

# **Pensions in the Public Sector**

Edited by

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## **II**

# **Investment Policies, Regulation, and Reporting**

## Chapter 6

# **Regulation and Taxation of Public Plans**

### A History of Increasing Federal Influence

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Roderick B. Crane

The origin of pension plans in the United States is often traced to the end of the nineteenth and the early part of the twentieth centuries (Allen et al. 1992). It was during this time that both private and public employers began to examine ways to provide for the economic welfare of employees after the conclusion of their working careers. These pension plans, sponsored by such entities as American Can and B&O Railroad, and the early pension plans for teachers and public safety officers, were generally not established under any mandate or initiative from the federal level. Instead, employers were primarily responding to a combination of concerns about social responsibility and the normal forces of existing economic competition and organized labor.

Although the federal income tax laws in the first half of this century did provide some special tax treatments to pension contributions and benefits, it was the Social Security Act of 1935 that marked the first major entrance of the federal government into the arena of national retirement policy.<sup>1</sup> It took many years, however, before the federal government would begin to exercise its authority into the area of the substantive design and operations of employer-provided retirement benefit plans, and even longer before the federal government involved itself in state and local government pension plans.

The U.S. Congress did not focus on the employer-provided pension system in a substantive way until 1974, with the passage of the Employee Retirement Income Security Act of 1974 (ERISA). ERISA required only private sector retirement plans to satisfy minimum coverage, participation, vesting, funding, and fiduciary requirements as a means of improving retirement

TABLE 1. Recent Federal Laws Affecting Public Pension Plans (1987-97)

<i>Law</i>	<i>Impact</i>
Americans with Disabilities Act (ADA)	Restricts ability to limit retirement and disability benefits for protected disabilities.
Uniformed Services Employment and Reemployment Rights Act (USERRA)	Establishes protections for retirement benefits for qualified military service.
Omnibus Budget Reconciliation Act of 1990	Requires state and local government employee coverage in a retirement plan or Social Security.
Age Discrimination in Employment Act (ADEA)	ADEA: Prohibits pension discrimination on the basis of age.
Older Workers Benefit Protection Act (OWBPA)	OWBPA: Extends ADEA age discrimination protection to disability and other nonpension benefits.
Unemployment Compensation Amendments Act of 1992	Imposes 20 percent withholding on eligible rollover distributions not directly rolled over to an eligible plan.
Small Business Job Protection Act of 1996	Requires trust protections for §457 plans.

Source: Author's tabulations.

income security for plan participants. ERISA also established an insurance program for terminating underfunded defined benefit plans.<sup>2</sup>

Since the passage of ERISA, federal laws and regulations have grown to be a powerful influence on how state and local government retirement plans are designed and operated in the United States. As the remainder of this chapter shall demonstrate, this influence can be found in a combination of places, including federal tax, workplace, and civil rights protection laws. Recent federal legislation illustrating this point is summarized in Table 1.

### **The States' Rights Doctrine and Public Pension Plans**

The fact that federal influence has become so strong over state and local pension plans can be credited, in part, to the erosion of what legal experts call the "states' rights" doctrine. Under the states' rights doctrine, experts see the U.S. Constitution as creating a federal government with specified and limited powers, and all other powers reserved to the states.<sup>3</sup> This theory of constitutional government limits the central government powers and it has guided U.S. legal doctrine for most of this country's history. Its pur-

pose is to protect state and federal governments from significant federal regulation and interference, except in the arena of interstate commerce and national defense.

Evidence of the original force of the states' rights barrier in the public pension arena can be demonstrated clearly by two examples. First, employees of state and local governments were excluded from coverage in the original Social Security Act. Second, state and local governments were specifically excluded from the requirements of the Employees Retirement Income Security Act of 1974.

### **Erosion of the States' Rights Shield**

Nevertheless, over time, state and local governments' ability to assert states' rights as a shield from federal regulatory authority has been steadily eroded since the passage of ERISA. Several decisions of the U.S. Supreme Court—most notably, *National League of Cities v. Usery* (1976) and *Garcia v. San Antonio Metropolitan Transit Authority* (1985)—clearly established the ability of the federal government to indirectly affect the business of state and local governments through the federal income tax and interstate commerce powers. In a more recent case, *State of Michigan v. Davis* (1989), the Court stated the Equal Protection Clause of the federal Constitution also extended its authority to affect public employer retirement systems.

This shift away from states' rights has continued over the last twenty to thirty years, producing an expansion of federal laws, workplace and civil rights laws that has directly influenced almost every aspect of public pension benefits, funding, investment and administration policy.

Recent Supreme Court cases limiting federal power to force state action and upholding principles of constitutional federalism and states' rights concepts have focused on other subject areas (e.g., gun control) and have not yet been used by the states to limit federal intervention in employee benefits issues.<sup>4</sup> On the contrary, a strong example of the willingness of the federal government to impose substantive benefits requirements on public plans can be illustrated by the massive federal legislative efforts in the health benefits arena (e.g., the Health Insurance Portability and Accountability Act of 1996 and related laws). That state and local governments have not challenged this federal intervention gives some indication as to the potential weakness of the states' rights doctrine in the retirement arena. In the remainder of this chapter, we will summarize the major areas of federal laws that have influenced the design and administration of state and local government retirement plans.

## **The Impact of Past and Prospective Social Security Legislation**

For most public employees, social security has and will continue to be a major source of retirement income (EBRI 1997b); currently about three-fourths of public employees are covered (see Mitchell et al. this volume). Social security provides retirement, disability, and survivor benefits to insured workers and their dependents. Insured workers are eligible for full retirement benefits at ages 65 to 67 (depending on the member's year of birth) and reduced benefits at age 62. Social security retirement benefits are based on the worker's age and career earnings, are fully indexed for inflation after retirement, and replace a relatively higher proportion of the final year's wages for low earners. Social security's primary source of revenue is the 12.40 percent of payroll tax (up to a cap) under the old age, survivors, and disability insurance portion of the payroll tax paid by employers and employees.

When first adopted in 1935, the Social Security Act excluded state and local employees from coverage, largely because public employees very often already had their own retirement systems. Equally important, at that time Congress was concerned about the constitutionality of imposing a federal tax on state governments. Voluntary participation in social security was added to the act in 1950. This permitted state and local employers that did not offer a public retirement system to elect to participate in social security. In what came to be known as the Section 218 Agreements (named after the section of the social security law permitting voluntary participation), state and local governments were thereafter allowed to elect social security coverage for their employees. Section 218 Agreements can cover all public employees in a state, or only specified groups of employees. Section 218 was amended in 1954 to permit coverage of most employees participating in a public retirement system.

Prior to 1983, public employers were permitted to withdraw from social security once they were covered, but that policy was reversed in that year. Currently, most (96 percent) of the nation's workforce, including three-fourths of the state and local government workforce, is now covered by social security. This leaves about five million state and local government employees not covered by social security, with police, firefighters, and teachers most likely to be in noncovered positions.

Under the Omnibus Budget Reconciliation Act of 1991 (OBRA), employees of state and local governments not previously covered by any retirement plan were required to participate in social security. (The social security system also covers individuals in the military and other uniformed services.)

The social security program has had many direct and indirect impacts on the design of state and local government retirement plans. These include

the fact that public pension plans for employees without social security coverage have tended to provide greater retirement benefits than other plans for employees with social security coverage (cf. Mitchell, Myers, and Young 1999). Also, some public employees, such as firefighters and police, may not be covered by social security because of their need for earlier retirement and their need for greater death and disability protections. It is also likely that raising the social security normal retirement age will create pressure for greater benefits from state and local governments to fill in the "benefits gaps." For those social security employers with plans with earlier normal retirement ages, many have implemented special "bridge" benefits to help employees afford to retire before social security eligibility (The Segal Company 1997).

Recently, a variety of proposals addressing the financial solvency of the social security system have emerged that would further extend federal influence over state and local retirement plans (Mitchell et al. this volume). Virtually all of these proposals involve mandating social security coverage for new hires in the public sector. If mandatory social security coverage were enacted, public sector employers would have to choose between higher total contributions to fund the existing level of pension benefits, or lower benefits to keep costs level. Other specific benefits design concerns may also arise as a result of the social security reform process. One of these concerns is that social security benefits are intentionally redistributive, paying proportionately more to low than high paid employees; therefore, public employers not covered by social security will need to decide whether to keep benefit levels equal for all employment groups, or have a tiered system with different benefit levels for new hires.

Governmental employers would be trading a secure actuarially-funded system for a system that is not funded in advance (pay-as-you-go funding). Further, social security does not have plans to target specific groups of workers (i.e., fire and police, judges, legislators). These groups do not currently exist in the Social Security benefit structure. Making all of the groups "whole" will certainly be expensive. Financially, state and local government plans are, in the main, fairly well funded (Mitchell et al this volume); a conversion to Social Security would undermine this funding status.

### **The Impact of the Employee Retirement Income Security Act of 1974**

As noted previously, the Employee Retirement Income Security Act of 1974, as amended (P.L. 93-406), is the federal law that regulates private sector employee retirement benefit plans. Its substantive requirements are divided into four titles:



*Title I.* Requires pension, profit sharing and stock bonus plans to meet specific minimum requirements as to participation, coverage, vesting, funding, fiduciary standards, and reporting and disclosure.

*Title II.* If the plan meets the conditions of availability of the minimum participation, vesting and funding standards of Title I of ERISA, certain tax benefits for employees and employers can be obtained.

*Title III.* Contains provisions regarding administration and enforcement of the ERISA requirements.

*Title IV.* Creates the Pension Benefit Guaranty Corporation (PBGC), a government entity that insures protection for defined benefit plans that terminate without sufficient assets.

State and local government plans enjoy a general exemption from most of the substantive requirements of ERISA. Thus, Title I reporting and disclosure, participation, funding, vesting and fiduciary responsibility standards do not apply to governmental plans (ERISA §4(b)). The Title II amendments to the tax code largely do not apply to government plans through specific exemptions. The Title IV defined benefit plan termination insurance provisions do not apply to government plans (ERISA §4021(b)).

A "government plan" is defined as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing" (ERISA §3(32)).

While ERISA does not directly govern the retirement plans of state and local governments, its requirements do affect public pensions in an indirect but important way. As the following discussion illustrates, ERISA influences the design and administration of government plans in areas ranging from investment and fiduciary standards to pension rights of surviving spouses.

*ERISA's impact on public plan governance and investments.* ERISA established that, for purposes of federal law, those persons managing the benefits and assets of qualified retirement plans are fiduciaries and, therefore, must act in that capacity under a "prudent person" standard of conduct. Since the passage of ERISA, the prudent person rule has come to be expected as the necessary high standard of care and responsibility for public pension plan managers as well (Moore 1995).

Public plan trustees recognize that similar prudence standards apply to them through the application of the trust provisions of their plans and that of general state laws governing trusts. Thus, public plan trustees have significantly adapted the diversification and monitoring requirements of the "modern portfolio theory" in the private sector. The importance of having uniform trust and fiduciary standards for state and local plans was underscored by the National Conference of Commissioners of Uniform State Laws (NCCUSL), which has drafted and promoted the Uniform Management of

Public Employees Retirement Systems Act (UMPERSA). UMPERSA, if enacted by a state, would hold public plan fiduciaries to ERISA-style fiduciary standards of care and reporting and disclosure requirements for most state and local government retirement plans.<sup>5</sup>

*ERISA's impact on public plan design.* ERISA has also had an impact on the way governmental plans design their benefit policies. Consider policies regarding the vesting of pension benefits: the five-year or three- to seven-year graded vesting requirements of ERISA have been adopted by most of the public sector. In many cases, governmental plans have been adopting even more rapid vesting schedules than those required by ERISA (Mitchell et al. this volume).

Governmental plans, however, have had a mixed experience with regard to the so-called "break in service" rules. Many government plans recognize all prior service of returning employees, usually only crediting such service on the repayment of withdrawn distributions. Some plans of old design, particularly the "relief association" plans for firefighters, maintain lengthy vesting requirements (e.g., twenty-year continuous service cliff vesting). In addition, while not allowed for ERISA plans, governmental defined benefit plans still tend to provide for the forfeiture of all employer-funded vested benefits if the employee withdraws his or her own contributions upon termination.

*ERISA's impact on public plan survivor benefits.* ERISA requires that pension plans provide post-retirement qualified joint and survivor annuities (QJSAs) to married members as the standard form of benefit unless another form is consented to by the spouse. ERISA also requires qualified preretirement survivor annuities (QPSAs). Both of these survivor benefits have found their way into a large number of government plans, although they have not been uniformly adopted within the governmental sector.

*ERISA's impact on public plan qualified domestic relations orders.* Private sector plans are required under ERISA to honor judicial domestic relations orders dividing retirement benefits between the member and a former spouse and dependent children. These provisions have not always been accepted in the government pension community. Some state and local governments have accepted the standard ERISA rules, or some variation of them, while others have refused to recognize them at all.

*ERISA's impact on public plan funding.* Although minimum funding standards of ERISA do not apply to governmental plans, they have cast a spotlight on the public plan funding status. Partly as a result of this federal government scrutiny there is increased pressure to adequately fund governmental plans. Along with other forces referred to by Munnell and Sundén, as well as Mitchell et al. (this volume), state and local government pension plans have benefited from greatly improved financing over the last twenty years.

## **The Influence of Federal Income Tax Laws on Public Sector Pension Plans**

The federal government has had an uneven but growing influence on state and local government retirement plans through the federal income tax authority. The original provisions of the Internal Revenue Code (IRC) of 1954, §401 in particular, required only limited regulation, requiring only that "qualified" retirement plans must meet certain trust requirements for the holding of assets, certain vesting requirements on termination of a plan, and that at least some funding of liabilities must occur. These early tax rules applied equally to both private and public sector plans. Until the passage of ERISA in 1974, the retirement plans of state and local governments largely operated without specific regard to these §401 requirements. While many did comply with the trust requirements and significant actuarial funding of benefits did take place, it was not because of the influence of the federal Internal Revenue Code. Although ERISA did mark an increase in federal involvement in private sector retirement plans, it left the public sector mostly untouched as the shield of states' rights continued to protect public plans from direct federal government regulation.

*Tax Reform Act of 1986.* It was not until the Tax Reform Act of 1986 (TRA '86) that it became clear that the federal government was ready to use its taxing authority to influence state and local government plans and Congress showed its willingness to use tax laws for pension benefits to address both federal budget deficit and national retirement policy concerns. TRA '86 signaled a shift in federal income tax policy for governmental plans by clearly applying the IRC §415 limits on the amount of benefits that could be provided by qualified retirement plans to governmental entities.

Since that time, there has been a running battle between the federal and state and local governments over the extent to which the IRC qualified plan rules will be applied to governmental plans. Both sides have gained and lost ground over the years. The most significant area of debate has been the extent to which the IRC nondiscrimination rules of IRC §401 (limiting special benefits for highly paid employees) and the contribution and benefit limits of IRC §415. Table 2 provides a scorecard showing increases or decreases in federal regulation of governmental plans in recent major legislation in these and other areas.

## **Federal Workplace and Civil Rights Laws Affect Public Pension Plans**

*The impact of USERRA.* The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) provided for a complete rewrite of the previous law governing reemployment rights of veterans of military service,

TABLE 2. Major Federal Laws Since 1986 Affecting Public Retirement Plans

<i>Name of law</i>	<i>Significant changes</i>	<i>Increase/decrease in federal regulations</i>
<i>Tax Reform Act of 1986</i>	Clearly imposed §415 rules on governmental plans	Increase
	Eliminated §401(k) plans for governmental entities	Increase
	Imposed §401(a)(9) required and minimum distribution rules	Increase
	Imposed §401(a)(17) compensation limits	Increase
	Created elective deferral limits and applied to §403(b) and coordinated with §457 plans	Increase
<i>ADEA Amendments of 1987</i>	Extended ADEA protections to governmental pension benefits	Increase
<i>TAMRA of 1988</i>	Allowed election to grandfather governmental qualified plan benefits above §415 limits, but imposed private sector limits for the future	Mixed, but overall an increase
	Clarified that §457 does not apply to bona fide leave programs	Decrease
<i>OBRA 1990</i>	Required employees not covered by a retirement plan to be covered by social security	Increase
<i>OBRA 1993</i>	Imposed mandatory 20 percent withholding and direct rollover rules	Increase
<i>Small Business Job Protection Act of 1996</i>	Allowed governmental §415 excess benefit plans	Decrease
	Eliminated §415(b) 100 percent of average compensation limit	Decrease
	Established trust requirements for §457 deferred compensation plans	Neutral
<i>Taxpayer Relief Act of 1997</i>	Liberalized service purchase contribution §415 limits for governmental plans	Decrease
	Granted permanent moratorium on application IRC nondiscrimination rules	Decrease

Source: Author's tabulations.

the Veterans Reemployment Rights Act (VRRRA). While many of the provisions of USERRA restate the previous requirements of the VRRRA, the new law provided clarification of how prior law should be interpreted and, in some areas, significantly expands the reemployment entitlements of veterans of military service.

All public and private employers are covered by the USERRA's requirements. The definition of employer is broadly defined and covers entities like employee benefit pension and health and welfare trusts, which may be independently responsible for meeting benefits reinstatement and benefit rights for the returning military service veteran.

USERRA impacts public retirement plans primarily by requiring that qualified military service cannot result in a break in service for retirement vesting and eligibility purposes, and that such service must count as covered service for vesting.

USERRA also requires that a returning veteran must be credited with all benefit accruals under a defined benefit plan and all employer contributions to a defined contribution plan as if he or she had not left the civilian job. USERRA applies to people who apply for reinstatement after the effective date of the act—December 12, 1994.

*The impact of ADEA on public pension plans.* The Age Discrimination in Employment Act (ADEA) was amended to apply to pension plans of governmental entities effective in 1988.

The ADEA and related laws generally prohibit covered employers from discriminating against persons who are forty years of age or older. ADEA permits governmental employers to impose a minimum hire age and a mandatory retirement age for firefighters and law enforcement officers if the age requirements are established under a bona fide hiring or retirement plan that is not a subterfuge to avoid the purposes of the ADEA. The public safety exemption does not allow an employer or retirement plan to discriminate as to eligibility or benefits if an employee is otherwise permitted to participate in the plan.

The ADEA does not allow governmental employers to exclude an employee from participating in a defined contribution plan on the basis of age before normal retirement age. For governmental defined benefit plans, the ADEA provides that an employee hired at an age that is more than five years before normal retirement age cannot be excluded from the plan unless it is cost-justified. ADEA provides that a defined benefit plan may not cease or curtail benefit accruals because of an employee's age.

The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to clarify that an employee benefit plan may not discriminate against an individual on the basis of age. The OWBPA is generally effective for governmental plans beginning October 1992.

*The impact of other workplace laws on public pension plans.* Other federal work-

place laws affecting public pension plans include the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and various gender discrimination laws. The ADA prohibits disability-based distinctions as to eligibility and benefits under employer-provided service retirement and disability retirement plans. A service retirement plan includes the usual defined benefit and defined contribution plans that are designed to provide lifetime income (an annuitized benefit) to employees after they have reached a specified age or a combination of a specified age and years of service. A disability retirement plan is a plan that is designed to provide lifetime income (an annuitized benefit) for an employee who is unable to work because of an illness or injury, without regard to the age of the employee. These benefits could be provided as an ancillary benefit within a pension or retirement plan or could be provided separately under an insurance arrangement. A qualified individual with a disability may not be denied eligibility or benefits under a service retirement or disability retirement plan. The following are examples of actions that would violate the ADA:

- Participation is denied in a disability retirement plan because of the disability;
- A participant is forced to take a lesser disability retirement benefit even if he or she has met the conditions to be paid a service retirement benefit; and
- The qualified individual has a longer waiting period before coverage under the service or disability retirement plan.

The treatment of FMLA leave for retirement and deferred compensation benefit purposes is unclear in some respects. The FMLA language provides that FMLA leave must be "treated as continued service (i.e., no break in service) for purposes of vesting and eligibility to participate." The FMLA regulatory language is generally interpreted to require at minimum that FMLA leave may not result in a loss of benefits that had been accrued before the FMLA leave began, nor can it cause the employee to lose eligibility to participate in the retirement plan.

Federal law addresses the issue of gender discrimination in the area of employee benefits in several areas, including:

*Title VII of the Civil Rights Act of 1964.* Generally prohibits sex discrimination with respect to an individual's "compensation, terms, conditions, or privileges of employment."

*The Equal Pay Act of 1963.* Prohibits gender-based discrimination as to wages for work involving equal skill, effort, responsibility, and working conditions.

*The Pregnancy Discrimination Act of 1978.* Clarifies the Title VII sex discrimi-



nation protections to ensure pregnancy-based discrimination is treated the same as sex-based distinctions.

These three federal laws addressing sex discrimination in employment and wages have been interpreted at various times by the courts and by the EEOC to prohibit discrimination as to fringe benefits, including retirement and deferred compensation benefits. Under these laws and regulations, a retirement or deferred compensation plan may not make sex- or pregnancy-based distinctions as to any feature of the plan, including eligibility, vesting/participation, contributions and benefits, and retirement age as well as benefit eligibility. Of these, the areas of contribution and benefit discrimination have seen the most judicial and regulatory activity. In several key cases, including *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978) and *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), the requirements of Title VII have been interpreted to prohibit the use of sex-based actuarial tables to determine employee contributions to a defined benefit pension plan, and to prohibit the amount of benefits payable from a defined contribution plan to be determined using sex-based actuarial tables.

These cases make it clear that Title VII prohibits the classification of employees on the basis of sex for purposes of contribution and benefits. Public sector retirement plans have generally moved to using gender-neutral actuarial tables for contributions and benefit determination purposes. We note that because of state and local laws or contract rights that prohibit benefit reductions, the remedy for violations of Title VII has usually required "equalizing" benefits by bringing all employees up to the highest sex-based benefit formula.

These laws and cases do not prohibit the use of sex-based actuarial tables for purposes of employer contributions to defined benefit plans. Similarly, these laws do not prohibit retirement plans from requiring equal contributions regardless of sex from employees for either defined benefit or defined contribution plans.

## Conclusions

The federal laws governing U.S. public pensions highlighted in this chapter are only some of the ways in which the federal government intervenes in how public sector employers perform their functions. In any event, it should be clear that federal regulation has directly and indirectly significantly influenced the design and operation of public sector pension plans in many ways. While the public sector pension community has seen some recent successes in limiting the impact of federal authority (such as in the area of IRC nondiscrimination rules and the §415 limits), it is likely that the large fed-

eral interest in national retirement policy acting through tax and workplace laws will continue to have its impact on public sector retirement plans in the future.

## Notes

1. The Revenue Act of 1921, as well as amendments to the Internal Revenue Code in 1928, 1938, 1942, and 1954, established the exemption of interest income on pension plan assets from taxation and the deferral of tax to recipients, the employer deduction for contributions to such plans, and Trust and nondiscrimination requirements (EBRI, 1997a; see also Crane 1999).

2. Title IV of the Employee Retirement Income Security Act of 1974 created the Pension Benefit Guaranty Corporation (PBGC), which provides some employer-funded insurance programs to pay benefits of defined benefit plans terminating with insufficient assets to pay all account benefits. Governmental plans are not covered by this insurance program, leaving the risk of underfunding on the participants or the employer through its taxing authority.

3. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

4. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997).

5. As of this writing, the UMPERSA had been introduced in whole or import only in two with no states having actually enacting it into law.

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