

National Association of Public Pension Attorneys  
Legal Education Conference  
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## Investment

### Primer on Investment Management Agreements and Custodian Agreements

- Begin with your documents rather than the custodian's if they're willing
- Always attempt negotiation of terms (even those under custodian's template contract)
- Review standard of care provided, request fiduciary standard if not given

## Fiduciary & Plan Governance

### Fiduciary Duty of Impartiality Among Those Whom the Board Serves

- Protecting governmental exception to estoppel requires sometimes harsh uniform application of plan provisions
- Request range of options from experts
- Regard changes to new hires w/ caution as participants and admin will seek parity
- Regard requests for actuarial projections cautiously
- Board remains liable for delegated duties (unlike under ERISA plans)
- New trend – hiring fiduciary consultants to conduct due diligence independently of staff

### Trustees' Fiduciary Roles and Responsibilities on Retirement System Boards

- Where a relationship is disclosed, determine depth, recency of contact and whether trustee is able to act impartially
- No additional evidence/outside information should be allowed – determination must be made based only on the record (no blending of adjudicator/witness roles)

## Benefits

### Issues Affecting Public Safety Officers Who Work Non-Standard Hours

- Frequent legal contests over what constitutes “pensionable” service
- Major issue for plans w/o comprehensive compensation definition and exclusions

### State Implementation of the DOMA Decision and What's Coming Down the Pike

- 20 states recognize same-sex marriages currently
- Other states (prohibiting same-sex marriage) are likely to be required to recognize out-of-state marriages in near future based on equal protection clause of State and Federal Constitutions, comity, federal legislation etc.
- Problem for these other states now is the prohibition on spousal benefits to same-sex spouses, associated health benefits, marital status for filing state tax returns and the litigation risk this poses for these plans and state revenue departments
- Super-DOMA states like Kansas recognize common law marriage but enforce full ban on same-sex marriage, domestic partnerships, civil unions etc.
- Mini-DOMA states like Wisconsin recognize domestic partnerships and same-sex marriages from other jurisdictions affording retirement benefits (QDROs etc but only spousal survivorship if a beneficiary designation is filed and/or following federal tax law if the same-sex marriage occurred at least one year prior to the annuity effective date), health benefit and tax status rights afforded to opposite sex marriages
- Post-*Windsor* issue: whether decision will be applied day-forward or retroactively
- Office of Personnel Management has determined federal employees will have 2 year window from date of *Windsor* decision to change election to recognize same-sex spouse

- Many plans are concerned about the ramifications of administering this change and are preparing to notify participants – will require phase-out of domestic partnerships and civil unions in some states – state law changes required first in other plans

## Tax

### Federal Legislative Update

Rhoda

- Chairman of Ways and Means Committee just announced intent to unveil draft of comprehensive tax reform next week, but given nearness to end of his term unlikely there will be a vote on this issue for at least a year, possibly after next Pres. election
- Sen Orrin Hatch's Annuity Bill would establish optional (for ER) individual deferred fixed annuity contracts funded only by ER contributions with distributions from aggregated lifetime contracts (minus associated admin costs for aggregation)
- Public Employee Pension Transparency Act (PEPTA) would require annual State and Local Reporting to the federal government
- Medicare Tax Coverage Gap proposal to potentially cover all State/Local government EEs hired after 3/31/1986 - approximately 700,000 not currently covered by Medicare payroll tax but due to voluntary/opt-in nature of bill the impact is unclear
- IRS announced 4/25/13 that governmental plan sponsors cannot rely on a favorable determination letter for whether pickups (IRS § 414(h)(2)) and excess benefit arrangements (IRS § 415(m)(3) limits) are being done properly – PLR is suggested avenue
- Normal Retirement Age reg change (requiring age vs. YOS or YOS + age) effective 1/1/15
- Governmental Plan (IRC § 414(d)) definition still unresolved

### Current Developments Update

Lindahl

- Revenue Ruling 2013-17 provides that under federal tax law anyone in a civil union or domestic partnership will be treated as married

Nixon

- Proposed IRC change would allow plans to continue to be qualified despite pick-up differences where there are elective tiers (with different benefit structure and same or different contribution rates) – notably though several national orgs do not support this change because of fear of other negative change that may accompany it

Madden

- Length of Service Award Programs (i.e. VFCA) are generally governed by 457(e)(11)(B) (from Small Business Job Protection act of 199); or
- 457(f) (non-qualified plans) which subjects benefits to tax in year in which they vest (applies to benefits from 1986-1996) to afford same tax benefit to all employees...but not applicable to volunteers
- Many LOSAPs are not aware of the rules they're subject to including dollar limits (\$3,000)
- IRS has not addressed whether professional firefighters or EMTs who also volunteer as a firefighter or EMT may participate

## IRS Update

- New phone number for governmental plan section: 202.317.6799
- Definition of Governmental Plan is still pending – IRS has defined underlying concepts but is still reviewing 2300 comments received in ANPRM stage and is attempting to modernize some relevant principles (day-to-day control less significant than previously) in application of both fact patterns they made up and were provided and to address major/minor factors, safe harbors, grandfather treatment and other transition related issues
- Voluntary correction program is still effective but with cost; EPCRS provision allows plans to submit voluntary compliance submissions but due to overwhelming submissions they are encouraging 457 self-correction