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**2009**

**COURT OF APPEALS RULES THAT STRIKING NURSE DID NOT PERFORM WORK AND THEREFORE WAS NOT ENTITLED TO CREDIT FROM PERS FOR THE MONTH THE NURSE WAS ON STRIKE**

*Bailey v. Public Employees Retirement Board*, 228 Or App 300 (2009) arose because the nurse that was on strike at OSHU claimed that she was entitled to credit for the month that she was on strike due to a PERS remedy that was given, which ordered that the striking nurses were paid an amount that the non striking workers were paid because of the special bonuses that OSU paid to the non striking nurses. That decision can be found on the *Oregon Nurses Association v. Oregon Health and Science University*, 19 PECBR 692 (2002).

The Court of Appeals first noted that the payment was a penalty for OSU's conduct and it was not paid to all of the striking nurses only those that returned to work at OSHU. Secondly, the Court of Appeals interpreted the statutory scheme for PERS namely ORS 238.005 (5)(a) where salary is defined as a payment out of the funds of public employer "in return for services to the employer." The Court noted that the nurse did not work during the strike and therefore it was not payment for return for services.

*Editorial Comment: This case has little applicability to our clients, but what about association presidents or other officers who are on leave to run a labor organization and the labor organization reimburses the employer for the wages of the employee, because the employer carries the employee on the payroll? Might someone challenge the fact that the employee was not being paid "in return for services to the employer" since the employee was absent doing union business? Years ago this issue was raised and a legislative change was sought but abandoned. Those affected potentially by this case should reconsider getting a legislative change in this area.*

**2006**

**THE BENNETT HARTMAN FIRM FILED LITIGATION CHALLENGING THE CITY OF EUGENE'S SETTLEMENT WHICH REQUIRED PERS TIER I RETIREES WHO RETIRED BETWEEN 2000 AND 2004 TO PAY BACK AN ALLEGED OVER CREDITING OF THEIR ACCOUNT AND NOT GIVING THEM THE RETROACTIVE 2% COST OF LIVING INCREASES**

While this case has an uphill battle and is certainly one that should prevail, it probably will not.

2005

**THE SUPREME COURT UPHOLDS MOST OF THE NEW PERS LEGISLATION AS AN UNRELATED MATTER PERS HAS BEEN WITHHOLDING TOO MUCH TAXES ON RETIREES WITH A DUTY RELATED DISABILITY.**

The Oregon Supreme Court upheld most of the new PERS reform legislation. The Court's decision was based on its analysis of the PERS statutes, and the Court concluded that the only guarantee employees had was to have the formula calculation amount when they retire. The Court declared that the money match and pension plus annuity methods of calculating retirement payments were optional and not contractual in nature.

The good news is the Court did throw out the part of the legislation that eliminated the annual crediting of employees PERS accounts at the assumed rate. However, the crediting at the "assumed" rate, which historically has been at eight percent, is within the administrative discretion of the PERS Board to change by lowering that rate. So, in the future the assumed rate could be lowered significantly.

Secondly, the Court overturned taking away the annual COLA for retirees. However, the Court noted that it had not yet decided the *City of Eugene* case where Judge Lipscomb had ruled that the 1999 earnings credited should have only been 11 percent. The Court stated that when it decides that case, should it uphold Judge Lipscomb's decision, it might declare that temporarily suspending the COLA in order to recoup the over payment would be legal.

The Court ruled that diverting the six percent employee contribution into a separate account was legal. The Court's ruling was based on the fact that employees are still guaranteed the formula upon retirement. However, the six percent diversion means that part of an employees retirement account cannot be used to help the employee retire with the higher benefit level of the money match retirement option, and is not subject to the two percent annual COLA. Also, the Court upheld stopping future contributions into the variable program and adopting updated mortality tables.

This case was a 4 to 3 decision. Aggressive management attorneys could take the decision as a wedge to reopen the *OSPOA* decision and attempt to eliminate the six percent account altogether as long as the formula is provided at retirement. The Court's decision cannot be construed as putting the controversy to rest as to what the Legislature or the PERS Board can do to lower employees' retirement benefits in the future.

**PERS HAS BEEN WITHHOLDING TOO MUCH TAXES FROM RETIREES WHO HAVE A WORK RELATED DISABILITY**

Recently, I was contacted by a retiree who retired because of a work related disability. For years PERS had been withholding taxes on virtually all of his disability benefits. However, since 1991 PERS should not have done so, as only part of that benefit is taxable due to laws passed that year. Retirees can file refund claims to recover their overpayments.

The problem is that the refund claims can only be filed within three years of when the retiree paid his or her taxes. There appears to be no remedy for overpayments in taxes which were made more than three years ago. A lawsuit against PERS over withholding too much taxes does not appear to be viable. The best solution is for a legislative fix authorizing PERS to be liable for those amounts. However, given PERS' financial condition, such a solution is problematic at best.

### **OREGON SUPREME COURT DISMISSES THE CITY OF EUGENE (JUDGE LIPSCOMB) DECISION AS MOOT**

As most of you know, Marion County Circuit Court Judge Lipscomb had ruled that the State of Oregon acted improperly when it failed to set aside PERS' earnings in 1999 to be put in reserve funds instead of putting them into individual retirement accounts. He ordered that 11 percent should have been credited to employees' accounts instead of 20 percent. Subsequently, the 2003 Legislature passed laws that codified Judge Lipscomb's ruling. In addition, the City of Eugene entered into a settlement agreement with the State of Oregon, when Governor Kulongoski reversed the decision of the previous Governor to contest Judge Lipscomb's ruling on appeal, settled by agreeing to adjust the 1999 earnings distribution by taking the 9 percent of 1999 earnings from employee accounts and putting them in a reserve account.

The City of Eugene and the State of Oregon moved to dismiss the appeal that had been filed against Judge Lipscomb's ruling as being moot. While the Supreme Court initially denied the motion, it was granted it last week.

The practical affect of the Supreme Court's ruling is that it will be extremely difficult for the settlement to be overturned in court. The reason for this is that parties to a lawsuit have wide discretion on how to settle litigation and plaintiffs challenging the settlement will have to prove an abuse of discretion. Therefore, PERS is set to recoup the payments that it has made to retirees, including this author, which were calculated based on the full 1999 earnings. Confusion exists as to how aggressive PERS will be in its recoupment. An argument can be made that the previous Supreme Court decision in the *Strunk* case while stating that the two percent COLA was part of the PERS contract, it did not invalidate utilizing the two percent COLA to satisfy the "overpayment" that occurred in 1999.

The State statute on recoupment of overpayments, ORS 238.715 authorizes a number of different methods. The most common would be simply reducing retirement payment by

no more than 10 percent of the monthly payment until the recoupment occurs. This can be offset by annual COLAs which then will have to be given pursuant to the *Strunk* ruling.

The PERS Board is set to meet at the end of September to consider these issues and more clarification of how the Board will proceed on the overpayments will occur at that time.

*Editorial Comment: The PERS Plaintiffs are planning further legal action. However, due to the shenanigans of Governor Kulongoski and the decision by the Supreme Court to declare the appeal moot, it is doubtful that there will ever be a meaningful challenge or a meaningful legal ruling to the merits of the settlement. This is an injustice to everyone who is affected by the decision. Again the old adage of hard facts makes hard law come into play.*

**2004**

## **PERS LITIGATION STATUS REPORT**

The case continues to move along at breakneck speed. I have spent much of the last few weeks in depositions in Salem and Portland. By the time you receive this letter, the parties will have exchanged detailed expert witness reports and will be in the process of exchanging and finalizing exhibits and witness lists and final witness statements.

The Plaintiffs' attorneys have divided up the workload responsibility. Not surprisingly, my responsibility is dealing with state and local government witnesses who will testify that due to inadequate financial resources, paying projected increases in PERS rates would cause them not to meet essential services to the public. If that sounds close to an inability to pay defense in an Interest Arbitration, it's because it is.

The case is supposed to start with a hearing on the 23<sup>rd</sup> of February and go for the next two weeks or whenever it's completed. The location of the hearing will be at the Multnomah County Courthouse, 6<sup>th</sup> floor, "Commissioners Courtroom," in Portland. It will be open to the public.

The Supreme Court has indicated it is going to set an extremely tight briefing schedule with the initial brief due on May 17<sup>th</sup>, and oral argument on the case on July 30<sup>th</sup>. While these dates may be changed, my guess is that they will not. I have offered to bet all the other Plaintiffs' attorneys that there will be a decision by the Supreme Court this year. No takers.

The main arguments of the State of Oregon and local government attorneys is that the PERS Board did not follow the statutes by giving over-generous annual credits to members' accounts and failing to adequately reserve the gains on good years to provide for deficits in years of bad investment returns. I expect the defense to also be that the

rates are projected to go so high that if this legislation had not passed, local governments would be unable to provide adequate services to the public.

The Plaintiffs' contentions will be that while no human being is perfect, the agents and employees and Board members in PERS did the best they could with the information they had, and that the economic downturn cannot to be viewed with 20-20 hindsight. In addition, we will argue that in spite of increased PERS rates, state and local government does have the ability to meet essential public services and pay their contractual obligations. The parties have agreed that the whole record from the City of Eugene case will be admitted into this case to avoid duplication. From my review of that record, there were no significant facts that were in dispute. I expect almost no facts to be in dispute in this case, but the issue will be what legal conclusions can be drawn from the record. Therefore, I do not believe that either side will be able to realistically predict the outcome of the case when the two-week trial to make a factual record has been concluded.

Last and not least, some clients have made verbal promises of financial assistance with the costs. Now is a good time to come through with those promises. Two weeks in a hotel in Portland adds to the expenses.

## **FUTURE LITIGATION OVER THE “REFORMS” TO THE RETIREMENT SYSTEM**

Public sector layoffs are inevitable given the failure of Measure 30. Some of my clients who were concerned about being laid off asked if it was a fact that if the new retirement system, OPSRP (Oregon Public Service Retirement Plan) has a provision that if an employee is separated from a participating public employer for six consecutive months that the employee will go from PERS into the OPSRP system. The answer is: Yes. I have briefly discussed this matter with Greg Hartman the attorney for the PERS Coalition. He agrees that the problem exists and indicates that his client will work through the rule making process, i.e. the development of Oregon Administrative Rules, to try and take care of some of the problems with this statute. However, it will take legislation or a court decision to eliminate this problem. Some of the legislators are apparently now indicating sympathy for fixing the problem. However, they were warned that the problem existed when the statute was passed.

I see no alternative but to file a Declaratory Judgment action to get a ruling that the statute will not apply to those employees who are involuntarily separated from employment through layoffs, and that are able to then rejoin their or another public sector employer. The only question seems to be the timing of the lawsuit and whether to wait for the Administrative Rules to be adopted and work with the PERS Coalition on the litigation, or simply go ahead and file it as soon as possible.

*Editorial comment: But not before the “trial” over the changes in the PERS system is over.*

## **PERS UPDATE**

The Special Master in this case, Court of Appeals Judge Brewer, issued his Findings of Fact for utilization in this case when it is argued before the Supreme Court. In the 120 page report, Judge Brewer made findings similar to that of Judge Lipscomb in the City of Eugene case, which is that the failure of PERS to fund a thirty month reserve at once when it was recommended that it do so (PERS only funded about 70% of it in the first year) was unreasonable and imprudent. He also found that there was no explanation for PERS' failure to fund the contingency fund. Judge Brewer also concluded that the PERS system was flawed and accepted expert testimony that it was going to end up being under funded no matter what given the combination of the PERS crediting practices, the guarantee of the eight percent return, and the poor returns in the stock market. The report may be found at: [www.publications.ojd.state.or.us/PERS\\_report.pdf](http://www.publications.ojd.state.or.us/PERS_report.pdf). (Hot button on Web Page.)

While Judge Brewer only made factual findings and did not make legal rulings, his recommended finding that PERS acted unreasonably and imprudently when combined with the findings of Judge Lipscomb in the City of Eugene case, certainly gives us an uphill battle. It will take an extraordinary amount of courage for the Supreme Court not to uphold the new legislation.

Oral argument in this case is set for July 30<sup>th</sup>. It is my prediction that the Supreme Court will rule on this case before the Legislature convenes in January.

## **THE “SETTLEMENT” IN THE CITY OF EUGENE CASE**

Some of you have read about the “settlement” in the City of Eugene case. What happened is that the State of Oregon and the local government jurisdictions, at the direction of the Governor, agreed to “settle” the case by complying with the 2003 legislation. The other part of the settlement was that the Gary Law Firm will get paid for “partial reimbursement of attorney’s fees, \$750,000” from PERS, i.e. members’ money.

In conjunction with Daryl Garrettson, we filed a Motion requesting judicial review of that “settlement” on the grounds that there was an expenditure of trust funds. Because we only had an Amicus status in that case, i.e. Friend of Court, the Court denied the Motion. However, that may be pursued by the PERS Coalition which is a named Intervenor in the case. However, given Judge Brewer’s “findings,” I expect these cases to be decided when the Court rules on the challenges to the 2003 legislation later this year.

## **PERS UPDATE**

The plaintiffs have filed their opening briefs in the case. There are three more rounds of briefs to be filed with oral arguments on July 30<sup>th</sup>. The last client newsletter contained my opinion on the status of the litigation which I believe is still valid. The extent of my pessimism has drawn some disagreement from some of the other plaintiffs' attorneys. I stand by the statements previously made.

Josephine County Association's declaratory judgment petition to invalidate part of the new reform legislation must be dismissed.

In what is a "good news, bad news" report, because Josephine County has announced that it has no plans to lay off any employee until at least November, I was forced to dismiss the motion for declaratory judgment that I filed on behalf of the Association to obtain a court ruling that a part of the "reform legislation" which states that an employee who is voluntarily separated from a PERS employer for more than six months must leave the PERS system and go into the new OPSRP retirement system. The reason for the dismissal is that the Oregon Courts have ruled that a declaratory judgment lawsuit must involve an actual controversy and not a potential one. At the minimum, for a plaintiff, we will need a laid off employee who anticipates being laid off for six months. If there is any employee in that category, that employee should contact counsel to litigate the matter.

*Editorial comment: On an informal note, I've been told that employers recognize that this provision of the new legislation is a problem and that the next Oregon legislature may "fix" this issue. However, no one should bet the ranch on that occurring.*

## **ORAL ARGUMENT IN FRONT OF THE SUPREME COURT ON THE PERS LEGISLATION**

First, it is dangerous to try to predict how a case will turn out based on oral argument. That being said, I generally agree with the statements made by Greg Hartman, the lead lawyer for the PERS coalition, which were circulated by the OCPA. The Court's questions focused on what is the "contract" between members and the State of Oregon, i.e., what were the exact terms of PERS and what could members really expect. A lot of time was spent on the actuarial equivalency tables and why the PERS Board would think they could write a rule which says that the tables couldn't be changed, except for new hires. In addition, the Court seemed quite interested in how the retirees' benefits could be affected at all, i.e., the elimination of the two percent COLA. Members of the Court also hinted that their decision may be a mixed decision, with some parts of the statutes being thrown out and the others upheld.

Most interesting was the Court's almost total lack of questions about the utilization of "police powers" to void the contract for PERS benefits.

Given the fact that this legislature ordered that the PERS case was to be the Court's top priority, I expect a decision somewhere between September and November, and certainly before the legislature meets in January.

## **THE STOCK MARKET AND PERS**

Notice the article does not report the Supreme Court's decision. It has not yet come out. When it does I will send out a separate Newsletter. However, the underpinning and PERS and other public and private retirement funds is that over the long run the fund will return 8%. Over the last 25 years PERS has done better than that earning approximately a 9.5% rate of return.

The question is what can we predict for the future. When the PERS litigation experts testified, (approximately a year ago) they stated that utilizing the 8% figure was still valid. However, more conservative experts have been recently stating otherwise. In the November 8<sup>th</sup> issue of "Barron's Magazine" a bank credit analyst is quoted as stating that:

“...a typical balance fund portfolio isn't likely to return anymore than 5% a year over the next decade.”

If this pessimistic projection becomes true, the result will be a disaster for retirement plans. Given that my generation, the baby boom generation, is going to be retiring over the next 15 years, if that rate of return becomes the average, the result will be that many people in my generation will not get to experience their happy golden years. The result will be more PERS “reforms” when investments fall drastically short of expectations. Not a very optimistic year-end prediction. Ho, ho, ho.

**2003**

## **PERS LITIGATION**

The case has and will take up a considerable amount of my time for the next four months. I am spending three days on it this month, as much as three weeks in January, and two weeks at the end of February for the trial, which will be making a factual record for the Supreme Court.

Even though Judge Brewer has urged all attorneys to cooperate and to talk more and write less, that has not occurred to date. Probably as much as 50 pages of paper on the case crosses my desk each day, as well as numerous E-mails. More than one response to discovery requests has contained such double talk as “object to everything” and “will not waive an objection”, and “may provide a few items.” Reviewing some of these documents, it reminds me of why lawyers have bad reputations. The double talk that has been going on in legal documents is indeed embarrassing to the profession.

A number of clients have verbally indicated to me that they would like to make contributions for the expenses in the case and asked me for my best projections. To date, I have spent over 60 hours on the case. I have made two trips to Salem, two to Portland, and I anticipate that the workload will increase.

We may spend two to three weeks in depositions with court reporter expenses running almost \$1,000 a day. While the plaintiffs' attorneys have so far agreed to split those undermined costs, actual expenses will still remain significant. The largest expense will be at trial. Judge Brewer has requested a "real time" trial transcript. This will cost around \$2,000 a day for perhaps a two-week trial. It is my guess that Daryl Garretson and I will be splitting expenses for several thousand dollars of court reporter costs, plus other copying costs.

Daryl and I recently spent about a half a day reviewing documents in Portland. We discussed the matter of expenses and agreed that we would use any client-donated monies to pay for actual costs of court reporters. After that we would reimburse ourselves copying costs, mileage, and other miscellaneous expenses such as postage. One client asked how much did I think they should give. That is a difficult question because that depends upon client size and financial status. I believe that every client should keep a very healthy war chest for the un-hoped for but very expensive case that will require the utilization of experts. Once a client has that, if a client wishes to make a donation, I would suggest something in the neighborhood of \$10 per dues paying member. Daryl and I will keep a record of actual expenses and present an accounting to those clients that do make payments.

## **PERS LITIGATION UPDATE**

### **SUPREME COURT APPOINTS COURT OF APPEALS JUDGE DAVID BREWER AS SPECIAL MASTER RECOMMENDED FINDINGS OF FACT ARE DUE TO THE COURT NO LATER THAN APRIL 12, 2004**

Before being on the Court of Appeals, Judge Brewer has been a Lane County Circuit Court Judge where he was highly regarded for his abilities and respected for his judicial temperament. This makes him an excellent appointment to be Special Master in what are now seven consolidated cases.

His assignment is to rule on motions that may be filed and to submit to Recommended Findings of Fact to the Supreme Court no later than April 12, 2004.

In a status conference on Monday October 27<sup>th</sup>, Judge Brewer indicated that he intended to meet that deadline and wanted the trial on any disputed facts to be heard no later than February.

Generally, the duties of a Special Master include taking testimony and preparing Findings of Facts for a Court, which will apply them to legal principles. However, since Judge Brewer was given authority to rule on any motions that may be filed, Daryl

Garrettson and myself will be filing a Motion for Summary Judgment this week arguing that there are no facts in dispute concerning the fact that the new PERS legislation, HB 2003 and 2004, “impair” the contract that employees had with their employers. Judge Brewer has indicated some reluctance to rule on that motion because traditionally a Special Master does not make legal rulings.

However, a ruling in this area would be helpful, as I believe the case will turn on whether the deficit that PERS faces is sufficient to justify a public policy exception allowing the State to change the contract that employees have had for retirement benefits.

The next hearing, which like all proceedings in this case is open to the public, will be on November 12<sup>th</sup> at 9:00 a.m. At that time motions regarding the defenses raised by the City of Eugene and other local government Defendants will be heard, and the Court will establish litigation deadlines.

### **PERS, PERS, PERS**

The lawsuit to invalidate the new legislation is finished and will be filed on the 1<sup>st</sup> of July. It will be filed directly in the Supreme Court as required by HB 2004. Given the unique procedures required by the legislature, predicting how fast the case will be resolved is difficult. In spite of the legislative direction to give this matter priority, it could be a year or more before the dust settles.

### **PERS: THE MOVING TARGET**

It’s amazing how much things have changed since I wrote about PERS last December. All of these changes have been positive for those employees who do not want to take a dive and retire. The reasons for the changes are as follows:

1. The final judgment entered by Judge Lipscomb, which required PERS to back out of employees’ 1999 contributions, all earnings over 8%, did not have an exception in them for those employees who are already retired. On one hand, the judge incorporated his prior orders, but the judgment itself made no such exception. That distinction made by the Court was one of my reasons to recommend to employees who wanted to maximize the safeness of their retirement accounts to retire before the judgment was entered, if at all possible.
2. The Judge’s order, as it relates to adopting the new actuarial tables commanded PERS to do so “immediately.” The Assistant Attorney General representing PERS informed the Court that it would take PERS at least six months to reprogram its computer. The Court’s response was that PERS should do whatever’s right. The PERS Board’s response was to leave the date of January 2004 in place for the implementation of the new mortality tables. More significantly, the Board also decided that the table should only be applied

prospectively, i.e., for future earnings after that time, and not retrospectively. That means the pressure to retire before January 1, 2004, has been lifted.

What will the Legislature do? So far, the “reforms” that the Legislature has passed, do not affect an employee’s retirement account. As you may have read in the newspaper, the Legislature is contemplating ordering a change in the mortality tables to be utilized effective July 1<sup>st</sup> of this year. In addition, the Legislature’s version of the tables may have them being adopted retrospectively, i.e. back to your date of hire, but with a “look back option” to July 1. This is similar to what the Board was initially going to adopt. I assume if this occurs, litigation will ensue. So far only Grants Pass Police Association has asked to be formerly named as party to lawsuits over this, and the intervention into Judge Lipscomb’s case, which is on appeal. If other Associations wish to be formerly involved, I need written consent for them to do so.

## **2002**

### **DISABILITY RETIREMENT BENEFITS: THEY’RE PRETTY GOOD BUT THERE’S TWO CRITICAL AREAS THAT COULD BE IMPROVED.**

As an overview, Oregon’s PERS, Tier 1, has been proclaimed to be the best public employee retirement benefit in the Country. The disability retirement allowance portion of it is also very good. If, from day 1 of employment, an employee is injured in performance of duty, which was not intentionally self-inflicted, and the employee is unable to perform any work for which qualified, from day 1 of employment, the employee would receive a disability retirement as if for a police or firefighter, the employee had continuously worked to the age 55. For employers other than police or firefighters, it would be as if the employee had continuously worked to age 58. ORS 238.320. In other words, it would be same service pension as if the employee had actually worked until retirement age.

If the employee is disabled as a result of an off-the-job injury, the employee has to have worked for ten years in the PERS system before qualifying for the PERS disability retirement. The only limitation to the amount of retirement is that the employee’s disability retirement cannot exceed the employee’s wages at the time of disability. However, there are two limitations to the plan which have troubled a number of clients and friends who have recently had to take a disability retirement. They are limitations on earnings and medical insurance.

**Limitation on earnings:** After an employee has passed the earliest service retirement date (55/58), then there is no limitation on earnings. However, before that date, any income which exceeds the wages that were being earned by the employee at the time of disability, shall reduce the amount of disability retirement allowance but not to less than a minimum payment of \$400.

**Medical Retiree Insurance:** Unless an employee belongs to one of the few employers that provide for medical retiree insurance, something that is virtually impossible to obtain

through negotiations today, an employee will have to buy insurance for the employee's self and probably for the employee's family. Even doing so through the employer results in a steep reduction in the amount of disposable income for the employee. \$600 to \$700 a month for medical and dental full-family benefits is a normal amount that would be paid today. Needless to say, the costs of insurance will be increasing in the future at a greater rate than wages will increase. This will reduce the income that disabled employees receive.

An alternative: A program which would allow disabled employees to return to work in limited capacity for the employer, providing service to the employer, giving the employer access to the employee's knowledge acquired over the years, and providing income to the employee to supplement the disability benefits. This would take a legislative change. Up until now, employers have been reluctant to create permanent modified duty positions for a number of reasons. First, virtually no employer in this State is large enough to create these positions out of fear that too many employees would be in them, thereby reducing the number of positions available for employees who have no limitations. Until recently, there was also a concern that litigation would ensue under the ADA, that if these positions could be created for some employees, shouldn't they be available for all? In the last few years, the US Supreme Court has radically reduced the risk of ADA discrimination litigation in this area. However, the first problem still remains. Employers will state that they do not have the resources and do not wish to take the potential liability of guaranteeing every disabled employee a right to modified work, even at reduced income.

An alternative to this which could be a win/win situation is to partially fund these return-to-work programs through the disability retirement program with a match between the employer and PERS. This would reduce the PERS pay out, have a much-reduced cost to the employer, and give the employee a chance to continue to work and receive medical benefits. I know a number of employees who have had to go out on disability retirement or will be doing so in the future, who would jump at the chance for such an opportunity. Obviously, such a program would have to be carefully tailored so as to not aggravate the employee's medical conditions and to pencil out.

What exists in private disability plans? Through negotiations, most employees are also covered by a private long-term disability plan. The most common plan in this state is written by Standard Insurance. In its plan, there is a return-to-work incentive program, which is similar to the PERS plan. For the first 12 months, an employee is allowed to work, and up until the employee reaches the pre-disability earnings level, the employee is entitled to keep the income. After that, the difference will be deducted. This is identical to PERS. However, after the first 12 months, one half of the employee's work earnings will be deductible income, no matter how little or much. Perhaps a combination of these incentives, utilized on a long-term basis, could pencil out to the benefit of both the employer and PERS. This requires a legislative solution, and before the Legislature could be persuaded to enact it in these tight economic times, actuarial analyses will have to be undertaken by PERS's actuaries to project the financial impact of such a program. Employers will also have to buy into it.

A copy of this newsletter article will be sent to the OCPA representatives with a suggestion that they consider making this a legislative priority for the future, and at least causing a study to be undertaken by PERS as to the cost of such a program. It is my suggestion that the OCPA contact the police chiefs' and sheriffs' organizations to see if they will support this program. I personally know of at least one police chief, who, if he had the resources, would be more than willing to employ this type of program for his disabled officers that are having to retire.

### **PERS: WHERE IS IT GOING?**

As many of you have read, there was a serious movement during the special legislation session to abolish PERS all together. Another alternative was to have a third tier of PERS with fewer benefits.

The only bill that passed was one that gave the Oregon Supreme Court jurisdiction over legal challenges to new mortality tables, should they be adopted by PERS. Depending upon how those tables are adopted, i.e. retrospectively or prospectively, that could affect the retirement plans of many of you. With the assistance of OCPA and their lobbyist, Brian DeLashmutt, who did an excellent job fighting for all of us during the last legislative session, I will keep you informed of future developments in this area.

### **PERS INDICATES THAT IT WILL ADOPT NEW MORTALITY TABLES: LEGAL CHALLENGES TO FOLLOW**

The PERS statutes contemplate that from time to time PERS will undertake actuarial analysis of its retirement system with periodic adjustments, including adjustments of mortality tables. However, PERS has not seen fit to adjust the tables for years. Now with the stock market crash and PERS rapidly becoming a hot political issue with a negative rate of return on its investment, as contrasted with its obligation of an 8% guarantee on tier one accounts, PERS is under intense pressure to make changes.

As most of you know, PERS announced that it will be adopting new mortality tables, which will be effective January 1, 2004. Anyone who is not retired by that date will have the new tables affect all of the earnings that an employee's account has had to date. PERS attempted to make this legal by stating that any employee who retires after that date will have the higher of the two retirement amounts: that which the employee had accrued as of December 31, 2003 versus that which the employee will have accrued upon retirement with the new rates.

While my research is by no means complete, it is my tentative opinion that PERS' actions will violate federal and state rulings on the right of employees to have their existing benefits protected. PERS could change the mortality rates for earnings after the date of the PERS rule, but not for earnings before that date. Therefore, it will be my

recommendation to clients that litigation should be pursued for those employees who do not have the luxury of retiring by December 31, 2003.

OCPA has joined the PERS Coalition and urged all of its members to contribute to litigation that the PERS Coalition will be filing. While my retainer does not cover litigation over retirement benefits, when Measure 8 passed (the 6% pick up) the firm I was in handled that litigation as part of our services to all of our clients. It is my intent to handle this upcoming litigation in the same manner. However, whether you wish to make a contribution to the PERS Coalition is your decision.

The change in the mortality tables technically does not affect those employees who retire using the formula method (for law enforcement 2% times final average salary times years of service), but as soon as one of the options is exercised for survivorship, then the mortality tables come into play. For those utilizing the money match method for retirement, the mortality tables come into play. Only for those employees who pull all of their retirement contributions out of PERS will the mortality table not come into play. This is a rarely utilized option, and that is not recommended for tier one employees.

## **LEGISLATIVE THREATS TO END THE PERS SYSTEM WILL FAIL**

The Republican scheme in this special session to terminate PERS effective immediately and turn it into a defined contribution retirement plan for all time worked after the date of termination of the system will violate the court decision in the *OSPOA* case and previous Oregon Supreme Court decisions. Should the legislature pass such a statute and Governor (broken promise) Kitzhaber sign such legislation, I will immediately commence litigation over the legislative action.

Client inquiries about these issues are welcome.

## **PERS DISABILITY RETIREMENT: AN UPDATE**

In a prior newsletter I discussed the pluses and minuses of PERS disability retirement benefits. In addition, I have had research done by the lawyers I utilize for analyzing retirement benefits on the taxability of PERS' disability benefits. I have also corresponded with PERS on this matter.

While PERS gives a disclaimer that it does not give tax advice, both PERS and the attorneys I utilize agree that a duty related disability retirement benefit utilizing the formula (see above) is not taxable. However, if instead of utilizing the formula, a disabled retired employee were to use the money match option, then probably the difference between the money match and the formula disability retirement would be taxable. In addition, when an employee turns the normal retirement age, PERS puts the employee into its normal retirement system and then the retirement benefits are taxable.

Also, if an employee ends up with non-duty disability retirement, that income is taxable. Why? Because that's the way the IRS regulations are written.

## **THE CIRCUIT COURT PERS RULINGS**

I initially reported on Judge Lipscomb's rulings in the PERS litigation in the 5<sup>th</sup> Edition of the 2001 Newsletter. At that time Judge Lipscomb had ruled on the summary judgment motions of the parties to lawsuits initially filed by employers and then by employee groups, i.e. The PERS Coalition, attacking various aspects of PERS' decisions. The case has now gone to trial and Judge Lipscomb issued his final rulings earlier this month.

This case is quite complicated. The initial summary judgment decision is 26 pages and the final order in the case is another 26 pages. These cases deal with the interplay of PERS statutes. I do agree with Judge Lipscomb's comments that the overall statutory scheme is somewhat cumbersome because of all the amendments that have been made to it over the years. However, I disagree with every significant ruling that Judge Lipscomb has made in favor of the employers. Those rulings are as follows:

1. In 1999 PERS allocated far too much money to employees' retirement accounts when the PERS Board should have been funding the reserve account. Judge Lipscomb faulted PERS for not putting additional funding into that account in prior years, but indicated that any attack on PERS' failure to do so would be untimely.
2. Primarily as a result of the 1999 allocation, the PERS increased bills to employers sent out in the year 2000 were too high.
3. PERS used an improper method of calculating the employers' contributions for employees who retired on the "money match" system.
4. PERS should have been using updated actuarial tables over the years and its decision to adopt new tables as of the end of 2003 was described as too little and too late. Judge Lipscomb ordered the immediate use of new mortality tables.
5. Judge Lipscomb did not give specific orders as how PERS was to recalculate employer bills or recoup income that has been allocated to employees' accounts. He remanded the case back to PERS for decision-making in conformity with his rulings. However, that will not occur for a number of years.
6. Judge Lipscomb commented that retirees left public employment in reliance upon promise of a set income. Therefore, he opined without authority, that whatever PERS does cannot affect the accounts of employees who have already retired, even though there is a statute, which allows for re-couplement of overpayments. He ignored the issue of what happens to those employees who have kept working based on the promises of retirement

benefits at a certain level and did not switch jobs in reliance on those promises. Of course, what about those former employees who left years ago and were making their financial plans based upon their PERS projected benefits? (Yours truly.)

7. As previously reported, the Court did rule that PERS's giving employers retroactive credit for a year of matching employees' earnings in the variable account was improper as those earnings should have been allocated only to employees. However, given the Court's ruling on the failure of PERS fully fund the reserve account, any reallocation of this will not go to employees' benefit.

The State is going to appeal these rulings. A final decision is probably still years away.

The options for all of my clients are as follows:

1. Do nothing; there are plenty of oars in the water right now.
2. Support the PERS Coalition. It will be happy to accept your money.
3. Authorize me to file an Amicus brief in appellate courts in support of the actions that PERS has taken over the years.

It is my recommendation that those clients who wish to do so, authorize me to file an Amicus or Friend of the Court brief on their behalf in the Appellate Courts, arguing that PERS has acted properly. As I indicated in my last Newsletter when reporting on the Special Session's threats to amend PERS' statutes, and the PERS Board adoption of new mortality tables, this litigation has previously been handled without charge. In fact, because of the number of clients, no client was charged for hours spent of the OSPOA case years ago involving the 6% pick up.

Today things are considerably different. The OSPOA case was fairly simple and easy to litigate. The issues in these consolidated lawsuits over the PERS system are extremely complicated. A competent appellate brief cannot be written without reviewing the trial record including a huge transcript and mounds of exhibits. It would require a significant amount of work.

My retainer does not cover this type of litigation. Therefore, I propose that I will keep separate billing of my hours spent on this case and will allocate that time to client retainers on pro-rata basis. For instance, if only two clients authorized an Amicus brief in their name, and one of them had a 190 members and the other had 10 members, 95% of my time would be allocated to the large client and 5% would be allocated to the small client. This might or might not cause an increase in my retainer to an individual client when those retainers expire. The other alternative to this is additional hourly billings and that does not seem to be as beneficial as the method that I am proposing.

With this Newsletter, I am enclosing an extra page with a signature block for each client through its President to check indicating whether or not the Association wishes to participate in this case by way of an Amicus brief to be filed on its behalf. If you have questions about this, do not hesitate to contact me. I will be happy to respond to more inquiries about the lawsuit.

The number one question I am getting from employees who were close to retirement is: what should I do? The answer is doing whatever you planned to do. PERS will not act in accord with Judge Lipscomb orders, which would cause a reduction of every one of our retirement accounts, until the litigation in this case is over. That will take a number of years. It is my somewhat optimistic prediction that the rulings made by Judge Lipscomb will not be upheld on appeal. If I had to pick one issue in which PERS arguments were weakest, it was why it did not utilize updated actuarial tables as the statutes clearly contemplated. However, since my theory is that those tables can only be used prospectively, arguably it would be too speculative to recalculate the differences in retirements that a timely adoption of new tables would have produced.

### **PERS, PERS AND PERS**

In case you've missed it in the newspapers, the outgoing and incoming Governors are pushing the parties to the PERS litigation, which has been in front of Judge Lipscomb, to try to settle the matter. I am not confident that any settlement will be for the benefit of employees, but I am fairly confident that any "settlement" will probably produce more litigation. Given that fact, I have made the personal decision to start drawing my retirement account from the State. I had not wished to do so because of the guaranteed rate of return, but my distrust in what may occur as a result of that case, outweighs other factors.

It is my very murky crystal ball projection that intense pressure will be brought to bear on the parties to the lawsuit to settle the case. That settlement will not be to your benefit. It is my recommendation that any employee that is eligible to retire, retire a.s.a.p. Waiting until the end of next year to retire at the end of next year just before the proposed OAR revamping mortality tables goes into effect may be dangerous if the deal results in an immediate adoption of a new mortality table. However, every person must make their retirement decision based on their individual circumstances.

**2001**

### **MARION COUNTY CIRCUIT COURT JUDGE MAKES THREE IMPORTANT RULINGS ON PERS LITIGATION:**

1. The PERS handling of the variable annuity program as it related to the money match option was to the detriment of employers.
2. PERS did not allocate enough income to the contingency reserve account and are now charging employers too much as a result of that failure.
3. PERS's allowing employers retroactive credit for money in the money match account diverted money which should be for the sole benefit of employees to the employer.

These lawsuits came out of litigation where both employers and employees sued PERS.

In a complicated analysis of PERS' statutes, which have been amended over the years, Judge Lipscomb found that under the variable account statutes, employers should not have to "match" the higher variable returns (or get the benefit of "matching" lower returns). The employer should only have to contribute the same amount no matter whether the employee is in the fixed or variable account. The effect of this ruling is to reduce the value of variable accounts and will allow PERS to reduce the recently increased employer contributions. One ugly question concerns what happens to those employees who already retired based on the current method of calculations? Probably nothing, but that is by no means certain. In addition, the Court found that PERS had not set aside enough money from its earnings in a reserve fund to be utilized when the guaranteed rate of 8% was not earned. Both of these rulings can affect earnings credited to employees account.

On the other hand, employees had brought a lawsuit alleging that when PERS gave the employer retroactive credit for one year of investments in the variable fund, that PERS had taken earnings that were solely to be used to pay benefits to employees and used them to pay benefits for employers.

Judge Lipscomb then ordered the case set for trial to examine damages for employees and what remedy he was going to enter for employers.

*Editorial Comment: This case will be going through the Courts for years to come. A trial as to damages and remedies will be extremely complicated and may take more than a year to complete. The litigation will be three to four years on appeal.*

*Those with the greatest risk are employees who have money in variable accounts in that there may be a ruling that employers need not match the employees' contribution. Also, earnings may be reduced in order to better fund the contingency reserve.*

*Of more interest will be what remedy will be given to employees for the fact that their money was unlawfully diverted to employers. In theory, the dollar value of that money should be refunded to the account of all employees in PERS, whether they are in fixed or in variable accounts. However, that money may end up in the contingency reserve.*

*One thing can be sure. The answers to these lawsuits are three to four years away.*