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Analysis

Sub. H.B. 98 - Rep. Willamowski (As Enacted by the General Assembly)

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ORSC Position

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Sub. H.B. 98 amends the existing laws governing the division of retirement benefits upon termination of marriage under the five state retirement systems relative to the following two issues: (1) the annual cost-of-living allowance (COLA); and (2) the continuation of benefits to an alternate payee (i.e., former spouse) after the member's death pursuant to a court order.

The bill also creates a new joint and survivor annuity payment plan under the state retirement systems: the Public Employees Retirement System (PERS), the State Teachers Retirement System (STRS), the School Employees Retirement System (SERS), the Ohio Police & Fire Pension Fund (OP&F), and the Highway Patrol Retirement System (HPRS).

Details of the bill follow.

Annual COLA - The bill provides that the annual COLA payable under the five retirement systems shall be apportioned between the alternate payee and the benefit recipient in the same proportion that the alternate payee's benefit amount bears to the recipient's benefit amount. Under existing law, the COLA is payable only to the benefit recipient in its entirety.

The bill also provides that under the new joint and survivor annuity plan providing continuing benefits after the member's death to two, three or four beneficiaries, the annual COLA shall be divided among the designated beneficiaries in accordance with the portion of the benefit each beneficiary has been allocated. (R.C. §§145.323, 742.3711, 742.3716, 742.3717, 3307.67, 3309.374, 5505.174)

Continuing Benefits to Former Spouse under Court Order - The bill provides an exception to the automatic 50% joint and survivor annuity for married members under PERS, STRS, SERS, and OP&F which provides for the actuarial equivalent of the member's retirement allowance in a lesser amount payable for the life of the member and 50% of such allowance continuing after death to the member's spouse.¹ Under the bill, the automatic 50% joint and survivor annuity is waived *if* a plan of payment providing a specified amount continuing after death to the member's former spouse is required by a court order issued prior to the member's effective date of retirement. (This provision also applies to participants in the defined contribution plans established under PERS, STRS and SERS.)

Under existing law, the automatic 50% joint and survivor annuity may be waived only with the consent of the member's spouse.² Moreover, benefits payable to a former spouse pursuant to a division of benefits order (DOBO) currently terminate upon the member's death.

The bill provides that if a member is subject to a court order dividing retirement benefits and the retirement board has received a copy of such order, the board shall accept the member's election of a plan of payment at retirement, provided both of the following are satisfied:

- the member elects a plan of payment that is in accordance with the court order;
- if the member is married, the member elects the new joint and survivor annuity plan designating the member's current spouse as a beneficiary, along with the member's

¹HPRS law does not include the automatic 50% joint and survivor annuity for married members since the surviving spouse is entitled to 50% of the member's pension as a survivor benefit funded by the retirement system.

²Spousal consent may be waived due to the absence or incapacity of the member's spouse or any other cause specified by the board.

former spouse, unless the current spouse consents in writing to not being designated a beneficiary or the board waives the requirement that the current spouse consent. (This provision also applies to participants in the defined contribution plans established under PERS, STRS and SERS.)

(R.C. §§145.46, 145.92, 742.3711, 3307.60, 3307.87, 3309.46, 3309.92, 5505.162)

New Joint and Survivor Annuity Plan - The bill creates a new joint and survivor annuity plan under the five state retirement systems which shall consist of the actuarial equivalent of the member's retirement allowance in a lesser amount payable for the life and some portion of the allowance continuing after death to two, three or four surviving beneficiaries designated by the member at retirement and in such amount as allocated by the member at retirement. No portion allocated to any beneficiary under this plan shall be less than 10 percent unless compliance with a court order dividing retirement benefits requires the allocation of less than 10 percent to any beneficiary. The total of the portions allocated under this plan shall not exceed 100 percent of the member's lesser allowance.

Under existing law, monthly benefits may *not* be paid to more than one beneficiary under the various plans of payment provided by the state retirement systems.

The death of any designated beneficiary following the member's retirement shall cancel that portion of the plan of payment providing continuing benefits to the deceased beneficiary. The member shall receive the actuarial equivalent of the retirant's single life annuity based upon the number of remaining beneficiaries, with no change in the amount payable to any remaining beneficiary.

Upon remarriage, a retirant receiving an allowance pursuant to a plan of payment providing for a former spouse may elect the new joint and survivor annuity plan providing for the current spouse as well, provided the new plan of payment elected does not reduce the payment to the former spouse. (R.C. §§145.46, 742.3711, 3307.60, 3309.46, 5505.162)

Background - Prior to Sub. H.B. 535 (eff. 1/1/02), the laws of all five retirement systems generally provided that retirement benefits, including lump sum payments, shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency laws, or other process of law whatsoever, and shall not be assignable except as follows:³

- Alimony and child support pursuant to a withholding order; and
- Restitution for theft in public office or certain sex offenses committed within the context of the offender's employment pursuant to a withholding order.

Ohio domestic relations law provides that "marital property" shall include retirement benefits that are acquired by either or both of the spouses during the marriage (R.C. §3105.171). Accordingly, Sub. H.B. 535 was enacted to address the conflict between Ohio's domestic relations law that recognizes retirement benefits acquired during the marriage as marital property subject to equitable division upon termination of the marriage and Ohio's public pension laws that recognize only the member's right to retirement benefits, including lump sum payments, with the limited exceptions

³The specific language of OP&F law differs from that of the other four retirement systems relative to the non-alienation of benefits.

noted above.⁴

Effective January 1, 2002, Sub. H.B. 535 required the five state retirement systems to comply with a division of benefits order (DOBO) issued by a court upon termination of marriage that meets all of the following requirements:

- The order must be on a form created jointly by the state retirement systems, the Ohio State Bar Association and the Ohio Domestic Relations Judges Association;
- The order must set forth the name and address of each retirement system made subject to the order;
- The order must set forth the names, social security numbers, and current addresses of the member and alternate payee;
- The order must specify the amount to be paid to the alternate payee as both a monthly dollar amount and as a percentage amount with the numerator being the number of years in which the member was both a member of the retirement system(s) and married to the alternate payee and the denominator being the member's total years of service at the time the member elects to receive a benefit or lump sum payment;
- The order must specify the amount to be paid to the alternate payee from each benefit or lump sum payment if the member is eligible for more than one benefit or lump sum payment;
- The order must require the member or alternate payee to notify the retirement system in writing of any change in address;
- The order must notify the alternate payee of the following:
 - The alternate payee's right to payment under the order is conditional upon the member's right to a benefit or lump sum payment;
 - The possible reduction in the amount paid to the alternate payee if the member's benefit or lump sum payment is or becomes subject to more than one DOBO and/or spousal or child support order. (In the case of more than one DOBO and/or spousal or child support order, spousal or child support orders have priority over all other orders. All other orders have priority in order of earliest retention by the retirement system);
 - The possible termination of the alternative payee's rights to payment upon the earlier of the member's death, the alternate payee's death or termination of the member's benefit.

⁴For a married member covered by any of the five state retirement systems, the automatic plan of payment upon service retirement is a 50% joint and survivor annuity that provides an actuarially-reduced pension for the member's life and one-half of such pension continuing for the spouse's life. The written consent of the member's spouse is required should the member elect an optional plan of payment providing for less than the 50% joint and survivor annuity. Moreover, once elected, the member may cancel a joint and survivor annuity upon termination of marriage **only** upon the written consent of the former spouse or a court order.

- The order must apply to payments made by the retirement systems after retention of the order;
- The benefit amount used to determine the amount to be paid to the alternate payee shall be the monthly benefit amount the member is receiving at the time the decree for divorce or dissolution becomes final or, if the member has not applied for a benefit, the monthly benefit amount calculated at the time the member elects to receive it;
- Payments to an alternate payee shall commence as soon as practicable if the member is receiving a benefit or has applied for, but not yet received a lump sum payment or upon application for a benefit or lump sum payment if the member has not yet applied for a benefit or lump sum payment;
- The order shall not require the retirement system to take any action or provide any benefit not authorized by the law governing the retirement system;
- The order shall authorize the retirement system to determine an amount necessary to defray the cost of administering the order and divide such charge equally between the member and the alternate payee;
- The total of the amounts to be paid to an alternate payee(s) shall not exceed 50% of the member's benefit or lump sum payment.

In an interesting development that occurred between the legislative enactment and the effective date of Sub. H.B. 535, the Ohio Supreme Court ruled in Erb v. Erb; Ohio Police & Fire Pension Fund (Erb II) (May 30, 2001) that OP&F must comply with the terms of a domestic relations order requiring it to pay directly to the member's former spouse that portion of the member's benefit that represents the former spouse's property interest pursuant to a division of marital property. According to this ruling, the anti-alienation provisions of OP&F law do not prohibit direct payments to a member's former spouse (i.e., non-member of the fund) who has been awarded a property interest in the pension fund pursuant to a division of marital property. The anti-alienation provisions are intended to protect member benefits from the creditors of persons to whom benefits are due; a member's former spouse who has been awarded a property interest in the member's benefit is not a creditor, but has an outright property interest in the benefit itself. Moreover, the changes enacted in Sub. H.B. 535 relative to the division of public pensions upon termination of marriage reflect the legislature's dissatisfaction with numerous courts' incorrect interpretations of the anti-alienation provisions which prohibited OP&F from making direct payments to a former spouse pursuant to a domestic relations order and simply clarify the law as it exists today. A subsequent motion for reconsideration of the Supreme Court's ruling was denied.

As previously noted in footnote #3, the specific language of the anti-alienation provisions under OP&F law differs from that of the other four retirement systems. In Patterson v. Patterson, (February 18, 2003), the Ohio Court of Appeals for the Twelfth Appellate District recognized the difference in specific language and overturned the trial court's application of the Erb II decision to PERS on that basis.

Pursuant to Section 11 of Sub. H.B. 535, the Ohio Retirement Study Council was required to have prepared a report that examines all of the following issues relative to the division of benefits provided by the five state retirement systems upon termination of marriage:

- Provision of benefits to a former spouse of a member or retirant of the retirement systems;
- Cost and feasibility of offering an optional plan of payment that provides for continuing benefits after the death of a retirant to more than one beneficiary;

- Cost and feasibility of providing a cost-of-living allowance or other post-retirement benefit adjustment to an alternate payee; and
- Any other issues related to the division of retirement benefits upon termination of marriage.

The report was presented by Milliman USA to the ORSC on January 9, 2002.

Fiscal Impact - H.B. 98 is intended to have an actuarial cost-neutral impact upon the five state retirement systems since the member's retirement allowance would be reduced on an actuarial basis in order to provide for continuing benefits to more than one beneficiary. Also, the allocation of the annual 3% COLA between the alternate payee and the benefit recipients would have no actuarial impact upon the retirement systems.

ORSC Position - At the May 14, 2003 meeting of the Ohio Retirement Study Council, the ORSC voted to recommend that the 125th Ohio General Assembly approve H.B. 98 upon the adoption of the following amendments:

- That the proposed changes be made to the Ohio Police and Fire Pension Fund and the Highway Patrol Retirement System in order to maintain the existing uniform and equal treatment of Ohio's public employees relative to the division of benefits upon termination of marriage (Included in Sub. H.B. 98);
- That the effective date of the bill be delayed to July 1, 2004, assuming the bill is enacted before the end of this year, in order to provide the retirement systems adequate time to implement the proposed changes under the bill (18-month delayed effective date included in Sub. H.B. 98)
- That certain technical corrections identified by ORSC staff be made (Included in Sub. H.B. 98).

Effective Date - October 27, 2006