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Public Sector Legislative and Regulatory Update

Including discussion of the Janus Decision

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QUO VADIS JANUS v. AFSCME?

A. The Janus Decision

1. On the last day of its 2017-2018 term, the United States Supreme Court issued a 5-4 decision holding agency fee statutes for public sector collective bargaining an unconstitutional violation of the First Amendment. This overturned what had been settled law approving such arrangements for 40 years. The Court held that under the duty of fair representation, a union, in return fo exclusive representation status, ca be required to represent non-members. The Court did leave in place the right to charge non members for the cost of the union's representation in grievances.

2. Some states do not require unions to provide grievance representation to non members but must provide a collective bargaining agreement that does not discriminate on the basis of non-membership.

B. What Does This Have to Do with Pensions?

1. Participation in most state and local government pensions is a condition of employment. The reasoning has sound economic and actuarial reasons.

2. In light of Janus there are already efforts to demand the right to opt out claiming it infringes upon free association and free speech.

C. Can Plan Participation Violate Free Speech?

1. Some may claim that investment in certain industries or stocks (firearms, alcohol, gambling, private prisons, etc.) would violate the conscience of individual members. These types of exclusions are common in church plans. Such claims are likely to be rejected because in a defined benefit plan because members have a contractual right to a benefit and efforts by members to control individual investments have generally been rejected.

2. Some may argue that participation in litigation as an *amicus curie* may be using fund assets to make a political statement. Again, unless it affects the amount of the member's benefit, that individual is unlikely to have standing to object. In Janus, the member had standing because he was required to pay a fee.

3. The same objections may be levied regarding health plans providing various types of benefits without an opt out provision.

4. ESG initiatives may also see objections if any aspects of the benefits is dependent on investment return.

D. What Other Kinds of Objections Have Been Spawned?

1. Cases are already working their way through the courts on mandatory membership in a state bar as a condition of practicing law; whether unionization of home health care workers dedicated to minors violations parental rights; third party industry advancement funds paid only to unionize workplaces; denial of a managerial job because of being labeled a "union man," passing a test to be a historic guide; and restrictions on judicial employees.

2. So, where will this go??

CONSTITUTIONAL CASES

Federal Appeals Court Reinstates Class Action over Interest

The U.S. Court of Appeals for the 9th Circuit has ordered reinstatement of a class action filed a group of participants in the Washington State Teachers' Retirement System. The suit alleges that the state used interest which should have been credited to member accounts to pay benefits to other employees. The teachers claimed an entitlement to daily interest on their accounts and the state was only paying interest quarterly. If a member transferred an account before the end of the quarter, the member received no interest in that quarter. The complaint was brought as a "takings" claim under the 5th and 14th Amendments of the U.S. Constitution which prohibits government taking of property with just compensation. Reversing a trial court decision, the appeals court found that interest was earned daily, even if actually paid less frequently. The appeals court rejected claims of immunity as the action was actually a suit for an injunction to return interest withheld from member accounts and not a suit for damages. Finding that the case stated a takings claim, the appeals court returned the matter to the federal trial court to reconsider the class action certification. As of the date of this outline, a motion for rehearing is pending.

***Fowler v. Guerin,* 899 F. 3d 1112 (9th Cir. 2018)**

California Appeals Court Rewrites "California Rule"

In an effort to respond to the rise of "pension spiking," the California Legislature enacted the California Public Employees' Pension Reform Act of 2013. The act made significant changes to how pension benefits would be calculated. Three separate decisions have arisen and are now consolidated for review in the California Supreme Court.

In the first case, three weeks after the act was passed, five labor unions together with a number of individuals currently employed by Marin County instituted an action against the Marin County Employees' Retirement Association (MCERA). On August 17, 2016, a state appellate court in San Francisco unanimously ruled that the Pension Reform Act was not unconstitutional as it applied to the plaintiffs' rights. While the main issue of the case was to prevent employees from boosting their benefits, the court went beyond the issue of spiking and addressed the broad constitutional protection provided by the California Rule, which prohibits virtually any changes from being made to pension benefits once they are given.

In 1983, The Supreme Court of California stated in *Allen v. Board of Administration*, "Any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and when resulting in disadvantages to employees, must be accompanied by comparable new advantages." In addressing this case, the appellate court determined that the court's meaning of "must" in *Allen* was not the literal meaning but rather that the court intended it be read as merely a recommendation.

According to the court, prior to retirement, the legislature may alter the calculation formula thereby reducing the anticipated benefits as long as the modifications don't deprive an individual of a "reasonable pension." As a result of the decision, the lines determining what constitutes a reasonable pension have been blurred. This could allow employers to arbitrarily determine what is "reasonable." This could potentially open the door to a surge of litigation. The California Supreme Court accepted review and is consolidating the matter with other similar pending cases.

***Marin Ass'n of Public Employees v. Marin County Employees Retirement Ass'n.,* 2 Cal. App. 5th 674 (Cal. App. 2016)**

The second case involved the question of whether elimination of the right to purchase five years of "airtime" was an unconstitutional violation of the contract

clause and did not need to be accompanied by comparable new advantages. The Legislature's modification was reasonable and carried "some material relation to the theory of a pension system and its successful operation."

Using a statutory analysis, the appeals court held that the Legislature would have specified that airtime was permanent, but didn't. Court declined to add to the statute a promise not to modify or eliminate the airtime purchase option. The Court noted that CALPERS publications/statements were entitled to significant weight. Nevertheless, the court deferred to court precedent, not CALPERS literature describing the benefit as vested when an employee starts work. Relying on *Marin County*, the court agreed members were entitled to a "reasonable pension" and that *Allen* was not intended to be an inflexible standard.

***Cal Fire Local 2881 v. CALPERS*, 7 Cal. App. 5th 115 (2016)**

In the third case, the issue was whether reduction in pensionable compensation (terminal pay; on call and standby pay; administrative response; bonus pay and one-time payments) is permissible. "[W]e are faced squarely with the question of whether those changes constitute a reasonable modification ... or whether their effect is to impair the vested contractual rights of legacy members".

The appeals court affirmed in part and reversed in part. The appeals court found that the trial court's detailed analysis of the impact on legacy pensions was "incorrect in certain respects and also improperly failed to include a necessary vested rights analysis." Reasonableness must be judged independently for each of the three systems, "in the context of each county's particular CERL system." The appeals court found that the trial court never conducted a "systematic vested rights analysis." Thus, the *Alameda* court was more willing to allow estoppel. Essentially, the appeals court disagreed with *Marin* and *Cal Fire* on the manner in which the constitutional analysis should be conducted and the weight of the evidence needed to justify a reduction.

***Alameda County Deputy Sheriff's Ass'n v. Alameda County Employees' Retirement Ass'n*, 19 Cal. App. 5th 61 (2018)**

All three cases have been accepted for review in the California Supreme Court and are scheduled for determination in the fall of 2018.

Elimination of Pension Spiking Is Not a Constitutional Violation

A union filed suit on behalf of its members after the city passed an ordinance changing a vacation buy-back provision which allowed a lump sum payout of all accrued vacation leave in the last year of employment. The union argued that the loss of this benefit which spiked the value of retirement benefits violated the state constitutional prohibition against impairment of pension contract rights. A trial court ruled for the City. On appeal, the court held that the City did not alter the pension contract but altered an element of compensation which in prior years had the effect of substantially spiking pension benefits. The court concluded that a benefit based on earnings is part of the contract but there is no universal requirement as to what earnings an employer must pay. If vacation buy back was a constitutionally protected pension benefit, it would not have been unique to Springfield and would have inured to the benefit of plan participants without needing to be based on individual vacation pay accruals. Similarly, the court held a reduction in salary is not a reduction in pension benefits even though it may have the affect of reducing the ultimate size of the benefit received.

***Pisani v. City of Springfield,* 73 N.E.3d 129 (Ill. App. 2017)**

Reduction in Health Care Does Not Violate Pension Clause of Constitution

A group of retirees sued the City of Chicago and various pension boards of trustees over reduction in health care benefits claiming it violated the pensions clause of the state constitution. The funds provide a subsidy for retiree health care. Over the years the rising cost led the City to revisit its obligations. Following a series of lawsuits, a settlement was reached in 2003 with a ten year life span. In 20l3, the City announced its intention to reduce benefits until 2017 when they would end. Only certain classes of employees hired prior to 1989 would retain retiree health care. The remaining retirees sued. Ultimately, the court ruled that the terms of the 2003 agreement expired on its own. Nothing in the contract or the state constitution reasonably gave rise to a lifetime promise of a particular health benefit. The retirees claimed that pension handbooks gave rise to a contract. This claim was rejected by the court. Lifetime agreements for health care benefits by government must be express and unequivocal. The agreement under which the affected retirees were governed contemplated an expiration; as such, there was no constitutional impairment.

***Underwood v. City of Chicago,* 84 N.E.3d 420 (Ill. App. 2017)**

Louisiana Appeals Court Orders Partial Recalculation of Benefits

In the latest installment of a decades long series of lawsuits between the City of New Orleans and its Firefighter Pension Fund, the court considered an action by the City to require recalculation of certain member benefits. In prior settlement agreements over benefit calculations, the parties had agreed to prospective relief and no clawbacks of prior benefit payments which had been in dispute. Following a trial on the implementation of the settlement, the trial court ordered that recalculated benefits would only apply to certain benefits. The issue centered on who was fully vested as defined by Article X, Section 29 of the Louisiana Constitution: members with 30 or more years or members with 12 plus years of service but who had not attained age 50; and whether a later increase in the multiplier applied to years of service prior to its adoption. The Court found that those members retired at 30 years were irrevocably vested in the benefit even if it was an arguably erroneous calculation because the interpretation has existed since the 1990s. Members retiring with 12 years of service but who were awarded the enhanced benefit prior to age 50 did not have a vested right to an erroneous calculation which had been extended to them in 2011.

***New Orleans Firefighters' Pension and Relief Fund v. City of New Orleans,* 242 So. 3d 682 (La. App. 4th Cir. 2018)**

Demotion Based on Salary Does Not Constitute Age Discrimination

A Broward County, Florida Sheriff's Office investigator was demoted and brought claims for age discrimination. A trial court dismissed the claims. On appeal, the Fourth District Court of Appeal noted that the undisputed evidence showed the investigator was demoted based on cost. The Court observed that a job action based on cost or pension status is not age discrimination. While the investigator's higher salary may have been a function of his age and longevity, age was not the motivating factor for his demotion.

***Yaro v. Israel,* 2018 WL 1617198 (Fla. 4th DCA 2018)**

Non-Biological Parent Has Parental Rights Over Donor

On April 5, 2018, the Mississippi Supreme Court handed down an important ruling for same-sex parents. The Supreme Court ruled that a woman has parental rights to a six-year-old child born to her ex-wife while the two were married. The parties to this case were the biological and non-biological mothers of the child. Although the women were legally married in Massachusetts before the birth of their child, their marriage was not recognized in Mississippi, where the child was ultimately born. Additionally, only the biological mother's name was allowed to appear on the birth certificate. Some time after the birth of their child, the women legally divorced. In the final judgment, the chancery court held that the child, "was a child born during the marriage, not of the marriage," and so both parties were not considered parents. Even though the sperm donor was never identified, the court found that his legal parentage prevented the non-biological mother from a determination that she was a legal parent. In their decision, the Supreme Court ruled it would be unworkable and unfair for the unknown sperm donor to have parental rights over the child's non-biological mother. As a result, the Court held that the biological mother could not claim that the non-biological mother did not have parental rights. To allow such standard, "would disrupt the familial relations and expectations of Mississippians who have conceived children," using a donor.

***Strickland v. Day,* 239 So. 3d 486 (Miss. 2018)**.

California Strikes Down Pension Reductions without Bargaining

In a long-awaited decision, the California Supreme Court unanimously found that the City of San Diego committed an unfair labor practice by refusing to meet and confer over a voter initiative sponsored by the city's mayor. In 2010, a San Diego city councilman and the mayor proposed closing the city's defined benefit retirement system to new employees and replacing it with a defined contribution plan, similar to a 401(k) plan common in the private sector. The proposals were made on city letterhead and city employees worked on the process of gathering signatures needed to place the matters on the ballot. As the mayor's proposal and the council member's proposal differed, they met and agreed to a single proposal which would place all new city employees, except police officers, in a newly-created defined contribution plan and froze the amount of compensation which could be considered for pension purposes. City unions demanded to meet and confer under the public bargaining law. The city refused saying it was a "citizen" initiative. The unions filed an unfair practice over the refusal to meet and confer. The Public Employee Relations Board agreed to hear the matter but the City sought an injunction which

was granted by a trial court. On appeal, the appellate court found that the matter was within PERB's exclusive jurisdiction and vacated the stay. While the PERB case was pending, the measure appeared on the ballot and was approved by the electors. PERB ultimately found that the measure was a city initiative and that the mayor violated the labor law by refusing to meet and confer. PERB ordered the city to make employees whole for lost pension benefits for as long as the initiative remained in effect. The City appealed and an intermediate appellate court overturned PERB in April 2017. The California Supreme Court granted a petition for review from the unions and in August 2018 overturned the appeals court and reinstated the PERB decision. The Court found that deference to PERB on labor matters within its expertise was settled law and would not be overturned unless clearly erroneous. The Court also noted that under the statute, PERB's factual findings were conclusive. The Supreme Court found that the appeals court erred in rejecting the considerable evidence supporting the finding that the ballot measure was sponsored by the city and not by disconnected citizens. Lastly, the Supreme Court found that the duty to meet and confer was a central tenet of the public bargaining law and the appeals court erred when it took an unduly restrictive view of that duty. The case, however, is not over. The Supreme Court found that because it did not address PERB's remedy by finding no unfair labor practice, the case was remanded to the appeals court to address remedies consistent with the ruling of the Supreme Court. The case bears a close resemblance to a similar ruling by the Florida Supreme Court in 2017 finding the City of Miami committed an unfair labor practice in making unilateral pension and wage changes without bargaining.

***Boling v. PERB,* ____P. 3d ____(Cal. 8/2/18)**

DISABILITY RETIREMENT

Bias on the Part of Trustees Requires a New Hearing

A fire lieutenant applied for a disability pension and her application was denied. In her testimony before the board, the applicant, one of only three female firefighters out of a force of 30, stated that she had been subjected to intense harassment on the basis of gender from both subordinates and superior officers. At the employer's request the lieutenant filed an extensive complaint regarding her harassment allegations. Three of the five members of the board were specifically named as offenders in the lieutenant's harassment complaint. The appeals court found that this violated the due process rights of the applicant to a fair and impartial hearing. The

board was ordered to rehear the disability application without the three members deemed to have bias.

***Naden v. Firefighters Pension Fund of Sugar Grove,* 96 N.E. 3d 51 (Ill. App. 2017)**.

Untimely Application Results in Disability Benefit Denial

A police officer suffered an on-the-job injury and was placed on short term disability leave. During this period, an internal investigation was begun concerning the officer. The union lawyer and the union president, who was also a pension trustee, advised the officer to file a disability application. He filled out a request for information form but not an application. The member did receive a letter from the board's lawyer advising the member of the need to complete the retirement application. The city fired the officer and the union filed a grievance on his behalf. The member ultimately reached a settlement agreement in which he resigned but without waiving his workers' compensation or disability retirement claims. At the time of the settlement, however, the member did not file a disability application until after his employment ended. On this basis, the board denied the application finding that the member was no longer a "police officer" at the time of his application. The member filed suit claiming he misunderstood the form and was not advised by pension officials or city officials. A trial court reversed on equitable grounds. On appeal, the trial court was reversed. The appeals court found the plain language of the pension code required a disability application to be filed while the applicant was employed. As a result, the application was untimely. The appeals court also found that no one misled the member whose lack of understanding was purely subjective.

***Keeling v. Board of Trustees,* 2017 IL.App. 170804 (2017)**

Court Reverses Heart Bill Claim Based on Timing of Examination

A Homestead, Florida police officer made a claim for Heart Bill benefits in 2015. At the time the officer was hired in 1983, Section 112.18 did not yet apply to local police officers but the pre-hire examination requirement has existed since the law's inception. The officer had a physical in January 1983 before becoming an auxiliary officer, but did not have another exam prior to becoming a full time police officer in October 1984. A workers' compensation judge granted his application for presumptive benefits based on the original examination and his medical condition in 2015. The First District Court of Appeal reversed finding that a medical

examination nearly two years prior to becoming a full time officer did not meet the statutory requirement. The Court rejected the officer's claim that the statute did not apply to him at time of hire but did at the time of disability. The Court held that the physical examination requirement had always been a part of the law and disqualified the applicant from the presumption.

***City of Homestead v. Foust,* 242 So. 3d 1169 (Fla. 1st DCA 2018)**

Single Incidence of High Blood Pressure Does Not Disqualify Heart Bill Claim

A City of Tavares police officer made a claim for benefits under the Heart Bill, Section 112.18, Fla. Stat. The City denied the claim because at the time of his pre-entry physical, the officer had a single incidence of high blood pressure. Hypertension was not noted however in that examination, and no other incidents concerning high blood pressure or hypertension were observed until the claim for disability benefits. The medical opinions concluded that the one incident was caused by patient nervousness, also called "white coat" syndrome. The Court looked at the plain language of the statute which says the employee must have successfully completed a physical examination which failed to reveal evidence of the condition. The Court determined that given the absence of any diagnosis of heart disease or hypertension in the pre-entry physical, the single high blood pressure reading did not disqualify the officer from the presumption.

***City of Tavares v. Harper,* 230 So.3d 918 (Fla. 1st DCA 2017)**

Each Monthly Failure to Pay Renewed Statute of Limitations

A retired Lake Worth police officer suffered catastrophic injuries which rendered him permanently and totally disabled in 2001. He settled his workers' compensation claims in 2002. The City failed, however to pay the continuing health insurance for public safety officers suffering this level of disability as provided in Section 112.19, Fla. Stat. The officer sued in 2010 but his claim was dismissed based on statute of limitations grounds. According to the trial court he had four years from the settlement of his disability claims to make the insurance demand. On appeal, the Fourth District Court of Appeals reversed. The court held that each monthly insurance payment missed was a separate event and the statute of limitations was four years for each missed payment. The insurance claim was reinstated for each month beginning in 2006. The court rejected the officer's claim that the City had a duty to inform him of his statutory rights, finding no such duty in the statute.

***Viera v. City of Lake Worth,* 230 So.3d 484 (Fla. 4th DCA 2017)**

City Not Required to Place Otherwise Disabled Firefighter on List for Reinstatement

A firefighter in Providence injured his shoulder on the job and was later granted an accidental disability pension. Eleven years after receiving his pension, footage of the firefighter lifting a substantial amount of weights at the gym was aired on a local television channel. The board immediately ordered the firefighter to submit to an Independent Medical Exam (IME), but it was determined that the firefighter still suffered from his previous shoulder injury. Two years later, the board again directed the firefighter to submit to an IME but he refused, asserting he was bedridden from physical and psychological injuries. The board hired a private investigator who observed the firefighter driving his car, leaving his home, and shopping at various stores. As a result, the board voted to suspend his accidental disability benefits based on his failure to attend the IME.

The firefighter filed an action seeking to overturn the board's suspension of his benefits. The firefighter's motion for a preliminary injunction was denied and so he agreed to attend the IME. The doctor determined that the firefighter no longer suffered from his on-the-job injury, but was nonetheless not fit to return to work based on unrelated psychological disabilities and colorectal illness. Based upon the IME results, the board voted to discontinue the accidental disability benefits because the plaintiff was no longer disabled as a result of his on-the-job injury. Based upon his inability to return to work, the board did not place him on a list for appointment to duty.

The firefighter filed a complaint alleging that he was entitled to continue to receive his accidental disability pension while he remained on the wait list for a job opening in the fire department. Surprisingly, the firefighter now claimed that he was no longer disabled and was ready to return to work, despite his previous claims that he remained disabled. Ultimately, the trial court granted the firefighter's motion for summary judgment and ordered the board to continue to pay disability benefits until there is a formal determination as to whether he is fit to return to work. The City timely appealed to the Rhode Island Supreme Court.

The Court, in interpreting an ordinance that requires the continuation of payments until a new job is found, pointed out that the candidate must be prepared for appointment to a position from the department in which he or she was last retired. Here, it was clearly established that the firefighter remained disabled and he was neither prepared nor qualified for appointment. As a result, the trial court's order was overturned.

***Sauro v. Lombardi*, 178 A.3d 297 (R.I. 2018)**

Officer Diagnosed With PTSD Two Years After Unrelated Resignation Denied Disability Benefits

A police officer in Tucson appealed from the superior court's decision affirming the Board's decision to deny his application for a permanent accidental disability pension. While employed, the officer experienced two incidents that became the focus of his disability claim. The first incident occurred when the officer came in close contact with an armed and suicidal individual. Ultimately, after hours of confrontation, the individual was shot and killed by another officer. During his post-incident interview, the officer did not volunteer any concerns. While meeting with a psychologist about a week after the incident, he did admit to feelings of anxiety and self-doubt. The second incident occurred while responding to a shooting at a high school graduation. The officer was performing CPR on the victim when his sergeant directed him to stop. The officer took some time off after the incident and initially reported trouble concentrating, intrusive thoughts, guilt, self-doubt and low self-esteem. However, in a follow-up visit with the psychologist, he denied having any symptoms that would keep him from working.

Almost two years after the second incident, the officer announced his resignation in order to attend law school and pursue a legal career. Seven months after his resignation, the officer was hospitalized for expressing suicidal thoughts and he apparently tried to take his own life while in the hospital. He was diagnosed with unspecified bipolar and related disorder and PTSD. The officer then filed a disability application, but all of his supporting medical records were dated after his resignation. Ultimately, the board denied the application. The officer appealed. Ultimately, the court upheld the board's decision and determined that their decision was supported by substantial evidence that the officer worked for almost two years following the second incident. Additionally, the court held that the board was free to reject the officer's reasoning for why he minimized his reactions to the incidents.

***Fedor v. Tucson Police Public Safety Personnel Retirement System Board*, 2018 WL 1129600 (Ariz. Ct. App. 2018)**

Firefighter Suffering From Non-Work Related Condition Denied Disability Pension

A firefighter appealed the decision of the board to deny his line-of-duty disability application, instead awarding him a non-duty disability pension. In affirming the lower court's decision, the appellate court determined that evidence in the record showed that the firefighter's disability resulted from a degenerative shoulder condition and

was not caused by a work-related injury. In addition to evidence of a non-work related condition, the board determined that the act of repairing a wall in the firehouse, was not an "act of duty."

***Nagrocki v. Board of Trustees of Norwood Park Fire Protection District Firefighters Pension Fund,* 2018 IL App (1st) 171082-U**

Board Was Correct in Decision to Disregard Medical Records From After Initial Date of Disability Application

A police officer applied for a disability pension and was granted a partial disability pension for injuries stemming from a physical encounter with a suspect. The officer requested a reconsideration of her application as she believed she was totally disabled. A recommendation was issued denying the application for total disability and was adopted as a final order. The officer appealed the decision to the Superior Court arguing that the Board failed to consider medical records that established that her condition had worsened since her initial application. The Board responded that they had properly disregarded the records as they are not authorized to consider that evidence. Ultimately, the court held that the Board was correct in their refusal to consider the medical records and therefore their decision denying total disability was correct.

***Haggerty v. Board of Pension Trustees*, 177 A.3d 1235 (Del. 2018)**

Disability Must Not Be Caused By Inherent Job Risks To Be Considered "Accidental"

A police officer was injured when he responded to a call following Hurricane Sandy. When the officer arrived, he observed that the structure was very unstable but entered upon hearing screams from inside. The officer began removing debris in an attempt to free people underneath the pile. In doing so, he injured his shoulder. His shoulder was further injured when he reached up to brace a rafter that had come loose. Following a hearing on the officer's application for accidental disability retirement benefits, the Respondent Comptroller overruled the Hearing Officer's determination that the officer met his burden of proving that his injury resulted from an "accident." Appeals followed and the appellate court determined that the officer's injury resulted from a risk inherent to his employment as a police officer, whose duty it is to assist injured persons. As such, the injury was not considered an accident.

In a similarly situated case, a firefighter was injured while responding to a call at a supermarket. Shortly after assisting two unconscious individuals, the firefighter began to feel nauseous and light-headed. It was determined that he had been exposed to toxic gasses. As with the police officer, the Respondent Comptroller overruled the Hearing Officer's determination that the firefighter met his burden of proving that his injury resulted from an "accident." Appeals followed and the appellate court determined that the firefighter's injury resulted from a risk inherent to his employment as a firefighter, whose duties require working with exposure to fumes, toxic gasses, chemicals, and corrosives. As such, the injury was not considered an accident.

***Kelly v. DiNapoli,* 30 N.Y.3d 674 (N.Y. 2018)**

Ex-Wife Not Entitled to Half of Disability Pension

Former wife filed a petition to enforce a marital settlement agreement and requested that her former husband should be required to split his disability benefits with her pursuant to the agreement. Ultimately, the court determined that the ex-wife was not entitled to disability benefits. The agreement was unambiguous and the language of the agreement demonstrated that the parties did not intend to split disability benefits.

***In re Marriage of Farrell and Howe*, 2017 IL App (1st) 170611**

Officer Injured During Traffic Stop Awarded Health Insurance Benefits

A police officer injured his knee while conducting a traffic stop of a semitrailer truck. The officer believed the truck was operating with an overweight load and injured his knee while climbing up the truck's ladder to inspect the load. The load was overweight and after issuing a citation, the officer informed dispatch and his supervisor that he had injured his knee. The officer had surgery to repair his knee and participated in a year of physical therapy. With no improvement, the officer underwent a complete knee replacement. As a result of his injury, the officer applied for and was awarded a line-of-duty disability pension. The officer then applied for health insurance benefits pursuant to the Public Safety Employee Benefits Act. Although the City Manager admitted that the injury was "catastrophic," the application was denied because he did not believe the injury occurred: 1) during a fresh pursuit, 2) as part of or a response to an emergency, 3) by an unlawful act perpetrated by another, or 4) during the investigation of a criminal act. Cross motions for summary judgment were filed. Ultimately, the court held that the officer had

proven that his injury was the result of an unlawful act perpetrated by another. As a result, he was granted the benefits.

***Marquardt v. City of Des Plaines,* 2018 IL App (1st) 163186**

A Traumatic Event Must Be Undesigned and Unexpected

While conducting a "well being" check of an allegedly intoxicated and suicidal civilian, an officer was injured while taking cover from the individual who had a gun. During the incident, the officer witnessed another officer shoot and kill the individual. After taking two to three weeks off of work following the incident, the officer returned to work for another two years and was eventually promoted to sergeant. However, the officer struggled with the work and applied for accidental disability retirement benefits. The application was denied and an appeal followed. In order to qualify for accidental disability benefits, a member must be "permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of his regular or assigned duties." In order for an event to be considered traumatic, it must have been undesigned and unexpected. Here, the court found that the officer did not suffer from a traumatic event because the incident that occurred falls within a police officer's job description. As a result, the court held that the Board's decision to deny benefits was not arbitrary or unreasonable.

***Mogul v. Board of Trustees, Police and Firemen's Retirement System*, 2017 WL 3568097 (N.Y. Super. App. 2017)**

Financial Urgency Statute Not Facially Invalid

Florida Statute Section 447.4095 outlines a process by which an agreement can be unilaterally modified in response to a financial urgency. FOP Miami Lodge 20 challenged the facial validity of the statute, arguing it was void for vagueness, deprives the FOP of due process, and denies equal protection. On appeal from the Third District Court, the Florida Supreme Court affirmed and held that the statute is not facially invalid. In their decision, the court suggests that the legislature purposely chose not to define the term "financial urgency" in order to defer to the Public Employee Relations Commission's (PERC) expertise. As a result, the statute is not void for vagueness. Additionally, the court found that the statute is narrowly tailored to achieve a legitimate state interest, and so it does not violate substantive due process. Finally, the court held that the statute passes the strict scrutiny test because of the court's earlier decision in *Headley v. City of Miami*, 215 So.3d 1 (Fla. 2017) and so it does not deny equal protection. This decision does not change the

result of previous cases. It simply means that the statute can still be utilized, subject to the standards established in *Headley.*

***Fraternal Order of Police v. City of Miami*, 243 So. 3d 894 (Fla. 2018)**

PLAN ADMINISTRATION

Marital Settlement Agreement Determines Division of Retirement Benefits

An Illinois firefighter divorced and signed a marital settlement agreement that awarded both pension and death benefits to the former spouse. Following the entry of judgment, the plan member objected to the inclusion of death benefits claiming the statute did not permit it as death benefits would accrue after the end of the marriage and not as part of the marital estate. The trial court disagreed and the member appealed. The Illinois appellate court affirmed the trial court essentially finding that the parties intended to include death benefits and there was no reasonable basis to set aside their bargain.

***Dobberfuhl v. Dobberfuhl,* 2018 IL App. 162322-U (2018)**

Court Dismisses Suit Against Board Challenging Efforts to Recoup Fraud Losses

The General Retirement System of Detroit filed suit against former corrupt advisors who had stolen $27 million from the Fund. In thanks for their efforts, a retired member sued the System for expending $1million in litigation expenses. The retiree claimed this was a personal loss to her and sought class action status. A trial court dismissed the case on a variety of grounds including failure to state a claim for breach of fiduciary duty, lack of standing and immunity. The appeals court affirmed finding at the heart of the ruling that the member could not articulate any loss that she (or any other plan member) suffered in the form of reduced benefits.

***Nicholson-Gracia v. General Retirement System of Detroit,* 2018 WL 987212 (Mich. App. 2018)**

Determination of Retirement Age Governed by Collective Bargaining Agreement

A retired police officer sued the pension board, the city, the board members and the board's lawyer over the board's retroactive conversion of his disability pension to a normal retirement at age 50. The retiree argued that the conversion deprived him of five years of disability benefits. Under terms of the plan, a disability retirement converted to a regular retirement at normal retirement age. Under the city charter, that was at age 55. Under the CBA, however, the benefit converted at age 50. Under state law, the CBA controlled over the charter. The board inadvertently failed to convert the benefit when the member reached 50, acting under the mistaken belief his conversion age was 55. The board retroactively converted the benefit upon discovery of its error. The Court held that the matter was not only within the board's discretion, but was required by the governing instrument. Accordingly, the trial court decision dismissing the action was upheld on appeal.

***Peterson v. City of River Rouge,* 2017 WL 1967487 (Mich. App. 2017)**

Retirement Board Cannot Nullify Benefit for Failure to Obtain Actuarial Report

A 26-year police veteran retired pursuant to the terms of a CBA and a post-retirement agreement to become city manager. The agreement was also ratified as part of the CBA. The pension board determined some eight years after retirement that the agreement had not been accompanied by the actuarial impact statement whenever a new benefit is adopted. On advice of counsel, the board reduced the member's benefits. The member filed suit claiming various state and federal constitutional violations. The court held that the board could not interfere with the contractual rights of the member. No provision of the law requiring the actuarial impact statement authorized the board to unilaterally lower benefits and recoup claimed over payments. As such, the lower court correctly entered an injunction preventing the board from taking an enforcement action it was not authorized to perform.

***In re Waters,* 2018 WL 1832373 (Mich. App. 2018)**

FORFEITURE

Conviction for Possession of Cocaine Sufficient for Forfeiture

A corrections officer made arrangements through an inmate to receive cash and drugs on two occasions. While the money and drugs were received outside of the facility from an undercover officer posing as the inmate's cousin, the payments were made possible due solely to the officer's connection to the inmate through work. In post-arrest statements, the officer admitted his actions. He was later convicted for possession of cocaine. The retirement board forfeited his benefit despite the argument that the drugs were obtained outside the facility and the prisoner was no longer under the supervision of the officer. In accordance with an earlier Massachusetts ruling that complete forfeiture arguably violated the 8th Amendment prohibition of excessive punishment, the case was sent back to the trial court for that determination.

***Dell'Isola v. State Retirement Board,* 90 N.E.3d 784 (Mass. App. 2017)**

Judge's Conviction For Job Related Felony Ends Both His and His Ex-Wife's Claim to Pension Benefits

A state court judge was convicted of federal crimes of conspiracy to violate civil rights by promising lighter sentences to inmates who would not cooperate with federal investigators. The pension board forfeited his benefits. The judge argued that he vested in his pension prior to committing the crimes but that claim was rejected on the basis that vesting was conditional on honorable service through the end of office. In addition, the judge's former wife claimed the right to the share promised her in divorce proceedings. The Court ruled that the spousal share was entirely derivative of the member. And, if no member benefit was payable, then there was no marital share to receive.

***Thornsbury v. West Virginia Consolidated Public Retirement Board,* 2018 WL 798420 (W.Va. 2018)**

Solicitation of Minor for Sexual Activity Warrants Forfeiture

A Massachusetts state police officer communicated online for a period of six months with what he believed was a 14 year old boy. He used a family computer and was off duty during the communications. The 14 year old boy was actually an undercover FBI agent and the officer was arrested when he arrived for a pre-arranged meeting with the boy. The officer resigned and pleaded guilty to one count of federal internet laws relating to minors. The state retirement board forfeited his pension benefit and the officer appealed. He argued that none of his criminal acts occurred on duty or using department equipment. The Court held that while not every crime committed by a police officer may warrant forfeiture, a crime which would have endangered a child violated core principles of the law enforcement mission.

***State Retirement Board v. O'Hare,* 91 N.E.3d 677 (Mass. App. 2017)**

PENDING CASES OF INTEREST

Board of Trustees v. Commissioner of Finance of the USVI - This case concerns an enforcement action under a consent decree concerning funding of the retirement system which is scheduled to become insolvent in 2023.

Cherry v. Mayor and City Council - This case involves a class action challenge to unilateral reduction of benefits for active and retired police officers and firefighters in the City of Baltimore. An earlier ruling found the City wrongly cancelled a variable post-retirement benefit for retirees and held that active members stated a cause of action of wrongful reduction of benefits. The case is set for trial on October 29th in Baltimore Circuit Court.

Eddington v. Dallas Police and Fire Pension Fund - in 2016, a Texas appeals court upheld legislative changes made to the Dallas Police and Fire Pension Fund relating to DROP. To stem a massive withdrawal of cash, the changes froze or limited withdrawals. The bill also lowered the amount of interest attributable to DROP accounts left on deposit. Members sued claiming that the changes violated a 2003 constitutional amendment creating contract rights in accrued benefits of vested participants in a public employee retirement system. A trial court ruled against the members. On review, an appeals court held that DROP was a benefit calculation and was not constitutionally protected. The Texas Supreme Court agreed to hear the matter as a case of first impression. The only previous interpretation of the state constitutional provision had been by a federal court and

that ruling is not binding on a state supreme court. A ruling is expected in early 2019.

Beshear v. Bevin - In 2018 a sewer bill was transformed into a massive restructuring of the Kentucky Teachers' Retirement System. While the actual complaint focused on procedure by which the bill was adopted, it also concerns what Kentucky calls the "inviolable [pension] contract." A trial court ruled the bill unconstitutional. On September 20th the Kentucky Supreme Court heard arguments from the Attorney General seeking to invalidate the bill and the Governor who claims the bill will save Kentucky's financially distressed retirement systems.