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Appendix D

This document is solely an SCPP staff summary of the high-level takeaways from the legal analysis that is reprinted verbatim in other sections of this report. It was reviewed by the Assistant Attorney General and Ice Miller, but **no additional information was provided**.

We provide it here for the purposes of transparency and supplemental documentation only. In case of any conflict between this summary document and the legal analysis in the preceding sections of the report, those sections should be considered a more accurate reflection of the Assistant Attorney General's and Ice Miller's professional opinions than this document.

1. There is no apparent legal barrier to merging the Law Enforcement Officers' and Fire Fighters' Retirement System (LEOFF) Plan 1 and the Teachers' Retirement System (TRS) Plan 1, however any legislation comes with the risk that a court may strike it down.
   a. The merger described in Senate Bill (SB) 6668 is probably not prohibited under state or federal law.
   b. The Washington State Legislature has general authority to create and modify retirement plans, subject to restrictions in state law.
2. A "merger" is a merger of assets and liabilities of more than one tax-qualified plan.
   a. Assets must be usable across the combined plan.
   b. Can be contrasted with a "consolidation"; Washington plans are already consolidated for certain purposes.
3. If a bill was introduced that had the same provisions as SB 6668, the merger provided under that bill probably would not be prohibited under state or federal law. There are some suggested changes that can be made to the bill, such as:
   a. Modify TRS statutes to show merger of the two plans
      i. The prior bill only modified LEOFF 1 statutes (RCW 41.26), funding policy statutes (RCW 41.45), and the DRS statutes (RCW 41.50).
      ii. Specifically, there should be some adjustments in RCW 41.32 that put the reader on notice that the merger has occurred, and that the LEOFF 1 plan is

Aaron Gutierrez, MPA, JD
Senior Policy Analyst
360.786.6152
aaron.gutierrez@leg.wa.gov

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now a tier of the TRS 1 plan, but that each plan retains the benefits provided in that original plan.

b. A better structure would be if both LEOFF 1 and TRS 1 are merged into a new plan so that a Determination Letter (DL) can be sought from the IRS based upon its recent changes to the DL program.

c. Make the actual merger of assets and liabilities contingent on favorable Private Letter Ruling (PLR) and DL.

  i. In other words:

    1. The bill is effective, for example, 90 days after session.

    2. The actual merger is only effective once DRS receives both the PLR and a favorable DL from the IRS.

  ii. That said, other aspects of the bill (such as the rate relief provisions) can be effective whenever the Legislature chooses.

    1. The decision of whether or not to make rate relief contingent on a PLR/DL is a policy choice; not a legal concern.

4. As currently drafted, a court would probably find that SB 6668 does not impact members' vested benefits to a monthly retirement allowance.

  a. The bill contains explicit statements to this effect (specifically, that each participant in the merging plan will receive benefits after the merger which are equal to or greater than the retirement benefits the participant would have received on a termination basis immediately before the merger).

  b. Members have a vested right to certain benefits as defined by their plan.

    i. "Benefits" can mean the monthly benefit allowance after retirement as calculated by the formula in statute. It can also mean statutory disability, death and survivor benefits. It can also mean other rights that have been described by Washington courts.

    ii. So long as members (including survivors) receive the promised monthly benefit payments, the courts will likely not object to a merger for this reason based on a constitutional contractual right analysis.

5. At the state level, members have a right to the systematic funding of a public pension plan to maintain its actuarial soundness.

  a. There is no consistent measure of the term "actuarial soundness" because the term is not defined in statute, or in case law, or in actuarial standards of practice.

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   b. Absent evidence that a merger makes a plan actuarially unsound, the courts will likely not object to a merger for this reason.

6. No Washington court has considered the legality of a merger of pension plans such as provided for in SB 6668. Given the lack of precedent it is always possible that a court might find fault with this merger.

7. The liabilities of the plans and the funding level of the plans should be considered separately.

   a. At the federal level, the funded status of both plans is irrelevant for the purposes of a merger.

   b. For the purpose of federal tax law, plan "liabilities" means the benefits that are owed under the plans (including retirement benefits as calculated above, as well as disability and death benefits under the plans).

   c. These benefits do not increase or decrease with the funded level.

8. As currently drafted, SB 6668 is intended to satisfy the Exclusive Benefit Rule (EBR).

   a. Under tax law, the EBR must be satisfied, both before and after a merger.

   b. The IRS will consider the EBR satisfied so long as benefits are being paid such that each participant in the merging plan will receive retirement benefits after the merger which are equal to or greater than the retirement benefits the participant would have received on a termination basis immediately before the merger.

9. As currently drafted, SB 6668 does not result in a prohibited reversion of assets.

   a. A reversion of assets occurs when a party is entitled to remove assets from the trust and the assets are returned to either the plan sponsor or participating employers.

      i. For example, if the legislature wanted to remove assets from the pension trust to help pay for roads.

   b. When all total liabilities of a plan are satisfied, any remaining assets revert to the plan sponsor and/or participating employer(s) based upon the terms of the plan.

      i. In that sense, the plan sponsor and/or participating employer(s) "own(s)" the expected surplus.

         1. State is the plan sponsor.

      ii. Since total liabilities have not been satisfied (i.e., an expected surplus based on assumptions is not the same as having all liabilities finally paid and remaining assets

physically on hand), a reversion of LEOFF 1 assets may not take place at this time.

c. Because no money is being taken out for non-benefit purposes, the merger of assets and liabilities in SB 6668 does not meet the definition of a reversion, and is therefore not prohibited (see Ice Miller's discussion in Sections IV.L. and VIII of their letter and their answer to Question No. 34 in the Appendix to their letter).

10. The $5,000 lump sum payout is permissible under state and federal law, and is therefore a policy choice for lawmakers.
    a. It is not a prohibited gift of public funds under Art. II, Section 25 of the Washington Constitution.
    b. Art. II, Section 25 expressly provides an exception for increases in payments to retirees.
11. Retirement plans with dissimilar employers can be merged.
    a. The Public Employees' Retirement System, for example, combines many different types of employers.
    b. The fact that in a pension plan one employer is a utilities district and the other is a city is irrelevant under state and federal law so long as all participating employers are the state or political subdivisions of the state, including agencies or instrumentalities of the state or its political subdivisions.
    c. As noted above, the plan sponsor is the state.
12. The Alaska case of *Anchorage v. Gallion* is unlikely to be persuasive to Washington courts.
    a. Under federal law this case is irrelevant to a federal tax law analysis.
    b. Under state law:
        i. Its holding diverges from the holding by the Washington Supreme Court in *RPEC v. Charles*.
        ii. The *Anchorage v. Gallion* court based it's holding on a previous Alaska case, *Sheffield v. Alaska Public Employees' Ass'n*.
        iii. The Washington Supreme Court has recently expressly rejected the Alaska court's reasoning in the Sheffield case. Washington courts tend to rely primarily on their own case law.