



# HOUSE OF REPRESENTATIVES

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AUGUSTA, MAINE 04333-0002

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MAINE RELAY 711

**Gary A. Drinkwater**

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Senator Tipping, and my fellow members, I'm Gary Drinkwater representing district 27, the towns of Alton, Argyle twp. Bradford, Corinth, and my hometown of Milford.

I'm presenting LD 1221, Resolution, Proposing an Amendment to the Constitution of Maine to Prohibit the Legislature from Using Paid Family Medical Leave programs funds for any other purpose.

After five years on the labor committee and reviewing dozens of bills proposing changes to the mainstay retirement fund, I realized that without a constitutional amendment to protect it the fund risk being bankrupt.

I have enclosed information for your review detailing the events leading up to the 1995 referendum.

I hope you agree that, just as we've protected Maine PERS, we should ensure similar protections for the fund supporting paid family medical leave.

# MAINE STATE LEGISLATURE

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April 25, 1996

Claude R. Perrier, Executive Director  
Maine State Retirement System  
46 State House Station  
Augusta, ME 04333-0046

Dear Mr. Perrier:

I am writing in response to your inquiry of last November, posing a number of questions concerning the interpretation of recently enacted amendments to the Maine Constitution dealing with the funding of the Maine State Retirement System and its unfunded liability. Me. Const. art. IX, §§ 18-A, 18-B. I am sorry not to have been able to respond sooner; but, in view of the importance of the questions raised, I wanted to be in possession of the full legislative history of the amendments, the transcripts of the legislative debates of which have only become available in early February, and I wanted to permit members of my staff to discuss our tentative conclusions with you and the Board of Trustees to insure that we were aware of all relevant considerations.

The new constitutional amendments deal generally with three subjects: the funding of the current (or "normal") cost of all retirement and ancillary benefits of the Maine State Retirement System, the creation of new unfunded liabilities for the System, and the liquidation of existing unfunded liabilities. With regard to the first two, Section 18-A provides:

Beginning with the fiscal year starting July 1, 1997, the normal cost of all retirement and ancillary benefits provided to participants under the Maine State Retirement System must be funded annually on an actuarially sound basis. Unfunded liabilities may not be created except those resulting from experience losses. Unfunded liability resulting from experience losses must be retired over a period not exceeding 10 years.

provision that would allow the Legislature to suspend funding otherwise required by Section 18-A if the Governor certified that a severe economic emergency was present and 7/8 of the membership of each House concurred. The substance of the dispute between the majority and the minority of the Committee, as well as the record of the discussion in the House of Representatives on the only day the bill was debated in either House of the Legislature, reveals that all concerned were operating on the assumption that the objective of Section 18-A was to insure the sound actuarial funding of the normal cost of retirement benefits and the prevention of the creation of new unfunded liabilities by the Legislature. See, e.g., remarks by Rep. Joy ("For years the State has been robbing Peter to pay Paul. They have been withholding funds and not putting them in the Retirement System."); Rep. Winsor ("I am also very aware of the massive amount of unfunded liability that past Legislatures have allowed to grow . . ."); Rep. Tuttle ("I feel that by [voting for the bill] we do the taxpayers of this State a great service . . .") and Rep. Cameron (expressing concern about the welfare of "state employees in the future") (emphasis added) on June 23, 1995.<sup>4</sup>

There is no indication anywhere in the written record of the legislative history of L.D. 158 that the Legislature was considering the funding of normal retirement costs or the creation of unfunded liabilities by the participating local districts. Indeed, your agency advises this Department that employer and employee contributions to the Retirement System and earnings thereon by each PLD are held in each PLD's separate account, and that if that PLD's account is exhausted, the assets of the System attributable to the State and teacher plan(s) and to other PLDs are not available to make up any shortfall. Thus, the concerns of the Legislature reflected in the passage of Section 18-A are not affected by any actions of the PLDs. Consequently, this Department concludes that Section 18-A (as well as Section 18-B which expressly applies only to the State) was not intended to apply to them.

C. Funding of Increased Benefits.

You next ask whether Section 18-A means that, if the Legislature were to increase any benefits for the members of the Retirement System in the future, it must simultaneously fund such increases. In order to answer this question, it is necessary to distinguish between two kinds of possible legislative action: action which increases benefits based on creditable service already accrued, and action which increases benefits based on future creditable service.

With regard to the first type of possible legislative action, the second sentence of Section 18-A provides simply that: "Unfunded liabilities may not be created."

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<sup>4</sup>At the time of the preparation of this Opinion, the Legislative Record for the House of Representatives for this date had not been paginated.

The enactment by the Legislature of a statute increasing a benefit based on already accrued creditable service without any funding would be a clear case of the creation of an unfunded liability for the Retirement System. The System would be liable to pay the increased benefit at some time in the future, but would not be provided with the funds with which to do so. Thus legislative action of this kind is clearly prohibited.

If, on the other hand, the Legislature were to seek to increase benefits based on future creditable service, such action would also be governed by the first sentence of Section 18-A, which provides, in pertinent part, that "the normal cost of all retirement and ancillary benefits . . . must be funded annually on an actuarially sound basis." The obvious thrust of this provision is that each year the Legislature must determine what funding level, on an annual basis, is required to fund the cost of all existing retirement and ancillary benefits, and that, therefore, if it chooses to increase any benefits prospectively, those increased benefits must be included as part of "all retirement and ancillary benefits" and be adequately funded. In short, therefore, if the Legislature wishes to increase benefits based on future creditable service, the constitutional amendment requires that the cost of such benefits be included within the "normal cost" of existing benefits and funded on an actuarially sound basis.

D. Effective Date of Prohibition Against the Creation of Unfunded Liabilities.

Your next question concerns the effective date of the second sentence in Section 18-A, which provides: "Unfunded liabilities may not be created except those resulting from experience losses." Your question is whether this sentence does not become effective until July 1, 1997, the date contained in the first sentence of Section 18-A which requires the annual funding of all retirement benefits on an actuarially sound basis, or whether it became effective immediately upon the effectiveness of the constitutional amendments themselves, which occurred on November 27, 1995, the date of their proclamation by the Governor. In the view of this Department, the sentence in question became effective upon the Governor's proclamation.

The concern raised by your question is that, if the second sentence were not effective until July 1, 1997, the Legislature would be free to create unfunded liabilities until that time. Such a reading would, however, appear to be inconsistent with the overall intent of the amendment, which is to prevent the creation of new unfunded liabilities and to provide for the orderly retirement of existing unfunded liabilities. That this is the case may be seen not only by the text of the sentence at issue, but also by the provision of Section 18-B that the amount of these unfunded liabilities be fixed by the Retirement System's actuaries effective June 30, 1996. If the Legislature were able to create additional unfunded liabilities until July 1, 1997, the amount of the total unfunded liability related to State employees and teachers

established by the System's actuaries for retirement over 31 years would be inaccurate. Consequently, the prohibition against the creation of new unfunded liabilities must be deemed to have been effective upon the entry into force of both of the constitutional amendments.

E. Manner of Creation of Unfunded Liabilities.

Your fifth inquiry contains a series of questions concerning the manner by which unfunded liabilities may be created, and the consequences of the creation of such unfunded liability. Generally, your questions are whether unfunded liabilities may be created, not only by enhancing benefits, but by inadequate funding of existing benefits; whether the unconstitutional creation of an unfunded liability may result from action not only by the Legislature but by a State agency, a school administrative unit, or a participating local district;<sup>5</sup> and whether the Board of Trustees is required, by its fiduciary obligations, to take immediate action against any entity creating an unfunded liability to secure adequate funding. Our answers to these questions are as follows:

Section 18-A clearly contemplates that unfunded liabilities may be created not only by the enactment of increased benefits, but by the underfunding of existing benefits. The section provides that after July 1, 1997, the "normal cost of all retirement and ancillary benefits . . . must be funded annually on an actuarially sound basis." The concept of "normal cost" includes an actuarial determination of the amount required to fund benefits as they are earned or accrued. There is no room in this concept for any delay in the funding of such benefits, even on a temporary basis. Thus, the failure of the Legislature to provide adequate funding on an annual basis for benefits earned or accrued must be considered a creation of an unconstitutional unfunded liability.

As indicated in our answer to your second question above, Section 18-A relates to the creation of unfunded liabilities on behalf of state employee and teacher members of the Retirement System. Thus, the prohibition against the creation of unfunded liabilities necessarily extends to any governmental body in a position to create such a liability. This would include not only the Legislature, but state agencies and school administrative units. Therefore, if any of these entities either create new benefits or do not fund existing benefits on an actuarially sound basis, those actions would be unconstitutional.

Article IX, Section 18 of the Maine Constitution provides that the assets of the

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<sup>5</sup>As indicated in Part IB of this Opinion, *supra*, Section 18-A does not apply to the PLDs, so actions of the PLDs cannot violate the section. In responding to this question, therefore, this Opinion will make no further reference to the PLDs.

Retirement System shall be held "as in trust" by the Board of Trustees. This provision thus establishes that the Board has a fiduciary obligation to the members of the Retirement System with regard to the management of funds held in trust by the Retirement System. Such an obligation extends to the assertion of any legitimate claims which the fund may have. Section 18-A, by prohibiting the creation of unfunded liabilities, creates the possibility of a new class of claims to be asserted on behalf of the System's funds. Should such claims in fact arise, it would therefore be the fiduciary obligation of the Board to pursue them. Thus, if the Legislature were to create an unfunded liability, the Board of Trustees would have a fiduciary obligation to respond to such action, such as by refusing to implement the benefit in question until adequate funding was provided.

F. Effective Date of Provision Relating to Experience Losses.

Your final question relating to Section 18-A is whether the third sentence of the section, providing that unfunded liabilities resulting from experience losses must be retired over a period not to exceed 10 years, was effective immediately upon the proclamation of the amendment by the Governor, or is not effective until July 1, 1997. For the reasons set forth in our answer to your fourth question above, it is the Opinion of this Department that this provision was effective on November 27, 1995.

II. Questions Relating to Section 18-B.

A. Covered Employees.

Your first question with regard to the interpretation of Section 18-B concerns the range of coverage of that section. As quoted above, the section concerns the retirement of the existing unfunded liabilities "of the Maine State Retirement System that are attributable to State employees and teachers." In the Retirement System statutes, the terms "State employees" and "teachers" are defined. 5 M.R.S.A. § 17001(40) ("state employee" defined to exclude judges, legislators, and certain members of the State Police"), (42) ("teacher"). The question you present is whether, in enacting the constitutional provision, the Legislature meant to incorporate by reference these definitions, or whether it meant to use them in a broader sense, so as to encompass persons not included in those definitions, such as governors, legislators and judges.

In the Opinion of this Department, in enacting this constitutional provision, the Legislature intended that it apply to all persons eligible to receive retirement and ancillary benefits from the Retirement System; other than employees of participating local districts. As indicated in our answer to question IA, supra, the legislative history of the two constitutional amendments is replete with a general concern on behalf of the Legislature that the unfunded liability of the Retirement System related to State employees and teachers be retired over a fixed period of time. For example, the Statement of Fact to the Committee Amendment which