

TESTIMONY OF DERRICK HOHBEIN

House Bill 1419 – Public Safety Expansion to Dispatchers & Medical Services Professionals

Good afternoon, Madam Chair and members of the committee. My name is Derrick Hohbein and I am the Chief Operating/Financial Officer of the North Dakota Public Employees Retirement System, or NDPERS. I appreciate the committee taking the time to analyze House Bill 1419, which expands the eligibility in the Public Safety Plan for new hires to include state radio dispatchers in the State Public Safety Plan and allows political subdivisions to offer the Public Safety Plan to dispatchers & emergency personnel. I am here today on behalf of the NDPERS Board to provide information in a neutral capacity so the policy makers are able to make an informed decision regarding the bill.

Our actuary estimates that the bill could apply to approximately 460 political subdivision individuals into the Public Safety Plan and Adjutant General has identified 33 potential dispatchers in their organization. The 33 potential dispatchers information was used to provide the fiscal note allocation for their agency, even though the Legislation only applies to new hires after 8/1/2025.

The ongoing employer contribution rate across the political subdivisions would depend on the demographics of the newly eligible populations into the Plan. For the state individuals analyzed by the actuary, the impact on the ongoing employer contribution rate was an immaterial decrease. The additional member contribution of 0.50% covers the higher than average normal cost, and that theory may also extend to our Political Subdivisions, meaning an immaterial impact to the actuarially determined employer contribution rate. However, the actuary did caveat the analysis by clarifying that if the demographics (age, service, gender) of the political subdivision joining the Public Safety Plan were significantly different than the existing membership, that the results could be different.

There is a fiscal note attached to this bill, which recognizes the differences in the contribution rates between the Main Plan and the Public Safety Plans, so the Adjutant General would have sufficient appropriation authority if any of their dispatcher positions had turnover in the upcoming biennium.

Our federal tax consultant has confirmed this bill will not disqualify our retirement plans from an IRS perspective. The expanded eligibility will include participants who satisfy the definition of a “qualified public safety officer,” for correctional officers and medical

services personnel, meaning no 10% early distribution penalty would exist for benefits where the normal retirement benefit is achieved.

For dispatchers, however, they do not satisfy the definition of a “qualified public safety officer,” and will thus be subject to a 10% early distribution penalty if benefits are commenced before age 55. This will require employers to submit accurate job classes to the PERS office to ensure we accurately reflect the information on 1099s when participants begin receiving their retirement benefits.

We did find survey information indicating that Minnesota includes peace and correctional officers and park rangers in their public safety definitions. South Dakota includes EMTs and juvenile detention officers, correctional officers, and park rangers in their Public Safety definitions. We were unable to find information on Montana’s Public Safety population.

House Bill 1419 was a bill introduced during the interim, with the analysis provided to the Employee Benefits Programs Committee, which gave the bill an unfavorable recommendation. The consultant and legal analysis provided to the committee is included as an attachment to the end of my testimony (please note this was draft bill 41 during the interim session).

Another observation our office has is this bill touches the same sections of code as other bills being introduced during the Session. It is imperative that whatever bill is passed last has language from previously passed bill(s) incorporated into the final passage if these remain stand-alone bills throughout the session.

Madam Chair, I appreciate the committee taking the time to learn more about the impact this bill will have to our state. This concludes my testimony, and I’d be happy to answer any questions the committee may have.



August 14, 2024

Representative Austen Schauer, Chair
Legislative Employee Benefits Programs Committee
North Dakota State Government

Re: North Dakota Public Employees Retirement System Legislative Studies

Dear Representative Schauer:

In accordance with your request, we have analyzed the impact of Bill No. 25.0041.01000 on the North Dakota Public Employees Retirement System (NDPERS). Our review is actuarial in nature; we are not attorneys and cannot provide legal advice.

Systems Affected

North Dakota Public Employees Retirement System (Main System, Public Safety with prior Main System service, and Public Safety without prior Main System service)

Summary

Bill No. 25.0041.01000 allows governmental employers, on behalf of their dispatchers and emergency medical services personnel not in a Public Safety plan at this time, to enter into agreements with the retirement board, for the purpose of extending the benefits of the Public Safety retirement system to those dispatchers and emergency medical services personnel.

Data Summary

NDPERS provided data for dispatchers and emergency medical services personnel employed by the State of North Dakota or a political subdivision, as defined in Bill 041. The data was reviewed and compared to data from the July 1, 2023 actuarial valuation. Members that were found to be in the July 1, 2023 actuarial valuation were assumed to transfer from their current group to the State Public Safety Employees group. Members that were not found to be part of the July 1, 2023 actuarial valuation data were excluded from the actuarial analysis.

The data provided included 492 members.

- For 460 members, participant counts with no individual information was provided.
- An additional 10 members from the State Radio group were not found in the July 1, 2023 actuarial valuation data.
- The remaining 22 members eligible to transfer to the State Public Safety Employees group are currently in the Main System.

Actuarial Impact of Bill 041 on NDPERS

General Comments

The actuarial impact of this change will depend specifically on the number and age of new members who would enter the Public Safety Plan, whether or not the new members have participated in the Main System, and the amount of liabilities and assets (if any) that would be transferred into the Public Safety Plan.

- Eligible public safety dispatchers and emergency medical services personnel **who currently do not participate in NDPERS** in the Main System would be allowed to participate in the Public Safety without prior Main System service System, but only on a prospective basis. In other words, such employees would have a normal cost but would have no past service liability cost. The normal cost as a percentage of compensation will be dependent on the current age of the public safety dispatchers and emergency medical services personnel transferring into the system.
 - The following information is based on the results from the actuarial valuation as of July 1, 2023, for the Public Safety without prior Main System service System
 - Board approved employer contribution rate of 7.93% of pay (9.16% of pay effective January 1, 2024)
 - Employer normal cost rate (including administrative expenses) of 8.49% of pay
 - Average age of active employees of 37.8
 - Average service of active members of 4.9 years
 - The normal cost as a percentage of compensation would decrease (increase) if the average age for the transferring group is younger (older) than the average age at plan entry for the current active members of the Public Safety without prior Main System service System, and is expected to be lower based on a benefit accrual rate of 1.75% compared to the rate of 2.00% for members of the System hired before 2020.
 - There would be no past service liability cost since prior plan benefits would not be transferred into the System. However, the political subdivision will still contribute the entire employer contribution rate for the Public Safety without prior Main System service System, which includes components for the normal cost and the amortization of the unfunded past service liability based on the members who are currently in the system.
 - If the transferring group has a lower employer normal cost rate (currently 8.49% of pay) than the Board approved employer contribution rate (currently 9.16% of pay), there will be a decreased need for contributions to the System.
 - If the transferring group has a higher employer normal cost rate (currently 8.49% of pay) than the Board approved employer contribution rate (currently 9.16% of pay), there will be an increased need for contributions to the System.

- Eligible dispatchers and emergency medical services **who currently participate in NDPERS** in the Main System would have a normal cost plus an amortization payment of the increase in past service liability as a result of the transfer. The normal cost impact would be similar to the normal cost impact described for political subdivisions transferring from outside of NDPERS. It is assumed that the Main System past service liability would be transferred to the Public Safety with prior Main System service System in the form of an asset transfer equal to the value of service accrued under the Main System and the funded ratio under the Main System (about 66% as of July 1, 2023).
 - The following information is based on the results from the actuarial valuation as of July 1, 2023, for the Public Safety with prior Main System service System
 - Board approved employer contribution rate of 9.81% of pay (11.40% effective January 1, 2024)
 - For the State Public Safety Employees group, the employer contribution rate is 12.75% of pay effective August 1, 2023 and 14.34% of pay effective January 1, 2024
 - Employer normal cost rate (including administrative expenses) of 8.03% of pay
 - Average age of active employees of 36.7
 - Average benefit service of active members of 6.9 years
 - Normal retirement eligibility conditions of age 65 or Rule of 85 in the Main System (age 65 or age 60 with Rule of 90 for Main System members enrolled after December 31, 2015) and age 55 with three years of service or Rule of 85 in the Public Safety System
 - Early retirement eligibility conditions of age 55 with three years of service in the Main System and age 50 with three years of service in the Public Safety System
 - Because the Public Safety with prior Main System service System contains more favorable retirement provisions than the Main System, there would be an increase in past service liability as a result of the transfer. Therefore, the net impact of the transfer is expected to result in an increase in unfunded actuarial accrued liability to the Public Safety System due to an asset transfer that is about 66% of the actuarial accrued liability under the Main System and a higher actuarial accrued liability under the Public Safety with prior Main System service System.
 - If the transferring group has a total rate (employer normal cost plus amortization of their unfunded liability) that is lower than the Board approved employer contribution rate (currently 14.34% of pay), there will be a decreased need for contributions to the System.
 - If the transferring group has a total rate (employer normal cost plus amortization of their unfunded liability) that is higher than the Board approved employer contribution rate (currently 14.34% of pay), there will be an increased need for contributions to the System.

Actuarial Impact Based on Available Data

The cost impact calculated in this letter is based on the data for the Public Safety with Prior Main System Service system as of the July 1, 2023 actuarial valuation and additional data provided by PERS. As noted above, a total of 22 dispatchers and emergency medical services personnel impacted by this legislation were identified as being currently in the Main System.

Under the baseline scenario, the total number of active members in the Public Safety with Prior Main System Service system is 1,225, including 181 currently in the State Public Safety Employees group. Under the alternate scenario, the total number of active members in the Public Safety with Prior Main System Service system is 1,247, including 203 in the State Public Safety Employees group. It is assumed that members would transfer all service to the State Public Safety Employees group and that there would be a corresponding asset transfer (described on page 3). The number of active members in the Main System is reduced by 22 members. Potential State Public Safety Employees members provided by PERS that were not in the data for the July 1, 2023 actuarial valuation were excluded from the actuarial analysis.

Scenario	Baseline July 1, 2023 Valuation	Bill 25.0041.01000	Difference
Main System Actuarial Accrued Liabilities	\$ 5,559,270,755	\$ 5,557,606,256	\$ (1,664,499)
Main System Actuarial Value of Assets	\$ 3,683,545,963	\$ 3,682,458,793	\$ (1,087,170)
Main System Normal Cost	\$ 152,758,636	\$ 152,631,195	\$ (127,441)
Main System Funded Ratio	66.26%	66.26%	0.00%
Public Safety With Prior Main System Service Actuarial Accrued Liabilities	\$ 187,025,504	\$ 189,004,086	\$ 1,978,582
Public Safety With Prior Main System Service Actuarial Value of Assets	\$ 128,273,097	\$ 129,360,267	\$ 1,087,170
Public Safety With Prior Main System Service Normal Cost	\$ 12,179,130	\$ 12,338,372	\$ 159,242
Public Safety With Prior Main System Service Funded Ratio	68.59%	68.44%	-0.15%

In this cost analysis, the number of members potentially transferring from the Main System to the Public Safety System was 22. The Main System unfunded actuarial accrued liability (UAL) decreased by roughly \$577.3 thousand and the Public Safety System UAL increased by roughly \$891.4 thousand. The net cost was \$314.1 thousand, or \$14,277 per member. Previous transfers have had an estimated cost of \$15,000 to \$20,000 per member.

A separate ADC is not calculated for State Public Safety Employees members because the plan's assets are not allocated to any subgroups. State Public Safety Employees members contribute 6.0% of payroll, as compared to 5.5% for other Public Safety With Prior Service Plan members. State Public Safety Employees members also have a higher normal cost (NC) rate, due solely to demographic differences and the difference in member contributions. Our understanding is that statutes require employers of State Public Safety Employees members to contribute an amount determined by the board to be actuarially required to support the level of benefits.

The total NC rate for the plan including the administrative expense assumption (before any legislative changes) as of July 1, 2023 was 13.56% of pay. This is comprised of 12.97% of pay for the Public Safety group, 20.98% for the BCI group, and for State Public Safety Employees members, the total NC rate as of July 1, 2023 was 13.90% of pay, or 0.34% of pay higher than the group total. The additional member contribution of 0.50% for State Public Safety Employees members covers this extra cost.

As of July 1, 2023, the total Normal Cost of the State Public Safety Employees group initially decreases from 13.90% to 13.83% of projected compensation, due to the expansion of the group.

Bill 041 also increases the unfunded liability of the plan, which leads to an increase in the amortized unfunded liability portion of the ADC as of July 1, 2023. However, the covered payroll of the group is also expected to increase. The amortized unfunded liability portion of the ADC as a percentage of payroll increased from 4.34% to 4.35%, or 0.01%.

Summary

The numerical results in this letter are based solely on the 22 members that were in the actuarial valuation data as of July 1, 2023. This letter also includes general comments about the potential impact of other members for whom participant data is not currently available. Based on the data provided for this analysis, there are roughly 492 individuals potentially impacted by this proposed legislation. For most of these individuals, we either did not receive identifying information or they were not in the actuarial valuation data as of July 1, 2023.

Eligible public safety dispatchers and emergency medical services personnel who **currently do not participate in NDPERS** in the Main System:

- If the transferring group has a lower employer normal cost rate (currently 8.49% of pay) than the employer contribution rate (current 9.16% of pay), there will be a decreased need for contributions to the System. Otherwise, there will be an increased need for contributions to the System.

Eligible public safety dispatchers and emergency medical services personnel **who currently do participate in NDPERS** in the Main System:

- Based on current practices, the amount of assets transferred from the Main System to the Public Safety System on behalf of members transferring to Public Safety is lower than the amount of liability transferred, resulting in new unfunded liability for NDPERS.



Policy Issue Analysis

Benefits Policy Issues

- Adequacy of Retirement Benefits

The Public Safety System contains more favorable retirement provisions than the Main System. Therefore, Bill 041 will enhance retirement benefits for dispatchers and emergency medical services personnel who transfer into the Public Safety System, because they will now be able to retire at an earlier age.

- Competitiveness

The Bill may increase the benefits competitiveness for dispatchers and emergency medical services personnel who transfer into the Public Safety System.

- Benefits Equity and Group Integrity

Under the Bill, dispatchers and emergency medical services personnel would retire under normal and early retirement dates that are similar to the retirement dates of Public Safety personnel.

- Purchasing Power

No impact.

- Preservation of Benefits

No impact.

- Portability

No impact.

- Ancillary Benefits

No impact.

- Social Security

No impact.



Funding Policy Issues

- Actuarial Impacts

Previously noted.

- Investment Impacts

- Cash Flow: An asset transfer would increase initial cash flow to the Public Safety System, but decrease cash flows to the Main System.

Administration Issues

- Implementation Issues

The Bill will require that the System reprogram the prior service of applicable dispatchers and emergency medical services personnel to be counted under the Public Safety with prior Main service System rules. While this Bill would have minimal impact on administrative costs of the System, it would have an effect on the participating employers since the required contributions would increase.

- Administrative Costs

The Bill will have a minimal effect on administrative resources. However, employer contributions will increase from transfers from the Main System, since the statutory employer contribution rate for those transferring will increase from 8.12% (9.26% of pay for members enrolled on or after January 1, 2020) of salary to 14.34% under the Public Safety with prior Main service System (for the State Public Safety Employees group). Employer contributions will be 9.16% of pay under the Public Safety without prior Main service System compared to 9.26% of pay (for members enrolled after January 1, 2020) for the Main System.

- Needed Authority

The Bill appears to provide appropriate levels of administrative and governance authority to the PERS Board to implement the changes made by the Bill.

- Integration

No impact.

- Employee Communications

The Bill will require employee communications to the dispatchers and emergency medical services personnel who transfer into the Public Safety System to describe the new retirement rules applicable to them, including the normal retirement age and early retirement age.

Summary

- Dispatchers and emergency medical services personnel that enter the Public Safety retirement system would be subject to the same eligibility conditions to receive benefits as Public Safety personnel.
- Dispatchers and emergency medical services personnel that enter the Public Safety retirement system would be subject to the same benefit provisions as Public Safety personnel.

Disclosures and Additional Information

This analysis is based on projections of the actuarial valuation results for the North Dakota Public Employees Retirement System (NDPERS). The actuarial assumptions used in this analysis are the same assumptions used in the actuarial valuation as of July 1, 2023, including a discount rate of 6.50%.

Future actuarial measurements may differ significantly from the current measurements presented in this cost analysis, due to such factors as the following: plan experience differing from that anticipated by the economic or demographic assumptions; changes in economic or demographic assumptions; and changes in plan provisions, contribution amounts or applicable law.

If any of the provisions, underlying data or assumptions used in this analysis appear to be incorrect or unreasonable, please let us know as soon as possible so we can update the analysis.

This report was prepared using our proprietary valuation model and related software which, in our professional judgment, has the capability to provide results that are consistent with the purposes of the valuation, and has no material limitations or known weaknesses. We performed tests to ensure that the model reasonably represents that which is intended to be modeled.

We have reviewed the bill and provided an actuarial impact analysis as well as a policy issue analysis from our perspective as actuaries. However, the policy issue analysis should not be considered to be comprehensive and there may be additional benefits policy, administration issues or legal issues that are not discussed in this letter.




The signing actuaries are independent of the North Dakota Public Employees Retirement System.

Bonita J. Wurst and Abra D. Hill are Members of the American Academy of Actuaries (MAAA) and meet the Qualification Standards of the American Academy of Actuaries to render the actuarial opinions contained herein.

Please let us know if you have any questions or would like to discuss the results of this analysis further.

Sincerely,
Gabriel, Roeder, Smith & Company



Bonita J. Wurst, ASA, EA, MAAA, FCA
Senior Consultant



Abra D. Hill, ASA, MAAA, FCA
Consultant

cc: Rebecca Fricke, NDPERS
Joshua Murner, GRS

MEMORANDUM

TO: Derrick Hohbein, North Dakota Public Employees Retirement System

FROM: Audra Ferguson and Robert Gauss
ICE MILLER LLP

DATE: May 10, 2024

RE: Proposed Public Safety Legislation

This Memorandum is provided in confidence and subject to the attorney-client privilege. We have not provided copies to anyone other than the individual named above. To preserve the attorney-client privilege, you should disclose the contents of this Memorandum only to persons making decisions on the matters discussed herein.

Please allow this Memorandum to follow-up to your electronic mail message dated May 1, 2024. In particular, we have reviewed the following draft Bills:

- Bill No. 25.0115.01000 – Expanding the definition of “firefighter” in the Public Safety Plan to include those members employed by the State as a firefighter. A firefighter employed by the State shall be eligible for a normal retirement benefit at age 55 with 3 years of service or a combined age and service of 85.
- Bill Nos. 25.0045.01000 and 25.0041.01000– Including dispatchers, emergency medical personnel, and correctional officers employed by the State in the Public Safety Plan. Under these Bills, dispatchers, emergency medical personnel, and correctional officers employed by the State shall be eligible for a normal retirement benefit at age 55 with 3 years of service or a combined age and service of 85.
- Bill No. 25.0040.01000 – Including correctional officers employed by the State in the Public Safety Plan. Under this Bill, correctional officers employed by the State shall be eligible for a normal retirement benefit at age 55 with 3 years of service or a combined age and service of 85. [Note: Correctional officers employed by political subdivisions were already included in the Public Safety Plan.]
- Bill No. 25.0134.01000 – Defining “correctional officers” for purposes of the Public Safety Plan to include those individuals employed by a correctional facility who are enrolled in but not yet completed a correctional officer course.

This Memorandum highlights the federal law consideration and various definitions of a “public safety officer” and the impact on the plan qualification and member taxation. Specifically, this Memorandum considers the following federal law Internal Revenue Code (“Code”) sections and requirements:

- Code Section 72(t)(10)(B),
- Normal Retirement Age;
- Code Section 415(b), and
- Code Section 101(h).

I. CODE SECTION 72(t)(10)(B)

A. Relevant Federal Law

Internal Revenue Code (“Code”) section 72(t) imposes an additional 10% premature distribution tax on certain distributions that are paid to members from qualified plans. There are several exceptions to the premature distribution tax, including an exception for a "qualified public safety employee" in a governmental defined benefit plan who receives a distribution after separation from service after attainment of the earlier of age 50 or 25 years of service under the plan.¹ According to Code section 72(t)(10)(B), a "qualified public safety employee" is limited to the following:

- any employee of a State or political subdivision of a State who provides police protection, firefighting services, emergency medical services, services as a corrections officer or a forensic security employee providing for the care, custody, and control of forensic patients for any area within the jurisdiction of such State or political subdivision;
- any Federal law enforcement officer described in section 8331(2) or 8401(17) of title 5, United States Code;
- any Federal firefighter described in section 8331(21) or 8401(14) of such title;
- any air traffic controller described in 8331(30) or 8401(35) of such title;
- any nuclear materials courier described in section 8331(27) or 8401(33) of such title;
- any member of the United States Capitol Police;
- any member of the Supreme Court Police; and
- any diplomatic security special agency of the Department of State.

B. Analysis

¹ There is a separate exception for distributions paid to general employees after separation from service after attainment of age 55.

Correctional Officers, Emergency Medical Personnel, and Firefighters. Correctional Officers, Emergency Medical Personnel, and Firefighters clearly meet the definition of “Qualified Public Safety Officers” under Code Section 72(t)(10)(B).

Dispatchers. Dispatchers do not satisfy the Code section 72(t)(10)(B) definition of a “Qualified Public Safety Officer” because they do not directly provide police protection, firefighting services, or emergency medical services. As a result, a dispatcher could be eligible for early retirement benefits under the plan, but subject to an early distribution tax penalty if the member commenced a monthly benefit prior to age 55.

With respect to Bill No. 25.0134.01000 which expands the definition of “Correctional Officer” to include individuals who are employed by a correctional facility and who are enrolled in but have not yet completed a correctional officer course, this will be a facts and circumstances determination. If the individuals are in a correctional officer role and performing as a correctional officer, then we think the members would satisfy the definition of a “Qualified Public Safety Officer.” However, if the individuals are employed with a correctional facility, but not serving as a correctional officer until the individual has completed the correctional officer course, then the individual would not qualify as a “Qualified Public Safety Officer.” As noted above, the member could receive a benefit; however, if the member commences a monthly benefit prior to age 55, then the member will be subject to an early distribution penalty.

II. NORMAL RETIREMENT AGE

A. Retirement Age Under the Plan

Pursuant to N.D.C.C. § 54-52-17, the normal retirement age for members of the **Public Safety Plan** is as follows:

- The member is at least age 55 with 3 years of service; or
- The member has a combined total years of service credit and years of age equal 85.

By contrast, **under the Main Plan**, the normal retirement age for members is as follows:

- The member is at least age 65; or
- The member has a combined total years of service credit and years of age equal 85.

N.D.C.C. § 54-52-17.

Additionally, a member of the Public Safety Plan may receive an early retirement benefit when the member attains age 50 with 3 years of service. *Id.*

B. Pending Normal Retirement Age Regulations for Governmental Plans

On January 27, 2016, the IRS and Treasury Department issued a Notice of Proposed Rulemaking regarding proposed regulations regarding normal retirement age for governmental pension plans ("Proposed Regulations"). The Proposed Regulations have been long awaited as, in 2007, the IRS issued final regulations defining normal retirement age which are applicable to private sector pension plans. The Proposed Regulations distinguish between governmental plans which allow in-service distributions and those which do not. For governmental plans that do allow in-service distributions, the NRA must meet a "reasonably representative" requirement, which can be satisfied by using any of several safe harbor NRAs set forth in the proposed regulations.

For governmental plans that do not allow in-service distributions, the proposed regulations provide that the NRA must still meet the pre-ERISA vesting rules. In this regard, use of a period of service to determine normal retirement age under a governmental plan would be permissible if the period of service used is reasonable and uniformly applicable and the other pre-ERISA rules related to normal retirement age are satisfied. One of the pre-ERISA rules allows a governmental plan to specify a normal retirement age that is lower than age 65 **if that age represents the age at which employees customarily retire in the industry**.

As part of the Proposed Regulations, several sets of safe harbors were announced. For instance, the Proposed Regulations establish a general safe harbor for a normal retirement age that is at least age 62 or the later of age 62 or another specified date (such as the fifth anniversary of plan participation); this is referred to as the general safe harbor.² The Proposed Regulations also developed the following additional safe harbors specific to governmental plans:

- age 60 with five years of service;
- age 55 with ten years of service;
- a combined age and years of service of 80 or more; and
- any age with 25 years of service (in combination with a safe harbor that includes an age).

Additionally, the Proposed Regulations established separate safe harbor rules for qualified public safety employees. For qualified public safety employees, the proposed safe harbors are:

- age 50;
- combined age and years of service of 70 or more;
- any age with 20 years of service.

² It is important to note that subsequent to the Proposed Regulations, the SECURE Act reduced the age for in-service distributions under Code Section 401(a)(36) from 62 to 59 ½. As a result, it is likely the IRS will revise the general safe harbor to age 59 ½.

Importantly for purposes of the Bills, the term qualified public safety employee is defined by reference to Code § 72(t)(10)(B).

It is important to note that, under the Proposed Regulations, a plan may have more than one normal retirement age. For instance, a plan may have one normal retirement age for one classification of employees and one or more normal retirement ages for one or more different classifications of employees. This is permissible so long as each normal retirement age satisfies the pre-ERISA requirements.

Finally, the Proposed Regulations establish that a normal retirement age which does not satisfy any of the governmental plan safe harbors could still satisfy the reasonably representative requirement based on all of the relevant facts and circumstances. The normal retirement age must be evaluated and shown to satisfy a good faith determination of the typical retirement age for the industry in which the covered work force is employed and that the normal retirement age is otherwise consistent with the pre-ERISA vesting requirements.

While the IRS has stated its intent to issue final regulations, the Proposed Regulations remain pending. Separately, it is important to note that the Proposed Regulations state they are anticipated to be effective for employees hired after the effective date of the final regulations. In the meantime, governmental plan sponsors may rely on the Proposed Regulations prior to the effective date and pending the issuance of final regulations.

C. Analysis

Correctional Officers,³ Emergency Medical Personnel, and Firefighters. The normal retirement age under the Public Safety Plan satisfies the Safe Harbor for Qualified Public Safety Employees. As noted above, Correctional Officers, Emergency Medical Personnel, and Firefighters clearly meet the definition of “Qualified Public Safety Officers” under Code section 72(t)(10)(B). Thus, the lower normal retirement age proposed under the Bills for these job classifications does not raise a concern under federal law.

Dispatcher. As noted above, a Dispatcher does not satisfy the definition of a “Qualified Public Safety Officer.” Thus, NDPERS cannot rely on the Normal Retirement Age Safe Harbor for Qualified Public Safety Officers. However, the above IRS guidance is clear that, while a governmental plan that does not provide in-service distributions has flexibility in establishing a Normal Retirement Age, the parameters are not unlimited. Specifically, the Normal Retirement Age must satisfy the pre-ERISA vesting rules.

The pre-ERISA vesting rules provided that

³ As noted above, with respect to Bill No. 25.0134.01000 which expands the definition of “Correctional Officer” to include individuals who are employed by a correctional facility and who are enrolled in but have not yet completed a correctional officer course, this will be a facts and circumstances determination. If the individual is serving as a correctional officer with a job classification of a Correctional Officer, then the individual satisfies the definition of a “Qualified Public Safety Officer” under Code section 72(t)(10)(B).

[A]lthough normal retirement age under a pension or annuity plan is ordinarily age 65, a plan may specify a lower age at which the employee has the right to retire without the consent of the employer and to receive retirement benefits based on the amount of the employee's service at the full rate set forth in the plan if this lower age would be an age at which employees customarily retire in the particular company or industry, and if the provision permitting receipt of unreduced benefits at this age is not a device to accelerate funding.

Preamble to the Proposed Regulations Regarding Normal Retirement Age (Jan. 27, 2016). Thus, NDPERS will need to establish that age 55 with 3 years of service represents an age at which Dispatchers customarily retire. Note: The combined age and years of service of 85 satisfies the General Employee Normal Retirement Age Safe Harbor.

III. CODE SECTION 415(b) DEFINITION OF "QUALIFIED PARTICIPANTS"

A. Relevant Federal Law

Code section 415(b) provides that the annual benefit in the form of a single life annuity for a plan participant who is between the ages of 62 and 65 may not exceed \$160,000, as adjusted for inflation in \$5,000 increments (for 2024, the limit is \$275,000). However, there is no age-based actuarial reduction required for benefits beginning prior to age 62 for "qualified participants." Here, the Code defines "qualified participants" as those who (1) are participants of a defined benefit of a State or political subdivision of a State; and (2) have completed at least 15 years of service as a full-time employee of any police department or fire department which is organized and operated by the State or political subdivision to provide police protection, firefighting services, or emergency medical services, or as a member of the U.S. Armed Forces.

Importantly, the scope of the 415(b) public safety exception varies from the definition of public safety employees in Code section 72(t)(10)(B). Under Code section 415(b), the application of the rule depends on whether the employer is a police department or fire department of the state or political subdivision, rather than on the job classification of the individual participant. As a result, the definition of "qualified participant" under Code section 415(b) is more inclusive in terms of the types of employees that are covered than many public safety provisions, but less inclusive in terms of the types of employers that are covered.

Generally, the 415(b) exception is very beneficial to public safety officers and to other employees of police and fire departments, including non-public safety personnel. However, this definition does not cover all public safety employees. The examples in the Final 415 Regulations make it clear that an employee of a police division of an agency may be a qualified participant, but that an ambulance driver who works for an emergency medical services agency rather than for a police or fire department cannot. While the name of the agency is not important, it is necessary that the employer (or at least the appropriate division of employer) function as a police or fire department. For example, correctional officers will not be treated as employees of a police department for purposes of Code 415(b), as decided in PLR 201347028.

B. Analysis

NDPERS should be aware that only those Public Safety Plan participants that satisfy the definition of “qualified participants” will be eligible for the unreduced Code section 415(b) limit. This will include the Firefighter members, but it will not include Correctional Officers or Medical Services Personnel. In addition, Dispatchers will be considered “qualified participants” only if they are employees of a police or fire department. As a result, NDPERS would have to make sure its systems are programmed to recognize that not all employees in the Public Safety Plan would be eligible for the unreduced Code Section 415(b) limit.

IV. CODE SECTION 101(h) – DEFINITION OF PUBLIC SAFETY OFFICER

A. Relevant Federal Law

Code section 101(h) provides a federal income tax exclusion for certain amounts paid as a survivor annuity on account of the death of a "public safety officer" killed in the line-of-duty. The exclusion applies:

- if the survivor annuity is provided by a qualified 401(a) plan to the spouse, former spouse, or a child of the officer; and
- to the extent the annuity is attributable to the officer's service as a public safety officer.

In accordance with 42 U.S.C. 3796b(9) (the Omnibus Crime Control and Safe Streets Act of 1968), a "public safety officer" includes (i) an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, a firefighter, a chaplain, or as a member of a rescue squad or an ambulance crew; or (ii) with some limitation, an employee of a State, local or tribal emergency management or civil defense agency who is performing official duties in cooperation with the Federal Emergency Management Agency.

B. Analysis

NDPERS should be aware that only those Public Safety Plan survivors of participants that satisfy the definition of “public safety officers” will be eligible for the tax-free annuity under Code section 101(h). This will include the Firefighter members and Medical Services Personnel, but it will not include Correctional Officers. In addition, unless Dispatchers are considered law enforcement officers, firefighters, part of a rescue squad or part of an ambulance crew, they would only be included in this definition of a public safety officer for purposes of Code section 101(h) if they fall into the second category of working in cooperation with the Federal Emergency Management Agency.

V. SUMMARY OF BILL ANALYSIS

<u>Bill No.</u>	<u>Code § 72(t)</u>	<u>NRA</u>	<u>Code § 415(b) Reduction</u>	<u>Code § 101(h)</u>
25.0115.01000 Adding Firefighters employed by the State	<ul style="list-style-type: none"> Satisfies the definition of a “qualified public safety officer” No 10% early distribution penalty for monthly benefits commenced after age 50 and separation from service” 	<ul style="list-style-type: none"> Satisfies the definition of a “qualified public safety officer” Satisfies the NRA Safe Harbor for Qualified Public Safety Officer” 	<ul style="list-style-type: none"> Satisfies the definition of “qualified participants” and eligible for the unreduced Code section 415(b) limit. 	<ul style="list-style-type: none"> Satisfies the definition of “public safety officers” and the survivor will be eligible for the tax-free annuity under Code Section 101(h).
25.0134.01000 Amending definition of a “correctional officer” to include an individual employed by a correctional facility who is enrolled in but not yet completed a correctional	<ul style="list-style-type: none"> If the individuals are in a correctional officer role and performing as a correctional officer, then we think the members would satisfy the 	<ul style="list-style-type: none"> Same 	<ul style="list-style-type: none"> Do not satisfy the definition of “qualified participant” and will not be eligible for the unreduced Code section 415(b) limit. 	<ul style="list-style-type: none"> Do not satisfy the definition “public safety officer” and the survivor will not be eligible for the tax-free annuity under Code Section 101(h).

officer course.	definition of a “Qualified Public Safety Officer.” However, if the individuals are employed with a correctional facility but not serving as a correctional officer until the individual has completed the correctional officer course, then the individual would not qualify as a “Qualified Public Safety Officer.”			
25.0045.01000 and 25.0041.01000 Amends the Public Safety Plan to include Dispatchers, Medical	<u>Correctional Officers and Medical Service Personnel</u> • Satisfies the definition	<u>Correctional Officers and Medical Service Personnel</u> • Satisfies the definition of a	<u>Correctional Officers and Medical Services Personnel</u> • Do not satisfy the definition	<u>Correctional Officers</u> • Do not satisfy the definition “public safety officer” and the survivor will not be eligible for the tax-free annuity

Service Personnel and State Correctional Officers.	<p>of a “qualified public safety officer”</p> <ul style="list-style-type: none"> No 10% early distribution penalty for monthly benefits commenced after age 50 and separation from service <p><u>Dispatchers</u></p> <ul style="list-style-type: none"> Does not satisfy the definition of a “qualified public safety officer” Will be subject to a 10% early distribution penalty for monthly benefits commenced before age 55 	<p>“qualified public safety officer”</p> <ul style="list-style-type: none"> Satisfies the NRA Safe Harbor for Qualified Public Safety Officer” <p><u>Dispatchers</u></p> <ul style="list-style-type: none"> Do not satisfy the definition of a “qualified public safety officer” Will need to demonstrate that the NRA represents the age at which employees customarily retire in the industry. 	<p>of “qualified participant” and will not be eligible for the unreduced Code section 415(b) limit.</p> <p><u>Dispatchers</u></p> <ul style="list-style-type: none"> Will be considered “qualified participants” only if they are employees of a police or fire department. 	<p>under Code Section 101(h).</p> <p><u>Medical Services Personnel</u></p> <ul style="list-style-type: none"> Satisfies the definition of “public safety officers” and the survivor will be eligible for the tax-free annuity under Code Section 101(h). <p><u>Dispatchers</u></p> <ul style="list-style-type: none"> Do not satisfy the definition “public safety officer” and the survivor will not be eligible for the tax-free annuity under Code Section 101(h), unless they are considered law enforcement officers, firefighters, part of a rescue squad or part of an ambulance crew.
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25.0040.01000				
Amends the Public Safety Plan to State Correctional Officers.	<ul style="list-style-type: none"> • Satisfies the definition of a “qualified public safety officer” • No 10% early distribution penalty for monthly benefits commenced after age 50 and separation from service 	<ul style="list-style-type: none"> • Satisfies the definition of a “qualified public safety officer” • Satisfies the NRA Safe Harbor for Qualified Public Safety Officer 	<ul style="list-style-type: none"> • Do not satisfy the definition of “qualified participant” and will not be eligible for the unreduced Code section 415(b) limit. 	<ul style="list-style-type: none"> • Do not satisfy the definition “public safety officer” and the survivor will not be eligible for the tax-free annuity under Code Section 101(h).