) Special rule for government plan. An eligible deferred compensation plan of an employer described in subsection (e)(1)(A) shall not be treated as failing to meet the requirements of this subsection solely by reason of making a distribution described in subsection (e)(9)(A).

(e) Other definitions and special rules. For purposes of this section—

(1) Eligible employer. The term "eligible employer" means—

(A) a State, political subdivision of a State, and any agency or instrumentality of a State or political subdivision of a State, and

(B) any other organization (other than a governmental unit) exempt from tax under this subtitle [26 USCS §§ 1 et seq.].

(2) Performance of service. The performance of service includes performance of service as an independent contractor and the person (or governmental unit) for whom such services are performed shall be treated as the employer.

(3) Participant. The term "participant" means an individual who is eligible to defer compensation under the plan.

(4) Beneficiary. The term "beneficiary" means a beneficiary of the participant, his estate, or any other person whose interest in the plan is derived from the participant.

(5) Includible compensation. The term "includible compensation" has the meaning given to the term "participant's compensation" by section 415(c)(3) [26 USCS § 415(c)(3)].

(6) Compensation taken into account at present value. Compensation shall be taken into account at its present value.

(7) Community property laws. The amount of includible compensation shall be determined without regard to any community property laws.

(8) Income attributable. Gains from the disposition of property shall be treated as income attributable to such property.

(9) Benefits of tax exempt organization plans not treated as made available by reason of certain elections, etc. In the case of an eligible deferred compensation plan of an employer described in subsection (e)(1)(B)—

(A) Total amount payable is dollar limit or less. The total amount payable to a participant under the plan shall not be treated as made available merely because the participant may elect to receive such amount (or the plan may distribute such amount without the participant's consent) if—

(i) the portion of such amount which is not attributable to rollover contributions (as defined in section 411(a)(11)(D) [26 USCS § 411(a)(11)(D)]) does not exceed the dollar limit under section 411(a)(11)(A) [26 USCS § 411(a)(11)(A)], and

(ii) such amount may be distributed only if—

(I) no amount has been deferred under the plan with respect to such participant during the 2-year period ending on the date of the distribution, and

(II) there has been no prior distribution under the plan to such participant to which this subparagraph applied.

A plan shall not be treated as failing to meet the distribution requirements of subsection (d) by reason of a distribution to which this subparagraph applies.

(B) Election to defer commencement of distributions. The total amount payable to a participant under the plan shall not be treated as made available merely because the participant may elect to defer commencement of distributions under the plan if—

(i) such election is made after amounts may be available under the plan in accordance with subsection (d)(1)(A) and before commencement of such distributions, and

(ii) the participant may make only 1 such election.

(10) Transfers between plans. A participant shall not be required to include in gross income any portion of the entire amount payable to such participant solely by reason of the transfer of such portion from 1 eligible deferred compensation plan to another eligible deferred compensation plan.

(11) Certain plans excluded.

(A) In general. The following plans shall be treated as not providing for the deferral of compensation:

(i) Any bona fide vacation leave, sick leave, compensatory time, severance pay, disability pay, or death benefit plan.

(ii) Any plan paying solely length of service awards to bona fide volunteers (or their beneficiaries) on account of qualified services performed by such volunteers.

(B) Special rules applicable to length of service award plans.—

(i) Bona fide volunteer. An individual shall be treated as a bona fide volunteer for purposes of subparagraph (A)(ii) if the only compensation received by such individual for performing qualified services is in the form of—

(I) reimbursement for (or a reasonable allowance for) reasonable expenses incurred in the performance of such services, or

(II) reasonable benefits (including length of service awards), and nominal fees for such services, customarily paid by eligible employers in connection with the performance of such services by volunteers.

(ii) Limitation on accruals. A plan shall not be treated as described in subparagraph (A)(ii) if the aggregate amount of length of service awards accruing with respect to any year of service for any bona fide volunteer exceeds $ 3,000.

(C) Qualified services. For purposes of this paragraph, the term "qualified services" means fire fighting and prevention services, emergency medical services, and ambulance services.

(D) Certain voluntary early retirement incentive plans.

(i) In general. If an applicable voluntary early retirement incentive plan—

(I) makes payments or supplements as an early retirement benefit, a retirement-type subsidy, or a benefit described in the last sentence of section 411(a)(9) [26 USCS § 411(a)(9)], and

(II) such payments or supplements are made in coordination with a defined benefit plan which is described in section 401(a) [26 USCS § 401(a)] and includes a trust exempt from tax under section 501(a) [26 USCS § 501(a)] and which is maintained by an eligible employer described in paragraph (1)(A) or by an education association described in clause (ii)(II), such applicable plan shall be treated for purposes of subparagraph (A)(i) as a bona fide severance pay plan with respect to such payments or supplements to the extent such payments or supplements could otherwise have been provided under such defined benefit plan (determined as if section 411 [26 USCS § 411] applied to such defined benefit plan).

(ii) Applicable voluntary early retirement incentive plan. For purposes of this subparagraph, the term 'applicable voluntary early retirement incentive plan' means a voluntary early retirement incentive plan maintained by—

(I) a local educational agency (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801)), or

(II) an education association which principally represents employees of 1 or more agencies described in subclause (I) and which is described in section 501(c) (5) or (6) [26 USCS § 501(c)(5) or (6)] and exempt from tax under section 501(a) [26 USCS § 501(a)].

(12) Exception for nonelective deferred compensation of nonemployees.

(A) In general. This section shall not apply to nonelective deferred compensation attributable to services not performed as an employee.

(B) Nonelective deferred compensation. For purposes of subparagraph (A), deferred compensation shall be treated as nonelective only if all individuals (other than those who have not satisfied any applicable initial service requirement) with the same relationship to the payor are covered under the same plan with no individual variations or options under the plan.

(13) Special rule for churches. The term "eligible employer" shall not include a church (as defined in section 3121(w)(3)(A) [26 USCS § 3121(w)(3)(A)]) or qualified church-controlled organization (as defined in section 3121(w)(3)(B) [26 USCS § 3121(w)(3)(B)]).

(14) Treatment of qualified governmental excess benefit arrangements. Subsections (b)(2) and (c)(1) shall not apply to any qualified governmental excess benefit arrangement (as defined in section 415(m)(3) [26 USCS § 415(m)(3)]), and benefits provided under such an arrangement shall not be taken into account in determining whether any other plan is an eligible deferred compensation plan.

(15) Applicable dollar amount.

(A) In general. The applicable dollar amount shall be the amount determined in accordance with the following table:

For taxable years beginning in calendar year:	the applicable dollar amount:
2002	$11,000
2003	$12,000
2004	$13,000
2005	$14,000
2006 or thereafter	$15,000.

(B) Cost-of-living adjustments. In the case of taxable years beginning after December 31, 2006, the Secretary shall adjust the $ 15,000 amount under subparagraph (A) at the same time and in the same manner as under section 415(d) [26 USCS § 415(d)], except that the base period shall be the calendar quarter beginning July 1, 2005, and any increase under this paragraph which is not a multiple of $ 500 shall be rounded to the next lowest multiple of $ 500.

(16) Rollover amounts.

(A) General rule. In the case of an eligible deferred compensation plan established and maintained by an employer described in subsection (e)(1)(A), if—

(i) any portion of the balance to the credit of an employee in such plan is paid to such employee in an eligible rollover distribution (within the meaning of section 402(c)(4) [26 USCS § 402(c)(4)]),

(ii) the employee transfers any portion of the property such employee receives in such distribution to an eligible retirement plan described in section 402(c)(8)(B) [26 USCS § 402(c)(8)(B)], and

(iii) in the case of a distribution of property other than money, the amount so transferred consists of the property distributed,

then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

(B) Certain rules made applicable. The rules of paragraphs (2) through (7), (9), and (11) of section 402(c) [26 USCS § 402(c)] and section 402(f) [26 USCS § 402(f)] shall apply for purposes of subparagraph (A).

(C) Reporting. Rollovers under this paragraph shall be reported to the Secretary in the same manner as rollovers from qualified retirement plans (as defined in section 4974(c) [26 USCS § 4974(c)]).

(17) Trustee-to-trustee transfers to purchase permissive service credit. No amount shall be includible in gross income by reason of a direct trustee-to-trustee transfer to a defined benefit governmental plan (as defined in section 414(d) [26 USCS § 414(d)]) if such transfer is—

(A) for the purchase of permissive service credit (as defined in section 415(n)(3)(A) [26 USCS § 415(n)(3)(A)]) under such plan, or

(B) a repayment to which section 415 [26 USCS § 415] does not apply by reason of subsection (k)(3) thereof.

(18) Coordination with catch-up contributions for individuals age 50 or older. In the case of an individual who is an eligible participant (as defined by section 414(v) [26 USCS § 414(v)]) and who is a participant in an eligible deferred compensation plan of an employer described in paragraph (1)(A), subsections (b)(3) and (c) shall be applied by substituting for the amount otherwise determined under the applicable subsection the greater of—

(A) the sum of—

(i) the plan ceiling established for purposes of subsection (b)(2) (without regard to subsection (b)(3)), plus

(ii) the applicable dollar amount for the taxable year determined under section 414(v)(2)(B)(i) [26 USCS § 414(v)(2)(B)(i)], or

(B) the amount determined under the applicable subsection (without regard to this paragraph).

(f) Tax treatment of participants where plan or arrangement of employer is not eligible.

(1) In general. In the case of a plan of an eligible employer providing for a deferral of compensation, if such plan is not an eligible deferred compensation plan, then—

(A) the compensation shall be included in the gross income of the participant or beneficiary for the 1st taxable year in which there is no substantial risk of forfeiture of the rights to such compensation, and

(B) the tax treatment of any amount made available under the plan to a participant or beneficiary shall be determined under section 72 [26 USCS § 72] (relating to annuities, etc.).

(2) Exceptions. Paragraph (1) shall not apply to—

(A) a plan described in section 401(a) [26 USCS § 401(a)] which includes a trust exempt from tax under section 501(a) [26 USCS § 501(a)],

(B) an annuity plan or contract described in section 403 [26 USCS § 403],

(C) that portion of any plan which consists of a transfer of property described in section 83 [26 USCS § 83],

(D) that portion of any plan which consists of a trust to which section 402(b) [26 USCS § 402(b)] applies,

(E) a qualified governmental excess benefit arrangement described in section 415(m) [26 USCS § 415(m)], and

(F) that portion of any applicable employment retention plan described in paragraph (4) with respect to any participant.

(3) Definitions. For purposes of this subsection

(A) Plan includes arrangements, etc. The term "plan" includes any agreement or arrangement.

(B) Substantial risk of forfeiture. The rights of a person to compensation are subject to a substantial risk of forfeiture if such person's rights to such compensation are conditioned upon the future performance of substantial services by any individual.

(4) Employment retention plans. For purposes of paragraph (2)(F)—

(A) In general. The portion of an applicable employment retention plan described in this paragraph with respect to any participant is that portion of the plan which provides benefits payable to the participant not in excess of twice the applicable dollar limit determined under subsection (e)(15).

(B) Other rules.

(i) Limitation. Paragraph (2)(F) shall only apply to the portion of the plan described in subparagraph (A) for years preceding the year in which such portion is paid or otherwise made available to the participant.

(ii) Treatment. A plan shall not be treated for purposes of this title as providing for the deferral of compensation for any year with respect to the portion of the plan described in subparagraph (A).

(C) Applicable employment retention plan. The term "applicable employment retention plan" means an employment retention plan maintained by—

(i) a local educational agency (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801), or

(ii) an education association which principally represents employees of 1 or more agencies described in clause (i) and which is described in section 501(c) (5) or (6) [26 USCS § 501(c)(5) or (6)] and exempt from taxation under section 501(a) [26 USCS § 501(a)].

(D) Employment retention plan. The term "employment retention plan" means a plan to pay, upon termination of employment, compensation to an employee of a local educational agency or education association described in subparagraph (C) for purposes of—

(i) retaining the services of the employee, or

(ii) rewarding such employee for the employee's service with 1 or more such agencies or associations.

(g) Governmental plans must maintain set-asides for exclusive benefit of participants.

(1) In general. A plan maintained by an eligible employer described in subsection (e)(1)(A) shall not be treated as an eligible deferred compensation plan unless all assets and income of the plan described in subsection (b)(6) are held in trust for the exclusive benefit of participants and their beneficiaries.

(2) Taxability of trusts and participants. For purposes of this title—

(A) a trust described in paragraph (1) shall be treated as an organization exempt from taxation under section 501(a) [26 USCS § 501(a)], and

(B) notwithstanding any other provision of this title, amounts in the trust shall be includible in the gross income of participants and beneficiaries only to the extent, and at the time, provided in this section.

(3) Custodial accounts and contracts. For purposes of this subsection, custodial accounts and contracts described in section 401(f) [26 USCS § 401(f)] shall be treated as trusts under rules similar to the rules under section 401(f) [26 USCS § 401(f)].

(4) Death benefits under USERRA-qualified active military service. A plan described in paragraph (1) shall not be treated as an eligible deferred compensation plan unless such plan meets the requirements of section 401(a)(37) [26 USCS § 401(a)(37)].

(Added Nov. 6, 1978, P.L. 95-600, Title I, § 131(a), 92 Stat. 2779; April 1, 1980, P.L. 96-222, Title I, § 101(a)(4), 94 Stat. 196; July 18, 1984, P.L. 98-369, Div A, Title IV, § 491(d)(33), 98 Stat. 851; Oct. 22, 1986, P.L. 99-514, Title XI, § 1107(a), 100 Stat. 2426; Nov. 10, 1988, P.L. 100-647, Title I, § 1011(e)(1), (2), (9), (10), Title VI, §§ 6064(a)-(c), 6071(c), 102 Stat. 3460, 3461, 3700, 3701, 3705; Dec. 19, 1989, P.L. 101-239, Title VII, §§ 7811(g)(4), (5), 7816(j), 103 Stat. 2409, 2421; July 3, 1992, P.L. 102-318, Title V, § 521(b)(26), 106 Stat. 312; Aug. 20, 1996, P.L. 104-188, Title I, §§ 1421(b)(3)(C), 1444(b)(2), (3), 1447(a), (b), 1448(a), (b), 1458(a), 110 Stat. 1796, 1810, 1812, 1813, 1819; Aug. 5, 1997, P.L. 105-34, Title X, § 1071(a)(2), 111 Stat. 948; June 7, 2001, P.L. 107-16, Title VI, §§ 611(d)(3)(B), (e), 615(a), 632(c)(1), 641(a)(1)(A)-(C), 646(a)(3), 647(b), 648(b), 649(a), (b), 115 Stat. 98, 102, 115, 118, 119, 126-128; March 9, 2002, P.L. 107-147, Title I, Subtitle B, § 411(o)(9), (p)(5), 116 Stat. 49, 51; Aug. 17, 2006, P.L. 109-280, Title VIII, Subtitle C, § 829(a)(4), Subtitle D, § 845(b)(3), Title XI, § 1104(a)(1), (b), 120 Stat. 1002, 1015, 1058, 1059; June 17, 2008, P.L. 110-245, Title I, § 104(c)(3), 122 Stat. 1627.)

Notes of Decisions

1. Applicability

In chapter 7 liquidation case, debtors' pension plan established pursuant to § 457 of Internal Revenue Code, 26 USCS § 457, was not exempt from creditors' claims. In re Madia (2003, BC MD Fla) 294 BR 177, 16 FLW Fed B 121.

Language of 11 USCS § 541(b)(7) excludes from property of estate any amounts withheld by employer or paid by employee for deferred compensation plan that qualifies under 26 USCS § 457 prior to remission of such amounts to deferred compensation fund, and such amounts further do not constitute disposable income under 11 USCS § 1325(b)(2); additionally, Mont. Code Ann. §§ 19-50-101 to -50-204 and 26 USCS § 457(g) were applicable nonbankruptcy laws that created enforceable restrictions on debtor employee's transfer of his beneficial interest; therefore, 11 USCS § 541(c)(2) applied, debtor's state deferred compensation plan was not property of his bankruptcy estate, and trustee's objection to claimed exemption in plan was moot. In re Braulick (2006, BC DC Mont) 360 BR 327.

Trustee's motion to convert or dismiss Chapter 7 filed by county employee whose monthly contributions to 26 USCS § 457 "retirement fund" excluded from Chapter 13 disposable income by 11 USCS § 541(b)(7)(A)(II) triggered presumption of abuse under 11 USCS § 707(b) was denied; even though trustee established presumption of abuse and debtor failed to demonstrate "special circumstances," bankruptcy court was entitled to exercise

its discretion where it concluded that circumstances rendering dismissal or conversion improper existed. In re Mravik (2008, BC ED Wis) 399 BR 202, CCH Bankr L Rptr ¶ 81389.

State judge who agreed to have state deduct portion of salary and deposit it with state's retirement fund cannot exclude contributed portion from income since § 457 does not apply to qualified state judicial plans; state judicial plan that permits members to obtain refunds of contributions conflicts with requirement of § 457 that plan assets remain property of employer until made available to participant or other beneficiary, and accordingly contribution is not excluded from income. Foil v Commissioner (1989) 92 TC 376, affd (1990, CA5) 920 F2d 1196, 13 EBC 1495, 91-1 USTC P 50016, 67 AFTR 2d 407.

Deferred compensation plan does not fail to be eligible government plan under 26 USCS § 457(b) merely because plan is created, offered and administered by labor union for benefit of employees who are union members, provided adoption of plan meets specified criteria. Rev Rul 2004-57 (2004) 2004-24 IRB 1048.

Unpublished Opinion

Where debtor had taken contradictory position with respect to distribution of deferred compensation plan under 26 USCS § 457(b), Chapter 7 trustee was bound by acts of Chapter 11 debtor in possession after case was converted; plan was not property of estate pursuant to 11 USCS § 541(b)(7)(A)(i)(II); judicial estoppel was independent basis for denying motion to distribute § 457(b) plan funds. In re Twin City Hosp. (2011, BC ND Ohio) 2011 Bankr LEXIS 2783.

2. Forward averaging

Forward averaging is not available with respect to complete distribution from eligible state deferred compensation plan because such plan is not plan described in § 401(a) or 403(a). Rheal v Commissioner (1989) 11 EBC 1715, TC Memo 1989-525, RIA TC Memo P 89525, 58 CCH TCM 229.

3. Rollover of single-sum distribution

Single-sum cash distribution received or made available from eligible state deferred compensation plan may not be rolled over on tax-free basis into individual retirement account. Rev Rul 86-103 (1986) 1986-2 CB 62.

§ 503. Requirements for exemption

(a) Denial of exemption to organizations engaged in prohibited transactions.

(1) General rule.

(A) An organization described in section 501(c)(17) [26 USCS § 501(c)(17)], shall not be exempt from taxation under section 501(a) [26 USCS § 501(a)] if it has engaged in a prohibited transaction after December 31, 1959.

(B) An organization described in section 401(a) [26 USCS § 401(a)] which is referred to in section 4975(g)(2) or (3) [26 USCS § 4975(g)(2) or (3)] shall not be exempt from taxation under section 501(a) [26 USCS § 501(a)] if it has engaged in a prohibited transaction after March 1, 1954.

(C) An organization described in section 501(c)(18) [26 USCS § 501(c)(18)] shall not be exempt from taxation under section 501(a) [26 USCS § 501(a)] if it has engaged in a prohibited transaction after December 31, 1969.

(2) Taxable years affected. An organization described in section 501(c)(17) or (18) [26 USCS § 501(c)(17) or (18)] or paragraph [sic (a)] (1)(B) shall be denied exemption from taxation under section 501(a) [26 USCS § 501(a)] by reason of paragraph (1) only for taxable years after the taxable year during which it is notified by the Secretary that it has engaged in a prohibited transaction, unless such organization entered into such prohibited transaction with the purpose of diverting corpus or income of the organization from its exempt purposes, and such transaction involved a substantial part of the corpus or income of such organization.

(b) Prohibited transactions. For purposes of this section, the term "prohibited transaction" means any transaction in which an organization subject to the provisions of this section—

(1) lends any part of its income or corpus, without the receipt of adequate security and a reasonable rate of interest, to;

(2) pays any compensation, in excess of a reasonable allowance for salaries or other compensation for personal services actually rendered, to;

(3) makes any part of its services available on a preferential basis to;

(4) makes any substantial purchase of securities or any other property, for more than adequate consideration in money or money's worth, from;

(5) sells any substantial part of its securities or other property, for less than an adequate consideration in money or money's worth, to; or

(6) engages in any other transaction which results in a substantial diversion of its income or corpus to;

the creator of such organization (if a trust); a person who has made a substantial contribution to such organization; a member of the family (as defined in section 267(c)(4) [26 USCS § 267(c)(4)]) of an individual who is the creator of such trust or who has made a substantial contribution to such organization; or a corporation controlled by such creator or person through the ownership, directly or indirectly, of 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(c) Future status of organizations denied exemption. Any organization described in section 501(c)(17) or (18) [26 USCS § 501(c)(17 or (18)] or subsection (a)(1)(B) which is denied exemption under section 501(a) [26 USCS § 501(a)] by reason of subsection (a) of this section, with respect to any taxable year following the taxable year in which notice of denial of exemption was received, may, under regulations prescribed by the Secretary, file claim for exemption, and if the Secretary, pursuant to such regulations, is satisfied that such organization will not knowingly again engage in a prohibited transaction, such organization shall be exempt with respect to taxable years after the year in which such claim is filed.

(d) [Repealed.]

(e) Special rules. For purposes of subsection (b)(1), a bond, debenture, note, or certificate or other evidence of indebtedness (hereinafter in this subsection referred to as "obligation") shall not be treated as a loan made without the receipt of adequate security if—

(1) such obligation is acquired—

(A) on the market, either (i) at the price of the obligation prevailing on a national securities exchange which is registered with the Securities and Exchange Commission, or (ii) if the obligation is not traded on such a national securities exchange, at a price not less favorable to the trust than the offering price for the obligation as established by current bid and asked prices quoted by persons independent of the issuer;

(B) from an underwriter, at a price (i) not in excess of the public offering price for the obligation as set forth in a prospectus or offering circular filed with the Securities and Exchange Commission, and (ii) at which a substantial portion of the same issue is acquired by persons independent of the issuer; or

(C) directly from the issuer, at a price not less favorable to the trust than the price paid currently for a substantial portion of the same issue by persons independent of the issuer;

(2) immediately following acquisition of such obligation—

(A) not more than 25 percent of the aggregate amount of obligations issued in such issue and outstanding at the time of acquisition is held by the trust, and

(B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer; and

(3) immediately following acquisition of the obligation, not more than 25 percent of the assets of the trust is invested in obligations of persons described in subsection (b).

(f) Loans with respect to which employers are prohibited from pledging certain assets. Subsection (b)(1) shall not apply to a loan made by a trust described in section 401(a) [26 USCS § 401(a)] to the employer (or to a renewal of such a loan or, if the loan is repayable upon demand, to a continuation of such a loan) if the loan bears a reasonable rate of interest, and if (in the case of a making or renewal)—

(1) the employer is prohibited (at the time of such making or renewal) by any law of the United States or regulation thereunder from directly or indirectly pledging, as security for such a loan, a par-

ticular class or classes of his assets the value of which (at such time) represents more than one-half of the value of all his assets;

(2) the making or renewal, as the case may be, is approved in writing as an investment which is consistent with the exempt purposes of the trust by a trustee who is independent of the employer, and no other such trustee had previously refused to give such written approval; and

(3) immediately following the making or renewal, as the case may be, the aggregate amount loaned by the trust to the employer, without the receipt of adequate security, does not exceed 25 percent of the value of all the assets of the trust.

For purposes of paragraph (2), the term "trustee" means, with respect to any trust for which there is more than one trustee who is independent of the employer, a majority of such independent trustees. For purposes of paragraph (3), the determination as to whether any amount loaned by the trust to the employer is loaned without the receipt of adequate security shall be made without regard to subsection (e).

(Aug. 16, 1954, ch 736, 68A Stat. 166; Sept. 2, 1958, P.L. 85-866, Title I, § 30(a), (b), 72 Stat. 1629, 1630; July 14, 1960, P.L. 86-667, § 2, 74 Stat. 535; Oct. 10, 1962, P.L. 87-792, § 6, 76 Stat. 827; Dec. 30, 1969, P.L. 91-172, Title I, §§ 101(j)(7)-(14), 121(b)(6)(B), 83 Stat. 527, 542; Sept. 2, 1974, P.L. 93-406, Title II, § 2003(b), 88 Stat. 978; Oct. 4, 1976, P.L. 94-455, Title XIX, § 1906(b)(13)(A), 90 Stat. 1834; Nov. 5, 1990, P.L. 101-508, Title XI, § 11801(a)(22), 104 Stat. 1388-521.)

Notes of Decisions

1. Generally

An organization which was created for charitable purposes was exempt under 26 USCS § 501(c)(3) from the date of its creation where, even before applying for exemption, it made a loan which constituted a prohibited transaction, but the transaction did not involve a substantial part of its corpus or income and the circumstances relating to the transaction were no longer present at the time of the application for exemption, since the loan transaction was insubstantial and there was no purpose to divert a substantial amount of corpus or income from exempt purposes. Rev Rul 69-221 (1969) 1969-1 CB 156.

2. Prohibited transactions

Letter sent to foundation by borrower created an equitable lien even though not recordable, and foundation got adequate security and reasonable rate of interest for its loan, and transaction was not prohibited within meaning of this section. William Clay, Jr. Foundation v United States (1964, ND Tex) 233 F Supp 628, 64-2 USTC P 9650, 14 AFTR 2d 5289.

Where creator of an exempt employee's trust, issued preferred stock, some of which was purchased by the trust, and called the preferred shares for redemption, apparently allowing the preferred shareholders to accept in exchange, at their option, either cash or notes, and the trust elected to receive notes, the redemption of the stock in exchange for notes was a "loan" for purposes of the prohibited transactions rule, and, since the "loan" was unsecured, constituted a prohibited transaction; the requirements of § 503(e) weren't met because the notes amounted to 40% of the trusts assets after the exchange. Fuqua Nat., Inc. v United States (1971, SD Ga) 334 F Supp 1116, 72-1 USTC P 9224, 29 AFTR 2d 452.

Court lacked jurisdiction to review claim by members of city pension plans that IRS improperly failed to disqualify tax-exempt status of pension funds after finding that transfers from funds violated 26 USCS § 401(a)(2); Administrative Procedure Act did not waive immunity, as decision was committed to agency discretion, and there was no mandamus jurisdiction because there was no clear, non-discretionary duty to issue requested determination letter. Borrelli v Sec'y of Treasury (2004, SD NY) 343 F Supp 2d 249.

Where an exempt organization was given all the stock of X Corp., owned by A, a substantial contributor; X Corp.'s assets included an unsecured interest-bearing demand note of A; and the organization liquidated X and as a result acquired A's note and became A's creditor, failure of the organization to either promptly demand payment on the note or require security from A constitutes a prohibited transaction. Rev Rul 68-474 (1968) 1968-2 CB 240.

An unsecured loan by an exempt charitable trust to a corporation controlled by the son of the creator of the trust constitutes a prohibited transaction. Rev Rul 69-221 (1969) 1969-1 CB 156.

A loan to an employer-grantor by an exempt employees' trust is not a prohibited transaction under 26 USCS § 503(b)(1) where the loan is secured by a savings account passbook placed in escrow. Rev Rul 70-82 (1970) 1970-1 CB 134.

A corporate employer's debenture which constitutes a pledge of the corporation's general assets doesn't qualify as adequate security because the property pledged must be specific, something that may be sold, foreclosed upon, or otherwise disposed of in default of repayment of the loan, and an accommodation endorsement made by the corporation's principal stockholder about 18 months after the loan won't help since the later endorsement can't be considered security at the time the loan was made. Rev Rul 70-131 (1970) 1970-1 CB 135.

A bequest in trust made in a taxable year beginning before '70 and otherwise deductible, is not allowable where the decedent's son's interest-free notes are renewed, without adequate security, by the trustee in the year in which the bequest to the trust was made. Rev Rul 70-451 (1970) 1970-2 CB 196.

A loan to a labor union from a trust established between an association of employees and a union was not a prohibited transaction where the union was not a party to the trust for purposes of Code Sec. 503(b), the plan was adopted by several employers and is administered by a board composed equally of employer and union representatives, and the union did not adopt the plan for the benefit of its own employees; employers who adopt such plans for the benefit of their employees are considered to be the creators of multi-employee trusts and are subject to the requirements of § 503(b), but the union acting in its capacity as the bargaining agent of the employees in negotiations pertaining to the terms of the plan or as a representative in the board for administering the plan is not a party specified in § 503(b); however, though the loan is not a prohibited transaction, the loan must still be for the exclusive benefit of employees. Rev Rul 71-462 (1971) 1971-2 CB 238.

Where for a fee, an employees' qualified trust delivered to the employer, a stockbroker, for its temporary use, the trusts demand note secured by collateral consisting of securities, and a minimal amount of cash, the transaction constituted lending of corpus or income under § 503 where the transaction provided that the demand note and collateral were subordinated to the employer's other creditors, the employer agreed to pay the trust a percentage of the principal amount of the secured note during the time the note was outstanding and the agreement also provided that if the trust's note was not paid when presented, the employer was entitled to liquidate the collateral and issue to the trust its subordinated debenture equal in amount to that of the secured note, or if smaller, the amount realized; whether this was a prohibited transaction depends on whether the requirements of adequate security and a reasonable rate of interest were met. Rev Rul 72-494 (1972) 1972-2 CB 249.

An exempt employees' trust can make an unsecured loan to a corporation owned by the same individual who owns the employer corporation, i.e., a "brother corporation" where the brother corporation is neither the creator of the trust nor a substantial contributor to the trust, nor is the brother corporation 50% or more controlled by the creator of, or a substantial contributor to the trust, because the individual who owns the stock is neither; the only limitations on such unsecured loans by one corporation's trust to a brother corporation are that the two corporations must be separate entities, established for business reasons, and not for tax avoidance or self-dealing. Rev Rul 72-532 (1972) 1972-2 CB 250.

Unpublished Opinions

Unpublished: District court properly dismissed claims against federal defendants for lack of subject matter jurisdiction where: (1) Internal Revenue Service (IRS) did not find prohibited transaction within meaning of 26 USCS § 503(b), but only violation of 26 USCS § 401(a)(2); (2) violation of § 401(a)(2) did not automatically constitute prohibited transaction; (3) tax code contained no mandatory language circumscribing IRS's discretion in enforcing exclusive benefit rule; and (4) because § 401(a)(2) was drawn so that court would have no meaningful standard against which to judge agency's exercise of discretion, Administrative Procedure Act provided no cause of action for members of various retirement funds to challenge federal defendants' actions and did not waive federal government's sovereign immunity. Borrelli v Sec'y of Treasury (2005, CA2 NY) 155 Fed Appx 556, 96 AFTR 2d 7199.

TITLE 42. THE PUBLIC HEALTH AND WELFARE

§ 402. Old-age and survivors insurance benefit payments *(only selected subdivisions included)*

(b) Wife's insurance benefits.

(1) The wife (as defined in section 216(b) [42 USCS § 416(b)]) and every divorced wife (as defined in section 216(d) [42 USCS § 416(d)]) of an individual entitled to old-age or disability insurance benefits, if such wife or such divorced wife—

(A) has filed application for wife's insurance benefits,

(B) has attained age 62 or (in the case of a wife) has in her care (individually or jointly with such individual) at the time of filing such application a child entitled to a child's insurance benefit on the basis of the wages and self-employment income of such individual,

(C) in the case of a divorced wife, is not married, and

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of such individual,

shall (subject to subsection (s)) be entitled to a wife's insurance benefit for each month, beginning with—

(i) in the case of a wife or divorced wife (as so defined) of an individual entitled to old-age benefits, if such wife or divorced wife has attained retirement age (as defined in section 216(l) [42 USCS § 416(l)]), the first month in which she meets the criteria specified in subparagraphs (A), (B), (C), and (D), or

(ii) in the case of a wife or divorced wife (as so defined) of—

(I) an individual entitled to old-age insurance benefits, if such wife or divorced wife has not attained retirement age (as defined in section 216(l) [42 USCS § 416(l)]), or

(II) an individual entitled to disability insurance benefits,

the first month throughout which she is such a wife or divorced wife and meets the criteria specified in subparagraphs (B), (C), and (D) (if in such month she meets the criterion specified in subparagraph (A)),

whichever is earlier, and ending with the month preceding the month in which any of the following occurs—

(E) she dies,

(F) such individual dies,

(G) in the case of a wife, they are divorced and either (i) she has not attained age 62, or (ii) she has attained age 62 but has not been married to such individual for a period of 10 years immediately before the date the divorce became effective,

(H) in the case of a divorced wife, she marries a person other than such individual,

(I) in the case of a wife who has not attained age 62, no child of such individual is entitled to a child's insurance benefit,

(J) she becomes entitled to an old-age or disability insurance benefit based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of such individual, or

(K) such individual is not entitled to disability insurance benefits and is not entitled to old-age insurance benefits.

(2) Except as provided in subsections (k)(5) and (q), such wife's insurance benefit for each month shall be equal to one-half of the primary insurance amount of her husband (or, in the case of a divorced wife, her former husband) for such month.

(3) In the case of any divorced wife who marries—

(A) an individual entitled to benefits under subsection (c), (f), (g), or (h) of this section, or

(B) an individual who has attained the age of 18 and is entitled to benefits under subsection (d),

such divorced wife's entitlement to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) (but subject to subsection (s)), not be terminated by reason of such marriage.

(4) (A) Notwithstanding the preceding provisions of this subsection, except as provided in subparagraph (B), the divorced wife of an individual who is not entitled to old-age or disability insurance benefits, but who has attained age 62 and is a fully insured individual (as defined in section 214 [42 USCS § 414]), if such divorced wife—

(i) meets the requirements of subparagraphs (A) through (D) of paragraph (1), and

(ii) has been divorced from such insured individual for not less than 2 years,

shall be entitled to a wife's insurance benefit under this subsection for each month, in such amount, and beginning and ending with such months, as determined (under regulations of the Commissioner of Social Security) in the manner otherwise provided for wife's insurance benefits under this subsection, as if such insured individual had become entitled to old-age insurance benefits on the date on which the divorced wife first meets the criteria for entitlement set forth in clauses (i) and (ii).

(B) A wife's insurance benefit provided under this paragraph which has not otherwise terminated in accordance with subparagraph (E), (F), (H), or (J) of paragraph (1) shall terminate with the month preceding the first month in which the insured individual is no longer a fully insured individual.

(5) [Redesignated]

(c) Husband's insurance benefits.

(1) The husband (as defined in section 216(f) [42 USCS § 416(f)]) and every divorced husband (as defined in section 216(d) [42 USCS § 416(d)]) of an individual entitled to old-age or disability insurance benefits, if such husband or such divorced husband—

(A) has filed application for husband's insurance benefits,

(B) has attained age 62 or (in the case of a husband) has in his care (individually or jointly with such individual) at the time of filing such application a child entitled to child's insurance benefits on the basis of the wages and self-employment income of such individual,

(C) in the case of a divorced husband, is not married, and

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of such individual,

shall (subject to subsection(s)) be entitled to a husband's insurance benefit for each month, beginning with—

(i) in the case of a husband or divorced husband (as so defined) of an individual who is entitled to an old-age insurance benefit, if such husband or divorced husband has attained retirement age (as defined in section 216(l) [42 USCS § 416(l)]), the first month in which he meets the criteria specified in subparagraphs (A), (B), (C), and (D), or

(ii) in the case of a husband or divorced husband (as so defined) of—

(I) an individual entitled to old-age insurance benefits, if such husband or divorced husband has not attained retirement age (as defined in section 216(l) [42 USCS § 416(l)]), or

(II) an individual entitled to disability insurance benefits,

the first month throughout which he is such a husband or divorced husband and meets the criteria specified in subparagraphs (B), (C), and (D) (if in such month he meets the criterion specified in subparagraph (A)),

whichever is earlier, and ending with the month preceding the month in which any of the following occurs:

(E) he dies,

(F) such individual dies,

(G) in the case of a husband, they are divorced and either (i) he has not attained age 62, or (ii) he has attained age 62 but has not been married to such individual for a period of 10 years immediately before the divorce became effective,

(H) in the case of a divorced husband, he marries a person other than such individual,

(I) in the case of a husband who has not attained age 62, no child of such individual is entitled to a child's insurance benefit,

(J) he becomes entitled to an old-age or disability insurance benefit based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of such individual, or

(K) such individual is not entitled to disability insurance benefits and is not entitled to old-age insurance benefits.

(2) Except as provided in subsections (k)(5) and (q), such husband's insurance benefit for each month shall be equal to one-half of the primary insurance amount of his wife (or, in the case of a divorced husband, his former wife) for such month.

(3) In the case of any divorced husband who marries—

(A) an individual entitled to benefits under subsection (b), (e), (g), or (h) of this section, or

(B) an individual who has attained the age of 18 and is entitled to benefits under subsection (d), by reason of paragraph (1)(B)(ii) thereof,

such divorced husband's entitlement to benefits under this subsection, notwithstanding the provisions of paragraph (1) (but subject to subsection (s)), shall not be terminated by reason of such marriage.

(4) (A) Notwithstanding the preceding provisions of this subsection, except as provided in subparagraph (B), the divorced husband of an individual who is not entitled to old-age or disability insurance benefits, but who has attained age 62 and is a fully insured individual (as defined in section 214 [42 USCS § 414]), if such divorced husband—

(i) meets the requirements of subparagraphs (A) through (D) of paragraph (1), and

(ii) has been divorced from such insured individual for not less than 2 years,

shall be entitled to a husband's insurance benefit under this subsection for each month, in such amount, and beginning and ending with such months, as determined (under regulations of the Commissioner of Social Security) in the manner otherwise provided for husband's insurance benefits under this subsection, as if such insured individual had become entitled to old-age insurance benefits on the date on which the divorced husband first meets the criteria for entitlement set forth in clauses (i) and (ii).

(B) A husband's insurance benefit provided under this paragraph which has not otherwise terminated in accordance with subparagraph (E), (F), (H), or (J) of paragraph (1) shall terminate with the month preceding the first month in which the insured individual is no longer a fully insured individual.

(5) [Redesignated]

* * *

(e) Widow's insurance benefits.

(1) The widow (as defined in section 216(c) [42 USCS § 416(c)]) and every surviving divorced wife (as defined in section 216(d) [42 USCS § 416(d)]) of an individual who died a fully insured individual, if such widow or such surviving divorced wife—

(A) is not married,

(B) (i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 223(d) [42 USCS § 423(d)]) which began before the end of the period specified in paragraph (4).

(C) (i) has filed application for widow's insurance benefits,

(ii) was entitled to wife's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which such individual died, and—

(I) has attained retirement age (as defined in section 216(l) [42 USCS § 416(l)]),

(II) is not entitled to benefits under subsection (a) or section 223 [42 USCS § 423], or

(III) has in effect a certificate (described in paragraph (8)) filed by her with the Commissioner of Social Security, in accordance with regulations prescribed by the Commissioner of Social Security, in

which she elects to receive widow's insurance benefits (subject to reduction as provided in subsection (q)), or

(iii) was entitled, on the basis of such wages and self-employment income, to mother's insurance benefits for the month preceding the month in which she attained retirement age (as defined in section 216(l) [42 USCS § 416(l)]), and

(D) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount (as determined after application of subparagraphs (B) and (C) of paragraph (2)) of such deceased individual,

shall be entitled to a widow's insurance benefit for each month, beginning with—

(E) if she satisfies subparagraph (B) by reason of clause (i) thereof, the first month in which she becomes so entitled to such insurance benefits, or

(F) if she satisfies subparagraph (B) by reason of clause (ii) thereof—

(i) the first month after her waiting period (as defined in paragraph (5)) in which she becomes so entitled to such insurance benefits, or

(ii) the first month during all of which she is under a disability and in which she becomes so entitled to such insurance benefits, but only if she was previously entitled to insurance benefits under this subsection on the basis of being under a disability and such first month occurs (I) in the period specified in paragraph (4) and (II) after the month in which a previous entitlement to such benefits on such basis terminated,

and ending with the month preceding the first month in which any of the following occurs: she remarries, dies, becomes entitled to an old-age insurance benefit equal to or exceeding the primary insurance amount (as determined after application of subparagraphs (B) and (C) of paragraph (2)) of such deceased individual, or, if she became entitled to such benefits before she attained age 60, subject to section 223(e) [42 USCS § 423(e)], the termination month (unless she attains retirement age (as defined in § 216(l) [42 USCS § 416l)]) on or before the last day of such termination month). For purposes of the preceding sentence, the termination month for any individual shall be the third month following the month in which her disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 222(c)(4)(A) [42 USCS § 422(c)(4)(A)], the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful activity, but in no event earlier than the first month occurring after the 36 months following such period of trial work in which she engages or is determined able to engage in substantial gainful activity.

(2) (A) Except as provided in subsection (k)(5), subsection (q), and subparagraph (D) of this paragraph, such widow's insurance benefit for each month shall be equal to the primary insurance amount (as determined for purposes of this subsection after application of subparagraphs (B) and (C) of such deceased individual.

(B)

(i) For purposes of this subsection, in any case in which such deceased individual dies before attaining age 62 and section 215(a)(1) [42 USCS § 415(a)(1)] (as in effect after December 1978) is applicable in determining such individual's primary insurance amount—

(I) such primary insurance amount shall be determined under the formula set forth in section 215(a)(1)(B)(i) and (ii) [42 USCS § 415(a)(1)(B)(i), (ii)] which is applicable to individuals who initially become eligible for old-age insurance benefits in the second year after the year specified in clause (ii),

(II) the year specified in clause (ii) shall be substituted for the second calendar year specified in section 215(b)(3)(A)(ii)(I) [42 USCS § 415(b)(3)(A)(ii)(I)], and

(III) such primary insurance amount shall be increased under section 215(i) [42 USCS § 415(i)] as if it were the primary insurance amount referred to in section 215(i)(2)(A)(ii)(II) [42 USCS

§ 415(i)(2)(A)(ii)(II)], except that it shall be increased only for years beginning after the first year after the year specified in clause (ii).

(ii) The year specified in this clause is the earlier of—

(I) the year in which the deceased individual attained age 60, or would have attained age 60 had he lived to that age, or

(II) the second year preceding the year in which the widow or surviving divorced wife first meets the requirements of paragraph (1)(B) or the second year preceding the year in which the deceased individual died, whichever is later.

(iii) This subparagraph shall apply with respect to any benefit under this subsection only to the extent its application does not result in a primary insurance amount for purposes of this subsection which is less than the primary insurance amount otherwise determined for such deceased individual under section 215 [42 USCS § 415].

(C) If such deceased individual was (or upon application would have been) entitled to an old-age insurance benefit which was increased (or subject to being increased) on account of delayed retirement under the provisions of subsection (w), then, for purposes of this subsection, such individual's primary insurance amount, if less than the old-age insurance benefit (increased, where applicable, under section 215(f)(5) or (6) [42 USCS § 415(f)(5) or (6)] and under section 215(i) [42 USCS § 415(i)] as if such individual were still alive in the case of an individual who has died) which he was receiving (or would upon application have received) for the month prior to the month in which he died, shall be deemed to be equal to such old-age insurance benefit, and (notwithstanding the provisions of paragraph (3) of such subsection (w)) the number of increment months shall include any month in the months of the calendar year in which he died, prior to the month in which he died, which satisfy the conditions in paragraph (2) of such subsection (w).

(D) If the deceased individual (on the basis of whose wages and self-employment income a widow or surviving divorced wife is entitled to widow's insurance benefits under this subsection) was, at any time, entitled to an old-age insurance benefit which was reduced by reason of the application of subsection (q), the widow's insurance benefit of such widow or surviving divorced wife for any month shall, if the amount of the widow's insurance benefit of such widow or surviving divorced wife (as determined under subparagraph (A) and after application of subsection (q)) is greater than—

(i) the amount of the old-age insurance benefit to which such deceased individual would have been entitled (after application of subsection (q)) for such month if such individual were still living and section 215(f)(5), 215(f)(6), or 215(f)(9)(B) [42 USCS § 415(f)(5), (6), or (9)(B)] were applied, where applicable, and

(ii) 82 1/2 percent of the primary insurance amount (as determined without regard to subparagraph (C)) of such deceased individual,

be reduced to the amount referred to in clause (i), or (if greater) the amount referred to in clause (ii).

(3) For purposes of paragraph (1), if—

(A) a widow or surviving divorced wife marries after attaining age 60 (or after attaining age 50 if she was entitled before such marriage occurred to benefits based on disability under this subsection), or

(B) a disabled widow or disabled surviving divorced wife described in paragraph (1)(B)(ii) marries after attaining age 50,

such marriage shall be deemed not to have occurred.

(4) The period referred to in paragraph (1)(B)(ii), in the case of any widow or surviving divorced wife, is the period beginning with whichever of the following is the latest:

(A) the month in which occurred the death of the fully insured individual referred to in paragraph (1) on whose wages and self-employment income her benefits are or would be based, or

(B) the last month for which she was entitled to mother's insurance benefits on the basis of the wages and self-employment income of such individual, or

(C) the month in which a previous entitlement to widow's insurance benefits on the basis of such wages and self-employment income terminated because her disability had ceased,

and ending with the month before the month in which she attains age 60, or, if earlier, with the close of the eighty-fourth month following the month with which such period began.

(5) (A) The waiting period referred to in paragraph (1)(F), in the case of any widow or surviving divorced wife, is the earliest period of five consecutive calendar months—

(i) throughout which she has been under a disability, and

(ii) which begins not earlier than with whichever of the following is the later: (I) the first day of the seventeenth month before the month in which her application is filed, or (II) the first day of the fifth month before the month in which the period specified in paragraph (4) begins.

(B) For purposes of paragraph (l)(F)(i), each month in the period commencing with the first month for which such widow or surviving divorced wife is first eligible for supplemental security income benefits under title XVI [42 USCS §§ 1381 et seq.], or State supplementary payments of the type referred to in section 1616(a) [42 USCS § 1382e(a)] (or payments of the type described in section 212(a) of Public Law 93-66 [42 USCS § 1382 note]) which are paid by the Commissioner of Social Security under an agreement referred to in section 1616(a) [42 USCS § 1382e(a)] (or in section 212(b) of Public Law 93-66 [42 USCS § 1382 note]), shall be included as one of the months of such waiting period for which the requirements of subparagraph (A) have been met.

(6) In the case of an individual entitled to monthly insurance benefits payable under this section for any month prior to January 1973 whose benefits were not redetermined under section 102(g) of the Social Security Amendments of 1972 [note to this section], such benefits shall not be redetermined pursuant to such section, but shall be increased pursuant to any general benefit increase (as defined in section 215(i)(3) [42 USCS § 415(i)(3)]) or any increase in benefits made under or pursuant to section 215(i) [42 USCS § 415(i)], including for this purpose the increase provided effective for March 1974, as though such redetermination had been made.

(7) Any certificate filed pursuant to paragraph (1)(C)(ii)(III) shall be effective for purposes of this subsection—

(A) for the month in which it is filed and for any month thereafter, and

(B) for months, in the period designated by the individual filing such certificate, of one or more consecutive months (not exceeding 12) immediately preceding the month in which such certificate is filed;

except that such certificate shall not be effective for any month before the month in which she attains age 62.

(8) An individual shall be deemed to be under a disability for purposes of paragraph (1)(B)(ii) if such individual is eligible for supplemental security income benefits under title XVI [42 USCS §§ 1381 et seq.], or State supplementary payments of the type referred to in section 1616(a) [42 USCS § 1382e(a)] (or payments of the type described in section 212(a) of Public Law 93-66 [42 USCS § 1382 note]) which are paid by the Commissioner of Social Security under an agreement referred to in section 1616(a) [42 USCS § 1382e(a)] (or in section 212(b) of Public Law 93-66 [42 USCS § 1382 note]), for the month for which all requirements of paragraph (1) for entitlement to benefits under this subsection (other than being under a disability) are met.

(9) [Redesignated]

(f) Widower's insurance benefits.

(1) The widower (as defined in section 216(g) [42 USCS § 416(g)]) and every surviving divorced husband (as defined in section 216(d) [42 USCS § 416(d)]) of an individual who died a fully insured individual, if such widower or such surviving divorced husband—

(A) is not married,

(B) (i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 223(d) [42 USCS § 423(d)]) which began before the end of the period specified in paragraph (4),

(C)

(i) has filed application for widower's insurance benefits,

(ii) was entitled to husband's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which such individual died, and—

(I) has attained retirement age (as defined in section 216(l) [42 USCS § 416(l)]),

(II) is not entitled to benefits under subsection (a) or section 223 [42 USCS § 423], or

(III) has in effect a certificate (described in paragraph (8)) filed by him with the Commissioner of Social Security, in accordance with regulations prescribed by the Commissioner of Social Security, in which he elects to receive widower's insurance benefits (subject to reduction as provided in subsection (q)), or

(iii) was entitled, on the basis of such wages and self-employment income, to father's insurance benefits for the month preceding the month in which he attained retirement age (as defined in section 216(l) [42 USCS § 416(l)]), and

(D) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than the primary insurance amount (as determined after application of subparagraphs (B) and (C) of paragraph (3)) of such deceased individual,

shall be entitled to a widower's insurance benefit for each month, beginning with—

(E) if he satisfies subparagraph (B) by reason of clause (i) thereof, the first month in which he becomes so entitled to such insurance benefits, or

(F) if he satisfies subparagraph (B) by reason of clause (ii) thereof—

(i) the first month after his waiting period (as defined in paragraph (5)) in which he becomes so entitled to such insurance benefits, or

(ii) the first month during all of which he is under a disability and in which he becomes so entitled to such insurance benefits, but only if he was previously entitled to insurance benefits under this subsection on the basis of being under a disability and such first month occurs (I) in the period specified in paragraph (4) and (II) after the month in which a previous entitlement to such benefits on such basis terminated,

and ending with the month preceding the first month in which any of the following occurs: he remarries, dies, or becomes entitled to an old-age insurance benefit equal to or exceeding the primary insurance amount (as determined after application of subparagraphs (B) and (C) of paragraph (3)) of such deceased individual, or, if he became entitled to such benefits before he attained age 60, subject to section 223(e) [42 USCS § 423(e)], the termination month (unless he attains retirement age (as defined in section 216(l) [42 USCS § 416(l)]) on or before the last day of such termination month). For purposes of the preceding sentence, the termination month for any individual shall be the third month following the month in which his disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 222(c)(4)(A) [42 USCS § 422(c)(4)(A)], the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful activity, but in no event earlier than the first month occurring after the 36 months following such period of trial work in which he engages or is determined able to engage in substantial gainful activity.

(2) (A) Except as provided in subsection (k)(5), subsection (q), and subparagraph (D) of this paragraph, such widower's insurance benefit for each month shall be equal to the primary insurance amount (as determined for purposes of this subsection after application of subparagraphs (B) and (C)) of such deceased individual.

(B) (i) For purposes of this subsection, in any case in which such deceased individual dies before attaining age 62 and section 215(a)(1) [42 USCS § 415(a)(1)] (as in effect after December 1978) is applicable in determining such individual's primary insurance amount—

(I) such primary insurance amount shall be determined under the formula set forth in section 215(a)(1)(B)(i) and (ii) [42 USCS § 415(a)(1)(B)(i) and (ii)] which is applicable to individuals who

initially become eligible for old-age insurance benefits in the second year after the year specified in clause (ii),

(II) the year specified in clause (ii) shall be substituted for the second calendar year specified in section 215(b)(3)(A)(ii)(I) [42 USCS § 415(b)(3)(A)(ii)(I)], and

(III) such primary insurance amount shall be increased under section 215(i) [42 USCS § 415(i)] as if it were the primary insurance amount referred to in section 215(i)(2)(A)(ii)(II) [42 USCS § 415(i)(2)(A)(ii)(II)], except that it shall be increased only for years beginning after the first year after the year specified in clause (ii).

(ii) The year specified in this clause is the earlier of—

(I) the year in which the deceased individual attained age 60, or would have attained age 60 had she lived to that age, or

(II) the second year preceding the year in which the widower or surviving divorced husband first meets the requirements of paragraph (1)(B) or the second year preceding the year in which the deceased individual died, whichever is later.

(iii) This subparagraph shall apply with respect to any benefit under this subsection only to the extent its application does not result in a primary insurance amount for purposes of this subsection which is less than the primary insurance amount otherwise determined for such deceased individual under section 215 [42 USCS § 415].

(C) If such deceased individual was (or upon application would have been) entitled to an old-age insurance benefit which was increased (or subject to being increased) on account of delayed retirement under the provisions of subsection (w), then, for purposes of this subsection, such individual's primary insurance amount, if less than the old-age insurance benefit (increased, where applicable, under section 215(f)(5), 215(f)(6), or 215(f)(9)(B) [42 USCS § 415(f)(5), (6), or (9)(B)] and under section 215(i) [42 USCS § 415(i)] as if such individual were still alive in the case of an individual who has died) which she was receiving (or would upon application have received) for the month prior to the month in which she died, shall be deemed to be equal to such old-age insurance benefit, and (notwithstanding the provisions of paragraph (3) of such subsection (w)) the number of increment months shall include any month in the months of the calendar year in which she died, prior to the month in which she died, which satisfy the conditions in paragraph (2) of such subsection (w).

(D) If the deceased individual (on the basis of whose wages and self-employment income a widower or surviving divorced husband is entitled to widower's [or surviving divorced husband's] insurance benefits under this subsection) was, at any time, entitled to an old-age insurance benefit which was reduced by reason of the application of subsection (q), the widower's [or surviving divorced husband's] insurance benefit of such widower or surviving divorced husband for any month shall, if the amount of the widower's insurance benefit of such widower or surviving divorced husband (as determined under subparagraph (A) and after application of subsection (q)) is greater than—

(i) the amount of the old-age insurance benefit to which such deceased individual would have been entitled (after application of subsection (q)) for such month if such individual were still living and section 215(f)(5), 215(f)(6), or 215(f)(9)(B) [42 USCS § 415(f)(5), (6), or (9)(B)] were applied, where applicable, and

(ii) 82 1/2 percent of the primary insurance amount (as determined without regard to subparagraph (C)) of such deceased individual;

be reduced to the amount referred to in clause (i), or (if greater) the amount referred to in clause (ii).

(3) For purposes of paragraph (1), if—

(A) a widower or surviving divorced husband marries after attaining age 60 (or after attaining age 50 if he was entitled before such marriage occurred to benefits based on disability under this subsection), or

(B) a disabled widower or surviving divorced husband described in paragraph (1)(B)(ii) marries after attaining age 50,

such marriage shall be deemed not to have occurred.

(4) The period referred to in paragraph (1)(B)(ii), in the case of any widower or surviving divorced husband, is the period beginning with whichever of the following is the latest:

(A) the month in which occurred the death of the fully insured individual referred to in paragraph (1) on whose wages and self-employment income his benefits are or would be based,

(B) the last month for which he was entitled to father's insurance benefits on the basis of the wages and self-employment income of such individual, or

(C) the month in which a previous entitlement to widower's insurance benefits on the basis of such wages and self-employment income terminated because his disability had ceased,

and ending with the month before the month in which he attains age 60, or, if earlier, with the close of the eighty-fourth month following the month with which such period began.

(5) (A) The waiting period referred to in paragraph (1)(F), in the case of any widower or surviving divorced husband, is the earliest period of five consecutive calendar months—

(i) throughout which he has been under a disability, and

(ii) which begins not earlier than with whichever of the following is the later: (I) the first day of the seventeenth month before the month in which his application is filed, or (II) the first day of the fifth month before the month in which the period specified in paragraph (4) begins.

(B) For purposes of paragraph (1)(F)(i), each month in the period commencing with the first month for which such widower or surviving divorced husband is first eligible for supplemental security income benefits; under title XVI [42 USCS §§ 1381 et seq.], or State supplementary payments of the type referred to in section 1616(a) [42 USCS § 1382e(a)] (or payments of the type described in section 212(a) of Public Law 93-66 [42 USCS § 1382 note]), which are paid by the Commissioner of Social Security under an agreement referred to in section 1616(a) [42 USCS § 1382e(a)] (or in section 212(b) of Public Law 93-66 [42 USCS § 1382 note]), shall be included as one of the months of such waiting period for which the requirements of subparagraph (A) have been met.

(6) In the case of an individual entitled to monthly insurance benefits payable under this section for any month prior to January 1973 whose benefits were not redetermined under section 102(g) of the Social Security Amendments of 1972 note to this section], such benefits shall not be redetermined pursuant to such section, but shall be increased pursuant to any general benefit increase (as defined in section 215(i)(3) [42 USCS § 415(i)(3)] or any increase in benefits made under or pursuant to section 215(i) [42 USCS § 415(i)], including for this purpose the increase provided effective for March 1974, as though such redetermination had been made.

(7) Any certificate filed pursuant to paragraph (1)(C)(ii)(III) shall be effective for purposes of this subsection—

(A) for the month in which it is filed and for any month thereafter, and

(B) for months, in the period designated by the individual filing such certificate, of one or more consecutive months (not exceeding 12) immediately preceding the month in which such certificate is filed;

except that such certificate shall not be effective for any month before the month in which he attains age 62.

(8) An individual shall be deemed to be under a disability for purposes of paragraph (1)(B)(ii) if such individual is eligible for supplemental security income benefits under title XVI [42 USCS §§ 1381 et seq.], or State supplementary payments or the type referred to in section 1616(a) [42 USCS § 1382e(a)] (or payments of the type described in section 212(a) of Public Law 93-66 [42 USCS § 1382 note]) which are paid by the Commissioner of Social Security under an agreement referred to in such section 1616(a) [42 USCS § 1382e(a)] (or in section 212(b) of Public Law 93-66 [42 USCS § 1382 note]), for the month for which all requirements of paragraph (1) for entitlement to benefits under this subsection (other than being under a disability) are met.

(9) [Redesignated]

(g) Mother's and father's insurance benefits.

(1) The surviving spouse and every surviving divorced parent (as defined in section 216(d) [42 USCS § 416(d)]) of an individual who died a fully or currently insured individual, if such surviving spouse or surviving divorced parent—

(A) is not married,

(B) is not entitled to a surviving spouse's insurance benefit,

(C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,

(D) has filed application for mother's or father's insurance benefits, or was entitled to a spouse's insurance benefit on the basis of the wages and self-employment income of such individual for the month preceding the month in which such individual died,

(E) at the time of filing such application has in his or her care a child of such individual entitled to a child's insurance benefit, and

(F) in the case of a surviving divorced parent—

(i) the child referred to in subparagraph (E) is his or her son, daughter, or legally adopted child, and

(ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income,

shall (subject to subsection (s)) be entitled to a mother's or father's insurance benefit for each month, beginning with the first month in which he or she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to a child's insurance benefit, such surviving spouse or surviving divorced parent becomes entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, he or she becomes entitled to a surviving spouse's insurance benefit, he or she remarries, or he or she dies. Entitlement to such benefits shall also end, in the case of a surviving divorced parent, with the month immediately preceding the first month in which no son, daughter, or legally adopted child of such surviving divorced parent is entitled to a child's insurance benefit on the basis of the wages and self-employment income of such deceased individual.

(2) Such mother's or father's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

(3) In the case of a surviving spouse or surviving divorced parent who marries—

(A) an individual entitled to benefits under this subsection or subsection (a), (b), (c), (e), (f), or (h), or under section 223(a) [42 USCS § 423(a)], or

(B) an individual who has attained the age of eighteen and is entitled to benefits under subsection (d),

the entitlement of such surviving spouse or surviving divorced parent to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) but subject to subsection (s), not be terminated by reason of such marriage.

(4) [Deleted]

* * *

(k) Simultaneous entitlement to benefits.

* * *

(5) (A) The amount of a monthly insurance benefit of any individual for each month under subsection (b), (c), (e), (f), or (g) (as determined after application of the provisions of subsection (q) and the preceding provisions of this subsection) shall be reduced (but not below zero) by an amount equal to two-thirds of the amount of any monthly periodic benefit payable to such individual for such month which is based upon such individual's earnings while in the service of the Federal Government or any

State (or political subdivision thereof, as defined in section 218(b)(2) [42 USCS § 418(b)(2)]) if, during any portion of the last 60 months of such service ending with the last day such individual was employed by such entity—

(i) such service did not constitute "employment" as defined in section 210 [42 USCS § 410], or

(ii) such service was being performed while in the service of the Federal Government, and constituted "employment" as so defined solely by reason of—

(I) clause (ii) or (iii) of subparagraph (G) of section 210(a)(5) [42 USCS § 410(a)(5)], where the lump-sum payment described in such clause (ii) or the cessation of coverage described in such clause (iii) (whichever is applicable) was received or occurred on or after January 1, 1988, or

(II) an election to become subject to the Federal Employees' Retirement System provided in chapter 84 of title 5, United States Code [5 USCS §§ 8401 et seq.], or the Foreign Service Pension System provided in subchapter II of chapter 8 of title I of the Foreign Service Act of 1980 [22 USCS §§ 4071 et seq.] made pursuant to law after December 31, 1987,

unless subparagraph (B) applies.

The amount of the reduction in any benefit under this subparagraph, if not a multiple of $ 0.10, shall be rounded to the next higher multiple of $ 0.10.

(B) (i) Subparagraph (A)(i) shall not apply with respect to monthly periodic benefits based wholly on service as a member of a uniformed service (as defined in section 210(m) [42 USCS § 410(m)]).

(ii) Subparagraph (A)(ii) shall not apply with respect to monthly periodic benefits based in whole or in part on service which constituted "employment" as defined in section 210 [42 USCS § 410] if such service was performed for at least 60 months in the aggregate during the period beginning January 1, 1988, and ending with the close of the first calendar month as of the end of which such individual is eligible for benefits under this subsection and has made a valid application for such benefits.

(C) For purposes of this paragraph, any periodic benefit which otherwise meets the requirements of subparagraph (A), but which is paid on other than a monthly basis, shall be allocated on a basis equivalent to a monthly benefit (as determined by the Commissioner of Social Security) and such equivalent monthly benefit shall constitute a monthly periodic benefit for purposes of subparagraph (A). For purposes of this subparagraph, the term "periodic benefit" includes a benefit payable in a lump sum if it is a commutation of, or a substitute for, periodic payments.

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(Aug. 14, 1935, ch 531, Title II, § 202, 49 Stat. 623; Aug. 10, 1939, ch 666, Title II, § 201, 53 Stat. 1363; Aug. 10, 1946, ch 951, Title IV, §§ 402, 403(a), 404(a), 405(a), 60 Stat. 986, 987; Aug. 28, 1950, ch 809, Title I, § 101(a), 64 Stat. 482; Aug. 14, 1953, ch 483, § 2, 67 Stat. 580; Sept. 1, 1954, ch 1206, Title I, §§ 102(i), 105(a), 107, 110(a)-(c), 68 Stat. 1073, 1079, 1083, 1085; Aug. 9, 1955, ch 685, § 2, 69 Stat. 621; Aug. 1, 1956, ch 836, Title I, §§ 101(a)-(c), 102(c), (d)(1)-(10), 103(c)(1)-(3), 113, 114(a), 118(a), 121(a), 70 Stat. 807, 810, 818, 831, 832, 835, 838; Aug. 1, 1956, ch 837, Title IV, §§ 403(a), 407, 70 Stat. 871, 876; Aug. 30, 1957, P. L. 85-238, §§ 1, 3(a)-(g), 71 Stat. 518; Aug. 28, 1958, P. L. 85-798, § 1, 72 Stat. 964; Aug. 28, 1958, P. L. 85-840, Title I, § 101(e), Title II, § 205(b)-(i), Title III, §§ 301(a)(1), (b)(1), (c)(1), 303, 304(a)(1), 305(a), 306(a), 307(a)-(e), 72 Stat. 1017, 1021-1024, 1026, 1027, 1029-1032; Sept. 2, 1958, P. L. 85-857, § 13(i)(1), 72 Stat. 1265; Sept. 6, 1958, P. L. 85-927, Part III, § 301, 72 Stat. 1783; June 25, 1959, P. L. 86-70, § 32(c)(1), 73 Stat. 149; July 12, 1960, P. L. 86-624, § 30(c)(1), 74 Stat. 420; Sept. 13, 1960, P. L. 86-778, Title I, § 103(a)(1), (j)(2)(C), (D), Title II, §§ 201(a), (b), 202(a), 203(a), 205(a), (b), 208(d), 211(i)-(l), Title III, § 301(a), Title IV, § 403(d), 74 Stat. 936, 937, 946, 947, 949, 952, 957-959, 969; June 30, 1961, P. L. 87-64, Title I, §§ 102(a)-(b)(2)(A), (3), (e), 104(a)-(d), 75 Stat. 131, 134, 136, 138, 139; July 30, 1965, P. L. 89-97, Title I, Part I, § 104(a), Title III, §§ 303(d), 304(a)-(j), 306(a)-(c)(9), 307(a), (b), 308(a), (b), (d)(1), (2)(A), (3)-(5), (12), (13), 319(d), 323(a), 324(a), 328(a), 333(a)-(c), 334(e), (f), 339(b), 343(a), 79 Stat. 334, 367-379, 392, 397, 398, 400, 403-405, 410, 412; Jan. 2, 1968, P. L. 90-248, Title I, Part 1, §§ 103(a)-(d), 104(a)-(c), 112(a), Part 4, §§ 151(a)-(d)(2), 157(a), (b), 158(c)(1), (2), 162(a)(1),

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§ 415. Computation of primary insurance amount *(only selected subdivisions included)*

For the purposes of this title [42 USCS §§ 401 et seq.]—

(a) Primary insurance amount.

(1) (A) The primary insurance amount of an individual shall (except as otherwise provided in this section) be equal to the sum of—

(i) 90 percent of the individual's average indexed monthly earnings (determined under subsection (b)) to the extent that such earnings do not exceed the amount established for purposes of this clause by subparagraph (B),

(ii) 32 percent of the individual's average indexed monthly earnings to the extent that such earnings exceed the amount established for purposes of clause (i) but do not exceed the amount established for purposes of this clause by subparagraph (B), and

(iii) 15 percent of the individual's average indexed monthly earnings to the extent that such earnings exceed the amount established for purposes of clause (ii),

rounded, if not a multiple of $ 0.10, to the next lower multiple of $ 0.10, and thereafter increased as provided in subsection (i).

(B) (i) For individuals who initially become eligible for old-age or disability insurance benefits, or who die (before becoming eligible for such benefits), in the calendar year 1979, the amount established for purposes of clause (i) and (ii) of subparagraph (A) shall be $ 180 and $ 1,085, respectively.

(ii) For individuals who initially become eligible for old-age or disability insurance benefits, or who die (before becoming eligible for such benefits), in any calendar year after 1979, each of the amounts so established shall equal the product of the corresponding amount established with respect to the calendar year 1979 under clause (i) of this subparagraph and the quotient obtained by dividing—

(I) the national average wage index (as defined in section 209(k)(1) [42 USCS § 409(k)(1)]) for the second calendar year preceding the calendar year for which the determination is made, by

(II) the national average wage index (as so defined) for 1977.

(iii) Each amount established under clause (ii) for any calendar year shall be rounded to the nearest $ 1, except that any amount so established which is a multiple of $ 0.50 but not of $ 1 shall be rounded to the next higher $ 1.

(C) (i) No primary insurance amount computed under subparagraph (A) may be less than an amount equal to $ 11.50 multiplied by the individual's years of coverage in excess of 10, or the increased amount determined for purposes of this clause under subsection (i).

(ii) For purposes of clause (i), the term "years of coverage" with respect to any individual means the number (not exceeding 30) equal to the sum of (I) the number (not exceeding 14 and disregarding any fraction) determined by dividing (a) the total of the wages credited to such individual (including wages deemed to be paid prior to 1951 to such individual under section 217 [42 USCS § 417], compensation under the Railroad Retirement Act of 1937 prior to 1951 which is creditable to such individual pursuant to this title [42 USCS §§ 401 et seq.], and wages deemed to be paid prior to 1951 to such individual under section 231 [42 USCS § 431]) for years after 1936 and before 1951 by (b) $ 900, plus (II) the number equal to the number of years after 1950 each of which is a computation base year (within the meaning of subsection (b)(2)(B)(ii)) and in each of which he is credited with wages (including wages deemed to be paid to such individual under section 217 [42 USCS § 417], compensation under the Railroad Retirement Act of 1937 or 1974 which is creditable to such individual pursuant to this title [42 USCS §§ 401 et seq.], and wages deemed to be paid to such individual under section 229 [42 USCS § 429]) and self-employment income of not less than 25 percent (in the case of a year after 1950 and before 1978) of the maximum amount which (pursuant to subsection (e)) may be counted for such year, or 25 percent (in the case of a year after 1977 and before 1991) or 15 percent (in the case of a year after 1990) of the maximum amount which (pursuant to subsection (e)) could be counted for such year if section 230 [42 USCS § 430] as in effect immediately prior to the enactment of the Social Security Amendments of 1977 [enacted Dec. 20, 1977] had remained in effect without change (except that, for purposes of subsection (b) of such section 230 [42 USCS § 430] as so in effect, the reference to the contribution and benefit base in paragraph (1) of such subsection (b) shall be deemed a reference to an amount equal to $ 45,000, each reference in paragraph (2) of such subsection (b) to the average of the wages of all employees as reported to the Secretary of the Treasury shall be deemed a reference to the national average wage index (as defined in section 209(k)(1) [42 USCS § 409(k)(1)]), the reference to a preceding calendar year in paragraph (2)(A) of such subsection (b) shall be deemed a reference to the calendar year before the calendar year in which the determination under subsection (a) of such section 230 is made, and the reference to a calendar year in paragraph (2)(B) of such subsection (b) shall be deemed a reference to 1992).

(D) In each calendar year the Commissioner of Social Security shall publish in the Federal Register, on or before November 1, the formula for computing benefits under this paragraph and for adjusting wages and self-employment income under subsection (b)(3) in the case of an individual who becomes eligible for an old-age insurance benefit, or (if earlier) becomes eligible for a disability insurance benefit or dies, in the following year, and the national average wage index (as defined in section 209(k)(1) [42 USCS § 409(k)(1)]) on which that formula is based.

* * *

(7) (A) In the case of an individual whose primary insurance amount would be computed under paragraph (1) of this subsection, who—

(i) attains age 62 after 1985 (except where he or she became entitled to a disability insurance benefit before 1986 and remained so entitled in any of the 12 months immediately preceding his or her attainment of age 62), or

(ii) would attain age 62 after 1985 and becomes eligible for a disability insurance benefit after 1985,

and who first becomes eligible after 1985 for a monthly periodic payment (including a payment determined under subparagraph (C), but excluding (I) a payment under the Railroad Retirement Act of 1974 or 1937, (II) a payment by a social security system of a foreign country based on an agreement concluded between the United States and such foreign country pursuant to section 233 [42 USCS § 433], and (III) a payment based wholly on service as a member of a uniformed service (as defined in section 210(m) [42 USCS § 410(m)])) which is based in whole or in part upon his or her earnings for service which did not constitute "employment" as defined in section 210 [42 USCS § 410] for purposes of this title [42 USCS §§ 401 et seq.] (hereafter in this paragraph and in subsection (d)(3) referred to as "noncovered service"), the primary insurance amount of that individual during his or her concurrent entitlement to such monthly periodic payment and to old-age or disability insurance benefits shall be computed or recomputed under subparagraph (B).

(B) (i) If paragraph (1) of this subsection would apply to such an individual (except for subparagraph (A) of this paragraph), there shall first be computed an amount equal to the individual's primary insurance amount under paragraph (1) of this subsection, except that for purposes of such computation the percentage of the individual's average indexed monthly earnings established by subparagraph (A)(i) of paragraph (1) shall be the percent specified in clause (ii). There shall then be computed (without regard to this paragraph) a second amount, which shall be equal to the individual's primary insurance amount under paragraph (1) of this subsection, except that such second amount shall be reduced by an amount equal to one-half of the portion of the monthly periodic payment which is attributable to noncovered service performed after 1956 (with such attribution being based on the proportionate number of years of such noncovered service) and to which the individual is entitled (or is deemed to be entitled) for the initial month of his or her concurrent entitlement to such monthly periodic payment and old-age or disability insurance benefits. The individual's primary insurance amount shall be the larger of the two amounts computed under this subparagraph (before the application of subsection (i)) and shall be deemed to be computed under paragraph (1) of this subsection for the purpose of applying other provisions of this title [42 USCS §§ 401 et seq.].

(ii) For purposes of clause (i), the percent specified in this clause is—

(I) 80.0 percent with respect to individuals who become eligible (as defined in paragraph (3)(B)) for old-age insurance benefits (or became eligible as so defined for disability insurance benefits before attaining age 62) in 1986;

(II) 70.0 percent with respect to individuals who so become eligible in 1987;

(III) 60.0 percent with respect to individuals who so become eligible in 1988;

(IV) 50.0 percent with respect to individuals who so become eligible in 1989; and

(V) 40.0 percent with respect to individuals who so become eligible in 1990 or thereafter.

(C) (i) Any periodic payment which otherwise meets the requirements of subparagraph (A), but which is paid on other than a monthly basis, shall be allocated on a basis equivalent to a monthly payment (as determined by the Commissioner of Social Security), and such equivalent monthly payment shall constitute a monthly periodic payment for purposes of this paragraph.

(ii) In the case of an individual who has elected to receive a periodic payment that has been reduced so as to provide a survivor's benefit to any other individual, the payment shall be deemed to be increased (for purposes of any computation under this paragraph or subsection (d)(3)) by the amount of such reduction.

(iii) For purposes of this paragraph, the term "periodic payment" includes a payment payable in a lump sum if it is a commutation of, or a substitute for, periodic payments.

(D) This paragraph shall not apply in the case of an individual who has 30 years or more of coverage. In the case of an individual who has more than 20 years of coverage but less than 30 years of coverage (as so defined), the percent specified in the applicable subdivision of subparagraph (B)(ii) shall (if such percent is smaller than the applicable percent specified in the following table) be deemed to be the applicable percent specified in the following table:

If the number of such individual's years of coverage (as so defined) is:	The applicable percent is:
29	85 percent
28	80 percent
27	75 percent
26	70 percent
25	65 percent
24	60 percent
23	55 percent
22	50 percent
21	45 percent

For purposes of this subparagraph, the term "year of coverage" shall have the meaning provided in paragraph (1)(C)(ii), except that the reference to "15 percent" therein shall be deemed to be a reference to "25 percent".

(E) This paragraph shall not apply in the case of an individual whose eligibility for old-age or disability insurance benefits is based on an agreement concluded pursuant to section 233 [42 USCS § 433] or an individual who on January 1, 1984—

(i) is an employee performing service to which social security coverage is extended on that date solely by reason of the amendments made by section 101 of the Social Security Amendments of 1983; or

(ii) is an employee of a nonprofit organization which (on December 31, 1983) did not have in effect a waiver certificate under section 3121(k) of the Internal Revenue Code of 1954 and to the employees of which social security coverage is extended on that date solely by reason of the amendments made by section 102 of that Act, unless social security coverage had previously extended to service performed by such individual as an employee of that organization under a waiver certificate which was subsequently (prior to December 31, 1983) terminated.

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(Aug. 14, 1935, ch 531, Title II, § 215, as added Aug. 28, 1950, ch 809, Title I, § 104(a), 64 Stat. 506; July 18, 1952, ch 945, §§ 2(a), (b)(1), 3(c), 6(a), (b), 66 Stat. 767, 768, 770, 771, 776; Sept. 1, 1954, ch 1206, Title I, §§ 102(a)-(d), (e)(1)-(4), 104(d), 106(c), 68 Stat. 1062-1068, 1078, 1079; Aug. 1, 1956, ch 836, Title I, §§ 103(c)(4), (5), 109(a), 115(a)-(c), 70 Stat. 818, 830, 832, 833; Aug. 28, 1958, P.L. 85-840, Title I, §§ 101(a)-(d), 102(d), Title II, § 205(m), 72 Stat. 1013-1016, 1020, 1025; April 8, 1960, P.L. 86-415, § 7, 74 Stat. 35; Sept. 13, 1960, P.L. 86-778, Title I, § 103(j)(2)(C), Title II, § 211(n), Title III, §§ 303(a)-(e), 304(a), 74 Stat. 937, 958, 960-962, 966; June 30, 1961, P.L. 87-64, Title I, §§ 101(a), 102(d), 75 Stat. 131, 135; July 30, 1965, P.L. 89-97, Title III, §§ 301(a), (b), 302(a)-(d), 303(e), 304(k), 320(a)(4), 79 Stat. 361, 363-365, 367, 370, 393; Jan. 2, 1968, P.L. 90-248, Title I, Part 1, §§ 101(a), (c), (d), 108(a)(4), Part 4, § 155(a)(1)-(6), Title IV, § 403(b), 81 Stat. 824, 827, 834, 864, 865, 931; Dec. 30, 1969, P.L. 91-172, Title X, §§ 1002(a), (c), (d), 83 Stat. 737, 740; March 17, 1971, P.L. 92-5, Title II, §§ 201(a), (c), (d), 203(a)(4), 85 Stat. 6, 9, 10; July 1, 1972, P.L. 92-336, Title II, §§ 201(a), (c)-(f), 202(a)(1), (3), 203(a)(4), 86 Stat. 406, 410-412, 416, 418; Oct. 30, 1972, P.L. 92-603, Title I, §§ 101(a), (c)-(e), 104(b), 134, 142(b), (c), 144(a)(1), 86 Stat. 1333, 1334,

1340, 1362, 1368, 1369; July 9, 1973, P.L. 93-66, Title II, Part A, § 203(a)(4), 87 Stat. 153; Dec. 31, 1973, P.L. 93-233, §§ 1(h)(1), 2(a), (d), 3(a)-(h), 5(a)(4), 87 Stat. 948-953; Dec. 20, 1977, P.L. 95-216, Title I, § 103(d), Title II, § 201, 91 Stat. 1514, 1519; June 9, 1980, P.L. 96-265, Title I, §§ 101(b)(3), (4), 102(a), 94 Stat 442, 443; Oct. 19, 1980, P.L. 96-473, § 6(d), 94 Stat. 2265; Aug. 13, 1981, P.L. 97-35, Title XXII, §§ 2201(a), (b)(1)-(9), (c)(1)-(5), 2206(a), (b)(5)-(7), 95 Stat. 830, 831, 838; Dec. 29, 1981, P.L. 97-123, § 2(a)-(d), 95 Stat. 1660; April 20, 1983, P.L. 98-21, Title I, Part B, §§ 111(a)(1)-(3), (6), (b)(1), (2), (c), 112(a)-(d), 113(a)-(c), Title II, § 201(c)(1)(C), 97 Stat. 72-78, 109; July 18, 1984, P.L. 98-369, Division B, Title VI, Subtitle D, §§ 2661(k), 2663(a)(10), 98 Stat. 1157, 1164; April 7, 1986, P.L. 99-272, Title XII, Subtitle A, § 12105, 100 Stat. 286; Oct. 21, 1986, P.L. 99-509, Title IX, Subtitle A, § 9001(a), (b), 100 Stat. 1969; Oct. 22, 1986, P.L. 99-514, Title XVIII, Subtitle B, Ch 1, § 1883(a)(7), 100 Stat. 2916; Nov. 10, 1988, P.L. 100-647, Title VIII, Subtitle A, §§ 8003(a), 8011(a), (b), 102 Stat. 3780, 3789; Dec. 19, 1989, P.L. 101-239, Title X, Subtitle B, § 10208(b)(1)(A)-(C), (2)(A), (B), (3), (4), (d)(2)(A)(i), 103 Stat. 2477, 2478, 2480; Nov. 5, 1990, P.L. 101-508, Title V, Subtitle B, §§ 5117(a)(1)-(3)(A), (C)-(E), 5122, 104 Stat. 1388-274-1388-277, 1388-283; Aug. 15, 1994, P.L. 103-296, Title I, § 107(a)(4), Title III, §§ 307(a), (b), 308(b), 321(a)(16), (17), (e)(2)(B)-(G), (g)(1)(C), 108 Stat. 1478, 1522, 1536, 1539, 1540, 1543.)

INDEX

Section number references in the index are preceded by an abbreviation for the code to which the section numbers refer, as follows:

5 CCR: Title 5 of the California Code of Regulations (Volume 1); **Ed:** Parts 13, 13.5 and 14 of Title 1 of the Education Code (Volume 1); **Ex 26 USC:** Extracts – Title 26 of the U.S. Code (Volume 2); **Ex 42 USC:** Extracts – Title 42 of the U.S. Code (Volume 2); **Ex CCP:** Extracts – Code of Civil Procedure (Volume 2); **Ex Ed:** Extracts – Education Code (Volume 2); **Ex Gov:** Extracts – Government Code (Volume 2); **Ex Pen:** Extracts – Penal Code (Volume 2); **Ex Pro:** Extracts – Probate Code (Volume 2); **Ex PubCon:** Extracts – Public Contract Code (Volume 2); **Ex PubRes:** Extracts – Public Resources Code (Volume 2).

A

ABSENCE, LEAVES OF. (*See* LEAVES OF ABSENCE)

ACCOUNTS
Individual account statements, Ed §22309

ACTIONS
Subrogation
Permissible activities under provisions, Ed §24502

ACTUARIAL INVESTIGATIONS, Ed §22311
Actuary's duties, Ed §22311.5
Plan amendments in light of investigation, Ed §22311.7

AD HOC INCREASE; LESS THAN 20 YEARS SERVICE, Ed §24406

ADJUSTMENTS OF ERRORS AND OMISSIONS, Ed §22008

ADMINISTRATION OF SYSTEM, Ed §22300 to 22335; 5 CCR §20520, 20521
Accounts
Individual account statements, Ed §22309
Actuarial investigations, Ed §22311
Actuary's duties, Ed §22311.5
Plan amendments in light of investigation, Ed §22311.7
Applications
Signatures
Validity, Ed §22011
Chief executive officer
Designation as chief administrative officer, Ed §22300
Oaths
Administration, Ed §22300
Powers, Ed §22301; 5 CCR §20520
Computation of benefits
Amount of compensation
Members as of July 1, 1996, Ed §22317.5
Confidentiality
Information filed with system, Ed §22306
Contracts with third party administrators, Ed §22302.5
Contributions
Rate adjustments
Retroactive adjustments, Ed §22313
Correction of errors or omissions, Ed §22308
Costs of administration
Allocation, Ed §22304
Source of payment, Ed §22304
Counseling services
Retirement counseling services, Ed §22303
Criminal offenses, Ed §22010
Death benefits
Outstanding death benefits
Report, Ed §22323
Death benefits, active
Family allowance
Time for payment, Ed §22320
Interest for late payment, Ed §22321
Reporting late payment, Ed §22322
Disability allowance
Cancellation
Credits on cancellation of allowances accrued after July 1, 1972, Ed §22328
Checks, payment, Ed §22318
Interest for late payment, Ed §22321
Reporting late payment, Ed §22322
Earnings of recipient of disability benefits
Disclosure, Ed §22327
Disability retirement
Checks, payment, Ed §22318
Interest for late payment, Ed §22321
Reporting late payment, Ed §22322
Earnings of recipient of disability benefits
Disclosure, Ed §22327
Documents
Signatures
Validity, Ed §22011
Fraudulent activities, Ed §22010
Income tax
Advisement of tax liabilities, Ed §22314
Late payments
Interest on late payments, Ed §22322
Reporting, Ed §22322
Legislation affecting investment strategy
Analysis of asset and liability implications, Ed §22330
Midcareer retirement information program, Ed §22303.5
Ombudsman, Ed §22302
Report of board
Annual report, Ed §22324
Retirement allowance
Cancellation
Credits on cancellation of allowances accrued after July 1, 1972, Ed §22328
Rulemaking
Legal effect of rules and regulations, Ed §22305
Service credit
Time required, 5 CCR §20521
Service retirement
Checks, payment, Ed §22319
Interest for late payment, Ed §22321
Reporting late payment, Ed §22322

ADMINISTRATION OF SYSTEM—Cont'd
Signatures
Validity, Ed §22011
Teachers' retirement development fund, Ed §22307.5
Transfer of assets in fund to designated fund, Ed §22307.6
Teachers tax-sheltered annuity fund
Disbursements from fund, Ed §22335
Toll-free telephone assistance, Ed §22329
Transfer and disbursement of funds, Ed §22307, 22307.6
Unclaimed refund or benefit, Ed §22310
Unlawful acceptance of benefits, Ed §22010

AMENDMENT OF PLEADINGS, Ex CCP §473

ANNUAL STATEMENT, Ed §22309

ANNUITY CONTRACT AND CUSTODIAL ACCOUNTS, Ed §24950 to 24953
Administration of account, Ed §24950
Contracting for services, Ed §24953
Costs and expenses, responsibility, Ed §24952
Community college employees
Third-party administrator, contracting with, Ex Ed §87040.5
Contracting for services, Ed §24953
Third party administrator, contracting with, Ex Ed §44041.5
Community college employees, Ex Ed §87040.5
Contributions, Ed §24950
Costs and expenses, responsibility, Ed §24952
Income tax, federal
Qualified pension, etc, plans
Taxation of employee annuities, Ex 26 USC §403
Investment options, Ed §24950
Offering account, Ed §24950
Roth IRA, administration of, Ed §24950.5
Termination if participation insufficient, Ed §24951
Vendor registration and information bank generally, Ed §25100 to 25115. (*See* **VENDOR REGISTRATION AND INFORMATION BANK**)

ANNULMENT
Community property
Cash balance benefit program, Ed §27400 to 27413. (*See* **CASH BALANCE BENEFIT PROGRAM**)
Generally, Ed §22650 to 22666. (*See* **COMMUNITY PROPERTY**)
Option elections
Cancellation of options, Ed §24305

APPEAL
Member's right to internal informal appeal of benefit or obligation
Administrative hearing, 5 CCR §27103
Administrative remedy for audits, 5 CCR §27102
Administrative remedy for benefits and services, 5 CCR §27101
Definitions, 5 CCR §27100

ASSIGNMENTS
Cash balance benefit program
Rights to benefits not subject to execution or assignment, Ed §26701

AUDITS
Board
Accountant to be employed, Ed §22217
Power to audit public agencies, Ed §22206
Financial and compliance audits, Ex Ed §14502.1
Public pensions and retirement plans, general regulation, Ex Gov §7504
University and postsecondary education, Ex Ed §84040.5

AUTHORIZATION TO CONTRACT WITH STATE FUND OR ATTORNEY GENERAL FOR RECOVERY FROM THIRD PERSONS, Ed §24501

AUXILIARY SUPPLEMENTAL BENEFIT MAINTENANCE ACCOUNT, Ed §24417

B

BANKS
Financial institutions generally. (*See* **FINANCIAL INSTITUTIONS**)

BARNES ACT; TEACHERS' RETIREMENT LAW Ed §22000

BENEFICIARIES
Birth date
Proof, Ed §22451.5
Withholding benefit payments pending receipt of proof, Ed §22451.7
Cash balance benefit program
Annuity
Changes to beneficiary, Ed §26811
Disability benefits, Ed §26910
Death benefits
Death of beneficiary under program
Payments after death of beneficiary, Ed §27008
Definition of beneficiary, Ed §26108
Designation, Ed §27100 to 27102
Community property
Nonparticipant spouse, designation of beneficiary, Ed §27410
Failure to find participant or beneficiary
Forfeiture of benefit, Ed §27302
Information provided by participants and beneficiaries, Ed §26306
Spouse signature requirement, Ed §26703
Action upon refusal of spouse to sign, Ed §26704
Community property
Effect of community property on designation, Ed §23300
Nonmember spouse
Designation of beneficiaries, Ed §22660
Death benefits, active
Survivor benefits, Ed §23852

BENEFICIARIES—Cont'd
Death benefits, retired
Payment to beneficiary, Ed §23880
Option beneficiary, payment to, Ed §23881
Defined benefit supplement program
Final benefits
Death of beneficiary, Ed §25023
Elections as to receipt of final benefit, Ed §25021
Joint and survivor annuities
Designation of beneficiaries, Ed §25015
Designation, Ed §23300 to 23304
Allowed, Ed §23300
Cash balance benefit program, Ed §27100 to 27102
Community property
Nonparticipant spouse, designation of beneficiary, Ed §27410
Community property
Effect, Ed §23300
Defined benefit supplement program
Joint and survivor annuities, Ed §25015
Discharge of liability upon payment to designee, Ed §23302
Entities capable of designation, Ed §23301
Funeral expenses
Circumstances for payment, Ed §23303
No designation effective at death
Estate of member as payee, Ed §23304
Health care benefits program
Definition of beneficiaries, Ed §25910
Information affecting status
Contents, Ed §22451
Employing agency and county superintendent to supply, Ed §22455
Providing to board, Ed §22450
Option elections
Death of option beneficiary, Ed §24300.5
New beneficiary designation if beneficiary predeceases member, Ed §24306
Retirement allowance without modification, Ed §24313
Spouse, designation as new beneficiary, Ed §24305.5
Unmarried retirees
Marriage or registration of domestic partnership
Authority to elect, Ed §24300.6

BENEFIT EFFECTIVE DATE, Ed §24204

BENEFIT LIMITATIONS
Income tax, federal
Qualified pension, etc, plans
Limitation on benefits and contributions, Ex 26 USC §415
Postretirement compensation limitation, Ed §24214.5

BENEFIT MAINTENANCE AND PURCHASING POWER PROTECTION, Ed §24400 to 24417
Actions or claims against board or system
Provisions not intended to generate, Ed §24401
Annual allowance
Minimum annual allowance, Ed §24410.5, 24410.6
Applicability of benefit improvement factor, Ed §24402
Increase in allowances by application of factor, Ed §24403
Appropriations, Ed §24412
Elk Hills Naval Petroleum Reserve, revenues from, Ed §24413
Increases, Ed §24404
1980 increases, Ed §24407
Base date for postretirement increases, Ed §24410
Less than specified years of service, Ed §24406
Minimum unmodified allowance of retired person, Ed §24408
Reduction, Ed §24409
Monthly allowance increases, Ed §24410.7
Procedure, Ed §24403
Scheduled increases, Ed §24405
Legislative findings and intent, Ed §24400
Less than specified years of service
Increases, Ed §24406
Minimum annual allowance, Ed §24410.5, 24410.6
Minimum unmodified allowance of retired person, Ed §24408
Reduction, Ed §24409
Monthly allowance increases, Ed §24410.7
Option elections
Minimum annual allowance, Ed §24410.5, 24410.6
Process for purchasing power adjustments, 5 CCR §26000
Supplemental benefit maintenance account, Ed §24415
Adjustment of purchasing power protection benefits payable to account, Ed §24415.5, 24416
Appropriations for supplemental benefit maintenance account, Ed §22954.5
Distributions, Ed §24415, 24417
Process for purchasing power adjustments, 5 CCR §26000

BLIND PERSONS
California school for the blind
Pupil rights and responsibilities, state special schools, Ex Ed §48927

BOARD, Ed §22200 to 22228
Accounts, Ed §22218
Affirmations
Witnesses and others transacting business of system, Ed §22204
Allowances
Actions by board to assure continued monthly payments, Ed §22214
Fixing and modifying, Ed §22215
Appointments to board, Ed §22200
Assets and liabilities of system
Actuary recommendations
Adoption, Ed §22221
Audits
Accountant to be employed, Ed §22217
Power to audit public agencies, Ed §22206
Bonds, surety
Members, officers and employees, Ed §22259

BOARD—Cont'd
Campaign contributions and investment relationships
Campaign disclosures generally, Ex Gov §84200.5 to 84225
Generally, 5 CCR §24010 to 24013. (*See* **CAMPAIGN CONTRIBUTIONS AND INVESTMENT RELATIONSHIPS**)
Political reform generally, Ex Gov §82002 to 87314
Cash balance benefit program
Administration of plan, Ed §26002, 26200 to 26216
Definition of board, Ed §26109
Chairperson
Defined, 5 CCR §20500
Chief executive officer
Administration of system generally. (*See* **ADMINISTRATION OF SYSTEM**)
Appointment, Ed §22209
Compensation, Ed §22212.5
Reversal of actions by board, Ed §22210
Secretary
Service of CEO as secretary to board, Ed §22201.3; 5 CCR §20514
Service at pleasure of board, Ed §22209
Committees
Appointment, Ed §22208
Reversal of actions by board, Ed §22210
Compensation of investment officers and portfolio managers, Ex Gov §20098
Compensation of members, Ed §22223, 22225
Composition, Ed §22200
Conflicts of interest, Ed §22253
Contributions
Interest credit, Ed §22216
Death benefits
Adjustment, Ed §22222
Defined, Ed §22109
Delegation of board authority, Ed §22208
Elections to board, Ed §22200.5; 5 CCR §24000 to 24009
Ballots
Counting, 5 CCR §24005
Distribution, 5 CCR §24004
Campaign contributions and investment relationships, 5 CCR §24010 to 24013. (*See* **CAMPAIGN CONTRIBUTIONS AND INVESTMENT RELATIONSHIPS**)
Campaign statements for candidates, Ed §22227; 5 CCR §24003
Candidates
Nominations, 5 CCR §24002
Statements, Ed §22227; 5 CCR §24003
Conduct of elections, 5 CCR §24000
Counting ballots, 5 CCR §24005
Nomination of candidates, 5 CCR §24002
Notice, 5 CCR §24001
Protest, 5 CCR §24008
Recount, 5 CCR §24007
Results
Notice, 5 CCR §24006
Vacant seats, election for, 5 CCR §24009
Emergency meetings
Defined, 5 CCR §20500
Emerging investment managers
Strategic plan for participation, Ed §22228
Employees
Appointment, Ed §22212
Employers and employing agencies
Regulation, Ed §22213
Fiduciary duty towards members and beneficiaries, Ed §22250 to 22261. (*See* **FIDUCIARY DUTY TOWARDS MEMBERS AND BENEFICIARIES**)
Funds
Control of administration, Ed §22202
Health insurance
Study on providing benefits, Ed §22226
Hearings, Ed §22219
Indemnification of members, Ex Gov §16642
Information requests
Dependents
Information provided to board, 5 CCR §21023
Power of board, Ed §22207
Investment officers and portfolio managers
Compensation, Ex Gov §20098
Investments
Authority, Ed §22203
Campaign contributions and investment relationships
Campaign disclosures generally, Ex Gov §84200.5 to 84225
Generally, 5 CCR §24010 to 24013. (*See* **CAMPAIGN CONTRIBUTIONS AND INVESTMENT RELATIONSHIPS**)
Political reform generally, Ex Gov §82002 to 87314
Officers and portfolio managers
Civil service appointment of investment officers, Ed §22212.5
Compensation for certain investment officers, Ed §22212.5
Departure from position, restrictions on subsequent employment, Ed §22212.5
Public disclosure of investment transactions, Ed §22203.5
Rollcall vote on investment decisions, Ed §22203.5
Meetings, Ed §22201; 5 CCR §20510
Emergency meetings
Defined, 5 CCR §20500
Quorum, Ed §22201.2; 5 CCR §20513
Regular meetings
Defined, 5 CCR §20500
Special meetings
Defined, 5 CCR §20500
Oaths
Witnesses and others transacting business of system, Ed §22204
Other states
Agreements of board with other states, Ed §22205
Policy making, Ed §22201
Procedures, 5 CCR §20510 to 20514
Public authorities
Regulation, Ed §22213

BOARD—Cont'd
Quorum, Ed §22201.2; 5 CCR §20513
Records, Ed §22218
Regular meetings
Defined, 5 CCR §20500
Release time to allow board, committee, etc, service, Ed §22224
Report of board
Annual report, Ed §22324
Secretary
Chief executive officer of system acting as secretary, Ed §22201.3
Duties, Ed §22201.3; 5 CCR §20514
Service
Determinations by board, Ed §22215
Special meetings
Defined, 5 CCR §20500
Terms of members, Ed §22200
Travel expense reimbursements, Ed §22223
Vacancies
Filling, Ed §22200.5
Election for vacant elected seats, 5 CCR §24009
Vice chairman
Defined, 5 CCR §20500
Witnesses
Subpoenas, Ed §22220

BOND ISSUES
Financing of pension obligations of state. (*See* **FINANCING OF PENSION OBLIGATIONS OF STATE**)

BONDS, SURETY
Board members, officers and employees, Ed §22259

BRIBERY
Public officers and employees
Forfeiture of rights under retirement system, Ex Gov §7522.70

C

CALCULATION OF PART-TIME SERVICE CREDIT (7/1/1956 THROUGH 6/30/1968), Ed §24218

CALENDAR
School month, Ex Ed §37201
School year, Ex Ed §37200

CALIFORNIA STATE UNIVERSITY
Disability retirement
Employment of retired employees
Applicable employment limitations, Ed §24116
Retirement incentives, Ed §22716
Service retirement
Activities of retired member
Service by retired teachers, Ed §24215

CAMPAIGN CONTRIBUTIONS AND INVESTMENT RELATIONSHIPS, 5 CCR §24010 to 24013
Definitions, 5 CCR §24013
Disclosures, 5 CCR §24011
Enforcement, 5 CCR §24012
Inadvertent violations, 5 CCR §24012
Investigations, 5 CCR §24012
Public pensions and retirement plans, general regulation
Boards, commissions, etc
Elections
Campaign disclosures generally, Ex Gov §84200.5 to 84225
Recusals, 5 CCR §24011
Restrictions on contributions, 5 CCR §24010

CAMPAIGN CONTRIBUTIONS OF GIFTS, Ed §22363

CANCELLATION OF BENEFIT, Ed §27204

CAREER FACTOR, Ed §24203.5

CASH BALANCE BENEFIT PROGRAM, Ed §26000 to 28101
Accounts and financial records of plan, Ed §26208
Accounts, employee and employer, Ed §26600 to 26607
Additional annuity credit
Declaration, Ed §26607
Additional earnings credit
Credits to account, Ed §26601, 26602
Declaration of credit, Ed §26605
Determination of credit, Ed §26606
Community property
Nonparticipant spouse
Nominal accounts, rights in, Ed §27404
Credits to accounts, Ed §26600 to 26602
Date to credit, Ed §26603
Definition of employee accounts, Ed §26119
Discontinuation of plan
Effect of discontinuation, Ed §28101
Minimum interest rate
Credits to account, Ed §26601, 26602
Declaration of minimum interest rate, Ed §26604
Actuarial equivalent
Defined, Ed §26101
Actuary
Adoption of actuarial assumptions, rates, etc, as plan amendment, Ed §26213
Defined, Ed §26102
Duties, Ed §26211
Employment, Ed §26211
Investigation of plan, Ed §26211
Database for actuarial investigation, Ed §26212
Additional earnings credit
Accounts, employee and employer
Credits to accounts, Ed §26601, 26602
Declaration of credit, Ed §26605
Determination of credit, Ed §26606
Defined, Ed §26103
Administration of plan, Ed §26002, 26200 to 26216
Accounts and financial records of plan, Ed §26208
Actuary
Adoption of actuarial assumptions, rates, etc, as plan amendment, Ed §26213
Duties, Ed §26211
Investigation of plan
Database for actuarial investigation, Ed §26212

CASH BALANCE BENEFIT PROGRAM—Cont'd
Administration of plan—Cont'd
Annuitant reserve
Established, Ed §26204
Transfers between reserves, Ed §26205
Confidentiality of information in custody of plan, Ed §26215
Costs
Definition of administrative costs, Ed §26104
Payment from fund, Ed §26206
Database for actuarial investigation, Ed §26212
Deposits into fund, Ed §26200
Investment earnings, Ed §26201
Funding of plan, Ed §26207.5
Gain and loss reserve
Established, Ed §26202
Transfers between reserves, Ed §26205
Investment of retirement fund, Ed §26210
Statement to participants
Annual statement, Ed §26214
Third party administration, Ed §26216
Transfer and disbursement of funds from fund, Ed §26209
Transfers between reserves, Ed §26205
Unfunded actuarial obligation
Amortization, Ed §26203
Amortization of unfunded actuarial obligation, Ed §26203
Annuitant reserve
Defined, Ed §26105
Established, Ed §26204
Transfer of credits to annuitant reserve upon election of annuity, Ed §26809
Death benefits, Ed §27006
Disability benefits, Ed §26908
Transfers between reserves, Ed §26205
Annuity
Additional annuity credit
Declaration, Ed §26607
Amount of annuity
Determination, Ed §26808
Beneficiary changes, Ed §26811
Community property
Credits awarded to nonparticipant spouse counted towards participant eligibility for annuity, Ed §27412
Determination of rights in annuity, Ed §27405
Election by nonparticipant spouse, Ed §27411
Death benefits
Amount of annuity, Ed §27005
Annuitant under program, death
Payment pursuant to terms of annuity, Ed §27007
Beneficiary under program, death
Payments after death of beneficiary, Ed §27008
Election to take benefit as annuity, Ed §27004
Transfer of credits to annuitant reserve, Ed §27006
Participant dying prior to commencement of annuity
Amount of benefit, Ed §27002
Death of annuitant under program
Payment pursuant to terms of annuity, Ed §27007
Defined, Ed §26106
Disability benefits, election of annuity, Ed §26906, 26906.5
Beneficiary change, Ed §26910
Change of annuity, Ed §26906.6
Reemployment, effect, Ed §26911
Transfer of credits to annuitant reserve, Ed §26908
Value of annuity, Ed §26907
Discharge of plan obligation upon final payment, Ed §27301
Election to take distribution as annuity, Ed §26807, 26807.5
Change of annuity, Ed §26807.6
Transfer of credits to annuitant reserve, Ed §26809
Reemployment of retired annuitant
Effect, Ed §26505
Termination of annuity upon employment, Ed §26810
Applicability of definitions, Ed §26100
Assignments
Rights to benefits not subject to execution or assignment, Ed §26701
Basis of employment
Defined, Ed §26107
Beneficiaries
Annuity
Changes to beneficiary, Ed §26811
Disability benefits, Ed §26910
Community property
Nonparticipant spouse, designation of beneficiary, Ed §27410
Death benefits
Death of beneficiary under program
Payments after death of beneficiary, Ed §27008
Definition of beneficiary, Ed §26108
Designation, Ed §27100 to 27102
Community property
Nonparticipant spouse, designation of beneficiary, Ed §27410
Failure to designate, Ed §27101
Persons or entities that may be designated, Ed §27100
Process for designation, Ed §27100
Simultaneous death, applicable provisions, Ed §27102
Failure to find participant or beneficiary
Forfeiture of benefit, Ed §27302
Information provided by participants and beneficiaries, Ed §26306
Spouse signature requirement, Ed §26703
Action upon refusal of spouse to sign, Ed §26704
Board
Administration of plan, Ed §26002, 26200 to 26216
Definition of board, Ed §26109
Cash balance benefit program defined, Ed §22110.1
Change in employment
Eligibility, Ed §26400

CASH BALANCE BENEFIT PROGRAM—Cont'd
Class of employees
Defined, Ed §26112.5
Community property, Ed §27400 to 27413
Annuities
Credits awarded to nonparticipant spouse counted towards participant eligibility for annuity, Ed §27412
Determination of rights in annuity, Ed §27405
Election by nonparticipant spouse, Ed §27411
Division of credits upon dissolution or separation, Ed §27402
Joinder of plan, Ed §27407
Lump sum payment
Determination of rights in lump sum, Ed §27406
Nonparticipant spouse
Annuity
Credits awarded to nonparticipant spouse counted towards participant eligibility for annuity, Ed §27412
Election, Ed §27411
Rights in, Ed §27405
Applicability of various provisions to nonparticipant spouse in same was as applicable to participant, Ed §27408
Beneficiary designation, Ed §27410
Defined, Ed §27401
Information required from nonparticipant spouse, Ed §27409
Lump sum payment
Determination of rights in lump sum, Ed §27406
Nominal accounts, rights in, Ed §27404
Status, Ed §27403
Purpose of provisions, Ed §27400
Terminable interest doctrine
Legislative intent, Ed §27413
Confidentiality of information in custody of plan, Ed §26215
Contributions, Ed §26500 to 26507
Adjustment of employer contribution rate, Ed §26507
Amount, Ed §26501, 26503, 26503.5
Collective bargaining agreement to determine, Ed §26504
Collective bargaining agreement to determine amount, Ed §26504
Consent to deduction, Ed §26500
Election to participate, effect, Ed §26501.5
Employee contributions
Accounts, employee and employer
Credits to accounts, Ed §26601
Amount, Ed §26501
Collective bargaining agreement to determine, Ed §26504
Correction of erroneous contribution amounts, employer duty, Ed §26302
Deduction and remission of employee contributions
Consent to deduction, Ed §26500
Duty of employer, Ed §26301.5
Defined, Ed §26121
Delinquent payments, Ed §26303
Election to participate, effect, Ed §26501.5
Penalty or interest assessed, appeal, Ed §26303.5
Pick up by employer, Ed §26502
Rates
Definition of employee contribution rate, Ed §26120
Time to transmit contributions, Ed §26303
USERRA, benefits for reemployed members, Ed §28001
Employer contributions
Accounts, employee and employer
Credits to accounts, Ed §26602
Adjustment of employer contribution rate, Ed §26507
Amount, Ed §26503, 26503.5
Collective bargaining agreement to determine, Ed §26504
Correction of erroneous contribution amounts, employer duty, Ed §26302
Defined, Ed §26125
Delinquent payments, Ed §26303
Penalty or interest assessed, appeal, Ed §26303.5
Rates
Definition of employer contribution rates, Ed §26124
Reports by employers, Ed §26301
Time to transmit contributions, Ed §26303
USERRA, benefits for reemployed members, Ed §28002
Pick up by employer of employee contributions, Ed §26502
Reemployment of retired annuitant
Effect on contributions, Ed §26505
USERRA, benefits for reemployed members
Employee contributions, Ed §28001
Employer contributions, Ed §28002
Voluntary contributions, rollovers or redeposits, Ed §26506
Creditable service
Defined, Ed §26113
Database for actuarial investigation, Ed §26212
Death benefits, Ed §27000 to 27008
Annuitant under program, death
Payment pursuant to terms of annuity, Ed §27007
Annuity, election to take benefit, Ed §27004
Amount of annuity, Ed §27005
Transfer of credit to annuitant reserve, Ed §27006
Annuity not commenced, death of participant
Amount of benefit, Ed §27002
Beneficiary under program, death
Payments after death of beneficiary, Ed §27008
Defined, Ed §26114
Lump sum payment
Effect, Ed §27003
Proof of death, Ed §27000
Time for payment, Ed §27001
Defined, Ed §26112
Defined benefit program
Defined, Ed §26115

CASH BALANCE BENEFIT PROGRAM—Cont'd
Definitions, Ed §26100 to 26145
Applicability of definitions, Ed §26100
Disability benefits, Ed §26900 to 26911
Amount, Ed §26904
Annuity, election, Ed §26906, 26906.5
Beneficiary change, Ed §26910
Change of annuity, Ed §26906.6
Reemployment, effect, Ed §26911
Transfer of credits to annuitant reserve, Ed §26908
Value of annuity, Ed §26907
Application, Ed §26900
Persons authorized to apply, Ed §26901
Defined, Ed §26116
Determination of disability, Ed §26902
Lump sum payment
Effect, Ed §26905
Termination of creditable service, Ed §26903
Total and permanent disability
Determination of disability, Ed §26902
Disability date
Defined, Ed §26117
Discontinuation of plan
Accounts, employee and employer
Effect of discontinuation on accounts, Ed §28101
Notice, Ed §28100
Right of employer to discontinue, Ed §28100
Distributions, Ed §27300 to 27303
Annuity, election to take distribution as, Ed §26807, 26807.5
Amount of annuity
Determination, Ed §26808
Beneficiary changes, Ed §26811
Change of annuity, Ed §26807.6
Community property
Credits awarded to nonparticipant spouse counted towards participant eligibility for annuity, Ed §27412
Determination of rights in annuity, Ed §27405
Nonparticipant spouse, election, Ed §27411
Death benefits, Ed §27004 to 27008
Disability benefits, Ed §26906 to 26911
Discharge of plan obligation upon final payment, Ed §27301
Termination of annuity upon employment, Ed §26810
Transfer of credits to annuitant reserve, Ed §26809
Commencement, Ed §26802
Forfeiture of benefit upon failure to find participant or beneficiary, Ed §27302
Limitation on benefits, Ed §26004
Lump sum payment
Community property
Determination of rights in lump sum, Ed §27406
Death benefits
Effect of payment, Ed §27003
Disability benefits
Effect of payment, Ed §26905
Discharge of plan obligation, Ed §27300
Retirement benefits
Effect of payment, Ed §26806
Simultaneous death, applicable provisions, Ed §27102
Termination benefits
Effect of payment, Ed §27207
Overpayment
Deduction, Ed §27303
Erroneous information reported by employer, consequences, Ed §27303.5
Reinstatement of forfeited distribution, Ed §27302
Eligibility, Ed §26400 to 26403
Change in employment, Ed §26400
Part-time employees, Ed §26400
Election to become participant for creditable service, Ed §26401
Social security coverage
Election, Ed §26400
Temporary employees
Community college district temporary employees, Ed §26400
Trustee service
Persons performing trustee service, Ed §26403
Employed
Defined, Ed §26126
Employee accounts
Accounts, employee and employer generally, Ed §26600 to 26607. (*See* within this heading, "Accounts, employee and employer")
Defined, Ed §26119
Employee contribution rates
Contributions generally. (*See* within this heading, "Contributions")
Defined, Ed §26120
Employee contributions
Contributions generally. (*See* within this heading, "Contributions")
Defined, Ed §26121
Employees
Defined, Ed §26118
Employer accounts defined, Ed §26123
Employer contribution rates defined, Ed §26124
Contributions by employers generally. (*See* within this heading, "Employers/employing agencies")
Employer contributions defined, Ed §26125
Contributions by employers generally. (*See* within this heading, "Employers/employing agencies")
Employers/employing agencies
Accounts, employee and employer, Ed §26600 to 26607
Agreement with retirement system to provide cash balance benefit program, Ed §26000.5
Change of status of employee
Report by employer, Ed §26304
Compensation of employees
Information to be provided by employer, Ed §26305
Contributions
Accounts, employee and employer
Credits to accounts, Ed §26602
Adjustment of employer contribution rate, Ed §26507

CASH BALANCE BENEFIT PROGRAM—Cont'd
Employers/employing agencies—Cont'd
Contributions—Cont'd
Amount, Ed §26503, 26503.5
Collective bargaining agreement to determine, Ed §26504
Correction of erroneous contribution amounts, employer duty, Ed §26302
Deduction and remission of employee contributions, duty of employer, Ed §26301.5
Definition of employer contributions, Ed §26125
Delinquent payments, Ed §26303
Penalty or interest assessed, appeal, Ed §26303.5
Rates
Definition of employer contribution rates, Ed §26124
Reports by employers, Ed §26301
Time to transmit contributions, Ed §26303
USERRA, benefits for reemployed members, Ed §28002
Correction of erroneously reported information, Ed §26302
Definition of employer, Ed §26122
Election to provide benefits, Ed §26000.6
Information provided to employees, Ed §26300
Responsibilities of employers and participants, Ed §26300 to 26306
Employment
Defined, Ed §26126
Errors and omissions, adjustment
Limitations period, Ed §26702
Established, Ed §26000
Exemptions from legal process
Rights to benefits not subject to execution or assignment, Ed §26701
Forfeitures
Failure to find participant or beneficiary, Ed §27302
Full-time equivalent
Defined, Ed §26127
Funding of plan, Ed §26207.5
Gain and loss reserve
Defined, Ed §26129
Established, Ed §26202
Transfers between reserves, Ed §26205
Income tax, California
Compliance with federal and state provisions, Ed §26001
Income tax, federal
Combination defined benefit plans and qualified cash or deferred arrangements
Special rules, Ex 26 USC §414
Compliance with federal and state provisions, Ed §26001
Limitation on benefits, Ed §26004
Interest
Minimum interest rate
Accounts, employee and employer
Credits to accounts, Ed §26601, 26602
Declaration of minimum interest rate, Ed §26604
Defined, Ed §26131
Investment earnings
Defined, Ed §26130
Surplus
Additional earnings credit, declaration, Ed §26605
Determination of credit, Ed §26606
Teachers' retirement fund
Deposits into fund, Ed §26201
Investments
Control of investment of retirement fund, Ed §26210
Legislative findings and intent, Ed §22001.5, 26000
Limitation on benefits, Ed §26004
Lump sum payment
Community property
Determination of rights in lump sum, Ed §27406
Death benefits
Effect of payment, Ed §27003
Disability benefits
Effect of payment, Ed §26905
Discharge of plan obligation, Ed §27300
Retirement benefits
Effect of payment, Ed §26806
Simultaneous death, applicable provisions, Ed §27102
Termination benefits
Effect of payment, Ed §27207
Military service
USERRA, benefits for reemployed members, Ed §28000 to 28006
Minimum interest rate
Accounts, employee and employer
Credits to accounts, Ed §26601, 26602
Declaration of minimum interest rate, Ed §26604
Defined, Ed §26131
Normal retirement age, Ed §26800
Overpayment
Deduction, Ed §27303
Erroneous information reported by employer, consequences, Ed §27303.5
Partial distributions
Termination benefits, Ed §27206
Participants
Accounts, employee and employer
Definition of employee accounts, Ed §26119
Generally, Ed §26600 to 26607. (*See* within this heading, "Accounts, employee and employer")
Defined, Ed §26132
Failure to find participant or beneficiary
Forfeiture of benefit, Ed §27302
Information provided by participants and beneficiaries, Ed §26306
Responsibilities of employers and participants, Ed §26300 to 26306
Statement to participants
Annual statement, Ed §26214
Part-time employees
Election to become participant for creditable service, Ed §26401
Eligibility, Ed §26400
Pay periods
Defined, Ed §26133

CASH BALANCE BENEFIT PROGRAM—Cont'd
Plan year
Defined, Ed §26135
Redeposits
Voluntary contributions, rollovers or redeposits, Ed §26506
Reemployment of retired annuitant
Effect, Ed §26505
Responsibilities of employers and participants, Ed §26300 to 26306
Retirement
Defined, Ed §26136
Retirement benefits, Ed §26800 to 26813
Activities of retired, Ed §26812, 26813
Amount of benefits, Ed §26805
Annuity, Ed §26812
Annuity, election to take distribution as, Ed §26807, 26807.5
Amount of annuity
Determination, Ed §26808
Beneficiary changes, Ed §26811
Change of annuity, Ed §26807.6
Termination of annuity upon employment, Ed §26810
Transfer of credits to annuitant reserve, Ed §26809
Application, Ed §26804
Date for retirement, Ed §26801
Defined, Ed §26137
Distribution
Annuity, election to take distribution as, Ed §26807, 26807.5
Amount, determination, Ed §26808
Beneficiary changes, Ed §26811
Change of annuity, Ed §26807.6
Termination of annuity upon employment, Ed §26810
Transfer of credits to annuitant reserve, Ed §26809
Commencement, Ed §26802
Lump sum payment, effect, Ed §26806
Form of benefit, Ed §26806
Limitation on benefits, Ed §26812, 26813
Lump sum payment
Effect, Ed §26806
Normal retirement age, Ed §26800
Rate of pay, Ed §26812
Records, Ed §26813
Termination of creditable service, Ed §26803
Retirement date, Ed §26801
Defined, Ed §26138
Rights to benefits, Ed §26700 to 26704
Errors and omissions, adjustment
Limitations period, Ed §26702
Spouse signature requirement, Ed §26703
Action upon refusal of spouse to sign, Ed §26704
Vested right to benefit, Ed §26700
Rollovers
Voluntary contributions, rollovers or redeposits, Ed §26506
Salary
Defined, Ed §26139
Employer to provide information, Ed §26305
USERRA, benefits for reemployed members
Computation of salary during military service, Ed §28003
Service credit
Permissive and additional service credit
Previous exclusion from membership
Election to purchase credit, Ed §22802
Severability of provisions, Ed §26003
Simultaneous death
Applicable provisions, Ed §27102
Spouse
Defined, Ed §26140
Signatures, Ed §26703
Action upon refusal of spouse to sign, Ed §26704
Term includes registered domestic partner, Ed §26002.5
State teachers' retirement plan
Definition of plan, Ed §26134
System
Defined, Ed §26142
Teachers' retirement fund
Definition of fund, Ed §26128
Deposits into fund, Ed §26200
Investment earnings, Ed §26201
Transfer and disbursement of funds from fund, Ed §26209
Transfer of funds to plan, Ed §22403
Temporary employees
Community college district temporary employees
Eligibility, Ed §26400
Termination benefits, Ed §27200 to 27207
Application for benefit, Ed §27200
Cancellation of application, Ed §27205
Form, Ed §27202
Multiple applications, time between, Ed §27203
Cancellation of application, Ed §27205
Defined, Ed §26143
Lump sum payments
Effect, Ed §27207
Multiple applications
Time between, Ed §27203
Partial distributions, Ed §27206
Termination of creditable service, Ed §27201
Time for payment, Ed §27204
Termination of annuity, Ed §26810
Disability benefits, Ed §26911
Termination of creditable service, Ed §26803
Disability benefits, Ed §26903
Termination benefits, Ed §27201
Total and permanent disability
Defined, Ed §26144
Disability benefits
Determination of disability, Ed §26902
Trustee service
Defined, Ed §26144.5
Persons performing trustee service
Eligibility for plan, Ed §26403

CASH BALANCE BENEFIT PROGRAM—Cont'd
Unfunded actuarial obligation
Amortization, Ed §26203
Defined, Ed §26145
USERRA, benefits for reemployed members, Ed §28000 to 28006
Continuity in employment, break for military notwithstanding, Ed §28001
Contributions
Employee contributions, Ed §28001
Employer contributions, Ed §28002
Definitions, Ed §28000
Five year absence, longer than, Ed §28004
Legislative findings and intent, Ed §28000
Salary
Computation of salary during military service, Ed §28003
Tax impact, Ed §28006
Termination of rights
Grounds, Ed §28005
Vested right to benefit, Ed §26700
Voluntary contributions, rollovers or redeposits, Ed §26506

CERTIFICATED EMPLOYEES
Classification on salary schedule, Ex Ed §45028
Definition of certificated, 5 CCR §20500
Employers/employing agencies to employ, Ex Ed §44830
Leaves of absence
Boards, commissions, etc, service on, Ex Ed §44987.3
Employee organizations, service as officer, Ex Ed §44987
Industrial accident and illness leave, Ex Ed §44984
Pregnancy and childbirth, Ex Ed §44965
Study and travel, Ex Ed §44966
Compensation during leave, Ex Ed §44968, 44968.5
Default in service upon return, reduction in payment, Ex Ed §44970
Payment for leave time, manner, Ex Ed §44969
Service during leave, Ex Ed §44968
Time qualifications, Ex Ed §44967
Part-time employees
Reduction of workload to part-time, Ex Ed §44922
Salary, Ex Ed §45025
Retirement, effect of, Ex Ed §44907
Sojourn teachers, Ex Ed §44856
Substitute employees
Classification of substitute employees, Ex Ed §44917
Technical assistance and planning grant funding, Ex Ed §45028
Termination
Probationary employees
Reduction in employees as reason for termination, Ex Ed §44957

CHANGE OF OPTION; WINDOW PERIOD; JANUARY 1, 2007 THROUGH JUNE 30, 2007, Ed §24300.2

CHARTER SCHOOLS
Establishment and operation
Conditions, Ex Ed §47605
Local educational agencies
Intervention
Early warning program, Ex Ed §52055.57, 52055.59
Pupil academic achievements, measurable pupil outcomes, Ex Ed §47605
State teachers' retirement plan
Participation in plan, Ex Ed §47611
Reports required by system
Creation, Ex Ed §47611.3

CHILDBIRTH LEAVE, Ex Ed §44965

CHILDREN OR MINORS
Death benefits, active
Family allowance
Payment of benefits to children, Ed §23806
Survivor benefits, Ed §23852
Eligibility of dependent children, Ed §23856
Disability allowance
Reduction
Dependent children becoming ineligible, Ed §24009
Disability retirement
Reduction of allowance
Dependent children becoming ineligible, Ed §24108
Payment procedures
Custodian receiving payment, Ed §24612

CITATION OF PROVISIONS, Ed §22000

CLASSIFIED EMPLOYEES
Age limits
No establishment of age limits, Ex Ed §45134
Community college employees
Age limits not to be used, Ex Ed §88033
Definitions, Ex Ed §88001
Retirement allowance recipients
Eligibility for employment, Ex Ed §45134

CLASS SIZE REDUCTION PROGRAM
Service retirement
Compensation of retired members
Exemptions from limits, Ed §24216.5

CLERICAL MISTAKES IN COURT PROCEEDINGS
Correction, Ex CCP §473

C.O.L.A.
Benefit maintenance generally, Ed §24400 to 24417; 5 CCR §26000. (*See* **BENEFIT MAINTENANCE AND PURCHASING POWER PROTECTION**)

COMMUNITY COLLEGE EMPLOYEES
Academic employees
Full-time employment, teachers' retirement system, Ed §22138.5
Annuity contract and custodial accounts
Third-party administrator, contracting with, Ex Ed §87040.5
Classified employees
Age limits not to be used, Ex Ed §88033
Definitions, Ex Ed §88001
Deductions in salary payments, Ex Ed §87040
Definitions, Ex Ed §87002

COMMUNITY COLLEGE EMPLOYEES—Cont'd
Finances
Annual audit, Ex Ed §84040
Fiscal accountability, Ex Ed §84040
Full-time employment, Ed §22138.5
Part-time employees
Reduction in workload to part-time, Ex Ed §87483
Service credit
Additional service credit to encourage retirement, Ex Ed §87488
Temporary employees
Classification of certain instructors, Ex Ed §87482.5

COMMUNITY PROPERTY, Ed §22650 to 22666
Beneficiaries
Designation, Ed §22660
Effect of community property, Ed §23300
Cash balance benefit program, Ed §27400 to 27413. (*See* **CASH BALANCE BENEFIT PROGRAM**)
Court order upon separation or dissolution
Contents, Ed §22652
Retired members
Determination of community property rights in allowance, Ed §22655
Service of judgment or order on system, Ed §22656
Court's powers, Ed §22650
Defined benefit supplement program
Final benefits
Death of nonmember spouse during receipt of annuity, Ed §25022.5
Nonmember spouses
Defined, Ed §25000.9
Retirement benefits under program
Effect on community property rights, Ed §25009 to 25011.5
Joinder of plan, Ed §22656
Judgments upon separation or dissolution
Contents, Ed §22652
Retired members
Determination of community property rights in allowance, Ed §22655
Service of judgment or order on system, Ed §22656
Members
Eligibility determinations, Ed §22665
Nonmember registered domestic partners
Defined, Ed §22651
Nonmember spouse
Administration of accounts, Ed §22658
Beneficiaries
Designation, Ed §22660
Defined, Ed §22651
Defined benefit supplement program, Ed §25000.9
Effect of award, Ed §22653
Information provided by nonmember spouse, Ed §22659
Provisions applicable to nonmember spouse, Ed §22657
Redeposit of previously refunded contributions, Ed §22662
Refund of contributions, Ed §22661
Service credit
Purchase of additional service credit, Ed §22663
Service retirement
Right to allowance and benefit, Ed §22664
Retired members
Determination of community property rights in allowance, Ed §22655
Terminable interest doctrine
Legislative intent to abolish, Ed §22666

COMMUNITY SERVICE TEACHER, Ed §22712.5

COMPENSATION EARNABLE
Defined, Ed §22115
Military service
USERRA, benefits for reemployed members
Computation of compensation earnable, Ed §22853

COMPLIANCE WITH FEDERAL AND STATE TAX CODES, Ed §25000.5

COMPOSITION OF THE BOARD, Ed §22200

CONDITIONS FOR APPLICATION, Ed §24102

CONFIDENTIALITY
Cash balance benefit program
Confidentiality of information in custody of plan, Ed §26215
Information filed with system, Ed §22306
Investments
Public employees' retirement system
Cooperation between PERS and teachers' retirement system
Confidentiality maintained while cooperating, Ex Gov §7516

CONFLICTS IN LAW, Ed §22003

CONFLICTS OF INTEREST
Board, Ed §22253
Fiduciary duty towards members and beneficiaries, Ed §22253
Investment products
Providing products that would be assets of funds by board members, Ex Gov §7513.95
Placement agents, regulation, Ex Gov §7513.8 to 7513.9
Public officials
Investment management by public officials, Ex Gov §87314
Teachers' retirement system conflict of interest code, 5 CCR §22000

CONSOLIDATION OF ACTIONS
Subrogation
Permissible activities under provisions, Ed §24502

CONSOLIDATION OF BENEFITS, Ed §22802
Transfer to retirement fund, Ed §22955

CONTINUING QUALIFICATION
Medical examinations, Ed §24112, 24301, 234001

CONTINUOUS APPROPRIATION, Ed §22955

CONTRIBUTIONS
Annuity contract and custodial accounts, Ed §24950
Annuity deposit contributions, Ed §22908
Refunds, Ed §23107
Cash balance benefit program, Ed §26500 to 26507
Adjustment of employer contribution rate, Ed §26507
Amount, Ed §26501, 26503, 26503.5
Collective bargaining agreement to determine, Ed §26504
Consent to deduction, Ed §26500
Election to participate, effect, Ed §26501.5
Employee contributions
Accounts, employee and employer
Credits to accounts, Ed §26601
Amount, Ed §26501
Collective bargaining agreement to determine, Ed §26504
Correction of erroneous contribution amounts, employer duty, Ed §26302
Deduction and remission of employee contributions
Consent to deduction, Ed §26500
Duty of employer, Ed §26301.5
Defined, Ed §26121
Delinquent payments, Ed §26303
Election to participate, effect, Ed §26501.5
Penalty or interest assessed, appeal, Ed §26303.5
Pick up by employer, Ed §26502
Rates
Definition of employee contribution rate, Ed §26120
Time to transmit contributions, Ed §26303
USERRA, benefits for reemployed members, Ed §28001
Employer contributions
Accounts, employee and employer
Credits to accounts, Ed §26602
Adjustment of employer contribution rate, Ed §26507
Amount, Ed §26503, 26503.5
Collective bargaining agreement to determine, Ed §26504
Correction of erroneous contribution amounts, employer duty, Ed §26302
Defined, Ed §26125
Delinquent payments, Ed §26303
Penalty or interest assessed, appeal, Ed §26303.5
Rates
Definition of employer contribution rates, Ed §26124
Reports by employers, Ed §26301
Time to transmit contributions, Ed §26303
USERRA, benefits for reemployed members, Ed §28002
Pick up by employer of employee contributions, Ed §26502
Reemployment of retired annuitant
Effect on contributions, Ed §26505
USERRA, benefits for reemployed members
Employee contributions, Ed §28001
Employer contributions, Ed §28002
Voluntary contributions, rollovers or redeposits, Ed §26506
Collection and reporting procedures, Ed §23000 to 23010
Deductions, Ed §23000
Delinquency
When due, payable and delinquent, Ed §23002
Failure to pay assessments, Ed §23007
Incorrect contributions
Adjustments, Ed §23008
Interest, Ed §23009
Appeal of assessed penalties or interest, Ed §23010
Interest, Ed §23003
Appeal of assessed penalties or interest, Ed §23010
Penalties, Ed §23003
Appeal of assessed penalties or interest, Ed §23010
Reports to administer provisions, Ed §23004
Deadline, Ed §23005
Penalties for late or unacceptable reports, Ed §23006
Appeal of assessed penalties or interest, Ed §23010
Requisitions for contributions, Ed §23001
Retired members, disabled members or deceased persons, collection from, Ed §24615
Year-round or continuous school programs, Ed §23002.5
Crediting interest
Board duties, Ed §22216
Deductions, Ed §23000
Delinquency
Appeal of assessed penalties or interest, Ed §23010
Interest, Ed §23003
Penalties, Ed §23003
When due, payable and delinquent, Ed §23002
Election of method of payment, Ed §23100
Employee contributions, Ed §22900 to 22909
Adjustments
Birth date change, Ed §22907
Allocation, Ed §22905
Amount, Ed §22901
State employees, Ed §22901.3
Annuity deposit contributions, Ed §22908
Cash balance benefit program. (*See* within this heading, "Cash balance benefit program")
Computation of accumulated contributions, Ed §22902
Consent, Ed §22900
Employer payment of employee contributions, Ed §22909
Pick-up of contributions
Employer pick-up to defer taxes, Ed §22903
State pick-up via salary reduction program, Ed §22904
Service erroneously credited
Refund of contributions, Ed §22906
State employees
Rate, Ed §22901.3
Employer and state contributions, Ed §22950 to 22956
Additional percentage contributed, Ed §22951
Allocation, Ed §22950, 22956
Amount, Ed §22950

CONTRIBUTIONS—Cont'd
Employer and state contributions—Cont'd
Appropriations, Ed §22954
Transfer to retirement fund, Ed §22955
Cash balance benefit program. (*See* within this heading, "Cash balance benefit program")
Collection and reporting procedures, Ed §23000 to 23010
Creditable compensation
Defined, Ed §22955.5
Evaluation of rate
Quadrennial evaluation, Ed §22954.1
Increase in rate, Ed §22951.5
Monthly, Ed §22950
Purchasing power protection
Evaluation of rate, Ed §22954.1
Forfeiture of benefits, Ed §23101
Income tax, federal
Catch-up contributions, Ex 26 USC §414
Qualified pension, etc, plans
Limitation on benefits and contributions, Ex 26 USC §415
Tax sheltered annuity contributions, 5 CCR §20554, 20554.1
Tax treatment of certain contributions, Ex 26 USC §414
Withdrawals from eligible automatic contribution arrangements, Ex 26 USC §414
Incorrect contributions
Collection and reporting procedures
Adjustments, Ed §23008
Interest, Ed §23009
Appeal of assessed penalties or interest, Ed §23010
Military service
USERRA, benefits for reemployed members
Cash balance benefit program
Employee contributions, Ed §28001
Employer contributions, Ed §28002
Employer liability, Ed §22852
Public pensions and retirement plans, general regulation
Sex differential in contribution rate
Remediation, Ex Gov §7500
Rate adjustments
Retroactive adjustments, Ed §22313
Redeposits, Ed §23200 to 23203
Amount of redeposit, Ed §23202, 23203
Cancellation of redeposit, Ed §23202
Circumstances for redeposit, Ed §23200
Community property
Nonmember spouse
Redeposit of previously refunded contributions, Ed §22662
Other retirement allowances, Ed §23201
Payment of contributions, Ed §23203
Time for election to redeposit, Ed §23202
Refunds, Ed §23100 to 23107
Annuity deposits, Ed §23107
Community property
Nonmember spouse, right to refund, Ed §22661
Employee contributions
Service erroneously credited, Ed §22906
Events triggering refund, Ed §23100
Certification of termination of employment, Ed §23102
Forfeiture of rights to service credit benefit, Ed §23101
Redeposits of refunded contributions, Ed §23200 to 23203. (*See* within this heading, "Redeposits")
Request for refund, Ed §23103
Service in other system, Ed §23106
Warrants refunding contributions
Cancellation, Ed §23104
Mailing, Ed §23104
Requisitions for contributions, Ed §23001
Service credit
Out-of-state service credit
Nonqualified service, Ed §22826
Purchase
Payment of contributions, Ed §22823
Service retirement
Retired members, Ed §24214
Exemptions, Ed §24216.6
Limitation on postretirement compensation, Ed §24214.5
Sex differential in contribution rate
Remediation, Ex Gov §7500
Tax sheltered annuity contributions, 5 CCR §20554, 20554.1

CONTRIBUTIONS TO BE REFUNDED, Ed §23100

CONVICTIONS OF CRIME
County employees retirement law
Forfeiture of position, Ex Gov §31563
Public employees' retirement system (PERS)
Forfeiture of position, Ex Gov §20343

CORRECTION OF ERRORS OR OMISSIONS, Ed §22308

COST OF LIVING ADJUSTMENTS
Benefit maintenance generally, Ed §24400 to 24417; 5 CCR §26000. (*See* **BENEFIT MAINTENANCE AND PURCHASING POWER PROTECTION**)

COUNSELING SERVICES
Retirement counseling services, Ed §22303

COUNTY EMPLOYEES RETIREMENT LAW
Forfeiture of position
Conviction of crime relating to official duties, Ex Gov §31563
Transfer of membership to teachers' retirement system, Ex Gov §31565

COURT ORDERED DEDUCTION, Ed §22652

CREDENTIALING OF TEACHERS
Basic skills proficiency test
Administration, Ex Ed §44252.5
Definition of credentials, Ed §22110.2; 5 CCR §20500

CREDITABLE COMPENSATION, Ed §22119.3

CREDIT FOR JOB RELATED INJURY OR ILLNESS, Ed §22710

CUSTODIAL ACCOUNTS
Annuity contract and custodial accounts, Ed §24950 to 24953. (*See* **ANNUITY CONTRACT AND CUSTODIAL ACCOUNTS**)

D

DEAF PERSONS
California schools for the deaf
Pupil rights and responsibilities, state special schools, Ex Ed §48927

DEATH BENEFITS
Active employees. (*See* **DEATH BENEFITS, ACTIVE**)
Adjustment
Board's standards for adjustment, Ed §22222
Cash balance benefit program
Definition of death benefit, Ed §26114
Generally, Ed §27000 to 27008. (*See* **CASH BALANCE BENEFIT PROGRAM**)
Family allowance, Ed §23800 to 23812. (*See* **DEATH BENEFITS, ACTIVE**)
Outstanding death benefits
Report, Ed §22323
Payment procedures
Overpayments
Deduction of overpayment from subsequent payments, Ed §24616
Erroneous information reported by employer, consequences, Ed §24616.5
Pre-1972 benefits
Continuation, Ed §23402
Retired, Ed §23880 to 23882. (*See* **DEATH BENEFITS, RETIRED**)
Survivor benefits, Ed §23850 to 23859. (*See* **DEATH BENEFITS, ACTIVE**)

DEATH BENEFITS, ACTIVE
Family allowance, Ed §23800 to 23812
Amount, Ed §23801
Applicability of provisions, Ed §23800
Benefit maintenance
Applicability of benefit improvement factor, Ed §24402
Children
Payment of allowance to children, Ed §23806
Components, Ed §23802
Conditions for payment of family allowance, Ed §23804
Election of disability and death benefit coverage, Ed §23700 to 23706
Acknowledgment of receipt of election, Ed §23705
Effective date of new programs, Ed §23700
Eligibility, Ed §23702
Failure to file election
Effect, Ed §23706
Requirements of election, Ed §23703
Signature by spouse
Refusal, Ed §23704
Time for election, Ed §23701
Lump sum payment upon termination, Ed §23811
Parents claiming benefits
Dependency determinations, Ed §23805.5
Payment of benefits, Ed §23801
Children, payment to, Ed §23806
Priority for payment of family allowance, Ed §23805
Reduction in light of benefits from other systems, Ed §23809
Remarriage causing loss of allowance
Resumption of allowance for deceased member's surviving spouse, Ed §23812
Termination of allowance, Ed §23810
Lump sum payment upon termination, Ed §23811
Time for payment, Ed §22320, 23803
Interest for late payment, Ed §22321
Reporting late payment, Ed §22322
Survivor benefits, Ed §23850 to 23859
Amount, Ed §23851
Applicability of provisions, Ed §23850
Beneficiaries, Ed §23852
Benefit maintenance
Applicability of benefit improvement factor, Ed §24402
Circumstances triggering payment, Ed §23851
Computation of allowance, Ed §23855
Death of beneficiary
Remaining accumulated contributions, disposition, Ed §23859
Termination of allowance, Ed §23858
Dependent children, Ed §23852
Eligibility, Ed §23856
Election of disability and death benefit coverage, Ed §23700 to 23706
Acknowledgment of receipt of election, Ed §23705
Effective date of new programs, Ed §23700
Eligibility, Ed §23702
Failure to file election
Effect, Ed §23706
Requirements of election, Ed §23703
Signature by spouse
Refusal, Ed §23704
Time for election, Ed §23701
Eligibility for survivor allowance, Ed §23854
Members
Defined, Ed §23850
Payments on death, Ed §23851
Request for benefits, Ed §23853
Return of contributions
Request, Ed §23853
Surviving spouse
Elections, Ed §23852

DEATH BENEFITS, RETIRED, Ed §23880 to 23882
Amount, Ed §23880
Beneficiaries
Payment to beneficiary, Ed §23880
Option beneficiary, payment to, Ed §23881
Request for payment and return of contributions, Ed §23882

DEATH OF MEMBERS
Notice to board, Ed §22457

DECEDENTS' ESTATES
Beneficiaries
Designation
No designation effective at death
Estate of member as payee, Ed §23304
Cash balance benefit program
Beneficiary not designated at death
Payment of lump sum to estate, Ed §27101
Death benefits, active
Survivor benefits
Death of beneficiary
Remaining accumulated contributions, disposition, Ed §23859
Personal property
Collection or transfer without probate, Ex Pro §13100

DEDUCTIONS FROM SALARY, Ex Ed §44041
Cash balance benefit program
Contributions, deduction and remission
Consent to deduction, Ed §26500
Duty of employer, Ed §26301.5
Community college employees, Ex Ed §87040
Contributions
Collection and reporting procedures, Ed §23000

DEFERRED COMPENSATION PLANS, Ed §24975 to 24977
Adoption of plan by employer, Ed §24975
Community college employees
Third-party administrator, contracting with, Ex Ed §87040.5
Contracting for services, Ed §24977
Third party administrator, contracting with, Ex Ed §44041.5
Community college employees, Ex Ed §87040.5
Development of plans, Ed §24975
Income tax, federal, Ex 26 USC §457
Combination defined benefit plans and qualified cash or deferred arrangements
Special rules, Ex 26 USC §414
Roth IRA operating account, Ed §24976
Teachers' deferred compensation fund, Ed §24976

DEFINED BENEFIT AND DEFINED BENEFIT SUPPLEMENT ACCOUNTS
Contributions, crediting
Pretax and posttax contributions, Ed §22905

DEFINED BENEFIT AND DEFINED BENEFIT SUPPLEMENT PROGRAM
Computation of service, Ed §22703

DEFINED BENEFIT SUPPLEMENT PROGRAM, Ed §25000 to 25025
Accounts, Ed §25001 to 25008.5
Additional annuity credit, Ed §25007
Additional earnings credit to accounts, Ed §25006
Annuitant reserve, Ed §25002
Distribution of credits
Time for and manner of distribution, Ed §25008.5
Gain and loss reserve, Ed §25001
Interest
Declaration of rate, Ed §25005
Member accounts, Ed §25004
Vesting of account balance, Ed §25008
Transfers of funds, Ed §25003
Additional annuity credit, Ed §25007
Additional earnings credit to accounts, Ed §25006
Administration
Contracts with third party administrators, Ed §22302.5
Amendment of plan
Circumstances authorizing, Ed §25000.5
Annuitant reserve, Ed §25002
Transfers of funds, Ed §25003
Credits, transfer to annuitant reserve, Ed §25013
Annuities
Calculation, Ed §25012
Determination of value, Ed §25012
Disability benefits
Change of annuity, Ed §25018.2
Details of payment options, Ed §25018, 25018.1
Methods of distribution, Ed §25016
Termination of allowance
Effect, Ed §25019
Final benefits
Death of beneficiary, Ed §25023
Death of member during member's receipt of annuity, Ed §25022
Death of nonmember spouse during receipt of annuity, Ed §25022.5
Election to receive as annuity, Ed §25021
Joint and survivor annuities
Beneficiary designations, Ed §25015
Reinstatement to service
Effect on annuity, Ed §25014
Retirement benefits under program
Annuity as payment option, Ed §25011, 25011.1
Change of annuity, Ed §25011.5
Transfer of credits to annuitant reserve, Ed §25013
Community property
Final benefits
Death of nonmember spouse during receipt of annuity, Ed §25022.5
Nonmember spouses
Defined, Ed §25000.9
Retirement benefits under program
Effect on community property rights, Ed §25009 to 25011.5
Death of member or annuitant
Final benefits generally, Ed §25020 to 25023. (*See* within this heading, "Final benefits")
Disability benefits, Ed §25016 to 25019
Annuities
Change of annuity, Ed §25018.2
Details of payment options, Ed §25018, 25018.1
Termination of allowance
Effect, Ed §25019
Application for benefits, Ed §25017
Date of receipt, Ed §25017
Described, Ed §25016

DEFINED BENEFIT SUPPLEMENT PROGRAM—Cont'd
Disability benefits—Cont'd
Election of method of distribution, Ed §25018
Change of annuities, Ed §25018.2
Methods of distribution, Ed §25016, 25018.1
Change of election, Ed §25018.2
Election, Ed §25018
Return to work
Recurrence of original disability, Ed §25018.5
Termination of allowance
Effect, Ed §25019
Established, Ed §25000
Final benefits, Ed §25020 to 25023
Annuities
Death of beneficiary, Ed §25023
Death of member during member's receipt of annuity, Ed §25022
Death of nonmember spouse during receipt of annuity, Ed §25022.5
Election to receive as annuity, Ed §25021
Beneficiaries
Elections as to receipt of final benefit, Ed §25021
Death of member, Ed §25020
Gain and loss reserve, Ed §25001
Transfers of funds, Ed §25003
Income tax, federal
Combination defined benefit plans and qualified cash or deferred arrangements
Special rules, Ex 26 USC §414
Interest
Declaration of rate, Ed §25005
Joint and survivor annuities
Beneficiary designations, Ed §25015
Member accounts, Ed §25004
Additional annuity credit, Ed §25007
Additional earnings credit to accounts, Ed §25006
Vesting of account balance, Ed §25008
Nonmember spouses
Defined, Ed §25000.9
Final benefits
Death of nonmember spouse during receipt of annuity, Ed §25022.5
Option elections
Joint and survivor annuity
Change of annuity or beneficiary, Ed §24305.3
Purpose, Ed §25000
Reinstatement to service
Termination of annuity, Ed §25014
Retirement benefits under program, Ed §25009 to 25011.5
Annuity as payment option, Ed §25011, 25011.1
Change of annuity, Ed §25011.5
Application for benefits, Ed §25010
Described, Ed §25009
Election of method of distribution, Ed §25011
Eligibility, Ed §25010
Method of distribution, Ed §25009
Election, Ed §25011
Change, Ed §25011.5
Restrictions on use, Ed §25009
Return to work
Disability benefits
Recurrence of original disability, Ed §25018.5
Rollovers, Ed §25000.7
Termination benefits, Ed §25024 to 25025
Application for termination benefits, Ed §25024
Certification of termination, Ed §25024
Eligibility, Ed §25024
Method of payment, Ed §25024
Multiple termination benefits
Lapse of time between terminations, Ed §25024.5
Time for payment, Ed §25025
Vested rights, Ed §25000.7

DEFINITIONS
Accredited, 5 CCR §20500
Accumulated annuity deposit contributions, Ed §22101
Accumulated defined benefit supplement account balance, Ed §22101.5
Accumulated retirement contributions, Ed §22102
Accumulated tax-sheltered annuity contributions, Ed §22103
Active members, Ed §22146
Actuarial equivalent, Ed §22104
Cash balance benefit program, Ed §26101
Public pension and retirement systems, Ex Gov §7513.97
Actuary, Ed §22104.5
Cash balance benefit program, Ed §26102
Additional earnings credit, Ed §22104.7
Cash balance benefit program, Ed §26103
Administrative actions
Public utilities commission proceedings, Ex Gov §82002
Administrative costs
Cash balance benefit program, Ed §26104
Administrators
Community college employees, Ex Ed §87002
Affiliated service group
Income tax, federal, Ex 26 USC §414
All school districts, Ex Ed §80
Annuitant reserve, Ed §22104.9
Cash balance benefit program, Ed §26105
Annuity, Ed §22105
Cash balance benefit program, Ed §26106
Annuity beneficiary, Ed §22105.5
Annuity contracts
Annuity contract and custodial accounts, contracting for services, Ed §24953
Community college employees, contracting with third-party administrators, Ex Ed §87040.5
Third party administrator, contracting with, Ex Ed §44041.5
Annuity deposit contributions, Ed §22106
Any school district, Ex Ed §80
Applicability, Ed §22100
Awarding body
Iran Contracting Act of 2010, Ex PubCon §2202
Base days, Ed §22106.1
Base hours, Ed §22106.2
Basic sick leave days, Ed §22170.5

DEFINITIONS—Cont'd
Basis of employment, Ed §22106.5
Cash balance benefit program, Ed §26107
Beneficiary, Ed §22107
Cash balance benefit program, Ed §26108
Health care benefits program, Ed §25910
Public pension and retirement systems, Ex Gov §7513.97
Benefits, Ed §22108
Board, Ed §22109
Cash balance benefit program, Ed §26109
Placement agents, regulation, Ex Gov §7513.8
Break in service, Ed §22109.5
California desert
School land bank, PubRes §8721
California service, Ed §22110
Cash balance plan
Cash balance benefit program, Ed §26112
Cause
Community college employees, classified, Ex Ed §88001
Certificated, Ed §22110.5; 5 CCR §20500
Certificated employees
Health and welfare benefits, Ex Ed §7004
Certificates, Ed §22110.2
Chairperson, 5 CCR §20500
Change in placement
Pupil rights and responsibilities, state special schools, Ex Ed §48927
Children's portion, Ed §22111
Child's portion, Ed §22111
Church plan
Income tax, federal, Ex 26 USC §414
City and county, Ed §22118
Classification
Community college employees, classified, Ex Ed §88001
Classified administrators
Community college employees, Ex Ed §87002
Class of employees, Ed §22112.5
Cash balance benefit program, Ed §26112.5
Commission
School land bank, Ex PubRes §8702
Committee
Political reform, Ex Gov §82013
Comparable level positions, Ed §22113
Compensation
Income tax, federal, Ex 26 USC §414
Compensation earnable, Ed §22115
Concurrent membership, Ed §22115.2
Concurrent retirement, Ed §22115.5
Contribution rate for additional service credit, Ed §22117
County, Ed §22118
County board of education
Pupil rights and responsibilities, state special schools, Ex Ed §48927
County superintendent, Ed §22119
Credentials, Ed §22110.2; 5 CCR §20500
Creditable compensation, Ed §22119.2
Employer and state contributions, Ed §22955.5
Creditable service, Ed §22119.5
Cash balance benefit program, Ed §26113
Credited interest, Ed §22120
Credited service, Ed §22121
Custodial accounts
Annuity contract and custodial accounts, contracting for services, Ed §24953
Community college employees, contracting with third-party administrators, Ex Ed §87040.5
Third party administrator, contracting with, Ex Ed §44041.5
Custodians, Ed §22122
Days of service for classes of employees, Ed §22112.6
Death benefits
Cash balance benefit program, Ed §26114
Death payment, Ed §22122.4
Deferred compensation plans
Community college employees, contracting with third-party administrators, Ex Ed §87040.5
Third party administrator, contracting with, Ex Ed §44041.5
Defined benefit formula
Public Pension Reform Act of 2013, Ex Gov §7522.04
Defined benefit plan
Income tax, federal, Ex 26 USC §414
Defined benefit program, Ed §22122.5
Cash balance benefit program, Ed §26115
Defined benefit supplement contributions, Ed §22122.7
Defined contribution plan
Income tax, federal, Ex 26 USC §414
Demotions
Community college employees, classified, Ex Ed §88001
Dependent child
Disability allowance and family allowance programs, Ed §22123
Disability retirement and survivor benefit allowance programs, Ed §22123.5
Health care benefits program, Ed §25915
Dependent parents, Ed §22124
Health care benefits program, Ed §25920
Determination of final compensation, Ed §22134.5
Disability, Ed §22126
Disability allowance, Ed §22127
Disability benefits, Ed §22127.2
Cash balance benefit program, Ed §26116
Disability date
Cash balance benefit program, Ed §26117
Disabled, Ed §22126
Disabled members, Ed §22146
Disciplinary actions
Community college employees, classified, Ex Ed §88001
Early retirement, Ed §22128
Early retirement age, Ed §22128
Educational administrators
Community college employees, Ex Ed §87002
Educational institutions, Ed §22129
Effective date, Ed §22130

DEFINITIONS—Cont'd
Election cycle
Political reform, Ex Gov §85204
Elective office
Political reform, Ex Gov §82023
Elective state office
Political reform, Ex Gov §82024
Emergency meetings, 5 CCR §20500
Employed, Ed §22132
Cash balance benefit program, Ed §26126
Employee accounts
Cash balance benefit program, Ed §26119
Employee contribution rates
Cash balance benefit program, Ed §26120
Employee contributions
Cash balance benefit program, Ed §26121
Public Pension Reform Act of 2013, Ex Gov §7522.04
Employees
Cash balance benefit program, Ed §26118
Employees of controlled group of corporations
Income tax, federal, Ex 26 USC §414
Employees of partnerships, proprietorships, etc, under common control
Income tax, federal, Ex 26 USC §414
Employer accounts
Cash balance benefit program, Ed §26123
Employer contribution rates
Cash balance benefit program, Ed §26124
Employer contributions
Cash balance benefit program, Ed §26125
Employers, Ed §22131
Cash balance benefit program, Ed §26122
Health care benefits program, Ed §25921
Third party administrator, contracting with, Ex Ed §44041.5
Employing agencies, Ed §22131
Employment, Ed §22132
Cash balance benefit program, Ed §26126
Energy sector
Iran Contracting Act of 2010, Ex PubCon §2202
Excess sick leave days, Ed §22170.5
External managers
Placement agents, regulation, Ex Gov §7513.8
Political reform, Ex Gov §82025.3
Family allowance, Ed §22133
Federal system
Public Pension Reform Act of 2013, Ex Gov §7522.04
Final benefit, Ed §22133.5
Final compensation, Ed §22134
Classroom teachers, Ed §22135
Managerial or supervisory employees, Ed §22137
Reduced salary, Ed §22136
Final vesting, Ed §22138
Financial institution
Iran Contracting Act of 2010, Ex PubCon §2202
Financially dependent
Disability allowance and family allowance programs, Ed §22123
Disability retirement and survivor benefit allowance programs, Ed §22123.5
Health care benefits program, Ed §25915
403(b) product or 403(b) products
Vendor registration and information bank, Ed §25100
Full-time
Community colleges, minimum standard, Ed §22138.5
K to 12, minimum standard, Ed §22138.5
Full-time basis, Ed §22106.5
Full-time equivalent, Ed §22138.6
Cash balance benefit program, Ed §26127
Fund
Cash balance benefit program, Ed §26128
Health care benefits program, Ed §25923
School land bank, Ex PubRes §8702
Gain and loss reserve, Ed §22139.5
Cash balance benefit program, Ed §26129
Governing board
Pupil rights and responsibilities, state special schools, Ex Ed §48927
Governing board of each school district
Pupil rights and responsibilities, state special schools, Ex Ed §48927
Governmental plan
Income tax, federal, Ex 26 USC §414
Highly compensated employee
Income tax, federal, Ex 26 USC §414
Improvement factor, Ed §22140
Increase of minimum unmodified allowance, Ed §22141
Inactive members, Ed §22146
Indexed final compensation, Ed §22142
Individualized education program team
Pupil rights and responsibilities, state special schools, Ex Ed §48927
Investment activities
Iran Contracting Act of 2010, Ex PubCon §2202.5
Investment advisers, Ed §22143
Investment earnings
Cash balance benefit program, Ed §26130
Investment managers, Ed §22143
Investment transactions, Ed §22144
Iran
Iran Contracting Act of 2010, Ex PubCon §2202
Late contribution
Political reform, Ex Gov §82036
Late independent expenditure
Political reform, Ex Gov §82036.5
Layoff for lack of funds
Community college employees, classified, Ex Ed §88001
Layoff for lack of work
Community college employees, classified, Ex Ed §88001
Liability gains and losses, Ed §22144.5
Lobbyist
Political reform, Ex Gov §82039

DEFINITIONS—Cont'd
Local educational agency
Early warning program, Ex Ed §52055.57
Pupil rights and responsibilities, state special schools, Ex Ed §48927
Local systems, Ed §22145
Mandatory furloughs
Service credit, effect of mandatory furloughs, Ed §22708
Member
Public Pension Reform Act of 2013, Ex Gov §7522.04
Members, Ed §22146
Death benefits, active
Survivor benefits, Ed §23850
Disability allowance and family allowance programs, Ed §22123
Disability retirement and survivor benefit allowance programs, Ed §22123.5
Health care benefits program, Ed §25925
Membership, Ed §22146.5
Minimum interest rate, Ed §22146.7
Cash balance benefit program, Ed §26131
Month, Ed §22147
Multiemployer plan
Income tax, federal, Ex 26 USC §414
New employee
Public Pension Reform Act of 2013, Ex Gov §7522.04
New member
Public Pension Reform Act of 2013, Ex Gov §7522.04
Nonmember registered domestic partner
Community property, Ed §22651
Defined benefit supplement program purposes, Ed §25000.9
Nonmember spouse
Community property, Ed §22651
Defined benefit supplement program, Ed §25000.9
Nonparticipant registered domestic partners, Ed §27401
Nonparticipant spouse
Cash balance benefit program, community property, Ed §27401
Nonqualified service, Ed §22147.5
Normal cost
Public Pension Reform Act of 2013, Ex Gov §7522.04
Normal retirement, Ed §22148
Normal retirement age, Ed §22148
Offspring
Disability allowance and family allowance programs, Ed §22123
Disability retirement and survivor benefit allowance programs, Ed §22123.5
Health care benefits program, Ed §25915
Option beneficiary, Ed §22149
Other public systems, Ed §22150
Overtime, Ed §22151
Parent, Ed §22152
Participants
Cash balance benefit program, Ed §26132
Part-time basis, Ed §22106.5
Pay period, Ed §22154
Cash balance benefit program, Ed §26133
Payroll, Ed §22155
Permanent
Community college employees, classified, Ex Ed §88001
Permanent reservation
Lieu lands, Ex PubRes §7401
Person
Iran Contracting Act of 2010, Ex PubCon §2202
Placement agents, regulation, Ex Gov §7513.8
Placement agents, Ex Gov §7513.8
Political reform, Ex Gov §82047.3
Plan, Ed §22155.5
Cash balance benefit program, Ed §26134
Plan administrators
Income tax, federal, Ex 26 USC §414
Plan vesting, Ed §22156
Plan year, Ed §22156.05
Cash balance benefit program, Ed §26135
Present value, Ed §22156.1
Present value factor, Ed §22156.2
Prior year's compensation earnable, Ed §22156.5
Projected final compensation, Ed §22157
Projected service, Ed §22158
Proof of death, Ed §22159
Provisional vesting, Ed §22160
Public agency
Federal old age and survivors insurance, Ex Gov §22009.03
Public employee
Public Pension Reform Act of 2013, Ex Gov §7522.04
Public employer
Public Pension Reform Act of 2013, Ex Gov §7522.04
Public retirement system
Public Pension Reform Act of 2013, Ex Gov §7522.04
Public schools, Ed §22161
Qualified domestic relations orders
Income tax, federal, Ex 26 USC §414
Qualified military service, Ed §22161.3
Quasi-legislative proceeding
Public utilities commission proceedings, Ex Gov §82002
Ratemaking proceeding
Public utilities commission proceedings, Ex Gov §82002
Reclassification
Community college employees, classified, Ex Ed §88001
Refunds, Ed §22161.5
Registered domestic partners, Ed §22007.5, 22171
Cash balance plan purposes, Ed §26002.5
Regular
Community college employees, classified, Ex Ed §88001
Regular interest, Ed §22162
Regular meeting, Ed §22162.5; 5 CCR §20500
Reinstatement, Ed §22163
Replacement benefits program, Ed §22164
Retired member activities
Teachers' retirement system, Ed §22164.5
Retired members, Ed §22146

DEFINITIONS—Cont'd
Retirement, Ed §22165
Cash balance benefit program, Ed §26136
Retirement allowance, Ed §22166
Retirement benefit, Ed §22166.5
Cash balance benefit program, Ed §26137
Retirement date
Cash balance benefit program, Ed §26138
Retirement fund, Ed §22167
Retirement systems
Federal old age and survivors insurance, Ex Gov §22009.1
Return on investments, Ed §22168
Salary
Cash balance benefit program, Ed §26139
Public pension and retirement systems, Ex Gov §7513.97
School district
Health and welfare benefits, Ex Ed §7004
Pupil rights and responsibilities, state special schools, Ex Ed §48927
School land
School land bank, Ex PubRes §8702
School year, Ed §22169
Health care benefits program, Ed §25926
Service, Ed §22170
Service for predecessor employer
Income tax, federal, Ex 26 USC §414
Service in the uniformed services
USERRA, benefits for reemployed members, Ed §22850
Cash balance benefit program, Ed §28000
Sick leave days, Ed §22170.5
Special meetings, 5 CCR §20500
Spouse, Ed §22171
Cash balance benefit program, Ed §26140
Health and welfare benefits, Ex Ed §7004
Stakeholder
Local educational agencies early warning program, Ex Ed §52055.57
Superintendent
Pupil rights and responsibilities, state special schools, Ex Ed §48927
Superintendent of schools of the governing board
Pupil rights and responsibilities, state special schools, Ex Ed §48927
Survivor allowance, Ed §22172
Survivor benefit allowance, Ed §22173
System, Ed §22174
Cash balance benefit program, Ed §26142
Temporary reservation
Lieu lands, Ex PubRes §7401
Termination benefit, Ed §22176
Cash balance benefit program, Ed §26143
Third-party administrators
Annuity contract and custodial accounts, contracting for services, Ed §24953
Community college employees, contracting with third-party administrators, Ex Ed §87040.5
Contracting with third-party administrators, Ex Ed §44041.5
Total and permanent disability
Cash balance benefit program, Ed §26144
Trustee
School land bank, Ex PubRes §8702
Trustee service
Cash balance benefit program, Ed §26144.5
Unforeseen emergency condition, 5 CCR §20500
Unfunded actuarial obligation, Ed §22177
Cash balance benefit program, Ed §26145
Uniformed services
USERRA, benefits for reemployed members, Ed §22850
Cash balance benefit program, Ed §28000
Unmodified pension or retirement allowance
Public pension and retirement systems, Ex Gov §7513.97
Vendors
Vendor registration and information bank, Ed §25100
Vice chairman, 5 CCR §20500

DELINQUENCY
Cash balance benefit program
Contributions
Payments by employer, Ed §26303
Penalty or interest assessed, appeal, Ed §26303.5
Contributions
Appeal of assessed penalties or interest, Ed §23010
Interest, Ed §23003
Penalties, Ed §23003
When due, payable and delinquent, Ed §23002

DENIAL OF BENEFITS, Ed §28005

DENTAL COVERAGE
Health and welfare benefits generally, Ex Ed §7000 to 7008. (*See* **HEALTH AND WELFARE BENEFITS**)

DEPENDENTS
Board
Information requests
Information provided to board, 5 CCR §21023
Power of board, Ed §22207
Death benefits, active
Family allowance
Parents claiming benefits
Dependency determinations, Ed §23805.5
Survivor benefits
Dependent children, Ed §23852
Eligibility of dependent children, Ed §23856
Definition of dependent child
Disability allowance and family allowance programs, Ed §22123
Disability retirement and survivor benefit allowance programs, Ed §22123.5
Health care benefits program, Ed §25915
Disability allowance
Reduction
Dependent children becoming ineligible, Ed §24009

DEPENDENTS—Cont'd
Disability retirement
Reduction of allowance
Dependent children becoming ineligible, Ed §24108
Financially dependent defined
Disability allowance and family allowance programs, Ed §22123
Disability retirement and survivor benefit allowance programs, Ed §22123.5
Health care benefits program, Ed §25915
Information provided to board, 5 CCR §21023
Parents
Definition of dependent parents, Ed §22124
Health care benefits program, Ed §25920

DIRECT DEPOSIT
Authorized, Ex Gov §21267
Methods of deposit in account, Ed §24604
Public pensions and retirement plans, general regulation
Direct deposit to financial institution, Ex Gov §7505, 7506
Agreements, Ex Gov §7506.5

DISABILITY ALLOWANCE, Ed §24001 to 24018
Accommodation allowing for employment
Board may require member to request, Ed §24003
Amount, Ed §24006
Application for allowance, Ed §24001
Conditions, Ed §24002
Time for application, Ed §24002
Benefit maintenance
Applicability of benefit improvement factor, Ed §24402
Cancellation
Credits on cancellation of allowances accrued after July 1, 1972, Ed §22328
Cash balance benefit program
Disability benefits under program, Ed §26900 to 26911. (*See* **CASH BALANCE BENEFIT PROGRAM**)
Checks, payment, Ed §22318
Interest for late payment, Ed §22321
Reporting late payment, Ed §22322
Credited service
Calculation of allowance on credited service, Ed §24007
Defined benefit supplement program
Disability benefits, Ed §25016 to 25019
Dependent children
Ineligibility
Reduction of allowance upon children becoming ineligible, Ed §24009
Earnings of recipient of disability benefits
Disclosure, Ed §22327
Excessive earnings
Effect on allowance, Ed §24016
Rehabilitation program participants, Ed §24017
Income limits to retain allowance, Ed §24015
Effective date of allowance, Ed §24005
Eligibility for allowance, Ed §24001
Employee organizations
Officers
Eligibility for allowance, Ed §24001.5
Employment of disabled member
Creditable service, performance of
Effect on allowance, Ed §24014
Income limits to retain allowance, Ed §24015
Last day of service
Notice, Ed §24005
Limitation of allowance, Ed §24004
Medical documentation, Ed §24003
Medical examinations
Requiring examination, Ed §24003, 24013
Notice of last day of service, Ed §24005
Recurrence of original disability, Ed §24018
Reduction
Dependent children becoming ineligible, Ed §24009
Other systems, benefits under, Ed §24010
Rehabilitation
Earnings of recipient of disability benefits
Excessive earnings
Participants in rehabilitation program, Ed §24017
Requirement to participate in rehabilitation, Ed §24012
Return to work
Recurrence of original disability, Ed §24018
Substance abuse
Limitation of allowance, Ed §24004
Time for application, Ed §24002
Treatment of disability
Requirement to pursue treatment, Ed §24011

DISABILITY ALLOWANCE AND DISABILITY RETIREMENT
Earnings of recipient of disability benefits
Disclosure, Ed §22327

DISABILITY ALLOWANCE TO SERVICE RETIREMENT
Termination of disability allowance upon retirement age, Ed §24213

DISABILITY RETIREMENT, Ed §24100 to 24119
Applicability of provisions, Ed §24100
Application for disability retirement, Ed §24101
Time for application, Ed §24102
Benefit maintenance
Applicability of benefit improvement factor, Ed §24402
California state university
Employment of retired employees
Applicable employment limitations, Ed §24116
Cash balance benefit program
Disability benefits under program, Ed §26900 to 26911. (*See* **CASH BALANCE BENEFIT PROGRAM**)
Checks, payment, Ed §22318
Interest for late payment, Ed §22321
Reporting late payment, Ed §22322
Composition of allowance, Ed §24106
Defined benefit supplement program
Disability benefits, Ed §25016 to 25019
Dependent children
Ineligibility
Reduction of allowance upon children becoming ineligible, Ed §24108

DISABILITY RETIREMENT—Cont'd
Earnings of recipient of disability benefits
Disclosure, Ed §22327
Limitation on earnings, Ed §24114
Effective date, Ed §24105
Eligibility, Ed §24101
Employee organizations
Officers, service as, Ed §24101.5
Employee organizations
Officers, service as
Ineligibility, Ed §24101.5
Employment of retired members
California state university
Applicable employment limitations, Ed §24116
Creditable service performed
Effect of employment, Ed §24113
Earnings limitation, Ed §24114
Last day of service
Notice of last day of service, Ed §24105
Limitation of retirement period, Ed §24104
Medical documentation of impairment, Ed §24103
Medical examinations
Requiring examination, Ed §24103, 24112
Modification of allowance
Options, Ed §24107
Notice of last day of service, Ed §24105
Options
Modification of allowance, Ed §24107, 24301
Pre-1972 benefits, Ed §23400, 23401
Medical examination, Ed §23401
Reduction of allowance, Ed §23400
Recurrence of original disability, Ed §24119
Reduction of allowance
Dependent children becoming ineligible, Ed §24108
Workers' compensation benefits, Ed §24109
Rehabilitation
Requiring participation in rehabilitation, Ed §24111
Return to work
Recurrence of original disability, Ed §24119
Substance abuse
Limitation of retirement period, Ed §24104
Termination of allowance, Ed §24117
Credits to member's accounts, Ed §24118
Service retirement following prior terminated disability retirement, Ed §24210
Treatment
Requiring treatment of impairment, Ed §24110
Workers' compensation
Reduction of allowance, Ed §24109

DISCHARGE OF MEMBERS
Cash balance benefit program
Termination benefits, Ed §27200 to 27207
Contributions
Refunds
Events triggering refund, Ed §23100
Certification of termination of employment, Ed §23102
Defined benefit supplement program
Termination benefits, Ed §25024 to 25025
Notice to board, Ed §22457
Probationary employees
Reduction in employees
Rights of terminated employees, Ex Ed §44957

DISSOLUTION OF MARRIAGE
Community property
Cash balance benefit program, Ed §27400 to 27413. (*See* **CASH BALANCE BENEFIT PROGRAM**)
Generally, Ed §22650 to 22666. (*See* **COMMUNITY PROPERTY**)
Option elections
Cancellation of options, Ed §24305

DIVORCE
Community property
Cash balance benefit program, Ed §27400 to 27413. (*See* **CASH BALANCE BENEFIT PROGRAM**)
Generally, Ed §22650 to 22666. (*See* **COMMUNITY PROPERTY**)
Option elections
Cancellation of options, Ed §24305

DOMESTIC PARTNERS
Cash balance benefit program
Community property
Nonparticipant spouse, treatment of domestic partner as, Ed §27401
Spouse includes registered domestic partner, Ed §26002.5, 26140
Defined benefit supplement program
Community property interest of partner or former partner
Treatment of partner as nonmember spouse, Ed §25000.9
Option elections
Unmarried retirees
Marriage or registration of domestic partnership
Authority to elect, Ed §24300.6
Spouses, treatment as, Ed §22007.5
Termination, nullity, etc, of domestic partnership
Community property
Cash balance benefit program, Ed §27400 to 27413. (*See* **CASH BALANCE BENEFIT PROGRAM**)
Generally, Ed §22650 to 22666. (*See* **COMMUNITY PROPERTY**)

E

EARLY RETIREMENT
Credit for additional years to encourage retirement, Ex Ed §44929
Community college employees, Ex Ed §87488
Incentives to encourage retirement, Ed §22714, 22715
Service retirement, Ed §24203
Partial allowance with reversion to full allowance for normal retirement age, Ed §24205

EARLY RETIREMENT LIMITED TERM REDUCTION PROGRAM, Ed §24205

EARNINGS LIMITATION
Effect of employment on disability allowance, Ed §24015
Reduction of disability retirement allowance, Ed §23400

EDUCATION LEAVE
Service credit
Computation
Accumulated and unused leave, Ed §22717.5

ELECTION OF AN OPTION; NEW SPOUSE, Ed §24300.6

ELECTION OF DISABILITY AND DEATH BENEFIT COVERAGE, Ed §23700 to 23706
Acknowledgment of receipt of election, Ed §23705
Effective date of new programs, Ed §23700
Eligibility, Ed §23702
Failure to file election
Effect, Ed §23706
Requirements of election, Ed §23703
Signature by spouse
Refusal, Ed §23704
Time for election, Ed §23701

ELECTION OF OPTIONS
Options generally, Ed §24300 to 24313. (*See* **OPTION ELECTIONS**)

ELECTION OF RETIREMENT SYSTEM, Ed §22508, 22508.5; Ex Gov §20309
County employees retirement law
Transfer of membership to teachers' retirement system, Ex Gov §31565
Notice of right to elect, Ed §22509
Procedure to effect election, Ed §22509
Public employees' retirement system (PERS)
Transfer to PERS, Ed §22510
Continuity of service, effect of transfer, Ed §22512
Effect of electing not to transfer, Ed §22511
Nonvested members, tacking of service to attain vested status, Ed §22514
Vested members, retention of survivor and disability benefits, Ed §22513
Service credit
Permissive and additional service credit
Coverage elected, Ed §22801.5
Subsequent employment, Ed §22508.6; Ex Gov §20309.5

ELECTIONS
Board, election to
Campaign statements for candidates, Ed §22227
Generally, Ed §22200.5; 5 CCR §24000 to 24009. (*See* **BOARD**)
Campaign contributions and investment relationships
Campaign disclosures generally, Ex Gov §84200.5 to 84225
Generally, 5 CCR §24010 to 24013. (*See* **CAMPAIGN CONTRIBUTIONS AND INVESTMENT RELATIONSHIPS**)
Political reform generally, Ex Gov §82002 to 87314
Political reform, Ex Gov §82002 to 87314
Applicability of political reform provisions to retirement board elections, Ex Gov §84225
Campaign disclosures
Committee organization, Ex Gov §84101
Filing of campaign statements, Ex Gov §84200.5 to 84225
Copies to be filed, Ex Gov §84215
Preelection statements, Ex Gov §84200.5, 84200.9
Conflicts of interest
Investment management by public officials, Ex Gov §87314
Definitions, Ex Gov §82002 to 82047.3
Election cycle, Ex Gov §85204

ELECTRONIC FUNDS TRANSFERS (EFT)
Direct deposit generally. (*See* **DIRECT DEPOSIT**)
Methods of deposit in account, Ed §24604

ELIGIBILITY REQUIREMENTS
Disability allowance, application, Ed §24001
Disability retirement, application, Ed §24101

EMBEZZLEMENT
Public officers and employees
Forfeiture of rights under retirement system, Ex Gov §7522.70

EMINENT DOMAIN
Headquarters of system
Condemnation to purchase selected property, Ed §22378
School land bank, Ex PubRes §8703

EMPLOYEE AND EMPLOYER CONTRIBUTIONS
Cash balance benefit program
USERRA, benefits for reemployed members
Computation of salary during military service, Ed §28003

EMPLOYEE CONTRIBUTIONS, Ed §22900 to 22909. (*See* CONTRIBUTIONS)

EMPLOYEE LEASING
Income tax, federal, Ex 26 USC §414

EMPLOYEE ORGANIZATIONS
Disability allowance or retirement
Officers of employee organizations
Eligibility for allowance, Ed §24001.5
Leaves of absence for service as officer, Ex Ed §44987
Service credit
Inclusion of service, Ed §22711
Meeting and negotiating in public educational employment
Definitions, Ex Gov §3540.1
Service credit
Leave to serve as elected officer
Inclusion of service, Ed §22711

EMPLOYER PICK-UP OF EMPLOYEE CONTRIBUTIONS
Cash balance benefit program, Ed §26502

EMPLOYERS/EMPLOYING AGENCIES
Beneficiaries
Information affecting status
Employing agency and county superintendent to supply, Ed §22455
Board
Regulation by board, Ed §22213
Cash balance benefit program
Accounts, employee and employer, Ed §26600 to 26607
Agreement with retirement system to provide program, Ed §26000.5
Change of status of employee
Report by employer, Ed §26304
Compensation of employees
Information to be provided by employer, Ed §26305
Contributions
Accounts, employee and employer
Credits to accounts, Ed §26602
Adjustment of employer contribution rate, Ed §26507
Amount, Ed §26503, 26503.5
Collective bargaining agreement to determine, Ed §26504
Assessment of interest of late contributions, 5 CCR §27008
Correction of erroneous contribution amounts, employer duty, Ed §26302
Deduction and remission of employee contributions, duty of employer, Ed §26301.5
Definition of employer contributions, Ed §26125
Late contributions, 5 CCR §27006
Penalty or interest assessed, appeal, Ed §26303.5
Rates
Definition of employer contribution rates, Ed §26124
Reports by employers, Ed §26301
Time to transmit contributions, Ed §26303
USERRA, benefits for reemployed members, Ed §28002
Correction of erroneously reported information, Ed §26302
Definition of employer, Ed §26122
Election to provide benefits, Ed §26000.6
Employer accounts
Defined, Ed §26123
Reports
Acceptable report, 5 CCR §27002
Assessment of penalties for late reports, 5 CCR §27004
Monthly reports format, 5 CCR §27000
Responsibilities of employers and participants, Ed §26300 to 26306
Right to administrative hearing, 5 CCR §27009
Certificated persons to be employed, Ex Ed §44830
Sojourn certificated employees, Ex Ed §44856
Contributions
Cash balance benefit program. (*See* within this heading, "Cash balance benefit program")
Employee contributions
Employer payment of employee contributions, Ed §22909
Pick-up of contributions to defer taxes, Ed §22903
Employer and state contributions
Collection and reporting procedures, Ed §23000 to 23010. (*See* **CONTRIBUTIONS**)
Generally, Ed §22950 to 22956. (*See* **CONTRIBUTIONS**)
Deferred compensation plans
Adoption of plan, Ed §24975
Defined, Ed §22131
Defined benefit program
Contributions
Assessment of interest of late contributions, 5 CCR §27007
Late contributions, 5 CCR §27005
Reports
Acceptable report, 5 CCR §27001
Assessment of penalties for late reports, 5 CCR §27003
Monthly reports format, 5 CCR §27000
Right to administrative hearing, 5 CCR §27009
Fiduciary duty towards members and beneficiaries
Credit enhancement for employer instruments, Ed §22260
Surplus property of employers
Investments by board, Ed §22261
Health care benefits program
Definition of employers, Ed §25921
Interns
Employment of district interns, Ex Ed §44830.3
Members
Coverage by qualified retirement plan
Employer to provide opportunity for membership, Ed §22455.5
Failure to provide information or to pay amounts due
Withholding salary, Ed §22459
Information affecting status
Compensation, Ed §22458
Contents of information provided by employers, Ed §22456
Death, employment, resignation or discharge
Notice to board, Ed §22457
Employing agency and county superintendent to supply, Ed §22455
Failure to provide information or to pay amounts due
Withholding salary, Ed §22459
Military service
USERRA, benefits for reemployed members
Contributions, employer liability, Ed §22852
Service credit
Sick leave
Accumulated and unused leave
Billing employers, Ed §22718
Third-party employers, Ed §24214

ERRORS OR OMISSIONS
Correction of errors or omissions, Ed §22308

ESTABLISHMENT OF SYSTEM, Ed §22001

EXCEPTION TO PROBATE CODE
Request for death payments and return of contributions, Ed §23853, 23882
Time benefit to be paid, Ed §27001
Time of payment, Ed §23803

EXCESS SICK LEAVE, Ed §22718

EXCHANGE TEACHERS
Exclusions from membership
Out of state exchange or sojourn teachers, Ed §22601
Service credit
Inclusion of service, Ed §22712

EXCLUSION FROM PARTICIPATION IN CASH BALANCE BENEFIT PROGRAM, Ed §27403

EXCLUSION OF SICK LEAVE SERVICE BENEFITS FROM FINAL COMPENSATION, Ed §22720

EXCLUSIONS FROM MEMBERSHIP, Ed §22601 to 22604
Exchange teachers from out of state, Ed §22601
Part-time employees, Ed §22601.5
Hourly or daily basis, Ed §22604
Persons not excluded, Ed §22516
Sojourn teachers from out of state, Ed §22601
Substitute employees, Ed §22602

EXEMPTIONS FROM LEGAL PROCESS
Annuity, allowance, contribution returns, etc, Ed §22006
Cash balance benefit program
Rights to benefits not subject to execution or assignment, Ed §26701

EXTORTION
Public officers and employees
Forfeiture of rights under retirement system, Ex Gov §7522.70

F

FAMILY ALLOWANCE
Death benefits, active
Election of disability and death benefit coverage, Ed §23700 to 23706
Generally, Ed §23800 to 23812. (*See* **DEATH BENEFITS, ACTIVE**)

FEDERAL LAW REFERENCED
No Child Left Behind Act
Local educational agency intervention
Early warning program, Ex Ed §52055.57, 52055.59

FEDERAL OLD AGE AND SURVIVORS INSURANCE
Administrative costs
Reimbursements, Ex Gov §22560
Agreements for coverage
Application made by public agency, Ex Gov §22202
Board and public agency, agreement between, Ex Gov §22203
Division of retirement system
Modification of transfer agreement, Ex Gov §22155
Referendum provisions inapplicable, Ex Gov §22308
Execution, Ex Gov §22201
Inclusion of employees in groups covered
Formal application, Ex Gov §22208
Referendum for specified employees, Ex Gov §22302
Benefit payments, Ex 42 USC §402
Computation of insurance amount, Ex 42 USC §415
Division of retirement system, Ex Gov §22150
Modification of transfer agreement, Ex Gov §22155
Referendum provisions inapplicable, Ex Gov §22308
Husband's benefits, Ex 42 USC §402
Medicare coverage
Teachers' retirement plan, coverage through, Ex Gov §22156
Parent's benefits, Ex 42 USC §402
Public agencies
Agreements for coverage
Application made by public agency, Ex Gov §22202
Board and public agency, agreement between, Ex Gov §22203
Defined, Ex Gov §22009.03
Retirement system
Defined, Ex Gov §22009.1
Division of retirement system, Ex Gov §22150
Simultaneous entitlement to benefits, Ex 42 USC §402
Widower's benefits, Ex 42 USC §402
Widow's benefits, Ex 42 USC §402
Wife's benefits, Ex 42 USC §402

FIDUCIARY DUTY TOWARDS MEMBERS AND BENEFICIARIES, Ed §22250 to 22261
Assets
Purposes for which held, Ed §22251
Board's responsibility to act for members and beneficiaries, Ed §22250
Bonds, surety for board members, officers and employees, Ed §22259
Conflicts of interest, Ed §22253
Consideration
Adequate consideration required for transactions, Ed §22252
Employers/employing agencies
Credit enhancement for employer instruments, Ed §22260
Surplus property
Investments by board, Ed §22261
Insurance
Liability insurance for fiduciaries, Ed §22259
Appropriation, Ed §22258
Loans
Security, Ed §22252
Personal liability for breach, Ed §22254
Bases of personal liability, Ed §22256
Investment managers liability
Imputation to board members or officers, Ed §22257

FIDUCIARY DUTY TOWARDS MEMBERS AND BENEFICIARIES—Cont'd
Personal liability for breach—Cont'd
Scope of liability, Ed §22255
Prohibited transactions, Ed §22252

FINAL BENEFIT, Ed §25020

FINANCIAL INSTITUTIONS
Investments
Custodian services
Bank or trust company providing, Ed §22359
Mail to financial institution
Methods of deposit in account, Ed §24604
Privacy between customers and institutions
Permissible disclosures, Ex Gov §7480
Public pensions and retirement plans, general regulation
Direct deposit to financial institution, Ex Gov §7505, 7506
Agreements, Ex Gov §7506.5
Investments
International financial institutions, obligations of, Ex Gov §7514.1
Savings and loan associations
Deposits with associations in exchange for residential construction loans, Ex Gov §7520

FINANCING OF DEFINED BENEFIT PROGRAM
Legislative findings and intent, Ed §22002

FIVE-YEAR RULE
Cash balance benefit program
Termination benefits
Application for benefit
Multiple applications, time between, Ed §27203

403(B) PLANS
Annuity contract and custodial accounts generally, Ed §24950 to 24953. (*See* **ANNUITY CONTRACT AND CUSTODIAL ACCOUNTS**)
Vendor registration and information bank generally, Ed §25100 to 25115. (*See* **VENDOR REGISTRATION AND INFORMATION BANK**)

FREEDOM OF INFORMATION ACT
Exemption of public records from disclosure, Ex Gov §6254
Investments
Alternative investments invested in by public funds, Ex Gov §6254.26

FULL-TIME EMPLOYEES
Community colleges, minimum standard, Ed §22138.5
Full-time basis
Defined, Ed §22106.5
Full-time equivalent
Defined, Ed §22138.6
K to 12, minimum standard, Ed §22138.5
Status as members, Ed §22501

FUNDS, ESTABLISHMENT AND CONTROL, Ed §22400 to 22404

FUNERAL EXPENSES
Beneficiaries
Circumstances for payment, Ed §23303

FURLOUGHS
Service credit
Mandatory furloughs, effect, Ed §22708

G

GAIN AND LOSS RESERVE, Ed §25001

GENERAL REGULATION OF PUBLIC PENSIONS AND RETIREMENT PLANS, Ex Gov §7500 to 7514.5. (*See* PUBLIC PENSIONS AND RETIREMENT PLANS, GENERAL REGULATION)

GIFTS
School land bank, Ex PubRes §8716

H

HEADQUARTERS OF SYSTEM, Ed §22375 to 22380
Building account, Ed §22380
Condemnation to purchase selected property, Ed §22378
Excess building space
Authorizing of acquisition or improvements to provide, Ed §22376
Insuring building, Ed §22380
Permanent facility
Real property
Acquisition to establish permanent facility, Ed §22375
Public contract procedures, Ed §22379
State agency assistance
Contract for state agency assistance, Ed §22377

HEALTH AND WELFARE BENEFITS
Applicability of provisions, Ex Ed §7005
Conflict between provisions and existing regulations or contracts, Ex Ed §7003
Contacting retired employees and spouses
Not required, Ex Ed §7002.5
Definitions, Ex Ed §7004
Enrollment
Prerequisites, Ex Ed §7000.3
Retired employees and spouses, Ex Ed §7000
Exclusions from coverage, Ex Ed §7000.5
Medicare enrollment
Prerequisites, Ex Ed §7000.3
Preexisting conditions
Exclusions from coverage, Ex Ed §7000.5
Qualified organizations
Health benefits plan for qualified organizations, Ex Ed §7007
Vested right in benefits not created, Ex Ed §7002.5
Victims of violent act while in performance of job
Disabling injury
Continuing coverage under provisions while receiving other benefits, Ex Ed §7008

HEALTH CARE BENEFITS PROGRAM, Ed §25900 to 25955
Actuarial investigation and valuation, Ed §25933
Applicability of definitions, Ed §25901
Beneficiaries
Defined, Ed §25910
Costs
Source of payment, Ed §25900
Definitions, Ed §25900 to 25926
Dependent children
Defined, Ed §25915
Dependent parents
Defined, Ed §25920
Employers
Defined, Ed §25921
Financially dependent
Defined, Ed §25915
Legislative authorization, Ed §25900
Medicare premium payment program, Ed §25940 to 25955
Overpayments, recovery, Ed §25955
Part A premium payments, Ed §25940
Prescription drug program
Report to legislature, Ed §25950
Surcharges for Part A or Part B enrollment, Ed §25940
Members
Defined, Ed §25925
Offspring
Defined, Ed §25915
Prescription drug program
Report to legislature, Ed §25950
School year
Defined, Ed §25926
Teachers' health benefits fund, Ed §25930 to 25933
Actuarial investigation and valuation, Ed §25933
Administration of fund, Ed §25931
Appropriation of proceeds of fund to purposes of provisions, Ed §25930
Board control of fund, Ed §25931
Definition of fund, Ed §25923
Deposits, Ed §25930
Return on investments, Ed §25932
Established, Ed §25930
Plan
Defined, Ed §25933
Return on investments
Collection and deposit, Ed §25932

HEALTH INSURANCE
Study on providing benefits
Board to study, Ed §22226

HOME LOAN PROGRAM
Hundred percent residential financing, procedures to obtain, Ed §22360.5
Investments
Authorized investments, Ed §22360

HOME REPAIR OR REBUILDING
Natural disasters
Loans from retirement fund, Ed §22361

HUSBAND AND WIFE
Federal old age and survivors insurance
Benefits for husband and wife, Ex 42 USC §402
Signature of spouse on applications, Ed §22453
Refusal of spouse to sign, Ed §22454

I

INCOME TAX, CALIFORNIA
Advisement of tax liabilities, Ed §22314
Cash balance benefit program
Compliance with federal and state provisions, Ed §26001

INCOME TAX, FEDERAL
Advisement of tax liabilities, Ed §22314
Affiliated service groups, Ex 26 USC §414
Cash balance benefit program
Compliance with federal and state provisions, Ed §26001
Limitation on benefits, Ed §26004
USERRA, benefits for reemployed members, Ed §28006
Combination defined benefit plans and qualified cash or deferred arrangements
Special rules, Ex 26 USC §414
Contributions
Catch-up contributions, Ex 26 USC §414
Tax treatment of certain contributions, Ex 26 USC §414
Withdrawals from eligible automatic contribution arrangements, Ex 26 USC §414
Deferred compensation plans
Federal provisions, Ex 26 USC §457
Definitions, Ex 26 USC §414
Exempt organizations
Requirements for exemption, Ex 26 USC §503
Individual retirement accounts (IRA), Ex 26 USC §408
Leasing of employees, Ex 26 USC §414
Military service
Differential play for members on active duty, Ex 26 USC §414
USERRA, benefits for reemployed members
Effect of adverse tax consequences, Ed §22856
Qualified domestic relations orders, Ex 26 USC §414
Qualified pension, etc, plans, Ex 26 USC §401
Annuity plans
Taxation of employee annuities, Ex 26 USC §403
Beneficiaries of employees' trust
Taxability, Ex 26 USC §402
Limitation on benefits and contributions, Ex 26 USC §415
Merger or consolidation, Ex 26 USC §414
Transfer of assets of plans, Ex 26 USC §414
Replacement benefits program
Reduction of benefit pursuant to federal tax provisions
Restoration, Ed §24270
USERRA (Uniformed Services Employment and Reemployment Rights Act)
Special rules relating to reemployment rights, Ex 26 USC §414

INCREASE PROCEDURE (PRE-7/1/72 ALLOWANCES), Ed §24403

INDIVIDUAL RETIREMENT ACCOUNTS (IRA)
Income tax, federal, Ex 26 USC §408
Roth IRA
Administration, Ed §24950.5
Operating account
Deferred compensation plans, Ed §24976

INDUSTRIAL ACCIDENT AND ILLNESS LEAVE, Ex Ed §44984

INFLATION PROTECTION
Benefit maintenance generally, Ed §24400 to 24417; 5 CCR §26000. (*See* **BENEFIT MAINTENANCE AND PURCHASING POWER PROTECTION**)

INSURANCE
Fiduciary duty towards members and beneficiaries
Liability insurance for fiduciaries, Ed §22259
Appropriation, Ed §22258
Public pensions and retirement plans, general regulation
Insurance for system or fiduciary
Purchase of insurance, Ex Gov §7511

INSURANCE CODE §770.3
Applicability, Ed §25115

INTEREST
Cash balance benefit program
Minimum interest rate
Accounts, employee and employer
Credits to accounts, Ed §26601, 26602
Declaration of minimum interest rate, Ed §26604
Defined, Ed §26131
Contributions
Collection and reporting procedures
Incorrect contributions
Adjustments, Ed §23009
Delinquency, Ed §23003
Appeal of assessed penalties or interest, Ed §23010
Defined benefit supplement program
Declaration of rate, Ed §25005
Public pensions and retirement plans, general regulation
Loans made by systems, Ex Gov §7509

INTEREST PENALTY, Ed §22321

INTERNAL REVENUE CODE §415
Benefits subject to limitation, Ed §24275
Conflicts with, Ed §22824

INTERNS
Employment of district interns, Ex Ed §44830.3

INTERVENTION
Subrogation
Permissible activities under provisions, Ed §24502

INVESTMENT INFORMATION BANK
Vendor registration and information bank generally, Ed §25100 to 25115. (*See* **VENDOR REGISTRATION AND INFORMATION BANK**)

INVESTMENTS, Ed §22350 to 22364
Board
Authority of board over investments, Ed §22203
Investment officers and portfolio managers
Civil service appointment of investment officers, Ed §22212.5
Compensation for certain investment officers, Ed §22212.5
Departure from position, restrictions on subsequent employment, Ed §22212.5
Public disclosure of investment transactions, Ed §22203.5
Rollcall vote on investment decisions, Ed §22203.5
Campaign contributions and investment relationships
Campaign disclosures generally, Ex Gov §84200.5 to 84225
Generally, 5 CCR §24010 to 24013. (*See* **CAMPAIGN CONTRIBUTIONS AND INVESTMENT RELATIONSHIPS**)
Contracting for investment services, Ed §22352
Closed sessions to consider vendors and contractors, Ed §22363
Communications with interested parties, Ed §22364
Custodian services
Bank or trust company providing, Ed §22359
Freedom of Information Act
Exemption of public records from disclosure
Alternative investments invested in by public funds, Ex Gov §6254.26
Guidelines for board investments, Ed §22362
Home loan program
Authorized investments, Ed §22360
Hundred percent residential financing, procedures to obtain, Ed §22360.5
Investment advisers
Defined, Ed §22143
Separate individual advisers, Ed §22353
Legislation affecting investment strategy
Analysis of asset and liability implications, Ed §22330
Legislative findings and intent, Ed §22350, 22351
Managers
Definition of investment manager, Ed §22143
Duties of investment managers, Ed §22354
Fiduciary duty towards members and beneficiaries
Breach by investment manager
Imputation to board members or officers, Ed §22257
Natural disaster victims
Home repair or rebuilding
Loans from retirement fund, Ed §22361
Public employees' retirement system (PERS)
Board of administration
Investment staff of board serving teachers system, Ed §22355
Cooperation between PERS and teachers' retirement system, Ex Gov §7515
Confidentiality maintained while cooperating, Ex Gov §7516

INVESTMENTS—Cont'd
Public pensions and retirement plans, general regulation
Cooperation between PERS and teachers' retirement system, Ex Gov §7515
Confidentiality maintained while cooperating, Ex Gov §7516
Financial institutions
International financial institutions, obligations of, Ex Gov §7514.1
Foreign government guarantee of bonds or other debt, Ex Gov §7514
Iran
Public Divest from Iran Act, Ex Gov §7513.7
Northern Ireland, companies doing business in
Nondiscrimination, Ex Gov §7513.5
Real property, Ex Gov §7510
Sudan
Prohibition on investments in Sudan, Ex Gov §7513.6
Reduction of book value of securities, Ed §22356
Return on investments
Defined, Ed §22168
Deposits to teachers' retirement fund, Ed §22401
Surplus property
Employer surplus property
Board investments, Ed §22261
Vendors
Closed sessions to consider, Ed §22363
Communications with interested parties, Ed §22364
Vendor registration and information bank generally, Ed §25100 to 25115. (*See* **VENDOR REGISTRATION AND INFORMATION BANK**)

IRA (INDIVIDUAL RETIREMENT ACCOUNTS)
Income tax, federal, Ex 26 USC §408
Roth IRA
Administration, Ed §24950.5
Operating account
Deferred compensation plans, Ed §24976

IRAN
Public pensions and retirement plans, general regulation
Investments
Public Divest from Iran Act, Ex Gov §7513.7

IRAN CONTRACTING ACT OF 2010
Definitions, Ex PubCon §2202, 2202.5
Investment activities
Certification regarding, Ex PubCon §2204
Fines and civil penalties, Ex PubCon §2205
Defined, Ex PubCon §2202.5
Ineligibility to contract, Ex PubCon §2203
Legislative findings, Ex PubCon §2201
Preemption of local provisions, Ex PubCon §2206
Reports, Ex PubCon §2207
Severability of provisions, Ex PubCon §2208

J

JOINDER
Community property
Joinder of plan, Ed §22656
Cash balance benefit program, Ed §27407
Subrogation
Permissible activities under provisions, Ed §24502

JUDGMENTS
Clerical mistakes in court proceedings
Correction, Ex CCP §473

L

LAND BANK ACT
School land bank, Ex PubRes §8700 to 8723

LATE PAYMENTS
Interest on late payments, Ed §22322
Reporting, Ed §22322

LEASING OF EMPLOYEES
Income tax, federal, Ex 26 USC §414

LEAVES OF ABSENCE
Boards, commissions, etc, service on, Ex Ed §44987.3
Employee organizations, service as officer, Ex Ed §44987
Industrial accident and illness leave, Ex Ed §44984
Maternity leave, Ed §22803
Pregnancy and childbirth, Ex Ed §44965
Sick leave
Service credit, accumulated and unused leave, Ed §22717
Billing employers, Ed §22718
Chief executive officer, delegation of powers as to program, 5 CCR §23005
Excess days, determination, Ed §22724
Final compensation, effect on, Ed §22720
Payment for accumulated sick leave, effect on service credit, Ed §22721
Reinstated employees
Effect of reinstatement, Ed §22719
Study and travel, Ex Ed §44966
Compensation during leave, Ex Ed §44968, 44968.5
Default in service upon return, reduction in payment, Ex Ed §44970
Payment for leave time, manner, Ex Ed §44969
Service during leave, Ex Ed §44968
Time qualifications, Ex Ed §44967

LEGAL SEPARATION
Community property
Cash balance benefit program, Ed §27400 to 27413. (*See* **CASH BALANCE BENEFIT PROGRAM**)
Generally, Ed §22650 to 22666. (*See* **COMMUNITY PROPERTY**)
Option elections
Cancellation of options, Ed §24305

LIENS
Subrogation
Permissible activities under provisions, Ed §24502

LIMITATION OF ACTIONS
Application of limitation periods, Ed §22008
Cash balance benefit program
Errors and omissions, adjustment
Limitations period, Ed §26702
Subrogation, Ed §24505

LIMITED-TERM DISABILITY BENEFIT COVERAGE A, Ed §24004

LIMITED-TERM DISABILITY BENEFIT COVERAGE B, Ed §24104

LOBBYIST REGISTRATION
Public pensions and retirement plans, general regulation
Definitions, Ex Gov §82039
Placement agent regulation, Ex Gov §7513.86
Contractual services provided by placement agent
Fees not prohibited, Ex Gov §86206
PUC proceedings as ratemaking and quasi-legislative, Ex Gov §82002

LOCAL SERVICE CREDIT, Ed §24751

LOCAL SYSTEMS
Los Angeles unified school district plan, Ed §24750, 24751
San Francisco local system, Ed §24700 to 24706

LONGEVITY BONUS, Ed §24203.6

LOS ANGELES UNIFIED SCHOOL DISTRICT PLAN, Ed §24750, 24751
Refunded contributions and refunded permanent fund contributions taken, Ed §24751
Refunded contributions for members with permanent fund contributions, Ed §24750

LOSS OF PAYMENT
Warrants
Duplicate warrant, issuance on proof of loss, Ed §24605

LUMP SUM PAYMENT, Ed §26905

M

MAIL
Methods of deposit in account, Ed §24604

MAINTENANCE OF BENEFITS, Ed §24400 to 24417; 5 CCR §26000. (*See* BENEFIT MAINTENANCE AND PURCHASING POWER PROTECTION)

MANDATORY FURLOUGHS
Service credit
Effect of mandatory furloughs, Ed §22708

MATERNITY LEAVE, Ed §22803

MEDICAL EXAMINATIONS
Disability allowance
Requiring examination, Ed §24003, 24013
Disability retirement
Pre-1972 benefits, Ed §23401
Requiring examination, Ed §24103, 24112

MEDICARE ENROLLMENT
Federal old age and survivors insurance
Teachers' retirement plan, Medicare coverage through, Ex Gov §22156
Health and welfare benefits
Enrollment
Prerequisites, Ex Ed §7000.3

MEDICARE PREMIUM PAYMENT PROGRAM, Ed §25940 to 25955. (*See* HEALTH CARE BENEFITS PROGRAM)

MEMBERS
Applications
Spouses
Signatures, Ed §22453
Refusal to sign, Ed §22454
Birth date
Proof, Ed §22451.5
Withholding benefit payments pending receipt of proof, Ed §22451.7
Changes in employment
Effect, Ed §22508
Election of retirement system, Ed §22508.5
Notice of right of election, Ed §22509
Procedure to effect election, Ed §22509
Subsequent employment, Ed §22508.6
Community property
Eligibility determinations, Ed §22665
Coverage by qualified retirement plan
Employer to provide opportunity for membership, Ed §22455.5
Duration of membership obligations, Ed §22007
Election of retirement system, Ed §22508.5
Notice of right to elect, Ed §22509
Procedure to effect election, Ed §22509
Subsequent employment, Ed §22508.6
Transfer to PERS, Ed §22510
Continuity of service, effect of transfer, Ed §22512
Effect of electing not to transfer, Ed §22511
Nonvested members, tacking of service to attain vested status, Ed §22514
Vested members, retention of survivor and disability benefits, Ed §22513
Exchange teachers
Exclusions from membership
Out of state exchange or sojourn teachers, Ed §22601
Exclusions from membership, Ed §22601 to 22604
Exchange teachers from out of state, Ed §22601
Part-time employees, Ed §22601.5
Hourly or daily basis, Ed §22604
Persons not excluded, Ed §22516
Sojourn teachers from out of state, Ed §22601
Substitute employees, Ed §22602
Full-time employees
Status as members, Ed §22501
Health care benefits program
Definition of member, Ed §25925

MEMBERS—Cont'd
Information affecting status
Compensation, Ed §22458
Contents, Ed §22451
Employers, information provided by, Ed §22456
Death, employment, resignation or discharge
Notice to board, Ed §22457
Employing agency and county superintendent to supply, Ed §22455
Failure of members to provide
Withholding of salary, Ed §22459
Providing to board, Ed §22450
Leaving employment
Less than 5 years credited service
Notice to employee of benefits, Ed §22460
Military service
USERRA, benefits for reemployed members, Ed §22850 to 22856
Part-time employees
Daily basis, Ed §22504
Exclusions from membership, Ed §22604
Election to join plan, Ed §22515
Eligibility for membership, Ed §22502
Exclusions from membership, Ed §22601.5
Hourly basis, Ed §22504
Exclusions from membership, Ed §22604
Payments due from members
Failure of members to pay
Withholding of salary, Ed §22459
Reemployment of retired members
Employer obligation upon reemployment, Ed §22461
Right to internal informal appeal of benefit or obligation
Administrative hearing, 5 CCR §27103
Administrative remedy for audits, 5 CCR §27102
Administrative remedy for benefits and services, 5 CCR §27101
Definitions, 5 CCR §27100
San Francisco local system
Membership in plan, Ed §24700
Sojourn teachers
Exclusions from membership
Out of state exchange or sojourn teachers, Ed §22601
Status of members as of June 30, 1996, Ed §22500
Substitute employees
Election to join plan, Ed §22515
Exclusions from membership, Ed §22602
Status as members, Ed §22503

MEMORANDA OF UNDERSTANDING
Effect of memoranda, Ed §22004

MERCHANT MARINE
Service credit
Permissive and additional service credit, Ed §22806

MIDCAREER RETIREMENT INFORMATION PROGRAM, Ed §22303.5

MILITARY SERVICE
Income tax, federal
Differential play for members on active duty, Ex 26 USC §414
USERRA, benefits for reemployed members
Tax consequences
Effect of adverse tax consequences, Ed §22856
Service credit
Deceased members
Computation, Ed §22853.5
Permissive and additional service credit, Ed §22805, 22806
Contribution exemption, Ed §22808
Extension of military service, Ed §22807
USERRA, benefits for reemployed members, Ed §22850 to 22856
Cash balance benefit program, Ed §28000 to 28006. (*See* **CASH BALANCE BENEFIT PROGRAM**)
Compensation earnable
Computation, Ed §22853
Contributions
Employer liability, Ed §22852
Definitions, Ed §22850
Disqualification from benefits, Ed §22855
Five years, absence greater than
Effect, Ed §22854
Legislative intent, Ed §22850
Same employer, return to
Calculation of benefits, Ed §22851
Tax consequences
Effect of adverse tax consequences, Ed §22856

MILITARY SERVICE (CONTRIBUTION EXEMPTION), Ed §22808

MINIMUM GUARANTEE, Ed §24410.6

MUNICIPAL PENSION AND RETIREMENT SYSTEMS
Forfeiture of position for certain convictions, Ex Gov §7522.70

N

NATURAL DISASTERS
Home repair or rebuilding
Loans from retirement fund, Ed §22361

NONMEMBER REGISTERED DOMESTIC PARTNERS
Community property purposes, Ed §22651
Defined benefit supplement program purposes, Ed §25000.9

NONMEMBER SPOUSE
Community property purposes, Ed §22651
Defined benefit supplement program purposes, Ed §25000.9

NONPARTICIPANT REGISTERED DOMESTIC PARTNERS, Ed §27401

NONPARTICIPANT SPOUSE, Ed §27401

NORTHERN IRELAND
Public pensions and retirement plans, general regulation
Investments in companies doing business in Northern Ireland
Nondiscrimination, Ex Gov §7513.5

O

OASI. (*See* FEDERAL OLD AGE AND SURVIVORS INSURANCE)

OLD AGE AND SURVIVORS INSURANCE. (*See* FEDERAL OLD AGE AND SURVIVORS INSURANCE)

OMBUDSMAN
Duties, Ed §22302
Established, Ed §22302
Purpose, Ed §22302

ONE-YEAR
Determination of final compensation, Ed §22134.5

OPEN MEETINGS
Closed sessions
Investment services, contracting for
Closed sessions to consider vendors and contractors, Ed §22363
Public employees, issues relating to, Ex Gov §11126

OPTION ELECTIONS, Ed §24300 to 24313
Available options, Ed §24300
January 1, 2007, availability on, Ed §24300.1
Beneficiaries
Death, Ed §24300.5
New beneficiary designation if beneficiary predeceases member, Ed §24306
Retirement allowance without modification, Ed §24313
Spouse, designation as new beneficiary, Ed §24305.5
Unmarried retirees
Marriage or registration of domestic partnership
Authority to elect, Ed §24300.6
Benefit maintenance
Applicability of benefit improvement factor, Ed §24402
Minimum annual allowance, Ed §24410.5, 24410.6
Cancellation
Preretirement election, Ed §24309
Reelection, right of, Ed §24310
Change of options, Ed §24306.5, 24306.7
Preretirement election, Ed §24309, 24311
Availability of options on January 1, 2007, change without reduction, Ed §24312.1
Temporary opportunity to change without reduction, Ed §24312
Retired members, Ed §24300.2
Death prior to retirement
Preretirement election
Allowances, Ed §24307
Defined benefit supplement program
Joint and survivor annuity
Change of annuity or beneficiary, Ed §24305.3
Retirement benefits under program
Election of method of distribution, Ed §25011
Disability retirement allowance, Ed §24301
Dissolution of marriage
Cancellation of options, Ed §24305
Joint and survivor annuity
Change of annuity or beneficiary, Ed §24305.3
Listing of options
January 1, 2007, availability on, Ed §24300.1
Modification of allowance
Preretirement election, Ed §24307.5
Preretirement election, Ed §24307
Cancellation, Ed §24309
Reelection, right of, Ed §24310
Change, Ed §24309, 24311
Availability of options on January 1, 2007, change without reduction, Ed §24312.1
Temporary opportunity to change without reduction, Ed §24312
Modification of allowance, Ed §24307.5
Other benefits, effect of election, Ed §24308
Reelection following cancellation, Ed §24310
Termination of disability retirement allowance
Reinstatement, effect on options, Ed §24304
Termination of service retirement allowance
Reinstatement, effect on options already elected, Ed §24302, 24303
Unmarried retirees
Marriage or registration of domestic partnership
Authority to elect, Ed §24300.6

OTHER RETIREMENT SYSTEMS
Membership, Ed §22115.2
Retirement, Ed §22115.5

OTHER RETIREMENT SYSTEMS, MEMBERSHIP, Ed §22115.2

OTHER RETIREMENT SYSTEMS, RETIREMENT, Ed §22115.5

OTHER STATES
Board
Agreements of board with other states, Ed §22205
Exclusions from membership
Exchange or sojourn teachers from out of state, Ed §22601
Service credit
Out-of-state service credit, Ed §22820 to 22826. (*See* **SERVICE CREDIT**)

OUT-OF-STATE SERVICE CREDIT, Ed §22821

P

PARENTS
Federal old age and survivors insurance
Parent's benefits, Ex 42 USC §402

PARTIAL LUMP-SUM, Ed §24221

PART-TIME OR TEMPORARY EMPLOYEES
Cash balance benefit program
Community college district temporary employees
Eligibility, Ed §26400
Election to become participant for creditable service, Ed §26401
Eligibility, Ed §26400
Community college employees
Cash balance benefit program
Temporary employees of community college district
Eligibility, Ed §26400
Classification of certain instructors, Ex Ed §87482.5
Reduction in workload to part-time, Ex Ed §87483
Daily basis, Ed §22504
Exclusions from membership, Ed §22604
Election to join plan, Ed §22515
Eligibility for membership, Ed §22502
Exclusions from membership, Ed §22601.5
Hourly basis, Ed §22504
Exclusions from membership, Ed §22604
Part-time basis
Defined, Ed §22106.5
Probationary nature of temporary employment, Ex Ed §44917
Reduction of workload to part-time, Ex Ed §44922
Community college employees, Ex Ed §87483
Salary, Ex Ed §45025
Service credit
Permissive and additional service credit
Previous exclusion from membership
Election to purchase credit, Ed §22802
Service retirement
Part-time service credit
Calculation, Ed §24218

PAYMENT CONDITIONS, Ed §23854

PAYMENT OF DEATH BENEFIT TO BENEFICIARY, Ex Pro §13100

PAYMENT OF TERMINATION BENEFIT, Ed §25025

PAYMENT PROCEDURES, Ed §24600 to 24620
Accrual dates, Ed §24600
Children or minors
Custodian receiving payment, Ed §24612
Contributions
Collection from retired members, disabled members or deceased persons, Ed §24615
Death of retired or disabled member
Accrued allowances, payment, Ed §24609, 24610
Effect on payment, Ed §24607
Simultaneous death
Applicable provisions, Ed §24611
Deductions from allowances
Authorization, Ed §24608
Discharge and release from liability
Effect of good faith payment, Ed §24613
Discontinuance of certain district plan
Continued payments to retirees under, Ed §24614
Special reserve
Continuance of special reserve, Ed §24620
Emergency payments, Ed §24602
Estimated allowances
Adjustment of incorrect estimated allowances, Ed §24603
Authorization to pay based on, Ed §24601
Good faith payment
Discharge and release from liability
Effect of good faith payment, Ed §24613
Loss of payment
Warrants
Duplicate warrant, issuance on proof of loss, Ed §24605
Methods of deposit in account, Ed §24604
Overpayments
Collection, Ed §24617
Death benefits
Deduction of overpayment from subsequent payments, Ed §24616
Erroneous information reported by employer, consequences, Ed §24616.5
Debiting or crediting reserves in retirement fund, Ed §24618
Reporting, Ed §24619
Simultaneous death
Applicable provisions, Ed §24611
Termination dates, Ed §24600
Unclaimed warrants, Ed §24606
Underpayments
Debiting or crediting reserves in retirement fund, Ed §24618
Reporting, Ed §24619

PAYROLL
Defined, Ed §22155

PENALTIES
Contributions
Collection and reporting procedures
Appeal of assessed penalties or interest, Ed §23010
Reports to administer provisions
Late or unacceptable reports, Ed §23006
Delinquency, Ed §23003
Iran Contracting Act of 2010, Ex PubCon §2205

PERJURY
Public officers and employees
Forfeiture of rights under retirement system, Ex Gov §7522.70

PERMISSIVE SERVICE, Ed §22801

PERSONAL LEAVE PROGRAMS
Service credit
Inclusion, Ed §22708

PLEADINGS
Amendment of pleadings, Ex CCP §473

POLITICAL REFORM, Ex Gov §82002 to 87314
Applicability of political reform provisions to retirement board elections, Ex Gov §84225
Campaign disclosures
Committee organization, Ex Gov §84101
Filing of campaign statements, Ex Gov §84200.5 to 84225
Copies to be filed, Ex Gov §84215
Preelection statements, Ex Gov §84200.5, 84200.9
Conflicts of interest
Investment management by public officials, Ex Gov §87314
Definitions, Ex Gov §82002 to 82047.3
Election cycle, Ex Gov §85204
Organizational statements
Fee, Ex Gov §84101.5

POST-RETIREMENT EARNINGS LIMITATIONS
Activities of retired members
Compensation, limitations, Ed §24214
California state university
Service by certain retired teachers, Ed §24116

POSTSECONDARY EDUCATION
Audits, Ex Ed §84040.5
California state university. (*See* **CALIFORNIA STATE UNIVERSITY**)
Community college employees. (*See* **COMMUNITY COLLEGE EMPLOYEES**)
University of California retirement system
Public pensions and retirement plans, general regulation
Notice to legislature of proposed changes, Ex Gov §7507.5

PRE-1972 BENEFITS, Ed §23400 to 23404
Effect of legislative revisions from 1971 and 1972, Ed §22003

PREGNANCY AND CHILDBIRTH LEAVE, Ex Ed §44965

PRERETIREMENT ELECTION OF AN OPTION, Ed §24307.5

PRESCRIPTION DRUG PROGRAM
Report to legislature, Ed §25950

PRETAX AND POSTTAX CONTRIBUTIONS
Crediting to defined benefit and defined benefit supplement accounts, Ed §22905

PRISONS
Classes for inmates, Ex Pen §2054

PRIVACY
Financial institutions
Privacy between customers and institutions
Permissible disclosures, Ex Gov §7480

PROBATE
Personal property
Collection or transfer without probate, Ex Pro §13100

PUBLIC CONTRACTS
Annuity contract and custodial accounts
Contracting for services, Ed §24953
Third party administrator, contracting with, Ex Ed §44041.5
Community college employees, Ex Ed §87040.5
Cash balance benefit program
Administration of plan
Third party administration, Ed §26216
Deferred compensation plans
Contracting for services, Ed §24977
Headquarters of system
Applicable procedures, Ed §22379
Investments
Contracting for investment services, Ed §22352
Closed sessions to consider vendors and contractors, Ed §22363
Communications with interested parties, Ed §22364
Iran Contracting Act of 2010, Ex PubCon §2200 to 2208. (*See* **IRAN CONTRACTING ACT OF 2010**)

PUBLIC EMPLOYEES' MEDICAL AND HOSPITAL CARE ACT (PEMHCA)
Health and welfare benefits
Applicability of provisions, Ex Ed §7005
Public school employees health care pool feasibility study, Ex Gov §22849

PUBLIC EMPLOYEES' RETIREMENT SYSTEM (PERS)
Board
Indemnification of members, Ex Gov §16642
Investments
Investment staff of board serving teachers system, Ed §22355
Changes in employment to position covered by PERS
Effect, Ed §22508
Conviction of certain felonies
Forfeiture of rights under retirement system, Ex Gov §7522.70
Cooperation between PERS and teachers' retirement system, Ex Gov §7515
Confidentiality maintained while cooperating, Ex Gov §7516
Direct deposit
Authorized, Ex Gov §21267
Election of retirement system, Ex Gov §20309
Subsequent service of member, Ex Gov §20309.5
Felony convictions
Forfeiture of rights under retirement system, Ex Gov §7522.70
Forfeiture of position
Conviction of crime relating to official duties, Ex Gov §20343
Former officers and employees disqualification
Aiding, advising, consulting or assisting in obtaining award or negotiating contract, Ex Gov §87409
Placement agent
Acceptance of compensation for providing services, Ex Gov §87410

PUBLIC EMPLOYEES' RETIREMENT SYSTEM (PERS)—Cont'd
Former officers and employees disqualification—Cont'd
Representation, appearance or communication, Ex Gov §87408
Investments
Board of administration
Investment staff of board serving teachers system, Ed §22355
Cooperation between PERS and teachers' retirement system, Ex Gov §7515
Confidentiality maintained while cooperating, Ex Gov §7516
Transfer of membership to PERS
Election, Ed §22510
Continuity of service, effect of transfer, Ed §22512
Effect of electing not to transfer, Ed §22511
Nonvested members, tacking of service to attain vested status, Ed §22514
Vested members, retention of survivor and disability benefits, Ed §22513

PUBLIC LANDS
Revenues
Disposition, Ex PubRes §6217.5
School and lieu lands
Reservations, lieu lands, Ex PubRes §7401
Sale of school lands
Exchange of land with United States, Ex PubRes §7303, 7303.5
Indemnity scrip, use of lands for, Ex PubRes §7304
Lands authorized for sale, Ex PubRes §7301
Patent, right to, Ex PubRes §7305
Timber, sale separate from land, Ex PubRes §7306
State Teachers' Retirement Lands Act
Citation, Ex PubRes §6475
Reports, Ex PubRes §6477

PUBLIC MEETINGS
Closed sessions
Investment services, contracting for
Closed sessions to consider vendors and contractors, Ed §22363
Public employees, issues relating to, Ex Gov §11126

PUBLIC PENSIONS AND RETIREMENT PLANS, GENERAL REGULATION, Ex Gov §7500 to 7514.5
Actuarial advisory panel
Impartial and independent information
Duty to provide, Ex Gov §7507.2
Actuarial evaluation of future annual costs
Changes in benefits considered by legislature or local legislative bodies, Ex Gov §7507
Actuarial services, Ex Gov §7504
Audits, Ex Gov §7504
Boards, commissions, etc
Conflicts of interest
Investment management by public officials, Ex Gov §87314
Elections
Applicability of political reform provisions to retirement board elections, Ex Gov §84225
Campaign disclosures
Copies to be filed, Ex Gov §84215
Generally, Ex Gov §84200.5 to 84225
Preelection campaign statements, Ex Gov §84200.9
Election cycle
Defined, Ex Gov §85204
Former members, administrators, officers, etc
Appearances before board to represent persons, 2 year waiting period, Ex Gov §7508.5
Investment products
Providing products that would be assets of funds by board members, Ex Gov §7513.95
Placement agents, regulation, Ex Gov §7513.8 to 7513.9
Retirees of state systems, service on boards, etc, Ex Gov §7508
Conflicts of interest
Investment management by public officials, Ex Gov §87314
Contributions
Sex differential in contribution rate
Remediation, Ex Gov §7500
Credit enhancement programs
Authorized, Ex Gov §7514.3
Direct deposit to financial institution, Ex Gov §7505, 7506
Agreements, Ex Gov §7506.5
External managers
Defined, Ex Gov §82025.3
Financial reports and valuations
Actuarial services, Ex Gov §7504
Annual report by systems, Ex Gov §7503
Review, Ex Gov §7502
Financing of pension obligations of state. (*See* **FINANCING OF PENSION OBLIGATIONS OF STATE**)
Insurance for system or fiduciary
Purchase of insurance, Ex Gov §7511
Interest
Loans made by systems, Ex Gov §7509
Investments
Conflicts of interest
Investment management by public officials, Ex Gov §87314
Cooperation between PERS and teachers' retirement system, Ex Gov §7515
Confidentiality maintained while cooperating, Ex Gov §7516
Financial institutions
International financial institutions, obligations of, Ex Gov §7514.1
Foreign government guarantee of bonds or other debt, Ex Gov §7513.97, 7514
Iran
Public Divest from Iran Act, Ex Gov §7513.7

PUBLIC PENSIONS AND RETIREMENT PLANS, GENERAL REGULATION—Cont'd
Investments—Cont'd
Northern Ireland, companies doing business in Nondiscrimination, Ex Gov §7513.5
Prioritization of investment in in-state infrastructure projects, Ex Gov §7514.2
Real property, Ex Gov §7510
Sudan
Prohibition on investments in Sudan, Ex Gov §7513.6
Legislative intent, Ex Gov §7501
Legislature or local legislative bodies, changes in benefits
Actuarial evaluation of future annual costs, Ex Gov §7507
Loans made by systems
Interest, Ex Gov §7509
Membership in another retirement system
Transitional provisions, Ex Gov §7514.5
Placement agents, regulation, Ex Gov §7513.8 to 7513.9
Campaign contributions by agents
Disclosures, Ex Gov §7513.9
Definitions, Ex Gov §7513.8, 82047.3
Lobbyist registration, Ex Gov §7513.86
Contractual services provided by placement agent
Fees not prohibited, Ex Gov §86206
Payments to agents
Disclosures, Ex Gov §7513.85
Reports by placement agents, Ex Gov §7513.87
Political reform, Ex Gov §82002 to 87314
Applicability of political reform provisions to retirement board elections, Ex Gov §84225
Campaign disclosures
Committee organization, Ex Gov §84101
Filing of campaign statements, Ex Gov §84200.5 to 84225
Copies to be filed, Ex Gov §84215
Preelection statements, Ex Gov §84200.5, 84200.9
Definitions, Ex Gov §82002 to 82047.3
Election cycle, Ex Gov §85204
Public Pension Reform Act of 2013, Ex Gov §7522 to Ex Gov §7522.74
Applicability, Ex Gov §7522.02
Citation of article, Ex Gov §7522
Defined benefit formulas
Limitations, Ex Gov §7522.15
Nonsafety members, Ex Gov §7522.20
Safety members, Ex Gov §7522.25
Teachers' retirement system, formula applicable to new members, Ex Gov §7522.20
Defined benefit pension plan required by provisions, Ex Gov §7522.02
Supplemental defined benefit plan, Ex Gov §7522.18
Definitions, Ex Gov §7522.04
Elected or appointed officers on city councils or county boards of supervisors, Ex Gov §7522.48
Employer contributions, Ex Gov §7522.10
Combination with employee contributions, minimum amount, Ex Gov §7522.52
Equal sharing of normal costs, effect on contribution rates, Ex Gov §7522.30
Suspension of contributions, Ex Gov §7522.52
Employment following retirement
Public employer in same public retirement system, Ex Gov §7522.56
Service on state board or commission, Ex Gov §7522.57
Enhancement of retirement formulas or benefits, Ex Gov §7522.44
Equal sharing of normal costs by employers and employees, Ex Gov §7522.30
Felony convictions arising from performance of official duties
Forfeiture of rights and benefits, Ex Gov §7522.70 to Ex Gov §7522.74
Health benefit vesting schedule
Managerial or supervisory employees, restrictions applicable, Ex Gov §7522.40
Impasse procedures
Prohibited acts of employers offering plans to safety members, Ex Gov §7522.25
Individuals employed by subsequent employer for first time or after specified date, Ex Gov §7522.02
Limitations on defined or combination of defined benefits, Ex Gov §7522.10
Managerial or supervisory employees
Health benefit vesting schedule, restrictions, Ex Gov §7522.40
Prohibited acts of employers offering plans to safety members, Ex Gov §7522.25
Modification of plans, Ex Gov §7522.10
New member retirement benefits
Determination of benefit, Ex Gov §7522.32
Factors in determining retirement benefit, Ex Gov §7522.42
Pensionable compensation, Ex Gov §7522.34
Nonsafety members
Defined benefit formulas for plans offered to, Ex Gov §7522.20
Pensionable compensation
Calculation generally, Ex Gov §7522.10
Defined benefit formulas
Nonsafety members, limitation of compensation used to calculate, Ex Gov §7522.20
Safety members, limitation of compensation used to calculate, Ex Gov §7522.25
New member of retirement system, Ex Gov §7522.34
Postretirement employment
Service on state board or commission, Ex Gov §7522.57
With public employer in same public retirement system, Ex Gov §7522.56
Prohibited acts of employers offering plans to safety members, Ex Gov §7522.25

PUBLIC PENSIONS AND RETIREMENT PLANS, GENERAL REGULATION—Cont'd
Public Pension Reform Act of 2013—Cont'd
Purchase of nonqualified service credit, Ex Gov §7522.46
Reinstatement from retirement
Postretirement employment with public employer in same public retirement system, Ex Gov §7522.56
Replacement benefits for members, survivors or beneficiaries, Ex Gov §7522.43
Safety members
Defined benefit formulas for plans offered to, Ex Gov §7522.25
Industrial disability retirement benefit, Ex Gov §7522.66
Service following retirement on state board or commission, Ex Gov §7522.57
Supplemental defined benefit plan, Ex Gov §7522.18
Suspension of contributions, Ex Gov §7522.52
Teachers' retirement system, formula applicable to new members, Ex Gov §7522.20
Report on system performance
Members, providing to, Ex Gov §7512
Rollovers
Direct rollovers, Ex Gov §7513
Savings and loan associations
Deposits with associations in exchange for residential construction loans, Ex Gov §7520
University of California retirement system
Notice to legislature of proposed changes, Ex Gov §7507.5

PUBLIC RECORDS
Inspection of public records
Exemption of public records from disclosure, Ex Gov §6254
Investments
Alternative investments invested in by public funds, Ex Gov §6254.26

PUBLIC UTILITIES COMMISSION
Proceedings as ratemaking and quasi-legislative for lobbying purposes, Ex Gov §82002

PURCHASING POWER AD HOC INCREASE, Ed §24407

PURCHASING POWER PROTECTION
Benefit maintenance generally, Ed §24400 to 24417; 5 CCR §26000. (*See* **BENEFIT MAINTENANCE AND PURCHASING POWER PROTECTION**)

Q

QUALIFIED DOMESTIC RELATIONS ORDERS
Income tax, federal, Ex 26 USC §414

R

REAL PROPERTY
Public pensions and retirement plans, general regulation
Investments in real property, Ex Gov §7510

RED CROSS
Service credit
Permissive and additional service credit, Ed §22805
Contribution exemption, Ed §22808

REDEPOSIT OF CONTRIBUTIONS, Ed §23200 to 23203. (*See* CONTRIBUTIONS)

REDUCED WORKLOAD PROGRAM, Ed §22713

REEMPLOYMENT (PRIOR TO AGE 60), Ed §26911

REEMPLOYMENT OF RETIRED MEMBERS
Limitation on earnings
Advising member as to, Ed §22461
Reporting earnings, Ed §22461

REFUND OF CONTRIBUTIONS, Ed §23100 to 23107. (*See* CONTRIBUTIONS)

REFUNDS UPON DEATH OF MEMBER
Active death benefits
Family allowance, Ed §23802
Survivor benefits, Ed §23852

REGISTERED DOMESTIC PARTNERS
Defined, Ed §22007.5, 22171
Cash balance plan purposes, Ed §26002.5

REHABILITATION
Disability allowance
Earnings of recipient of disability benefits
Excessive earnings
Participants in rehabilitation program, Ed §24017
Requirement to participate in rehabilitation, Ed §24012
Disability retirement
Requiring participation in rehabilitation, Ed §24111

REINSTATEMENT, Ed §24208

RENEWABLE ENERGY RESOURCES PROGRAM
School land bank, land exchanges, PubRes §8720 to 8723
Approval of proposals, PubRes §8723
Consolidation efforts, PubRes §8722
Definitions, PubRes §8721
Memorandum of agreement, PubRes §8722
Submission of proposals, PubRes §8723

REPLACEMENT BENEFITS PROGRAM, Ed §24250 to 24275
Establishment of program, Ed §24260
Income tax, federal
Reduction of benefit pursuant to federal tax provisions
Restoration, Ed §24270
Legislative intent, Ed §24250
Limitation on benefits, Ed §24275
Purpose of program, Ed §24260
Reduction of benefit pursuant to federal tax provisions
Restoration, Ed §24270
Teachers' replacement benefits program fund, Ed §24255

REPORT ON EROSION OF PURCHASING POWER, Ed §24400

RESIGNATION OF MEMBERS
Notice to board, Ed §22457

RETIREMENT ALLOWANCE
Cancellation
Credits on cancellation of allowances accrued after July 1, 1972, Ed §22328
Classified employees
Recipients of retirement allowance
Eligibility for employment, Ex Ed §45134
Member first hired after specified date, Ed §24202.6 to Ed §24202.8
Pre-1972 benefits
Termination
Credits on termination, Ed §23404
Reduction, Ed §24202.5
Retired participants, Ed §24202.7

RETIREMENT BOARD, Ed §22200 to 22228. (*See* BOARD)

RETIREMENT, EFFECT OF, Ex Ed §44907

RETIREMENT INCENTIVES
Certificated or academic employees, Ed §22714
CSU employees, Ed §22716
State employees, Ed §22715

RETURN OF CONTRIBUTIONS AND INTEREST, Ed §23881

REVOLVING DOOR
Investments
Officers and portfolio managers
Departure from position, restrictions on subsequent employment, Ed §22212.5
Public pensions and retirement plans, boards, commissions, etc
Former members, administrators, officers, etc
Appearances before board to represent persons, 2 year waiting period, Ex Gov §7508.5

RIGHT OF ELECTION
Changes in employment, Ed §22508
Election of retirement system generally. (*See* **ELECTION OF RETIREMENT SYSTEM**)

RIGHT TO ELECT DEFINED BENEFIT MEMBERSHIP, Ed §22455.5, 22508.6

RIGHT TO REDEPOSIT, Ed §23201

ROTH IRA
Administration, Ed §24950.5
Operating account
Deferred compensation plans, Ed §24976

S

SABBATICAL
Leaves of absence for study and travel, Ex Ed §44966
Compensation during leave, Ex Ed §44968, 44968.5
Default in service upon return, reduction in payment, Ex Ed §44970
Payment for leave time, manner, Ex Ed §44969
Service during leave, Ex Ed §44968
Time qualifications, Ex Ed §44967

SALARY REDUCTION PROGRAMS
Contributions
Employee contributions
Pick-up of contributions
State pick-up via salary reduction program, Ed §22904

SAN FRANCISCO LOCAL SYSTEM, Ed §24700 to 24706
Classified service in local system
No transfer, Ed §24703
Concurrent certificated service, Ed §24701
Other states, performance in, Ed §24705
Concurrent retirement benefits, Ed §24704
Other states, performance in, Ed §24705
Membership in plan, Ed §24700
Minimum unmodified allowance
Increase, calculation, Ed §24702
Refunded contributions and refunded permanent fund contributions taken, Ed §24751
Refunded contributions for members with permanent fund contributions, Ed §24750
Retirees as of June 30, 1972
Status, Ed §24702
Service retirement
Local system retirees, Ed §24219
Subvention
Payments for subventions required prior to July 1, 1972, Ed §24706
Retirees as of June 30, 1972, Ed §24702
Uncertificated service in local system
No transfer, Ed §24703

SAVINGS AND LOAN ASSOCIATIONS
Financial institutions generally. (*See* **FINANCIAL INSTITUTIONS**)
Public pensions and retirement plans, general regulation
Deposits with associations in exchange for residential construction loans, Ex Gov §7520

SAVINGS CLAUSE, Ed §24217

SCHOOL AND LIEU LANDS
Reservations, lieu lands, Ex PubRes §7401
Sale of school lands
Exchange of land with United States, Ex PubRes §7303, 7303.5
Indemnity scrip, use of lands for, Ex PubRes §7304
Lands authorized for sale, Ex PubRes §7301
Patent, right to, Ex PubRes §7305
School land bank, Ex PubRes §8700 to 8723
Timber, sale separate from land, Ex PubRes §7306
State Teachers' Retirement Lands Act
Citation, Ex PubRes §6475
Reports, Ex PubRes §6477

SCHOOL CURRICULUM AND INSTRUCTIONAL PROGRAMS
Local educational agency intervention
Early warning program, Ex Ed §52055.57, 52055.59

SCHOOL DISTRICTS
All school districts
Defined, Ex Ed §80
Any school district
Defined, Ex Ed §80
Budgets
Approval recommendation accepted, Ex Ed §42127.3
Budget review committee formed, Ex Ed §42127.l
Computation of tax rates, Ex Ed §42127
Contents, Ex Ed §42122
County Office Fiscal Crisis and Management Assistance Team established, Ex Ed §42127.8
Designated fund balance, Ex Ed §42125
District budget changes, appeal of, Ex Ed §42127.9
Form of budget, Ex Ed §42126
Formulation and adoption, Ex Ed §42127
General reserve, Ex Ed §42124
Last adopted budget
Continued operation under, Ex Ed §42127.4
Negative unrestricted fund balance or negative cash balance, Ex Ed §42127.5
Neglect or refusal to make budget, Ex Ed §42128
Notice of fiscal distress, Ex Ed §42127.6
Proposed alternative budget, Ex Ed §42127.3
Public review, Ex Ed §42127
Regional review committee, Ex Ed §42127.l
Reports, Ex Ed §42129
Revenues and expenses itemized, Ex Ed §42123
Review of proposed budget and recommendations, Ex Ed §42127.2
Emergency apportionments from state school fund
Trustee to monitor and review district as condition for acceptance of funds, Ex Ed §41320.1
Employers generally. (*See* **EMPLOYERS/EMPLOYING AGENCIES**)
Health and welfare benefits
Definition of school district, Ex Ed §7004
Interns
Employment of district interns, Ex Ed §44830.3
Local educational agency intervention
Early warning program, Ex Ed §52055.57, 52055.59

SCHOOL LAND BANK
Acceptance of conveyances, Ex PubRes §8707
Acquisitions
Costs, Ex PubRes §8709
Eminent domain, Ex PubRes §8703
Mineral rights, Ex PubRes §8704
Trustee, Ex PubRes §8712
Definitions, Ex PubRes §8702
Deposits of money, Ex PubRes §8708
Fund
Creation, Ex PubRes §8711
Jurisdiction, Ex PubRes §8705
Gifts, Ex PubRes §8716
Legislative findings, Ex PubRes §8701
Management and remediation costs, Ex PubRes §8710
Nonexclusivity of provisions, Ex PubRes §8715
Open meetings, Ex PubRes §8713
Renewable energy-related projects, land exchanges for, PubRes §8720 to 8723
Approval of proposals, PubRes §8723
Consolidation efforts, PubRes §8722
Definitions, PubRes §8721
Legislative findings, PubRes §8720
Memorandum of agreement, PubRes §8722
Submission of proposals, PubRes §8723
Short title, Ex PubRes §8700
Sovereign capacity, Ex PubRes §8706
Trustee
Acquisitions, Ex PubRes §8712
Gifts, Ex PubRes §8716
Powers, Ex PubRes §8711

SCHOOL LANDS INCOME, Ed §24412

SCHOOL MONTH, Ex Ed §37201

SCHOOL YEAR, Ex Ed §37200

SERVICE CREDIT, Ed §22700 to 22826
Additional credit
Incentives to encourage retirement, Ed §22714, 22715; Ex Ed §44929
Permissive and additional service credit generally, Ed §22800 to 22811. (*See* within this heading, "Permissive and additional service credit")
Computation
Applicability of provisions, Ed §22700
Education leave
Accumulated and unused leave, Ed §22717.5
General rule, Ed §22703
July 1, 1972
Effect of date on computation, Ed §22701
Sick leave
Accumulated and unused leave, Ed §22717
Year-round or continuous programs, Ed §22704
Contributions
Refunds
Forfeiture of rights to service credit benefit, Ed §23101
Education leave
Accumulated and unused leave, Ed §22717.5
Employee organizations
Leave to serve as elected officer
Inclusion of service, Ed §22711
Exchange teachers
Inclusion of service, Ed §22712
Exclusions
Other retirement systems, service covered by, Ed §22705
Receiving retirement or disability allowance, Ed §22706
San Francisco systems, Ed §22705.5
Excuse from performance
Inclusion upon payment of contributions, Ed §22710
Furloughs
Mandatory furloughs, effect, Ed §22708
Less than 5 years credited service
Leaving employment, notice of benefits, Ed §22460

SERVICE CREDIT—Cont'd
Military service
Deceased members
Computation, Ed §22853.5
Nonqualifying service
Inclusion of service that does not qualify person for membership, Ed §22712.5
Other retirement systems
Exclusions, Ed §22705
San Francisco systems, Ed §22705.5
Out-of-state service credit, Ed §22820 to 22829
Internal revenue code, conflicts with, Ed §22824
Nonqualified service
Election of credit for nonqualified service, Ed §22826
Operative date of provisions, Ed §22825
Purchase
Contributions, payment, Ed §22823, 22829
Request to purchase, Ed §22821
Right to purchase, Ed §22820, 22827
Time and manner of request for purchase, Ed §22828
Request to purchase, Ed §22821
Nonqualified service, Ed §22826
Time for request, Ed §22822
Time for election, Ed §22822
Use
Limits, Ed §22820
Part-time service
Workload reduction while receiving full-time credit, regulations permitting, Ed §22713
Permissive and additional service credit, Ed §22800 to 22811
Claims
Corroboration, Ed §22800
Coverage under defined benefit program elected, Ed §22801.5
Election to purchase additional service credits, Ed §22801
Eligible service, Ed §22803
Incentives to encourage retirement, Ed §22714, 22715; Ex Ed §44929
Community college employees, Ex Ed §87488
July 1, 1944, service performed before, Ed §22810
Merchant marine service, Ed §22806
Military service, Ed §22805, 22806
Contribution exemption, Ed §22808
Extension of military service, Ed §22807
Previous exclusion from membership
Election to purchase credit, Ed §22802
Red Cross service, Ed §22805
Contribution exemption, Ed §22808
Transfer of funds into teachers' retirement fund to purchase credit, Ed §22811
War relocation center service, Ed §22809
War with foreign power
Conditions when war exists, Ed §22804
Personal leave program
Inclusion, Ed §22708
Prevention from performing service
Inclusion, Ed §22709
Purchase of additional service credit
Community property
Nonmember spouse, Ed §22663
Sick leave
Accumulated and unused leave, Ed §22717
Billing employers, Ed §22718
Chief executive officer, delegation of powers as to program, 5 CCR §23005
Excess days, determination, Ed §22724
Final compensation, effect on, Ed §22720
Payment for accumulated sick leave, effect on service credit, Ed §22721
Reinstated employees
Effect of reinstatement, Ed §22719
Subsequent service
Unpaid basis
Effect on service credit, Ed §22716
Time required for credit, 5 CCR §20521
Year-round or continuous programs
Computation, Ed §22704

SERVICE CREDIT AWARDED TO NONMEMBER SPOUSE, Ed §22665

SERVICE CREDIT FOR UNUSED EDUCATIONAL LEAVE
State employees, Ed §22717.5

SERVICE CREDIT PURCHASES, Ed §22803

SERVICE RETIREMENT, Ed §24201 to 24221
Activities of retired members, Ed §24214
California state university
Service by retired teachers, Ed §24215
Exemptions from restrictions, Ed §24216.6
Limitation on postretirement compensation, Ed §24214.5
Allowance pending disability determination of disability
Application for service retirement allowance, Ed §24201.5
Return to employment subject to coverage, Ed §24211
Annuity retirement allowance
Option to take under prior provision, Ed §24217
Application for retirement, Ed §24201
Application for retirement allowance pending disability determination, Ed §24201.5
Benefit maintenance
Applicability of benefit improvement factor, Ed §24402
Checks, payment, Ed §22319
Interest for late payment, Ed §22321
Reporting late payment, Ed §22322
Classified employees
Recipients of retirement allowance
Eligibility for employment, Ex Ed §45134
Community property
Nonmember spouse
Allowance and benefit, right to, Ed §22664
Compensation of retired members, Ed §24214
Exemptions from limits, Ed §24216.6
Class size reduction program, Ed §24216.5

SERVICE RETIREMENT—Cont'd
Compensation of retired members—Cont'd
Exemptions from limits—Cont'd
Emergencies, Ed §24216
Limitation on postretirement compensation, Ed §24214.5
Composition of allowance, Ed §24202
Option to take under prior provision, Ed §24217
Computation
Increase of percentage of final compensation, Ed §24203.5
Service after specified date, Ed §24202.5
Increase in monthly allowance, Ed §24203.6
Contributions
Retired members, Ed §24214
Exemptions, Ed §24216.6
Early retirement, Ed §24203
Credit for additional years to encourage retirement, Ex Ed §44929
Community college employees, Ex Ed §87488
Incentives to encourage retirement, Ed §22714, 22715
Partial allowance with reversion to full allowance for normal retirement age, Ed §24205
Eligibility, Ed §24201
Allowance, Ed §24204
Increases
Monthly allowance, Ed §24203.6
Percentage of final compensation, Ed §24203.5
Local system retirees, Ed §24219
Lump sum payment
Election to take lump sum and reduced monthly allowance, Ed §24221
Minimum allowance
Termination of allowance and subsequent retirement, Ed §24207
Unmodified, Ed §24206
Part-time service credit
Calculation, Ed §24218
Reduction of retirement allowance
Postretirement compensation limitation
Enforcement by reduction, Ed §24214.5
Reinstatement
Retirement for service following, Ed §24209
Creditable service for 2 or more years
Benefits, Ed §24209.3
Return to employment
Allowance to member granted disability allowance who returns subject to coverage, Ed §24211
Service after specified date
Computation, Ed §24202.5
Termination of allowance
Minimum allowance
Termination of allowance and subsequent retirement, Ed §24207
No return to employment
Calculation of service retirement, Ed §24212
Option elections
Reinstatement, effect on options already elected, Ed §24302, 24303
Procedure, Ed §24208
Retirement age reached, Ed §24213
Termination of disability retirement
Retirement for service following prior terminated disability retirement, Ed §24210

SERVICE RETIREMENT PENDING DISABILITY, Ed §24201.5

SETTLEMENTS
Subrogation
Authority to compromise claims, Ed §24503

SICK LEAVE
Service credit
Accumulated and unused leave, Ed §22717
Billing employers, Ed §22718
Chief executive officer, delegation of powers as to program, 5 CCR §23005
Excess days, determination, Ed §22724
Final compensation, effect on, Ed §22720
Payment for accumulated sick leave, effect on service credit, Ed §22721
Reinstated employees
Effect of reinstatement, Ed §22719
Employer's contributions, Ed §22951

SICK LEAVE SERVICE CREDIT, Ed §22951

SIGNATURES
Cash balance benefit program
Spouse, Ed §26703
Action upon refusal of spouse to sign, Ed §26704
Members, applications
Spouses, Ed §22453
Refusal to sign, Ed §22454
Validity, Ed §22011

SIMULTANEOUS DEATH
Payment procedures
Applicable provisions, Ed §24611
Cash balance benefit program, Ed §27102

SMALL AMOUNTS
Dispensing with payments or collections, Ed §22404

SOCIAL SECURITY
Cash balance benefit program
Social security coverage
Election, Ed §26400

SOJOURN TEACHERS
Certificated employees, Ex Ed §44856
Exclusions from membership
Out of state exchange or sojourn teachers, Ed §22601

SPOUSE
Cash balance benefit program
Term "spouse" includes registered domestic partner, Ed §26002.5

STATE CONTRIBUTIONS
Employer and state contributions, Ed §22950 to 22956. (*See* **CONTRIBUTIONS**)

STATE EDUCATIONAL EMPLOYEES: 7/1/91 THROUGH 9/11/00
Elections, Ed §22801.5

STATE SCHOOL FUND
Emergency apportionments
Conditions for acceptance, Ex Ed §41320.1

STATE SPECIAL SCHOOLS
Pupil rights and responsibilities, Ex Ed §48927

STATUS OF MEMBERS AS OF JUNE 30, 1996, Ed §22500

STATUTE OF LIMITATIONS
Application of limitation periods, Ed §22008
Cash balance benefit program
Errors and omissions, adjustment
Limitations period, Ed §26702
Subrogation, Ed §24505

STATUTORY CONSTRUCTION
Cash balance benefit program
Severability of provisions, Ed §26003
Severability of provisions, Ed §22009

STUDY AND TRAVEL LEAVE, Ex Ed §44966
Compensation during leave, Ex Ed §44968, 44968.5
Default in service upon return, reduction in payment, Ex Ed §44970
Payment for leave time, manner, Ex Ed §44969
Service during leave, Ex Ed §44968
Time qualifications, Ex Ed §44967

SUBPOENAS
Witnesses, Ed §22220

SUBROGATION, Ed §24500 to 24505
Contracting to recover, Ed §24501
Limitation of actions, Ed §24505
Permissible activities under provisions, Ed §24502
Recoveries
Allocation, Ed §24504
Settlements
Authority to compromise claims, Ed §24503
Third parties
Recovery from on behalf of plan, Ed §24500

SUBSTANCE ABUSE
Disability allowance
Limitation of allowance, Ed §24004
Disability retirement
Limitation of retirement period, Ed §24104

SUBSTITUTE EMPLOYEES
Classification of substitute employees, Ex Ed §44917
Community college employees
Effect of service as substitute, Ex Ed §87482.5
Election to join plan, Ed §22515
Exclusions from membership, Ed §22602
Service credit
Permissive and additional service credit
Previous exclusion from membership
Election to purchase credit, Ed §22802
Status as members, Ed §22503

SUDAN
Public pensions and retirement plans, general regulation
Investments
Prohibition on investments in Sudan, Ex Gov §7513.6

SUPPLEMENTAL BENEFIT MAINTENANCE ACCOUNT
Board's authority upon certain findings, Ed §24416
Continuous appropriation, Ed §22954
Increase in contribution rate, Ed §22951.5
Quadrennial evaluation and report as to system's ability to protect purchasing power, Ed §22954.1

SUPPLEMENTAL BENEFITS FOR DEFINED BENEFIT PROGRAM
Defined benefit supplement program generally, Ed §25000 to 25025. (*See* **DEFINED BENEFIT SUPPLEMENT PROGRAM**)

SURVIVOR BENEFITS
Continuation of certain survivor benefits, Ed §23403
Death benefits, active, Ed §23850 to 23859. (*See* **DEATH BENEFITS, ACTIVE**)
Federal old age and survivors insurance, Ex 42 USC §402

T

TAXATION OF INCOME
California. (*See* **INCOME TAX, CALIFORNIA**)
Federal. (*See* **INCOME TAX, FEDERAL**)

TAX EXEMPTIONS
Right to receive pension, allowance, benefit, etc, Ed §22005

TAX SHELTERED ANNUITY CONTRIBUTIONS
Discontinuation of former program, 5 CCR §20554.1
Establishment of program, 5 CCR §20554
Teachers tax-sheltered annuity fund
Disbursements from fund, Ed §22335

TEACHERS' HEALTH BENEFITS FUND, Ed §25930

TEACHERS' RETIREMENT DEVELOPMENT FUND, Ed §22307.5

TEACHERS' RETIREMENT FUND
Cash balance benefit program
Definition of fund, Ed §26128
Transfer of funds to plan, Ed §22403
Composition of fund, Ed §22400
Deposits to fund, Ed §22400
Returns on investment, Ed §22401
Disbursements from fund, Ed §22400
Establishment and control of funds, Ed §22400 to 22404
Interest
Uncredited interest
Use, Ed §22402
Returns on investment
Deposits, Ed §22401
Small amounts
Dispensing with payments or collections, Ed §22404
State lands, revenues
Crediting fund, Ex PubRes §6217.5

TEACHERS TAX-SHELTERED ANNUITY FUND
Disbursements from fund, Ed §22335

TERMINABLE INTEREST DOCTRINE
Community property
Legislative intent to abolish, Ed §22666
Cash balance benefit program, Ed §27413

TERMINABLE INTEREST DOCTRINE ABOLISHMENT, Ed §22666

THEFT AND LARCENY
Public officers and employees
Forfeiture of rights under retirement system, Ex Gov §7522.70

THIRD PARTIES, RECOVERIES FROM
Subrogation generally, Ed §24500 to 24505. (*See* **SUBROGATION**)

30 AND OUT, Ed §24203

THREE-YEAR FINAL COMPENSATION, Ed §22134

THRESHOLD FOR PAYMENTS AND COLLECTIONS, Ed §22404

TOLL-FREE TELEPHONE ASSISTANCE, Ed §22329

TRUST COMPANIES
Financial institutions generally. (*See* **FINANCIAL INSTITUTIONS**)

TRUSTS
Income tax, federal
Qualified pension, etc, plans
Beneficiaries of employees' trust, taxability, Ex 26 USC §402

TWO PERCENT AT AGE 60, Ed §24202

TWO PERCENT INCREASE
Improvement factor, Ed §22140

U

UNCLAIMED PAYMENTS, Ed §24606

UNCLAIMED REFUND OR BENEFIT, Ed §22310

UNIVERSITY AND POSTSECONDARY EDUCATION
Audits, Ex Ed §84040.5
California state university. (*See* **CALIFORNIA STATE UNIVERSITY**)
Community college employees. (*See* **COMMUNITY COLLEGE EMPLOYEES**)
University of California retirement system
Public pensions and retirement plans, general regulation
Notice to legislature of proposed changes, Ex Gov §7507.5

UNIVERSITY OF CALIFORNIA RETIREMENT SYSTEM
Public pensions and retirement plans, general regulation
Notice to legislature of proposed changes, Ex Gov §7507.5

USERRA (UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT)
Income tax, federal
Special rules relating to reemployment rights, Ex 26 USC §414
Reemployed members, benefits for
Cash balance benefit program, Ed §28000 to 28006. (*See* **CASH BALANCE BENEFIT PROGRAM**)
Generally, Ed §22850 to 22856. (*See* **MILITARY SERVICE**)

V

VENDOR REGISTRATION AND INFORMATION BANK, Ed §25100 to 25115
Administration fees for investment products offered, Ed §25108
Annual registration, Ed §25102
Applicability of provisions, Ed §25115
Awareness of employees of system
Development of process to ensure awareness, Ed §25111
Consideration from vendor for promoting products
Prohibition, Ed §25112
Costs of establishing and maintaining, Ed §25108
Date for completion of initial registration, Ed §25110
Definitions, Ed §25100
Disclosures, Ed §25101
Fees
Undisclosed fees not chargeable by vendor, Ed §25107
Established, Ed §25100
Fees
Undisclosed fees not chargeable by vendor, Ed §25107
Impartial investment information bank web site
Board to maintain on web site, Ed §25104
Contents, Ed §25106
Costs of establishing and maintaining, Ed §25108
Design of web site, Ed §25106
Liability of board and system for information provided
Immunity, Ed §25109
Notice to members, Ed §25105
Unregistered 403(b) products
Restrictions, Ed §25113
Liability of board and system for information provided
Immunity, Ed §25109
Logo of system
Prohibition on vendor use, Ed §25109
Promoting products of vendor
Consideration from vendor for promoting products
Prohibition, Ed §25112
Purpose, Ed §25100
Removal from registry
Grounds, Ed §25103
Renewal of registration, Ed §25102
Requirement to register, Ed §25101
Unregistered 403(b) products
Contributions, continuation, Ed §25114
Restrictions, Ed §25113

VIOLENCE IN SCHOOLS
Health and welfare benefits
Victims of violent act while in performance of job
Disabling injury
Continuing coverage under provisions while receiving other benefits, Ex Ed §7008

W

WAR
Service credit
Permissive and additional service credit
Conditions when war with foreign power exists, Ed §22804
War relocation center service, Ed §22809

WELFARE OF EMPLOYEES
Health and welfare benefits generally, Ex Ed §7000 to 7008. (*See* **HEALTH AND WELFARE BENEFITS**)

WITNESSES
Subpoenas, Ed §22220

WORKERS' COMPENSATION
Disability retirement
Reduction of allowance, Ed §24109
Temporary disability benefits
Limits, Ex Ed §44043
Retention by employee of check
Adjustment by employer in salary payment, Ex Ed §44044

WRITE-OFF, Ed §24618

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