

Senate Bill 238

(As Engrossed March 13, 2019)

Actuarial Cost Study prepared for
Joint Committee on Public Retirement and Social Security Programs
of the Arkansas 92nd General Assembly

Provisions of the Bill

Senate Bill 238 affects the Arkansas public retirement systems as defined in chapters 1 through 11 of Title 24 of the Arkansas Code except the alternative plans for higher education employees. Section 1 of Senate Bill 238 defines Elected Public Official. The remainder of the bill sets out rules for the forfeiture of retirement benefits when an elected public official is convicted or pleads guilty to a felony arising out of abuse of public trust, abuse of office, or fraud. There are provisions for a refund of member contributions and provisions to restore their benefits if the person is pardoned or the conviction is overturned.

Fiscal Impact

There is not a way to directly calculate the savings associated with the provisions of Senate Bill 238. There have not been many elected public officials convicted of crimes arising out of their official actions. This appears to primarily effect members of APERS, but, based on the language of the bill, benefits in any of the systems could be forfeited. There would be additional administrative expense to administer these provisions. It is our opinion that Senate Bill 238 would create a very small savings to any system from which benefits are forfeited.

Other

Senate Bills 52 and Senate Bill 238 amend the same sections of code. Senate Bill 52 deals with all public employees as defined and Senate Bill 238 deals with listed state elected officials. Senate Bill 52 also has language about the duties of the prosecuting attorney and system executive director to carry out the forfeiture that are not in Senate Bill 238.

Our primary concerns remain and are outlined in the attached document “Forfeiture of Retirement Benefits”, particularly conflicts with federal law prohibiting forfeiture of vested benefits. That attached document should be considered part of this Cost Study.

Sincerely,



Jody Carreiro, A.S.A, M.A.A.A.
Actuary

Senate Bills 52, 53, 234, and 238 and House Bill 1297

Forfeiture of Retirement Benefits prepared for Joint Committee on Public Retirement and Social Security Programs of the Arkansas 92nd General Assembly

Purpose of Document

This document has been prepared in addition to the Actuarial Cost Study for Bills mentioned in the title. All of these Bills have some form of garnishment or forfeiture of benefits to individuals meeting certain felony criteria. These general remarks hold for all of these Bills and will be attached and part of each Actuarial Cost Study. The comments below are more legal in nature than actuarial. This should not be considered a legal opinion because we are not attorneys. But this reflects our experience in over 30 years working with state and federal retirement law.

Concerns

Federal retirement law has a provision that would prohibit the actions proposed in these bills. But, that section of federal law, IRC 401(a)(13), does not apply to governmental plans. There are several federal law concepts that do apply to a qualified governmental plan. Two of these are definitely determinable benefits and exclusive benefit rule which are discussed below.

Definitely Determinable – “A pension plan within the meaning of section 401(a) is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement. Retirement benefits generally are measured by, and based on, such factors as years of service and compensation received by the employees.” The regulation to this law further states that, “in the case of a defined benefit pension plan, the benefits on behalf of each participant are determined in accordance with a stipulated formula that is not subject to the discretion of the employer, the requirements of Section 1.401-1(b)(1)(i) are satisfied.” The state of Arkansas is the employer. Under the proposed bills, the employer through the state’s judiciary would have discretion to deviate from the stipulated formula to determine whether an employee receives a benefit.

Exclusive Benefit - A trust is a medium under which the retirement plan assets are accumulated. The employer or employees, or both, contribute to the trust, which forms part of the retirement plan. The assets are held in the trust until distributed to the employees or their beneficiaries according to the plan’s provisions. The trust must be maintained for the **exclusive benefit** of the employees and their beneficiaries. It appears problematic for the state to collect and hold funds where one of the beneficiaries of those funds would be the fund itself or the state.

Constitutional Contract Clause – Every state has different interpretations of the U.S. Constitution and how it interacts with their own state’s contract clause. There are only two Arkansas Supreme Court cases that address these issues to any extent (Jones v. Cheney (1973) and Pyle v. Webb (also 1973)). The one point that appears to have agreement on all sides is this: when a member has met the qualifications for a benefit and has signed his paperwork to begin receiving a benefit, a contract exists and that base retirement benefit cannot be altered. Senate Bill 238 tries to address this by noting that anyone elected after January 1, 2020 agrees by taking office that their benefit could be reduced. I would be concerned about how this would be construed by a court if a teacher earning and receiving a benefit from ATRS is then elected to the legislature and commits a felony and the provisions of these bills attempt to reduce or end their ATRS benefit.

Other – The three above issues are not the only issues that could arise, but are the most compelling. For example, except for Senate Bill 238, the bills do not make a provision to return the employee’s own contributions to them. This could raise other federal retirement law issues. There are retroactivity issues that could be challenged. There are also numerous Arkansas and U.S. Constitutional issues that arise in legislating pension forfeiture.

Current Practices

Based on discussions with the various systems, these types of issues can be addressed with current tools. There are several situations where, as part of the plea and sentencing with the courts, a part or all of the retirement benefit is sent to a special bank account from which restitution or fines are paid.

Conclusion

In my opinion, there are tools in place to deal with the issues addressed in these bills without exposing the systems to qualification or legal risks.

Sincerely,



Jody Carreiro, A.S.A, M.A.A.A.
Actuary