

APPENDIX A

**TO LEGAL ADVISORY REPORT FOR
VERMONT COMMISSION ON DESIGN AND FUNDING OF
RETIREMENT AND RETIREE HEALTH BENEFITS**

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APPENDIX A

The following provides a state-by-state summary of the Constitutional provisions and case law relevant to the issue of modification of public pension benefits. Resources for much of the information compiled herein are CYNTHIA L. MOORE, *PROTECTING RETIREES' MONEY* (5th ed. 2005) and CYNTHIA L. MOORE, *PUBLIC PENSION PLANS: THE STATE REGULATORY FRAMEWORK* (3d ed. 1998).

Constitutional Clause Prohibiting Impairment of Contracts and Related Case Law

Alabama: Art. I, § 22: That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment. See also discussion infra on constitutional clause prohibiting impairment by destroying remedy for enforcement.

The Alabama Supreme Court has held that "without regard to whether a public retirement plan is mandatory or voluntary, where employees have served and retired, the benefits to which they are entitled may not be reduced subsequent to their retirement absent an express reservation of a right to amend at any time." Bd. of Trs. of the Policemen & Firemen's Ret. Fund of the City of Gadsden v. Cary, 373 So.2d 841, 842 (Ala. 1979). The court further stated that the pension rights of active employees, once vested, are not divested by subsequent legislative enactment. Id. at 843.

Alaska: Art. I, § 15: No bill of attainder or ex post facto law shall be passed. No law impairing the obligation of contracts, and no law making any irrevocable grant of special privileges or immunities shall be passed. No conviction shall work corruption of blood or forfeiture of estate. See also discussion infra on constitutional clause that membership is contractual relationship.

Arkansas: Art. 2, § 17: No bill of attainder, ex post facto law or law impairing the obligation of contracts shall ever be passed; and no conviction shall work corruption of blood or forfeiture of estate.

The Arkansas Supreme Court stated that "the retirement pay received by a retired employee ... under a system based on voluntary contributions of the employee represents delayed compensation for services rendered in the past due under a contractual obligation inuring to his benefit and is not a gratuitous right." Jones v. Cheney, 253 Ark. 926, 489 S.W.2d 785 (1973) (amendment to member's benefit after he fulfills service requirement is an impairment of contract). The Court further stated in Pyle v. Webb, 253 Ark. 940, 489 S.W.2d 796 (1973) that since the public employee "had perfected all the requirements on his part of his retirement plan, he was entitled to benefits and the legislature could not deprive him of these contractual benefits by future action on its part." In Robinson v. Taylor, 342 Ark. 459, 29 S.W.3d 691,

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(2000), the Court found retirement benefit that was paid entirely from the city's general fund, with no contributions by member, was merely a gratuitous allowance with no vested rights.

California:

Art. I, § 9: A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed.

A long line of cases in California holds that each public employee has contractual rights in the terms of his pension plan. See Kern v. City of Long Beach, 29 Cal. 2d 848, 856 (1947), 179 P.2d 799, 803 (Cal. 1947). After the status of a public employee has been fixed by the happening of the contingency that made the pension due and payable, the terms of the contract "may not be changed to his detriment by subsequent amendment." Terry v. Berkeley, 41 Cal.2d 698, 263 P.2d 833 (1953). In Allen v. City of Long Beach, 45 Cal.2d 128, 287 P.2d 765 (1955), the Court held invalid legislation increasing the employee's contribution from 2% to 10% of salary with no increased benefits and no showing that the city would be unable to meet its obligations under the existing plan without the increased contribution. California follows the rule that contract rights "vest" upon participation in the system but allow reasonable modification of the vested rights if change bears some material relation to the theory of a pension system and its successful operation, and changes which cause disadvantage are accompanied by comparable new advantages. The case appeared to leave open the possibility that evidence the plan would have difficulty in meeting its obligations to the affected employees may have caused a different result.

The legislature may make reasonable modifications in the terms of the plan in order to keep the plan flexible "to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy," and if the modification includes a comparable advantage. Miller v. State, 18 Cal.3d 808, 557 P.2d 970, 135 Cal. Rptr. 386 (1977) (State could constitutionally lower the retirement age for State employees from 70 to 67 without impairing any vested right to the larger monthly pension available if worked until 70). An amendment enacted after the member left office but before retirement that changed the benefit computation was unconstitutional because it withdrew benefits to which member earned a vested contractual right while employed. Betts v. Bd. of Adm. of the Public Employees' Ret. Sys., 21 Cal.3d 859, 582 P.2d 614, 148 Cal. Rptr. 158 (1978). Before the occurrence of the contingency that causes the pension to become payable, a public employee has no absolute right to fixed or specific benefits, but only to a "substantial or reasonable pension." Betts, 582 P.2d at 617.

The California Supreme Court held that the legislature's delay of state employer contributions to CalPERS unconstitutionally impaired members' contractual rights to an actuarially sound retirement system. Bd. of Adm. v. Wilson, 52 Cal.App.4th 1109, 61 Cal. Rptr.2d 207 (1997). The Court found

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that members had a contractual right to an actuarially sound retirement system, relying upon Valdes v. Cory, 139 Cal.App.3d 773, 189 Cal. Rptr. 212 (1983), which provided that contractual pension rights accrue when an employee accepts employment, and the contract right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity. Having found a contractual right, the Court found the right to be impaired, noting that the Governor failed to show any pension reform or pension-related connection to the changes and, therefore, the actions must have been simply a budget balancing measure. While California law permits modification of the retirement system members' contractual rights, it is only if the amendment provides a comparable advantage, which did not exist in this case.

The California Court of Appeals of the Third District held that legislation creating a new retirement benefit tier for new employees was not an unconstitutional impairment of contract where the collective bargaining agreement respecting future employees did not contain a promise by the State to leave the character of the system unchanged for new employees. California Ass'n of Professional Scientists v. Schwarzenegger, 137 Cal.App.4th 371, 40 Cal.Rptr.3d 354 (Cal. App. 2006).

The California Court of Appeals of the Third District held that legislation reducing the State's obligation to fund the Supplemental Benefit Maintenance Account ("SBMA") of the Teachers' Retirement Fund by \$500 million for fiscal year 2003-2004 was an unconstitutional impairment of contract, even if the SBMA remained actuarially sound with the reduced payment because prior legislation had created a vested contractual right to a certain percentage payment of creditable compensation from the general fund to the SBMA regardless of actuarial soundness. Teachers' Ret. Bd. v. Genest, 154 Cal.App.4th 1012, 65 Cal. Rptr.3d 326 (Cal. App. 2007).

The U.S. Court of Appeals of the 9th Circuit distinguished Allen when it held that San Diego City's 3.2% reduction of pickup contributions made on behalf of San Diego City Employees' Retirement System participants imposed after an impasse in labor negotiations to address pension funding and City budgetary crises had been reached did not violate the Contracts Clause of the Federal Constitution because case precedent concerning contribution levels only found the contractual right with respect to employees' contribution amounts, not the share of benefit costs paid by employees. San Diego Police Officers' Ass'n v. San Diego City Employees' Ret. Sys., 568 F.3d 725 (C.A.9 2009).

In County of Orange v. Bd. of Ret., Case No. BC 389758 (L.A. Cty. Sup. Ct. 2009), the Los Angeles County Superior Court dismissed a suit brought by Orange County seeking declaratory and injunctive relief against the retroactive application of a formula enhancement enacted on June 28, 2002, to service rendered prior to that date. The County argued that retroactive

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application costing approximately \$100 million in unfunded accrued actuarial liability as of 2001 and \$187 million as of 2007 violated the constitutional requirement that a county obtain a two-thirds electorate vote for any indebtedness or liability exceeding a year's income and revenue. The court rejected the argument while reasoning that not only did the constitutional provision not apply to actuarial projections, but it did not require the entire actuarial cost to be paid within one year. The County further argued that retroactive application with respect to current employees was unconstitutional under the provision prohibiting extra compensation granted after service has been rendered, although it conceded that retirement benefits could be increased for retirees. The court rejected this argument on the ground that the provision did not apply to retroactive pension increases and that there was no logical distinction between current employees and retirees for such increases.

Colorado: Art. II, § 11: No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.

The Colorado Supreme Court held that the vested pension rights of a retired public employee may not be impaired by subsequent legislation. Police Pension & Relief Bd. of Denver v. McPhail, 139 Colo. 330, 338 P.2d 694 (Colo. 1959). With respect to active employees the Court has stated that

Although prior to eligibility to retire the pension plan could be changed, it could not be abolished nor could there be a substantial change of an adverse nature, without a corresponding change of a beneficial nature. An employee's pension rights prior to his eligibility to retire may be modified for the purpose of keeping the pension system flexible to permit adjustments in accord with the changing conditions if at the same time the basic integrity of the plan is still maintained. Hence, prior to eligibility for retirement, changes may be properly made in a pension plan if these changes strengthen or better it, or if they are actuarially necessary.

Police Pension & Relief Bd. of Denver v. Bills, 148 Colo. 383, 390, 366 P.2d 581, 584 (Colo. 1961).

Florida: Art. I, § 10: No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

Retired public employees acquire a vested contract right in all of the benefits afforded by the law then in effect, and such rights may not be impaired by subsequent legislation modifying or withdrawing any of the benefits. State ex. Rel. O'Donald v. City of Jacksonville Beach, 142 So.2d 349, aff'd, 151 So.2d 430 (Fla. 1963). By state statute, the rights of retirement system members are of a contractual nature. The Florida Supreme Court has interpreted the statute to mean that all rights already earned under the plan

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may not be changed and that the legislature may "only alter retirement benefits prospectively." Florida Sheriffs' Assoc. of Dept. of Adm., Div. of Retirement, 408 So.2d 1033, 1037 (Fla. 1981).

Georgia:

Art. I, § 1, ¶ X: No bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed.

The Georgia Supreme Court has stated that a government retirement plan becomes a part of an employee's contract of employment if the employee contributes any amount toward the benefit he is to receive, and if the employee performs services while the law is in effect. Withers v. Register, 246 Ga. 158, 269 S.E.2d 431 (1980). The Court further stated in Withers that the legislature could not amend the plan if the effect of the amendment is to reduce rather than increase benefits, and that the employee need not be vested for this rule to apply: "if the employee performs services during the effective dates of the legislation [and contributes to the retirement system], the benefits are constitutionally vested ... regardless of whether or not the employee would be able to retire on any basis under the plan." Thus, both active and retired members would have constitutionally vested rights in the plan's benefits, because they have contributed to the plan.

The Georgia Supreme Court held that legislation removing the statutory tax exemption for retirement benefits was not an impairment of contract under 1983 Ga. Const., Art. I, Sec. I, Par. X because the state "may not suspend or irrevocably give, grant, limit, or restrain the right of taxation..." under 1983 Ga. Const. Art. VII, § 1, Para. I. Parrish v. Employees' Ret. Sys. of Georgia, 260 Ga. 613, 398 S.E.2d 353 (Ga. 1990).

The imposition of interest to the purchase price of military service credit under a legislative action was an enhancement to contract rights, rather than an unconstitutional diminishment, because the plaintiffs had no right to purchase any military service credit prior to the amendment. Horton v. State Employees Ret. Sys., 262 Ga. 458, 421 S.E.2d 703 (Ga. 1992).

The Georgia Supreme Court held that, although retiree medical insurance benefits were protected as part of the employee's contract of employment, such protection did not extend beyond the amount of coverage offered upon retirement. Therefore, the retiree appellees did not have a protected right to cost-free medical insurance benefits under a PPO option that normally required retiree premiums, even though the appellant agency had offered a single cost-free option in the past, which had since changed to the cost-free HMO and premium-paid PPO options by the time the appellees retired. Unified Government of Athens-Clarke County v. McCrary, 280 Ga. 901, 635 S.E.2d 150 (Ga. 2006).

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Idaho: Art. I, § 16: No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed.

The Idaho courts have held that the level of a public employee's rights in a pension plan which have vested may not be unilaterally altered by subsequent legislation. Nash v. Boise City Fire Dept., 104 Idaho 803, 663 P.2d 1105 (1983). In Nash the court held that legislation limiting COLAs to benefits could not be applied to a member who earned benefits by virtue of service prior to the legislation but retired after the legislation, because his rights were vested and the fund was not insolvent or unable to meet its obligations.

Legislative action that clarified employment classification between police officers and general members of the retirement system that caused employees who were formerly classified as police officers to prospectively accrue benefits at lesser rates for general members was not a prohibited modification. McNichols v. Public Employee Ret. Sys. of Idaho, 114 Idaho 247, 755 P.2d 1285 (Idaho 1988).

Illinois: Art. I, § 16: No ex post facto law, or law impairing the obligation of contracts or making an irrevocable grant of special privileges or immunities, shall be passed. See also discussion infra on constitutional clause that membership is a contractual relationship.

Indiana: Art. I, § 24: No ex post facto law, or law impairing the obligation of contracts, shall ever be passed.

Under Indiana law, a retirement system with voluntary participation creates contractually vested property rights for retired and active participants, and these rights are enforceable and cannot be impaired or diminished by the State. Bd. of Trs. of the Public Employees Ret. Fund v. Hill, 472 N.E.2d 204 (Ind. 1985) (striking down law changing salary used in benefit calculation). If participation in the system is mandatory, the benefits are considered a gratuity and active members have no contractual rights. Ballard v. Bd. of Trs. of Police Pension Fund of the City of Evansville, 263 Ind. 79, 324 N.E.2d 813 (1975). However, as of retirement, the member's interest becomes vested and contractual in nature, which, in the absence of statutory reservation, may not be legally diminished or otherwise affected by subsequent legislation. Klamm v. State ex rel. Carlson, 235 Ind. 289, 126 N.E.2d 487 (1955). In Etherton v. Wyatt, 155 Ind.App. 440, 293 N.E.2d 43 (1973), the court found that the budget agency's reduction in appropriations to the Teachers Retirement Fund was arbitrary and capricious because the reduction impaired the obligation of the contractual rights of retired members of the fund.

Iowa: Art. I, § 21: No bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall ever be passed.

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Iowa's pension statutes provide: "The right is reserved to the general assembly to alter, amend, or repeal any provision of this chapter or any application thereof to any person, provided, however, that to the extent of the funds in the retirement system the amount of benefits which at the time of any such alteration, amendment, or repeal shall have accrued to any member of the system shall not be repudiated, provided further, however, that the amount of benefits accrued on account of prior service shall be adjusted to the extent of any unfunded accrued liability then outstanding." Iowa Code § 97B65.

The Iowa Supreme Court has ruled that "a pension is not a matter of contract or vested right so far as concerns the right of the lawmaking power to change it by modifying or repealing the law, nevertheless when the right once has accrued it becomes vested so far as it relates to the obligations of the custodians of the fund to pay." Rockenfield v. Kuhl, 242 Iowa 213, 46 N.W.2d 17 (1951). The court found that a provision in the Sioux City's Firemen's Pension Fund (which provided that after entitlement to retirement such right may not be forfeited except by conviction of a felony) did not authorize forfeiture of a pension already being paid upon such a conviction.

The Court in Rockenfield cited an earlier Iowa Supreme Court case, which found no statute of limitations on a widow's right to present and future payments from the pension fund upon her husband's death and made the following observations with respect to the nature of pensions:

It has frequently been said that such a pension is not a matter of contract or vested right—that it is a mere gratuity or bounty from the sovereign power to be given, changed, or withheld at its pleasure.....

But this is said of the right of the lawmaking power with respect to the pension, or to change the terms and conditions upon which it shall be given, prior to the happening of the event upon which the party becomes entitled to it, and has no reference or application to the right of a party within the class to receive the pension provided for by existing law upon the happening of the event which entitles him to receive it. Upon the happening of that event, and the existence of other facts entitling him to the pension, it cannot be doubted that his right, so far as relates to the obligations of the custodians of the fund to pay and his right to receive the pension then provided for, accrued and vested, and could then have been enforced.

Gaffney v. Young et al., 200 Iowa 1030, 205 N.W. 865, 866-867 (1925).

Kentucky: § 19(1): No ex post facto law, nor any law impairing the obligation of contracts, shall be enacted.

Kentucky statutory law provides that members have a contractual right in their pensions. Ky. Stat. § 161.714.

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The Kentucky Supreme Court held that the Constitutional prohibition against the impairment of contracts did not prevent the General Assembly from passing a budget bill that temporarily suspended contribution rate-setting authority in the Board of the Kentucky Employees Retirement System ("KERS") and that set contribution rates based on market valuation methods rather than by book valuations methods as requested by the KERS Board absent a showing that such a bill would endanger current and future pension benefits. Jones v. Bd. of Trs. of the Kentucky Ret. Sys., 910 S.W.2d 710 (Ky. 1995).

Louisiana: Art. I, § 23: No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted. See also discussion infra on constitutional clause that membership is a contractual relationship.

Maine: Article 1, § 11: The Legislature shall pass no bill of attainder, ex post facto law, nor law impairing the obligation of contracts, and no attainder shall work corruption of blood nor forfeiture of estate.

The Maine Courts have found that "retirement benefits are more than a gratuity to be granted or withheld arbitrarily at the whim of the sovereign state." Spiller v. State of Maine, 627 A.2d 513 (Me. 1993). However, the court found that pension statutes did not create contractual rights for those employees whose pension rights had not yet vested and, therefore, modification did not violate State and Federal prohibitions on law impairing contracts (the court did not address the rights of employees who had enough service to qualify for benefits). The First Circuit, interpreting Maine law, rejected teachers' Contract Clause challenge to pension-reducing amendments. The Court found no contract under Maine law, even as to those teachers who had satisfied the service eligibility requirements for retirement. The Court suggested that the benefits of retired members would be protected. Parker v. Wakelin, 123 F.3d 1 (1st Cir. 1997).

Michigan: Art. I, § 10: No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted. See also discussion infra on constitutional clause that membership is a contractual relationship.

Minnesota: Art. I, § 11: No bill of attainder, ex post facto law, or any law impairing the obligation of contracts shall be passed, and no conviction shall work corruption of blood or forfeiture of estate.

In Minnesota, challenges to legislative changes to public pension plans have been characterized as claims alleging unconstitutional impairment of contract. Jacobson v. Board of Trs. of the Teachers Ret. Ass'n, 627 N.E.2d 106 (Minn. App. 2001) Also using the theory of promissory estoppel, Minnesota courts have held that only reasonable legislative modifications that serve an appropriate public purpose are permitted. Christensen v. Minneapolis Municipal Employees Ret. Bd., 331 N.W.2d 740 (Minn. 1983). There is a

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three-prong test for whether a modification is reasonable: Is there a substantial impairment of the "contractual" obligation; is there a significant and legitimate public purpose; is the proposed change based upon reasonable conditions and of a character appropriate to the public purpose underlying the legislation. In Christensen, the court struck down a statute suspending retirement benefits until age 60, as some individuals who had already retired would have been denied benefits until they reached age 60. However, the court upheld a statute requiring employees to make larger contributions to the pension system. AFSCME Councils 6, 14, 65 & 95, AFL-CIO v. Sundquist, 338 N.W.2d 560 (Minn. 1983).

Mississippi: Art. 3, § 16: Ex post facto laws, or laws impairing the obligation of contracts, shall not be passed.

The Mississippi Supreme Court found a statute which required that pre-retirement death benefits be paid to a surviving spouse, instead of the member's designated beneficiary, was unconstitutional as applied to a member who joined the system before the spousal benefit statute was enacted. The Court found that the "contract" was the law in effect when the member joined the system and, while this contract could be altered by the legislature, if such change resulted in a substantial disadvantage to the member it must be accompanied by a substantial advantage. Public Employees' Retirement System v. Porter, 763 So.2d 845 (Miss. 2000).

Missouri: Art. I, § 13: That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.

The Missouri Court of Appeals has found that contractual pension rights exist for members of the Public School Retirement System. While a "contract" is formed upon entering the system, the member does not "vest" until he has fully complied with all the conditions for retirement eligibility. Wehmeier v. Public School Retirement System of Mo., 631 S.W.2d 893 (Mo.Ct.App. 1982). In Fraternal Order of Police v. City of Joseph, 8 S.W.3d 257 (Mo.Ct.App. 1999), the city's change in calculating retirement benefits from including lump sum accrued leave payments in the year paid to including it in the year earned was challenged as an unconstitutional impairment of contract. The Court stated that the general rule is that a public pension is a gratuity as opposed to a contract. The Court did find that the employment contract includes the statute in effect at the time their rights to a pension vested, but if there is nothing in the statute which creates a right to have a certain method of calculating pension amount continued, employees have no vested right to a continuation of a certain method of calculation.

Montana: Art. II, § 31: No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature.

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By statute, pensions are obligations of the state of Montana, and courts have held that these sections of the statute are part of a member's contract. Clarke v. Ireland, 122 Mont. 191, 199 P.2d 965 (1948).

Nebraska:

Art. I, § 16: No bill of attainder, ex post facto law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed.

The Nebraska Supreme Court has held that a pension is not a gratuity but, rather, deferred compensation for services rendered; it is contractual in nature and is protected by the constitutional prohibition against impairment. Halpin v. Nebraska State Patrolmen's Retirement System, 211 Neb. 892, 320 N.W.2d 910 (1982) (change in calculation of benefit by no longer including accrued leave payment as compensation was unconstitutional impairment of contractual rights). The Court has more recently held that a public employee's constitutionally protected right in a pension vests upon acceptance and commencement of employment, subject only to reasonable or equitable changes by the legislature. Bauers v. City of Lincoln, 255 Neb. 572, 586 N.W.2d 452 (1998); Calabro v. City of Omaha, 247 Neb. 955, 531 N.W.2d 541 (1995) (city's elimination of COLA supplemental benefit plan violated Contract Clause of United States Constitution).

Nevada:

Art. I, § 15: No bill of attainder, ex-post-facto law, or law impairing the obligation of contracts shall ever be passed.

Statutory law provides that no statutory amendment may impair any vested retirement benefit (retirement benefits vest after 5 years of service for members and 10 years for survivors). Nev. Rev. Stat. § 286.6793(3) (1995).

The Nevada Supreme Court has held that pension benefits are a part of compensation and vest when the employee enters the employment contract. However, vesting at employment is "limited" vesting subject to modification. Any modification of the pension rights must be reasonable and necessary to keep system flexible and meet changing conditions and maintain the actuarial soundness of the system. To be reasonable, the change must bear some material relationship to the purpose of the system and its successful operation, and any disadvantage to employees must be accompanied by comparable new advantages. PERS Board, State of Nevada v. Washoe County, 96 Nev. 718, 615 P.2d 972 (1980) (legislative amendment removing special investigators and university police from eligibility for early retirement was unreasonable and unnecessary). To the extent a member has satisfied the benefit eligibility requirements ("absolute vested pension rights"), the benefit cannot be altered. Nicholas v. State, 992 P.2d 262 (Nev. 2000) (could not modify benefit of legislators who retired during five month period when legislation which quadrupled benefit was effective). When a statutory amendment increased the retirement benefit formula retroactively to those who retired on or after May 19, 1977, retirees who retired prior to that date did not have a valid

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contractual impairment claim for not receiving the benefit of such amendment because the amendment did not reduce their benefits and did not place the fund in danger of depletion. Allen v. State, 100 Nev. 130, 137, 676 P.2d 792, 796-797 (Nev. 1984).

New Mexico: Art. II, § 19: No ex post facto law, bill of attainder, nor law impairing the obligation of contracts shall be enacted by the legislature.

North Dakota: Art. I, § 16: No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

The North Dakota Supreme Court has found the relationship between the member and the system to be "contractual in nature" and subject to the principles of law governing contracts. Payne v. Bd. of Trs., 76 N.D. 278, 35 N.W.2d 553 (1948).

Ohio: Art. II, § 28: The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

In 1935, the Ohio Supreme Court adopted the pure gratuity theory that "a pension is generally defined as a gratuity, at all times subject to the will of the donor. It is a creature of law rather than of contract, and the pensioner has no vested right in the continuance of a gratuitous allowance... even where a pensioner has made compulsory contributions to the fund... The right to pension not being vested, the [pension] board has a right at any time, in its discretion, to modify or alter pension awards by increasing or decreasing them, so long as it acts reasonably and not in an arbitrary fashion." Mell v. State ex rel. Fritz, 130 Ohio St. 306, 309, 199 N.E. 72, 73 (Ohio 1935).

In response to the Mell decision, the Ohio General Assembly passed a "vested-right" statute that provided that any pension granted after the effective date of such statute was a vested right, "depriving the trustee of power to take away or impair the right to a subsequently granted pension but does not affect the trustees' right to pass rules altering pension previously granted." State ex rel. Lemperle v. McIntosh, 145 Ohio St. 107, 112, 60 N.E.2d 786, 788 (Ohio 1945). Effective May 26, 1937, the rule, therefore, was that pension rights vested once "granted," i.e., when a fund was obligated to pay upon formal application. For example, in 1949, the Ohio Supreme Court held that a participant who had met the minimum age and one-year service requirements for retirement but who had not filed an application until after a legislative amendment passed that had increased the service requirement to three years could not avail himself of the favorable eligibility requirements under the

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former law. State ex rel. West v. Waidner, 152 Ohio St. 109, 112-113, 87 N.E.2d 255, 257 (Ohio 1949).

By statute, members have a vested right to receive the payment authorized by the terms of the pension plan in effect at the time of their retirement. § 3307.711. The Ohio Supreme Court has confirmed that members do not possess contract rights in any system benefit unless and until they vest under this statute (*i.e.*, at retirement). State ex rel. Horvath v. State Teachers Retirement Bd., 83 Ohio St.3d 67, 697 N.E.2d 644 (1998). Noting that there must be a clear indication by the legislature of an intent to bind itself contractually for purposes of the Contract Clause, the Court found no intent to create a contract with respect to pension rights prior to fulfillment of benefit eligibility requirements.

The Supreme Court of Ohio found that the statutory language creating the Public Employees Retirement System and the State Teachers Retirement System granted employees a vested right to receive a benefit at the rate fixed by law when the benefit was conferred (*i.e.*, at retirement). However, there was no vested right to a continuing exemption from state income tax. Herrick v. Lindley, 391 N.E.2d 729 (Ohio 1979).

Oklahoma:

Art. II, § 15: No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed. No conviction shall work a corruption of blood or forfeiture of estate: Provided, that this provision shall not prohibit the imposition of pecuniary penalties.

The State Supreme Court has held that public employees who voluntarily contribute to a system have a vested contractual right to receive the prescribed benefits from it, once their payment becomes due. Bd. of Trs. of Pub. Pension and Ret. Sys. of Tulsa v. Kern, 366 P.2d 415 (Okla. 1961) (amendment to statute requiring widow to have been married to member for at least 5 years to be eligible for survivor benefits had only prospective effect and, therefore, not applicable to widow of member who drew benefits prior to enactment). In Baker v. Oklahoma Firefighters Pension & Retirement System, 718 P.2d 348 (Okla. 1986), relying in part upon the above constitutional provision, the Court found that the right to pension benefits for firefighters and police officers is absolute at the time the benefits become payable. Thus, employees who had retired or could have retired and been eligible for benefits before the effective date of the statutory amendment had a right which could not be detrimentally affected by the amendment. However, employees not eligible for benefits before the amendment did not have the same protection. See also Alldredge v. Oklahoma Firefighters Pension and Ret. Bd., 816 P.2d 580 (Okla. App. 1991) (Fire fighters who were not eligible to retire and, hence, were not vested prior to the repeal of a statute could not claim the benefit of that statute once becoming vested after the repeal date.); Steelman v. Oklahoma Police Pension and Ret. Sys., 128 P.3d 1090, (Okla. Civ. App. 2005) (following Baker) .

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Oregon:

Art. I, § 21: No ex-post facto law, or law impairing the obligation of contracts shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution; provided, that laws locating the Capitol of the State, locating County Seats, and submitting town, and corporate acts, and other local, and Special laws may take effect, or not, upon a vote of the electors interested.

Oregon's Supreme Court held that pension rights are contractual in nature, and that these rights can arise prior to the completion of the service necessary to be eligible for the pension. Taylor v. Multnomah County Dep. Sheriff's Retirement Bd., 265 Or. 445, 510 P.2d 339 (1973). The Court characterized the pension plan as an offer for unilateral contract, and upon the employee's acceptance of employment there is a vested contractual right. In 1992, the Court found that members of the public system have a contractual right to receive benefits accrued prior to 1991 free from state and local taxation. Hughes v. State of Oregon, 314 Or. 1, 838 P.2d 1018 (1992). The Court later held State and local employers to be liable for the breach of contract resulting from the Hughes holding for the failure to provide tax-free retirement benefits under the Public Employees' Retirement System. Stovall v. State, 324 Or. 92, 922 P.2d 646 (Or. 1996).

In 1996, the Oregon Supreme Court held that (i) legislation prohibiting State and local employers from making 6% pick-up contributions violated the Federal Contracts Clause, because the legislation substantially altered the cost of participation in the Public Employees Retirement System to the employees' detriment; (ii) legislation prohibiting state or local employers from contracting to guarantee any rate of interest or return on monies in a retirement plan established by law impaired the contractual obligation under State statute to provide guaranteed minimum returns; and (iii) legislation prohibiting any state or local employer from crediting service under a sick leave conversion program impaired the State's contractual obligations. Oregon State Police Officers' Ass'n v. State, 323 Or. 356, 918 P.2d 765 (Or. 1996).

In 2005, the Oregon Supreme Court held, *inter alia*, that

(i) legislation preventing employees from continuing to make contributions (picked-up or after-tax) to their regular defined benefit accounts with guaranteed interest accruals with employer matching, and prospectively requiring employee contributions to be made instead to define contribution accounts without employer matching, was not an unconstitutional impairment of contract because the statutes did not promise benefits under the Money Match formula nor promise a level of contributions to the regular account;

(ii) legislation that changed the rate of guaranteed interest accruals to regular accounts from one that was not less than the assumed earnings rate to a rate was capped at the assumed earnings rate throughout the life of the

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account was an unconstitutional impairment of contract because the new statute retroactively revoked past interest credits that were in excess of the assumed earnings rate;

(iii) legislation that prohibited further employee contributions to the Variable Annuity Account program was not an unconstitutional impairment of contract because the statute merely promised that contributions made to the Variable Annuity Account would be reserved for the purchase of annuities and did not contain a promise to permit continued contributions to the Account;

(iv) legislation that temporarily suspended annual cost-of-living adjustments ("COLAs") to "fixed" service retirement allowances of certain retired members, as a means of recouping amounts the Legislature had determined to be overpayments due to improper interest crediting of regular accounts at a rate of 20% in 1999 (see City of Eugene v. State Public Employees Ret. Bd.) was an unconstitutional impairment of the State's contractual obligation to grant annual COLAs based on the Consumer Price Index (in other words, the legislation impermissibly attempted a proper overpayment recovery action by improperly adjusting a protected benefit); and

(v) legislation modifying service retirement allowances with the adoption of new actuarial equivalency factors did not impair contractual obligations because the change required the Public Employees' Retirement Board ("PERB") to periodically update its actuarial factors to ensure that allowances satisfied an "actuarial equivalency" standard and the previous statute did not promise that the PERB had absolute authority to establish permanent actuarial factors.

Strunk v. Public Employees Ret. Bd., 338 Or. 145, 108 P.3d 1058 (Or. 2005).

In a case related to Strunk, the Oregon Supreme Court in City of Eugene v. State Public Employees Ret. Bd., 339 Or. 113, 117 P.3d 1001 (Or. 2005), *on reconsideration* 341 Or. 120, 137 P.3d 1288 (Or. 2006), dismissed an action where the PERB adopted the decision of the lower court. In July 2001, the circuit court had held that (1) PERB unlawfully had failed to maintain a contingency reserve account; (2) PERB unlawfully had required employers to match the earnings in members' variable annuity accounts; (3) PERB unlawfully had failed to adopt and implement updated actuarial factors when calculating member retirement benefits; and (4) PERB had abused its discretion by crediting Tier One members' regular accounts with 20 percent earnings for 1999. The new PERB order retroactively decreased the interest crediting of regular accounts from 20% to 11.33% for 1999. The Legislature codified the 11.33% interest crediting rate for 1999 in the legislation at issue under Strunk.

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The retroactive interest adjustment to 11.33% resulted in overpayments to certain groups of retirees, which PERB sought to recover. In two circuit court challenges to the overpayment recovery processes under Arken v. City of Portland, Case No. 0601-00536 (Cir. Ct. Multnomah Cty., Or. 2008), and Robinson v. Public Employees Ret. Bd., Case No. 0605-04584 (Cir. Ct. Multnomah Cty., Or. 2008), the overpayment recovery was held to not be an impairment of contract because the legislature had not intended to create contractual rights to the 20% interest accruals and no estoppel could apply where a state agency made statements contrary to statute.

Pennsylvania: Art. I, § 17: No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.

By statute, benefits are obligations of the State. 24 Pa. Stat. Ann. § 8531.

While early Pennsylvania cases had strongly stated that contractual pension rights accrue upon first day of membership in system, Harvey v. Allegheny County Retirement Bd., 392 Pa. 421, 141 A.2d 197 (1958) permitted a legislative increase of both contribution rates and minimum service tenure to be effective for employees who had not attained eligibility to receive a pension on the basis that such changes involved enhancement of the actuarial soundness of the pension fund. The Harvey court summarized the standards as follows:

1. An employee who has complied with all conditions necessary to receive a retirement allowance cannot be affected adversely by subsequent legislation which changes the terms of the retirement contract.
2. An employee who has not attained eligibility to receive a retirement allowance may be subject to legislation which changes the terms of the retirement contract if the change is a reasonable enhancement of the actuarial soundness of the retirement fund.
3. An employee who has not attained eligibility to receive a retirement allowance may not be subject to legislation which changes the terms of the retirement contract if the change does not reasonably enhance the actuarial soundness of the retirement fund.

Harvey, 141 A.2d at 203. See also Borough of Nanty Glo v. Fatula, 826 A.2d 58 (Pa. Cmwlth. 2003) (a borough could not reduce pension benefits of retired police officers who had become entitled to benefits, despite the contention that there were procedural defects in the adoption of the ordinances granting such benefits because the borough did not timely appeal the adoption).

In AFSCME, AFL-CIO v. Commonwealth of Pennsylvania, 80 Pa. Cmwlth. 611, 472 A.2d 746 (Pa. Cmwlth. 1984), amendments to the retirement code

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that increased contribution rates for vested and nonvested employees were held to be an unconstitutional impairment of contractual rights.

In Transport Workers Union v. Southeastern Pennsylvania Transportation Authority, 145 F.3d 619 (3rd Cir. 1998), the Third Circuit reviewed an action by a union against a public transportation authority which alleged that a plan modification requiring employee contributions violated the federal Contract Clause and the Pennsylvania Constitution contract clause. The Court concluded that, as the enabling legislation specifically authorized employee contributions, the employees' reasonable expectations could not include a guarantee that employee contributions would never be required, thereby finding no constitutional violations.

Rhode Island: Art. I, § 12: No ex post facto law, or law impairing the obligation of contracts, shall be passed.

In Nonnenmacher v. City of Warwick, 722 A.2d 1199 (R.I. 1999), the Rhode Island Supreme Court held that an ordinance passed after members went on disability retirement that required pensions be offset by other sources of income did not violate the Contract Clause. The Court found there was no vested contract right because the ordinance was passed before the members went on disability, and the ordinance did not show an intention to create a vested pension right prior to the disabling event. The Court further stated that, even if there was a substantial impairment of vested contract rights, the restrictions were a reasonable means of protecting the solvency of the pension system, an important public purpose.

The Rhode Island Supreme Court held that a city ordinance granting a 5% COLA benefit in accordance with collective bargaining agreements constituted a vital part of the retirement allowance which vested upon retirement and could not be reduced by subsequent ordinance. Arena v. City of Providence, 919 A.2d 379 (R.I. 2007).

South Carolina: Art. I, § 4: No bill of attainder, ex post facto law, law impairing the obligation of contracts, nor law granting any title of nobility or hereditary emolument, shall be passed

South Dakota: Art. VI, § 12: No ex post facto law, or law impairing the obligation of contracts or making any irrevocable grant of privilege, franchise, or immunity, shall be passed.

The South Dakota Supreme Court has held that pension rights are contractual and vest upon retirement. Tait v. Freeman, 74 S.D. 620, 57 N.W.2d 520 (1953) (law provided for liquidation of pension fund, under which any member with 30 years of service and attainment of age 60 was entitled to pension; members who had 30 years of service but had not attained age 60

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had no vested rights in fund but mere inchoate rights which could be cancelled by legislature).

Tennessee: Art. I, § 20: That no retrospective law, or law impairing the obligations of contracts, shall be made.

Tennessee statutes reserve the right to amend the system, but provide that no such amendment shall diminish any right acquired by a member or beneficiary. Tenn. Code § 8-34-204. The Tennessee Supreme Court has found the pension rights to be part of a member's contract of employment. Miles v. Tennessee Consolidated Retirement System, 548 S.W.2d 299 (Tenn. 1976) (statute changing benefit base for judges violated state and federal impairment of contract prohibitions and, with respect to judges still serving, constituted an unconstitutional diminution of compensation). In Blackwell v. Quarterly County Court, 622 S.W.2d 535 (Tenn. 1981), examining the pension statutes of a local retirement system, the Court adopted the Pennsylvania rule, providing that a legislature may make reasonable modifications to the system when necessary to protect or enhance the actuarial soundness of the plan, provided that no such modification can adversely affect an employee who has satisfied the eligibility requirements for a retirement allowance. The Court upheld legislature's modification of pension plan where detrimental modification was necessary to preserve the fiscal and actuarial integrity of the plan as a whole.

Texas: Art. I, § 16: No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

The Texas courts have found that a pension is not a gratuity but part of the employee's compensation. Byrd v. City of Dallas, 118 Tex. 28, 6 S.W.2d 738 (Tex. Com. App. 1928). Later, the court held that the right to a pension "is predicated upon the anticipated continuance of existing laws, and is subordinate to the right of the legislature to abolish the pension system or diminish accrued benefits of pensioners thereunder." City of Dallas v. Trammell, 129 Tex. 150, 101 S.W.2d 1009 (1937). See Attorney General Op. JM-427 at 4-5 (1986). In Reames v. Police Officers' Pension Bd., 928 S.W.2d 628 (Tex.App. 1996), the court held that a member did not have a vested right in his pension, where employees who elected to participate in the plan did so in contemplation of a reserved right of the legislature to repeal or amend laws governing the system—the member had only an expectancy based upon the anticipated continuance of existing law. See also Williams v. Houston Firemen's Relief and Ret. Fund, 121 S.W.2d 415, 431 (Tex. App. 2003).

Utah: Art. I, § 18: No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

Once the basic criteria for retirement have been met, retirement benefit rights have vested, and the legislature may then modify the plan only upon a

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showing that a vital state interest will be protected and where a substantial substitute is provided in lieu of the loss of benefits. Ellis v. Utah State Retirement Bd., 757 P.2d 882 (Utah App. 1988), aff'd, 783 P.2d 540 (Utah 1989). A statutory mandate to maintain the retirement system in an actuarially sound manner cannot be used to nullify rights explicitly granted to retirees in statute. Rather, if the retirement board believes a provision would make the system actuarially unsound, then the proper relief is through legislative amendment. Allred v. Utah State Ret. Bd., 914 P.2d 1172, 1175 (Utah App. 1996).

Virginia: Art. I, § 11: That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

Virginia statutes provide that a change in the amount of a retirement benefit shall be construed to effect only the benefits of those persons who qualify for a retirement allowance on or after the effective date of the legislation. Va. Code § 51.1-124.8.

Washington: Art. I, § 23: No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

The Washington Supreme Court has found that pension rights are contractual in nature. In Bakenhus v. City of Seattle, 48 Wash. 2d 695, 296 P.2d 536 (1956), the court found the obligation of the employer is based upon the "promise" made at the time the employee begins employment. The Court has also held that the legislature may make reasonable modifications to the plan provided such modifications are for the sole purpose of keeping the pension system flexible and maintaining its integrity, and any disadvantages are accompanied by a corresponding benefit. The Court ultimately concluded that the legislative effort to reduce the benefit calculation in effect at the time the member entered employment was void. See also Weaver v. Evans, 80 Wash. 2d 461, 495 P.2d 639 (1972) (principle of systematic funding became one of vested contractual pension rights flowing to members which could not be unilaterally changed except for purpose of keeping system flexible and maintaining its integrity).

In Bowles v. Wash. Dept. of Retirement Systems, 121 Wash. 2d 52, 847 P.2d 440 (1993), the system's change in practices to reduce pension levels based on employers' limitations on leave cashouts was found to be an unconstitutional impairment of contracts, as there was no corresponding benefit to the disadvantageous modification.

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In McAllister v. City of Bellevue Firemen's Pension Bd., 210 P.3d 1002 (Wash. 2009), no impairment of contract was found where the Firefighter retirees' excess pension payments, the difference between payment required under Law Enforcement Officers' and Fire Fighters' System Pension Plan (LEOFF) and payment that would have been required under a prior pension statute, were required to be calculated based on the statutory definitions of the prior act, even though under definitions of prior act retirees received a payment calculated at a lower rate based on lesser compensation schedules because the LEOFF plan provided many benefits not provided under the prior plan.

West Virginia: Art. 3, § 4: No bill of attainder, ex post facto law, or law impairing the obligation of a contract, shall be passed.

The State Supreme Court found members have contractually vested property rights under the pension statute, which cannot be impaired or diminished by the state. Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1989); see also Perdue v. Wise, 216 W.Va. 318, 323-324, 607 S.E.2d 424, 429-430 (W.Va. 2004) ("[T]here is no enforceable cause of action by a retiree against the state treasurer or auditor [regarding pension funding] *until* the funds are not available to pay the pension benefits to which retirees are statutorily entitled.") (emphasis in original). When reviewing the constitutionality of a legislative amendment, vesting is determined not by eligibility for the benefit but by whether the employee has sufficient years of service to have relied to his detriment on the existing plan. Bd. of Trs. of Police Officers Pension and Relief Fund v. Carenbauer, 567 S.E.2d 612 (W.Va. 2002). The Court has summarized its position as follows:

The pension rights of all current state pension plan members who have substantially relied to their detriment cannot be detrimentally altered at all, and any alterations to keep the trust fund solvent must be directed to the infusion of additional money.... Should the legislature seek to reduce certain advantages of the pension plan, it must offer equal benefits in their place as just compensation.... The legislature may alter the [public employee pension] statutes as it sees fit, but any alterations must have prospective effect, and cannot adversely affect the contractual rights of existing state employees who relied upon the statute to their detriment.

Adams v. Ireland, 207 W.Va. 1, 528 S.E.2d 197, 203 (1999). An employee may have so few years in the system that he or she could not be deemed to have detrimental reliance.

Wisconsin: Art. I, § 12: No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate.

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By state statute, benefits accrued to participants are treated as a contractual right and may not be abrogated by any subsequent act. However, the State reserves the right to amend or repeal the governing statutory provisions, and there shall be no right to further accrual of benefits after the effective date. The statute further provides that the State shall not be prevented from requiring forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights or benefits of equal or greater value. Wis. Stat. § 40.19(2), (3). In Wisconsin Retired Teachers Assoc. Inc. v. Employee Trust Funds Bd., 207 Wis.2d 1, 558 N.W.2d 83 (1997), relying upon a "unconstitutional taking of property without just compensation" theory as opposed to a contractual theory, the Court struck down legislation that required the system to pay supplemental benefits to certain retirees out of the trust fund (previously, the retirees had received the supplements from the general fund). See also Wisconsin Professional Police Ass'n, Inc. v. Lightbourn, 243 Wis.2d 512, 580, 627 N.W.2d 807, 841 (Wis. 2001) ("All participants who have 'benefits accrued' are protected by [the benefit protection statute] from the abrogation of those benefits unless the benefits are replaced by benefits of equal or greater value... [The statute] provides a limited contractual right that does not extend to every provision of [the pension chapter] or every procedural or substantive aspect of the [retirement system] – it extends only to 'rights exercised and benefits accrued' which are 'due' for 'service rendered.'").

Wyoming: Art. I, § 35: No ex post facto law, nor any law impairing the obligation of contracts, shall ever be made.

By statute, the State acknowledges that employer contributions create an obligation for the State, but it disclaims any other contractual rights for members. Wyo. Stat. § 9-3-428.

Constitutional Clause Prohibiting Impairment of Contracts by Destroying Remedy for Enforcement and Related Case Law

Alabama: Art. VI, § 95: There can be no law of this state impairing the obligation of contracts by destroying or impairing the remedy for their enforcement; and the legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this state. After suit has been commenced on any cause of action, the legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit.

The Alabama Supreme Court has held that "without regard to whether a public retirement plan is mandatory or voluntary, where employees have served and retired, the benefits to which they are entitled may not be reduced subsequent to their retirement absent an express reservation of a right to amend at any time." Board of Trs. of the Policemen & Firemen' s Ret. Fund of the City of Gadsden v. Cary, 373 So.2d 841, 842 (Ala. 1979). The court

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further stated that the pension rights of active employees, once vested, are not divested by subsequent legislative enactment. Id. at 843.

New Jersey: Art. IV § VII, ¶3: The Legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made.

A public pension is not a gratuity; a public employee has a property interest in an existing fund which the state cannot simply confiscate. Spina v. Consolidated Police & Firemen's Pension Fund Comm., 41 N.J. 391, 197 A.2d 169 (1964) (legislation requiring 25 years of service and attainment of age 51 for instead of 20 years of service/age 50 under old plan not constitutionally void as impairment of contract or taking of property; legislature may revise pension plans with mandatory participation). See also Charles C. Widdis, P.E., L.S. v. Public Employee Ret. Sys., 238 N.J. Super. 70, 78, 568 A.2d 1227, 1231-1232 (N.J. Super. 1990) ("It is virtually axiomatic that statutory pension provisions are to be liberally construed in favor of public employees and that pensions represent not merely the gratuity of a benevolent governmental employer but rather that they constitute deferred compensation earned by the employee during his years of service. [cite omitted]... Thus, when considering forfeiture provisions which adversely impact on vested rights, strict construction of the statute is required.").

A statutory law change in 1997 guaranteed vested member that benefits in effect at the point they attain 5 years of service cannot be reduced.

Constitutional Clause Prohibiting Gratuities to Citizens and Related Case Law

Arizona: Art. 9, § 7: Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state.

Based upon this provision, the Arizona Supreme Court has held that, since the state cannot offer its employees "gratuities," the promise of a pension is a legal obligation of the state founded upon valuable consideration. The Court stated that the legislature may not modify the terms of the pension plan without the assent of the public employee, but it reserved comment on the rights and remedies available to either party in a situation where it is established that a retirement plan was actuarially unsound. Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541 (1965) (public employee had right to rely on terms of legislation relating to pension as it existed at time entered service, and

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subsequent legislation could not be arbitrarily applied retroactively to impair contract). In Thurston v. Judges' Ret. Plan, 179 Ariz. 49, 876 P.2d 545 (Ariz. 1994), the Court elaborated on the holding in Yeazell as follows:

[W]e also read Yeazell as holding that when the amendment is beneficial to the employee or survivors, it automatically becomes part of the contract by reason of the presumption of acceptance. *Id.* Such beneficial amendments present no constitutional issue of impairment of contract, the usual focus of cases considering the validity of retirement fund amendments. See McClead v. Pima County, 174 Ariz. 348, 849 P.2d 1378 (App.1992); Fund Manager v. City of Phoenix Police Dep't, 151 Ariz. 487, 728 P.2d 1237 (App.1986). Where the modification is detrimental to the employee, it may not be applied absent the employee's express acceptance of the modification because it interferes with the employee's contractual rights. Yeazell, 98 Ariz. at 117, 402 P.2d at 546.

876 P.2d at 547-548.

Constitutional Clause that Membership in System is Contractual Relationship with Protected Accrued Benefit and Related Case Law

Alaska: Art. XII, § 7: Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

The Alaska Supreme Court has held that: (1) an employee's constitutional right to retirement benefits under the Public Employees Retirement System "vests immediately upon an employee's enrollment in that system"; (2) changes in the retirement system disadvantaging employees must be "offset by comparable new advantages"; and (3) an employee must be allowed to choose which system he or she desires to come under if the state does not provide an offsetting advantage." Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska 1981). The Court held that the calculation of early retirement benefits using actuarial tables that were adopted subsequent to an employee's employment date that caused a decrease in monthly benefits when compared to benefits calculated under tables adopted at the time of employment impaired the contractual relationship in violation of Article XII, § 7 of the Alaska Constitution. Sheffield v. Alaska Public Employees' Ass'n, Inc., 732 P.2d 1083 (Alaska 1987). The Court required the retirement system to permit the retiree to elect the most advantageous actuarial tables upon retirement. *Id.* at 1089, n. 13. In a decision limiting the impact of Hammond and Sheffield, the Court held in 2008 that retirees could not pick and choose advantageous statutes effective under different legislative eras – *i.e.*, a retiree claiming an advantageous provision under a former statute could not also avoid a cost provision that was repealed under the present statute. Alford v. State, 195 P.3d 118 (Alaska 2008).

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Hawaii: Art. XVI, § 2: Membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired.

The Hawaii Supreme Court held that legislation that caused "actuarial investment earnings in excess of a ten percent investment yield rate" in fiscal years 1997 and 1998 to be retroactive credits against State contributions required for those years was unconstitutional under Article XVI, Section 2 of the Hawaii Constitution. Kaho'ohanohano v. State, 114 Hawai'i 302, 162 P.3d 696 (Haw. 2007). The Court reasoned that the Constitutional provision was modeled after the New York provision, which provided an implied protection of the sources of funds for pension benefits in addition to protections of accrued benefits. Kaho'ohanahano, 162 P.3d at 732 (citing Sgaglione v. Levitt, 37 N.Y.2d 507, 337 N.E.2d 592, 594 (N.Y. 1975)).

Louisiana: Art. X, § 29: Membership in any retirement system of the state or of a political subdivision thereof shall be a contractual relationship between employee and employer, and the state shall guarantee benefits payable to a member of a state retirement system or retiree or to his lawful beneficiary upon his death.

Courts have held that an employee who is a member of a public pension plan obtains vested rights in the plan once he has satisfied the eligibility requirements for retirement. Patterson v. City of Baton Rouge, 309 So.2d 306 (La. 1975). Until such vesting, the legislature may modify the details of a contributory retirement system, including the system's rate of contributions, benefits, length of service, and age requirements. Louisiana State Troopers Assoc. v. Louisiana State Police Ret. Bd., 417 So.2d 440 (La.Ct.Ap.1st Cir. 1982) (legislation which withdrew entitlement to purchase service credits for prior employment and increased cost for credit purchases were legitimate acts for improving the actuarial integrity of the system and not unconstitutional). A statute concerning the transfer of credits from one retirement system to another that imposed the burden of cost differentials on the retiree could not be applied to divest the retiree of pension rights in existence at the time the retiree became a member of the transferring system. Harrison v. Trs. of Louisiana State Employees' Ret. Sys., 671 So.2d 385 (La. App. 1995). The merger of a local police retirement fund into a state-wide municipal police retirement system and the subsequent alteration of benefits did not take away vested rights because they had not vested for any of the plaintiffs who were not yet eligible for retirement. Coutee v. Municipal Police Employees' Ret. Sys., 921 So.2d 1147 (La. App. 2006).

Michigan: Art. IX, § 24: The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby. Financial benefits arising on account of service rendered in each

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fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

The phrase "accrued financial benefits" in the above provision has been defined as "the right to receive certain pension payments upon retirement, based upon service performed." Kosa v. State Treasurer, 408 Mich. 356, 370-31, 292 N.W.2d 452, 459-60 (1980) (statute retroactively substituting "entry age normal" system of accounting for previous "attained age" system so as to remedy underfunding by retrospective reallocation of previously appropriated current service monies to pay pre-constitution retiree benefits did not violate impairment of contracts provision). In another opinion the Michigan Supreme Court stated "the legislature cannot diminish or impair accrued financial benefits, but we think it may properly attach new conditions for earning financial benefits which have not yet accrued. Even though compliance with the new conditions may be necessary in order to obtain the financial benefits which have accrued, we would not regard this as a diminishment or impairment of such accrued benefits unless the new conditions were unreasonable and hence subversive of the constitutional protection." In re Enrolled Senate Bill 1269, 389 Mich. 659, 663-64, 209 N.W.2d 200, 202-03 (1973) (increasing contribution rate for certain class of employees to equalize them with other employees did not violate State Constitution).

A statute which restricted the amount of retirement annuity paid by the State to former probate judges to an amount, when added to any county pension annuity, that resulted in a total pension annuity not exceeding 66 2/3% of the judge's final salary did not violate the pension clause of the Michigan Constitution because the statute did not reduce county pension benefits. Seitz v. Probate Judges Ret. Sys., 189 Mich. App. 445, 474 N.W.2d 125 (Mich. App. 1991).

Health care benefits paid to public school retirees were not "accrued financial benefits" within the meaning of the State Constitutional provision prohibiting the diminishment or impairment of accrued financial benefits of any pension plan or retirement system because they are not monetary payments which increase in relation to number of years of service the retiree has performed. Studier v. Michigan Public Schools Employees' Ret. Bd., 472 Mich. 642, 698 N.W.2d 350 (Mich. 2005).

Constitutional Clause that Membership in System is Contractual Relationship with Protected Benefits that Exist at Time Become Member, Whether or Not Accrued, and Related Case Law

Illinois: Art. 13, § 5: Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.

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An Illinois appeals court interpreted the State Constitution's provision that membership is contractual and that benefits may not be impaired to prohibit legislative action which directly diminishes the benefits of those who became members of the system prior to the enactment of the legislation, even if they are not yet eligible to retire. Kraus v. Bd. of Trs. of the Police Pension Fund, 72 Ill.App.3d 833, 390 N.E.2d 1281 (Ill. App. Ct. 1979). Pension rights vest when a person enters the pension system by making contributions or when the Illinois Constitution of 1970 became effective in 1971, whichever is later. Hannigan v. Hoffmeister, 240 Ill. App. 3d 1065, 1073, 608 N.E.2d 396, 402 (Ill. App. Ct. 1992). The appeals court has stated that the contractual relationship is governed by the terms of the pension laws in effect at the time the employee becomes a member of the system. In re Marriage of Menken, 778 N.E.2d 281 (Ill. App. Ct. 2002).

The Illinois Supreme Court held that the State Constitution's pension anti-diminishment clause did not require any particular level of funding, but rather a contractual right that participants would receive the money due them at the time of their retirement. People ex rel. Illinois Federation of Teachers v. Lindberg, 60 Ill. 2d 266, 326 N.E.2d 749 (Ill. 1975). Thus, legislative amendments that changed the amortization schedule of accrued liabilities did not violate the clause. McNamee v. State, 173 Ill. 2d 433, 672 N.E.2d 1159 (Ill. 1996). Nor did the clause create any vested contractual relationship that would allow pension participants to enforce funding provisions because the State Constitution drafters did not intend to freeze the politically sensitive area of pension financing. People ex rel. Sklodowski v. State, 182 Ill. 2d 220, 695 N.E.2d 374 (Ill. 1998). Furthermore, the funding legislation that participants sought to enforce did not evince intent to create contractual rights in favor of beneficiaries. Id.

New York:

Art. V, § 7: After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

The New York Court of Appeals has liberally construed the above constitutional guarantee. The Court has found that the legislature may not take away a member's benefits even if only provided on a "temporary basis." Public Employees' Fed'n v. Cuomo, 62 N.Y.2d 450, 478 N.Y.S.2d 588, 467 N.E.2d 236 (N.Y. 1984). The Court has also held that a member is entitled to the benefit of actuarial tables in effect at the time he joined the system, regardless of subsequent changes in mortality experience. Birnbaum v. New York State Teachers' Ret. Sys., 5 N.Y.2d 1, 176 N.Y.S.2d 984, 152 N.E.2d 241 (N.Y. 1958).

The New York Court of Appeals held that health insurance benefits were not within the protection of the State Constitution because more than an incidental relationship to the retirement system must be found before an employee

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benefit will be held to be within the area of action prohibited by the State Constitution. Lippman v. Board of Educ. of the Sewanhaka Cent. High School Dist., 66 N.Y.2d 313, 317, 487 N.E.2d 897, 899-900 (N.Y. 1985). The Lippman court summarized cases held to directly affect retirement benefits in violation of the constitutional clause as follows: Public Employees', 467 N.E.2d 236, "to prevent change concerning refund of retirement contributions upon resignation through the device of limiting the duration of the statutory provision and then successively extending it; Kleinfeldt v. New York City Employees' Ret. Sys., 36 N.Y.2d 95, 101, 365 N.Y.S.2d 500, 324 N.E.2d 865, with respect to the rate of compensation part of the retirement formula (but with the recognition that "[t]his does not mean necessarily, and it should not be decided now, that no part of the formula, however trivial, or however within the contemplation of the 'contracting parties' would never be subject to retroactive modification"); Matter of Weber v. Levitt, 34 N.Y.2d 797, 359 N.Y.S.2d 39, 316 N.E.2d 327 affg. 41 A.D.2d 452, 344 N.Y.S.2d 381, in relation to final average salary for pension purposes; Matter of Donner v. New York City Employees' Ret. Sys., 33 N.Y.2d 413, 353 N.Y.S.2d 428, 308 N.E.2d 896, concerning the right to reenter the retirement system after withdrawal from service; Matter of Hessel v. New York City Employees' Ret. Sys., 33 N.Y.2d 381, 353 N.Y.S.2d 169, 308 N.E.2d 688, in relation to what part of terminal leave pay was includible in computing the retirement benefit; Kranker v. Levitt, 30 N.Y.2d 574, 330 N.Y.S.2d 791, 281 N.E.2d 840, with respect to the inclusion of vacation pay in computing the retirement benefit; Matter of Ayman v. Teachers' Ret. Bd., 9 N.Y.2d 119, 211 N.Y.S.2d 198, 172 N.E.2d 571, concerning the calculation of the annuity portion of the retirement allowance; Birnbaum, 152 N.E.2d 241, same as Ayman." Lippman, 487 N.E.2d at 899-900.

The Lippman court noted a holding finding a constitutional violation not directly related to benefit computation under Sgaglione v. Levitt, 37 N.Y.2d 507, 375 N.Y.S.2d 79, 337 N.E.2d 592, which invalidated a legislative direction to the Comptroller as administrative head of the retirement system to invest in Municipal Assistance Corporation bonds because the effect was "to remove a safeguard integral to the scheme of maintaining the security of the sources of benefits for over half a century" (id., at p. 512, 375 N.Y.S.2d 79, 337 N.E.2d 592), and "because the means designed to assure benefits to public employees and those already retired will be impaired by the offending device" (id., at p. 511, 375 N.Y.S.2d 79, 337 N.E.2d 592 [emphasis supplied]). Lippman, 487 N.E.2d at 900.

Following Lippman, the New York Appellate Division held that there was no valid constitutional challenge where the legislative change was a "minor and entirely incidental influence" on retirement benefits, such as a change in mandatory retirement age. Mainello v. McCall, 252 A.D.2d 235, 238, 684 N.Y.S.2d 83, 85 (N.Y. App. Div. 1999).

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No Constitutional Provision, But Statutory or Precedent Protection

Connecticut: The Connecticut Supreme Court held that, although state employees have no vested contract rights to retirement benefits, they do have statutory rights to retirement benefits once they satisfy the eligibility requirements of the act of becoming eligible to receive benefits. The Court did find that state employees have a property interest in the existing retirement fund, and that the due process clause prevents "legislative confiscation of the retirement fund and arbitrary forfeiture of pension benefits." Pineman v. Oechslin, 196 Conn. 405, 417, 488 A.2d 803, 810 (1985) (act raising retirement eligibility age of female did not create vested contractual rights in favor of state employees prior to their satisfaction of all benefit eligibility requirements). In the municipal context, the Connecticut Supreme Court upheld the lower court's interpretation of a collective bargaining agreement to provide a vested right to retirees to health insurance that survived the expiration of such agreement. Poole v. City of Waterbury, 266 Conn. 68, 98-99, 831 A.2d 211, 230 (Conn. 2003). However, a U.S. District Court found that nearly identical language in another collective bargaining agreement did not provide active employees with vested rights to retirement benefits. See Walker v. Waterbury, 26 EBC 2477, 2479 n. 1 (D.Conn. 2009).

Delaware: The Delaware Supreme Court has held that "vested contractual rights exist under the State Pension Law and in the State Pension Fund, at least as to those employees and former employees who have statutorily vested rights in service pension or who have otherwise fulfilled eligibility requirements for pension [sic]." The Court further held that a public employee with vested contractual rights in the plan is entitled to protection against unreasonable modification of the plan. In re State Employees' Pension Fund, 364 A.2d 1228, 1235 (Del. 1976). If an employee has no vested rights in the plan, a plan change would be permitted as to that employee. Petras v. State Board of Pension Trs., 464 A.2d 894 (Del. 1983).

Kansas: The Kansas Supreme Court has held that the state retirement systems create contracts between the public employer and employees who are members of the system. Brazelton v. The Kansas Pub. Employees Ret. Sys., 227 Kan. 443, 607 P.2d 510 (1980) (individual gains rights upon becoming member in system that cannot be unilaterally changed to member's detriment; retroactive requirement that additional contributions be made for years of past completed service adversely affected rights and was impairment of contract). Kansas courts follow the rule limiting modification of employee's pension rights set forth in the California Betts case, supra, generally permitting modification of an employee's vested contractual pension rights prior to retirement only for the purpose of keeping the pension system flexible to adjust to changing conditions while also maintaining the integrity of the system, and only if the modification is reasonable, which requires any changes resulting in disadvantage to employees to be accompanied by comparable new advantages. See also Kansas Public Employees Ret. Sys. v. Reimer, 262 Kan.

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635, 646-647, 941 P.2d 1321, 1330 (Kan. 1997) ("It is clear that fully vested benefits payable to retired or disabled employees or their beneficiaries are contractual obligations of the State. KPERS is a classic 'defined benefit' retirement plan... The State of Kansas and the numerous public entities whose employees are subject to the plan have an unequivocal constitutional, statutory, and contractual obligation to ensure that KPERS has sufficient funds to pay the defined benefits to public employees who are participating in the plan.")

Additionally, Kansas statutes provide that no change in the pension statute will affect the then-existing rights of members; the change may be effective only as to rights which would otherwise accrue as a result of services rendered by a member after the change. Kan. Stat. § 74-4923.

Maryland: Courts have found that a public employee has contractual or vested rights in a pension plan, but the legislature may make reasonable modifications to the plan. The modifications must be reasonably intended to preserve the integrity of the system by enhancing its actuarial soundness, as a reasonable change promoting an interest of the state without serious detriment to the employee—essentially, the employee must have substantially the program he bargained for, and any diminishment must be balanced by other benefits or justified by countervailing considerations for the public's welfare. City of Frederick v. Quinn, 35 Md.App. 626, 371 A.2d 724 (1977). See also Maryland State Teachers Ass'n, Inc. v. Hughes, 594 F.Supp. 1353, 1368 (D.C.Md. 1984) (Maryland law does not require that "the legislature wait until a pension plan is actuarially unsound before making changes to that system... Such a requirement would jeopardize the pension benefits of current and future retirees, would require that the trustees... abdicate their role as fiduciaries, and would impose an irrational limitation on the legislature's police power. A pension system need not be actuarially unsound before a legislature may move to change the system and benefits it provides its members.")

Massachusetts: Statutory law provides that a member has a contractual relationship with the state government derived from the terms of the pension contract, and the legislature may not alter the pension statutes if doing so would deprive members of benefits they enjoyed under a previous pension law, if the member paid the required contributions. Mass. Gen. Law ch. 32, § 25(5). The courts have found that the "contract" is formed when a person becomes a member of the system by entering employment, and he is entitled to have the level of rights and benefits then in effect preserved in substance without negative modification. Opinion of the Justices, 364 Mass. 847, 303 N.E.2d 320 (1973) (legislation raising mandatory employee contributions without increase in benefits would be presumptively invalid as to current members, unless necessity was shown to justify exercise of State's police power) However, reasonable modifications of the plan are permitted before retirement as long as other benefits are provided to offset any disadvantage. A court should examine the nature of the justification for the modification in light of

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the problem of financing and administering large plans under changing conditions. See also Madden v. Contributory Ret. Appeal Bd., 431 Mass. 697, 729 N.E. 2d 1095 (Mass. 2000). Amendments to a pension forfeiture statute that made its application differ from those criminal situations covered under the prior statute were not a "substantial impairment" to the pension contract because state pension benefits have always been heavily regulated and the precursor statute had put the plaintiff on notice when he entered government service that pension benefits could be revoked if he engaged in certain criminal activities. MacLean v. State Bd. of Ret., 432 Mass. 339, 345, 733 N.E.2d 1053, 1059 (Mass. 2000).

New Hampshire: The State Supreme Court has held that retirement benefits are part of the employee's compensation and become vested upon the commencement of permanent employee status. State Employees' Assoc. v. Belknap County, 122 N.H. 614, 448 A.2d 969 (1982).

North Carolina: The legislature has reserved to itself the right to modify or amend the retirement system, but only to coordinate with any changes made to Social Security. N.C. Gen.Stat. § 135-18.4; see Faulkenbury v. Teachers' and State Employees' Ret. Sys. of North Carolina, 345 N.C. 683, 483 S.E.2d 422 (1997).

The relationship between state employees and the retirement system is contractual in nature. Wells v. Consolidated Judicial Ret. Sys. of N.C., 136 N.C.App. 671, 526 S.E.2d 486 (2000). The contract is governed by the statutory provisions in effect at the time the rights vest, *i.e.*, at the time of achieving years of service (five) required for benefit eligibility under statutes.

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