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POLICY STUDY

NUMBER 38 MARCH 2015


# Pension Reform in Missouri

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## ABSTRACT

Missouri's public pension plans are critically underfunded. Meaningful reform may be necessary to preserve their integrity, and yet, reform efforts in other states have foundered on legal challenges under federal and state contract clauses. This study sets out the way those challenges have unfolded in other states and the legal framework that will govern pension reform in Missouri.

Unlike other state courts, which often adopt an all-or-nothing approach, the Missouri Supreme Court has insisted that the existence and contours of a pension contract depend upon the precise language of the pension statute at issue. This study explains that approach and identifies statutory provisions in Missouri's five major pension plans that will be key to determining whether a contract exists and what it protects. It predicts that the Missouri Supreme Court is likely to find that each of the five major plans gives rise to contractual interests because the statutory language indicates that they are a form of deferred compensation. But questions remain: What interests are protected? May the general assembly modify pension benefits retroactively? Prospectively? What about contribution increases or cost-of-living decreases? This study predicts that answers to these questions will vary depending on the pension plan at issue. It analyzes the statutory provisions relevant to these inquiries and concludes by setting forth a variety of pension reform measures that may be possible under Missouri law.

## EXECUTIVE SUMMARY

Missouri's public pension plans are an important component of state employment. These plans contribute to the retirement security of state employees and influence who enters public service and how long they remain.[1] They also are critically underfunded. As of 2013, national research shows that state defined benefit public pension plans are underfunded by approximately $4.1 trillion.[2] On average, state pension plans are only 39 percent funded.[3]

Missouri ranks 19th out of all states for underfunded pension plans.[4] In 2012, Missouri's five major state retirement plans reported unfunded liabilities of $11.1 billion for a combined funding ratio of 81 percent. There is widespread agreement, however, that current accounting rules allow public pensions to understate liabilities, and a recent study using market valuation found Missouri's pension plans to be only 46 percent funded, with $54 billion in unfunded liabilities.[5] The

***This study analyzes the legal framework that will govern pension reform in Missouri.***

escalating costs of Missouri's public pension plans threaten the security of benefits for future retirees and the financial wherewithal of the state. Even if Missouri's unfunded liabilities are as low as reported by the state, meaningful reform may be necessary to ensure long-term fiscal stability.[6]

With the twin goals of increasing plan funding and decreasing unfunded liabilities, many states have begun to initiate pension reform. Reform examples include decreasing or eliminating cost-of-living adjustments (COLAs), decreasing future benefits for new and/or current employees, and increasing employee contributions. Legal uncertainty often frustrates these reform efforts as state court after state court has held legislative amendments to pension plans unconstitutional.[7]

This study analyzes the legal framework that will govern pension reform in Missouri. Part I examines background law regarding pension reform. In particular, pension plans ordinarily are protected under the contract clauses of federal and state constitutions that prohibit a state from substantially impairing a contractual interest. Since the questions of when a contract is formed and what terms a contract contains are matters of state law, state courts take a variety of approaches in analyzing legislative amendments to pension plans. Under the California Rule, a contract is formed the first day of employment, and a state may not change the terms of a pension plan after that date—even one that operates prospectively. Under the Indiana Rule, a contract is not formed until the conditions for retirement are met, and thus a state may modify a pension plan up until such time. Under a third approach, some states conclude that the pension contract protects earned or accrued benefits but permits forward-looking modifications.

Part II sets out Missouri law regarding the protection of public pensions. Missouri law is unusual in that the Missouri Supreme Court has never squarely decided whether pension plans are gratuities or a form of deferred compensation—only the latter may give rise to contractual interests. Recent cases, however, suggest that pensions may create contractual interests. Missouri is also unique in that it has not adopted either the California or the Indiana approach, eschewing a one-size-fits-all legal regime. Instead, the existence of a contract depends upon the precise terms of the pension statute, and in particular, whether that statute seems to confer vested rights on members and beneficiaries. Similarly, the terms of the contract are determined by looking at the specific language used in the pension statutes.

Part III summarizes the five major pension plans that exist in Missouri and identifies key statutory provisions. Part IV then applies Missouri law to those statutes. It identifies contractual interests those statutes may create and reform measures that may be permissible under Missouri law.

In brief, the trend in Missouri courts is toward finding that pension plans give rise to constitutionally protected contractual rights. Since Missouri has not adopted either the California or Indiana approach, the extent of those interests, and in particular whether Missouri may make prospective and/or retroactive changes to pension plans, likely will depend upon the precise terms of the pension statute that is at issue.

## I. BACKGROUND LAW

Historically, the majority of states and the federal courts viewed public pensions as gratuities.[8] As such, pensions could be modified or even eliminated at any time. As the Missouri Supreme Court explained as late as 1953, "The unquestioned general rule is that a pension granted by the public authorities is not a contractual obligation but a gratuitous allowance, in the continuance of which the pensioner has no vested right, and that a pension is accordingly terminable at the will of the grantor, either in whole or in part."[9] Since no contract exists to require a state to pay a benefit, any modification to such benefit does not impair any contract or deprive the pensioner of property.[10]

Almost every state has retreated from the gratuity approach, instead embracing the view that pension benefits are a form of deferred compensation that can give rise to contractual interests.[11] This shift has been driven both by public policy and constitutional concerns. At the policy level, state courts were troubled by the harshness of a gratuity approach: States could modify or eliminate pension plans at any time and for any reason. Constitutional prohibitions on private gifts have also pressured courts to retreat from the gratuity approach. Such provisions barred states from paying pension benefits, if pensions were labeled gratuities.[12]

Today, two approaches to pension protection predominate: Most states protect public pension plans under either a contract or property interest theory. To begin with the latter, minority position, a few states protect pension plans as "property" under the due process and takings clauses of state and federal constitutions. The due process clause prohibits the taking of property without due process, and the takings clause prohibits government from taking property for public use without just compensation. In pension litigation, property-based theories are often raised in conjunction with contractual theories, but these theories ordinarily are derivative of a contractual claim. A pension term is unlikely to be "property"[13] unless it constitutes a contractual term protected by a federal or state contract clause.[14] For this reason, and because most states protect pensions under the federal or state contract clauses, this paper focuses on how contract claims influence pension reform.

*The Federal Approach.* The federal contract clause protects contracts (including pension plans) from substantial impairments by the state. [15] The first step in a contract clause case is to determine whether a contract exists at all.[16] The specific language of a statute is controlling.[17] Because future legislatures need to be able to set policy goals, there is a presumption that a statute does not create contractual interests, absent a clear indication otherwise.[18] If a contract exists, the court must examine the language of the statute to determine the scope and terms of the contract.[19]

The next question is whether the state's action substantially impairs those terms.[20] An impairment is substantial where the amended contractual term was important to the contractual relationship.[21] In making this inquiry, the U.S. Supreme Court considers whether the changed term was reasonably relied upon or induced the complaining party to enter into the contract.[22] Also relevant to the substantial impairment inquiry is whether alternative benefits are offered in exchange for the alleged impairment.[23]

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***The protection that pension plans are afforded varies significantly among the states.***

Finally, although the U.S. Constitution speaks of "any" impairment, the contract clause's prohibition on substantial impairments is not absolute.[24] A substantial impairment may nevertheless be constitutional "if it is reasonable and necessary to serve an important public purpose."[25] The test of necessity, however, is ordinarily a demanding one and does not much aid states undertaking pension reform.[26] Indeed, in a comprehensive study of public pension decisions, Professor Amy Monahan found that "[t]he only public pension plan cases identified that found substantial impairments to be reasonable and necessary to serve an important public purpose were in cases where the court first held that no substantial impairment occurred."[27]

*State Variation.* The protection that pension plans are afforded varies significantly among the states. This is because many states have their own contract clause protections and because the federal contract clause analysis turns on several questions of state law. States disagree, for example, over when a contract is formed and what terms it includes (both questions of state law). At one extreme, states that follow the California Rule hold that a contract is formed on the first day of employment and that the contract clause protects not only accrued benefits but also the rate of future accrual.[28] This means that pension plans may not be changed on a prospective basis.[29] At the other extreme, some states conclude that a contract is not formed until the statutory conditions for retirement (generally age and service) have been met.[30] This approach permits pension modifications up until the date of retirement eligibility.[31] Meanwhile, other states take a third approach and protect earned benefits but permit pension plan modifications on a prospective basis.[32]

These three approaches to pension protection are illustrated by the seven state constitutions that expressly state that pension plans are contracts.[33] A handful of state constitutions protect pension benefits as of the date of employment. The New York Constitution, for example, provides that membership in a retirement system "shall be a contractual relationship, the benefits of which shall not be diminished or impaired."[34] And New York's highest court has concluded that this provision protects pension benefits as of the date of employment.[35] The state constitutions of Michigan and Hawaii, on the other hand, protect accrued pension benefits and permit forward-looking modifications. Article IX, Section 24 of the Michigan Constitution provides, "The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." The Michigan Supreme Court has interpreted this provision to protect only earned pension benefits and thus permit prospective plan amendments.[36] The Hawaii Supreme Court similarly has interpreted its constitution, holding: "[T]he legislature [can] reduce benefits as to (1) new entrants into a retirement system, or (2) as to persons already in the system in so far as their future services were concerned."[37] The Louisiana Constitution also protects "accrued benefits."[38] But in adopting the third approach, the Louisiana Supreme Court has interpreted "accrued" to mean "in the sense of due and payable; vested" and held that benefits do not vest until an employee meets the age and service requirements for retirement.[39]

In short, three general approaches to pension protections under a contract theory exist. Some states protect an employee's

right to all future benefits from the date of employment, preventing even prospective changes to current employees.[40] Some states hold that a contract is not formed until the requirements for retirement are met and that states may modify benefits until that date.[41] Other states take an intermediate approach concluding that earned, but not future, benefits are protected, permitting prospective but not retroactive modifications.[42]

## II. BACKGROUND MISSOURI LAW

Pension reform proposals in Missouri are likely to be analyzed under Missouri's contract clause, rather than its takings or due process clauses. Because a due process or takings clause claim arising from pension reform is predicated upon the claimant's contractual relationship with the state, the Missouri Supreme Court has held that such claims are properly analyzed under the contract clause.[43]

*The Gratuity Wrinkle.* The trend in Missouri, as elsewhere, is toward viewing pension plans as contracts on the theory that pension benefits are a form of deferred compensation. Missouri law on the issue, however, is complicated. The Missouri Supreme Court specifically has left open the question whether pensions generally are gratuities or are instead a form of deferred compensation which may give rise to contractual rights.[44] The case law is in disarray, with the supreme court repeatedly conceding confusion as to the nature of interests created by retirement plans.[45] Some of the supreme court's cases state the "general rule" that a pension "is not a contractual obligation but is a gratuitous allowance."[46] This means that pension beneficiaries may not raise a contract claim based on a changed pension plan, and lower courts have relied on this general rule in dismissing pension cases.[47] Many other cases, in contrast, find that pension plans create contractual interests which are protected by Missouri's contract clause.[48]

Missouri's seeming adherence to the "general" rule that pensions are mere gratuities can be explained by its unique constitution. Article VI, Section 25 of the Missouri Constitution prohibits any political subdivision of the state from "grant[ing] public money or property to any private individual, association or corporation." Early on, that provision was interpreted to prohibit the granting of public pensions.[49] In contrast to other states, where the judiciary held that public pensions could not possibly be gratuities because they would be barred by similar constitutional provisions, the Missouri Constitution was specifically amended to except pensions from the constitutional ban on gratuities. Article VI, Section 25 provides that the general assembly may authorize localities "to provide for the retirement or pensioning of its officers and employees." This amendment has allowed Missouri's courts to uphold the granting of pension benefits without deciding whether they were gratuities,[50] but it has created confusion as to whether the federal and state constitutions protect pension benefits as contractual interests.

Recent decisions indicate that the Missouri Supreme Court is likely to consider pension plans to be a form of deferred compensation that may give rise to contractual interests protected by the federal and state contract clauses. As early as 1975, the court expressed doubt about the old "premise" that pensions are gratuities.[51] The court wrote of new authority "for the proposition that pensions constitute deferred compensation for

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services previously performed and are not gratuities."[52] As such, pension terms may give rise to a contract claim.[53] Indeed, the Missouri Supreme Court has held that two of the major pension plans in Missouri—the Public Education Retirement System (PERS) and the Missouri State Employees' Retirement System (MOSERS)—do create contractual interests.[54]

Under the Missouri Supreme Court's current approach, the existence of a contractual relationship "depends upon the specific provisions" of the pension plan at issue.[55] In *Breshears v. Missouri State Employees' Retirement System*, for example, the court found that MOSERS constitutes a contract between the state and employees "whereby members have certain vested rights and the state certain obligations."[56] In so doing, the supreme court focused on the precise terms of the pension plans, and in particular on the vested-rights provision, Section 104.540, which provides that pension benefits are a form of "deferred compensation" and that "any alteration, amendment, or repeal" shall not "affect the then existing rights of members and beneficiaries," but shall be effective only as to rights accruing as a result of later service.[57]

Similarly, the Missouri Supreme Court has held that PERS creates a contract between the state and its members. After "a careful review of the specific statutory provisions governing the relationship" between the retirement system and its members, the court concluded that PERS provided for the "creation of specific contractual rights in the members of the Retirement System to obtain specific benefits upon compliance with the terms."[58] The court again relied upon a vested-rights type of provision, Section 169.510(2), which provides: "No alteration, amendment or repeal … shall be deemed to affect the rights of members … or to reduce any accrued or potential benefits to those who are members at the time when such alterations, amendments, or repeal became effective…." The takeaway from these cases is that the existence of a contract must be determined by analyzing the specifics of the retirement statute at issue.

*Missouri's Contract Clause.* Missouri's contract clause has been interpreted to provide protections similar to those provided by the U.S. Constitution.[59] First, the existence of a contractual relationship between a retirement system and its members "depends upon the specific provisions" of the retirement statute.[60] The existence of a contract, however, does not protect pension plans *carte blanche*. Rather, the specific contractual rights of members can only be determined "by very careful scrutiny" of the relevant statute.[61] The intent of the legislature as expressed in the language of the statute controls,[62] and courts must "give the words and phrases used their plain and ordinary meaning."[63] A substantial impairment of specifically identified contractual rights is void unless the state action is reasonable and within the police power.[64]

*State ex rel. Phillip* provides an example of how the Missouri Supreme Court approaches contract clause challenges to pension reform efforts. In that case, the general assembly had amended the term "employee" in the pension statute to exclude non-teachers from retirement benefits under PERS.[65]

The court first determined that PERS constituted a contract and that the contractual terms protected the benefits

of non-teachers. The court focused on the particular language of the PERS statute and found dispositive the existing-rights provision which forbid the reduction of any "accrued or potential benefits" to those who were members at the time the alteration became effective.[66] Because the employee-members voluntarily had accepted the PERS contract and began compliance by working for the school district and making contributions, their pension rights could not be taken away by legislative action.[67] The court found that the legislative amendment substantially diminished the rights of the excluded employees because it "impair[ed] the obligation of contract and was unconstitutional and void."[68]

The court, moreover, found that the amendments to the PERS statute did not provide any substantial substitute for the excluded employees[69] and rejected the argument that the state's police power allowed a subsequent legislature to make new law.[70]

## III. MISSOURI PENSION PLANS

*I. MoDOT and Highway Patrol Employees' Retirement System (MPERS), Mo. Ann. Stat. §§ 104.020-272, and Missouri State Employees' Retirement System (MOSERS), Mo. Ann. Stat. §§ 104.312-552.*

The MoDOT and Highway Patrol Employees' Retirement System (MPERS) and MOSERS are 401(a) tax-qualified defined benefit plans provided by the state to its employees. The two statutes operate in a substantially similar manner. MPERS members include eligible employees of MoDOT, the Missouri State Highway Patrol (MSHP), and MPERS staff. The plan currently includes about 7,000 active members and 6,000 retirees. According to MPERS, the funded status is disturbingly low: 46.3 percent as of June 2013.[71] The plan has unfunded liabilities of $1.87 billion.[72] MOSERS includes most other state employees, judges, and general assembly members. It has 51,332 active members and reports a current funding ratio of 73 percent and an unfunded liability over $2 billion.[73]

MPERS and MOSERS are funded by a combination of employer contributions, employee contributions, and investment returns. As originally enacted, employees and employers each contributed 4 percent. In 1976, the general assembly passed legislation eliminating employee contributions and refunding prior contributions along with interest. The employer contribution rate was based on actuary calculations. The pension reform package of 2010 reinstated employee contributions; employees hired for the first time on or after January 2011 will contribute 4 percent of their salary. Employer contributions remain actuarially based.

As a defined benefit plan, MPERS and MOSERS members who meet the age and service requirements are guaranteed a retirement benefit based on a statutory formula. The base benefit formula is: final average pay[74] * credited years and months of service * a statutory multiplier. MOSERS and MPERS also provide for annual cost-of-living increases.[75] There are three main Missouri State Employees' Plans (MSEP) provided by MPERS and MOSERS (with separate plans for uniformed parole officers under MPERS): the Closed Plan (MSEP), the Year 2000 Plan (MSEP 2000), and the 2011 Tier of

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## Plan Types

| | Closed Plan (MSEP) | Year 2000 Plan (MSEP) | 2011 Tier of the Year 2000 Plan (MSEP 2011 Tier) |
|---|---|---|---|
| Multiplier | 1.6 percent | 1.7 percent | 1.7 percent |
| Years to Vest | 5 years | 5 years | 10 years |
| Retirement Age | 62 or 65 | 62 or 65 | 67 |

the Year 2000 Plan (MSEP 2011 Tier). Plan details are explained in the chart above.

*II. Public School Retirement System of Missouri (PSRS), Mo. Ann. Stat. § 169.010 – 597, and Public Education Employee Retirement System (PEERS), Mo. Ann. Stat. § 169.600 – 750.*

Established in 1946, the Public School Retirement System (PSRS) is a defined benefit plan that provides certified public school teachers with retirement benefits. Public school teachers are automatically enrolled in PSRS (unless they are employed by the Kansas City or St. Louis school districts). The PSRS statute categorizes school districts by size and provides somewhat different provisions with respect to each.[76] The Non-Teacher Retirement System of Missouri was created in 1965 to provide retirement benefits for noncertificated public school personnel. The system was renamed the Public Education Employee Retirement System (PEERS) in 2005.

The PSRS/PEERS system has $33.5 billion in assets and serves more than 240,000 active and retired members, making it the 45th largest public pension plan in the nation. As of June 2013, PSRS is 81.5 percent funded with unfunded liabilities of $6.5 billion.[77] PEERS is 82.5 percent funded with unfunded liabilities of $655 million.[78] Funding comes from equal contributions made by members and employers and from investment earnings.[79] The PSRS contribution rate for 2013-14 is 14.5 percent. The 2013-14 contribution rate for PEERS members is 6.86 percent. The vesting requirement is five years of service,[80] and depending upon the size of the school district, members generally may retire with full retirement benefits at either age 60 or 65.[81]

As a defined benefit plan, PSRS and PEERS members who meet the age and service requirements are guaranteed a

retirement benefit based on a statutory formula. The benefit formula is: final average salary[82] * years of service * a statutory multiplier.[83] The PSRS/PEERS statutes also allow cost-of-living adjustments in certain circumstances.[84]

*III. Missouri Local Government Employees Retirement System (LAGERS), Mo. Ann. Stat. §§ 104.020-722.*

The Missouri Local Government Employees Retirement System (LAGERS) is a defined benefit pension plan for local government employees created by the general assembly in 1967. Under LAGERS, governmental subdivisions (except school districts) may elect into the retirement system.[85] LAGERS is the largest pension system for local government employees in Missouri, covering nearly 650 employers. It has 33,000 active members, 16,000 retirees, and approximately $5 billion in assets. LAGERS is 83.5 percent funded and has unfunded liabilities of $845 million.[86] The state of Missouri is not generally liable for LAGERS.

Under LAGERS, an employer first elects a contributing or noncontributory plan. If an employer chooses a contributory plan, every full-time LAGERS-eligible employee must contribute 4 percent of their salary. If the employer chooses a noncontributory plan, employee contributions are 0 percent. Additionally, LAGERS employers must contribute actuarially computed amounts which, together with employee contributions (if applicable) and LAGERS investment income, are projected to cover the costs for the political subdivision's participation in LAGERS.

LAGERS benefits are based on a "single formula," but because of various elections available to employers, there are nearly 140 different benefit combinations available.[87] The vesting period is five years of service and the basic benefits formula is: final average salary[88] * years of service * an elective multiplier ranging between 1-2.5 percent. Post-retirement COLAs may be authorized by the Board of Trustees within its discretion.[89]

## IV. SUCCESSFUL PENSION REFORM IN MISSOURI

Under the Missouri Supreme Court's current approach to contract clause claims in the pension setting, the existence of a contractual relationship between a retirement system and its members and the terms of the contract both "depend upon the specific provisions" of the retirement statute.[90] Missouri's approach to pension reform, then, must be a statute-by-statute approach. After identifying a few principles that apply to Missouri's pension statutes generally, this section analyzes the five major pension statutes in Missouri. It will first identify the key statutory language relevant to a determination of whether or not the retirement system creates a contractual relationship. Second, assuming a contractual relationship, this section will next look at the specific scope of contract rights granted to members. Finally, this section will predict permissible pension reform measures under the five major Missouri pension plans.

***Missouri's approach to pension reform, then, must be a statute-by-statute approach.***

### A. Generally Applicable Principles

Before turning to specific plans, a few principles apply to all Missouri pension plans. There are two rules in particular that will apply if a pension reform proposal seeks to decrease benefits. First,

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the contract clause does not apply to pension modifications that affect only new hires. Even under the most protective of approaches, the pension plans of new employees may be less generous than those that apply to older hires. These principles place the Pension Reform Act of 2010, which created the 2011 tiers for MPERS and MOSERS, on strong legal footing. Because the general assembly required additional contributions and increased the retirement age for new hires only, no legal impediment exists.

Second, under both the Missouri and federal contract clauses, pension plans may be modified if the changes are reasonable, necessary, and within the police power. Theoretically, then, Missouri courts could uphold pension reform efforts—even ones that substantially impair a contract—under the necessity exception. This possibility is unlikely, however, as courts, including the Missouri Supreme Court, have been reluctant to uphold pension reforms on this basis.[91]

If the general assembly seeks to increase pension benefits, other global rules apply. Specifically, Missouri has three constitutional provisions that limit the ability of the general assembly to award extra or add-on benefits for completed work.

First, Article VI, Section 25 of the Missouri Constitution prohibits the state from granting public moneys to private individuals. The Missouri Supreme Court has held that this provision precludes increased benefits for retired (but not current) employees.[92]

Second, the Missouri Constitution, Article III, Section 39(3), prohibits the award of "any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part." In *Police Ret. Sys. of Kansas City v. Kansas City*, the Missouri Supreme Court concluded that a retroactive COLA for retirees would "amount to 'extra' or 'add on' compensation for services previously rendered" and violate Article III, Section 39(3).[93] Although the text suggests that the provision might bar additional compensation once work has been partially performed,[94] the Missouri Supreme Court has held that the constitutional prohibition does not apply when the retroactive increase is given to current employees.[95]

Third, the Hancock Amendment prohibits the state from requiring local governments to begin a new mandated activity or to increase the level of a previously mandated activity beyond its 1980-81 level without state financing.[96] The Hancock Amendment does not apply to rising pension obligations where there is no new mandate, but only a responsibility to fund "according to a previously-existing formula,"[97] but may forbid the state from requiring new or larger pension benefits.

**B. Plan-Specific Application**

This section addresses three pressing questions with respect to Missouri's five major pension plans. First, does a contract exist? Second, what does it protect? Third, what type of pension reform may be permissible? This analysis assumes that the Missouri Supreme Court will continue its statute-by-statute approach, looking closely at the terms of the statute to determine whether it creates a contract and what rights it bestows, instead of adopting a one-size-fits-all approach like some other

states. This approach makes sense as it gives the parties the benefits of the statutory language under which they have conducted their relationship.

*A. MPERS & MOSERS*

*Does a Contract Exist?* The Missouri Supreme Court has held that MOSERS creates a contractual relationship between employees and the state.[98] In so doing, the Missouri Supreme Court focused in particular on Section 104.540, which provides that pension benefits are a form of "deferred compensation" and that any "alteration, amendment, or repeal" shall not "affect the then existing rights of members and beneficiaries," but shall be effective only as to rights accruing as a result of later service.[99] Because MPERS operates in a substantially similar manner and contains an identical existing-rights provision, it is likely that Missouri courts will determine that MPERS also creates a contract between the state and its employees.

*Scope of Contractual Rights.* Under the Missouri Supreme Court's current approach, the specific statutory provisions of MOSERS and MPERS must be carefully scrutinized to determine the scope of any protected contractual rights. There are two key issues: (1) does the statute permit prospective changes; and (2) does the statute permit retroactive changes?

To begin, MOSERS and MPERS conceive of pension benefits as a form of deferred compensation.[100] This suggests that the statutes may permit prospective changes—an employee's wages can be decreased for future work, after all—and yet forbid changes based on work already performed. Other statutory language bears at least the former proposition out.

*Prospective Changes.* First, the statutory text plainly contemplates prospective changes. The existing-rights provision provides that amendments may only affect rights which would accrue as a result of post-modification services:

> No alteration, amendment, or repeal of sections 104.010 to 104.270 shall affect the *then existing rights* of members and beneficiaries*, but shall be effective only as to rights which would otherwise accrue* under sections 104.010 to 104.270 as a result of services rendered by an employee *after* such alteration, amendment, or repeal.

Under the plain language of MOSERS and MPERS, prospective changes—i.e., those changes that apply "as a result of services rendered by an employee after such … amendment"—are permissible. Thus, Missouri should be free to modify benefits, even for current employees, on a going-forward basis.

This conclusion is buttressed by general principles of law. Because the contract clause does not ordinarily prohibit legislation that operates prospectively, states must clearly indicate an intent to bind themselves prospectively.[101] Far from clearly indicating an intent to bind prospective legislatures, section 104.450 expressly authorizes forward-looking modifications.

*Retroactive Changes.* A tougher question is whether MOSERS and MPERS permit retroactive changes. The pension plans extend protection to "then existing rights." The general assembly, however, did not define "then existing rights." The

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approaches taken by other states and by the Missouri Supreme Court suggest three possibilities. First, employees may not have any existing rights up until the point they satisfy the requirements for retirement. Second, employees may have rights in earned pension benefits. Third, vested employees, but not non-vested employees, may have rights in earned benefits.

The Missouri Supreme Court's decision in *Atchison v. Retirement Board of Police Retirement System of Kansas City* suggests that pension rights accrue and become finally vested only after members meet service and age requirements, apply for, and are granted pensions.[102] After considering the police retirement pension statute as a whole, the court concluded that "a member who made the necessary contributions to the fund and met the prescribed requirements of age and creditable service acquired specified contractual rights to the benefits provided by the retirement system."[103] Members rights, the court went on, "fully accrued and finally became vested rights when, after contributing to the fund through the years as required under the contract, and after attaining the retirement age and meeting the requirements of creditable service, they applied for and were granted pensions."[104] For this latter proposition, the court cited *Klamm v. Indiana*,[105] a 1955 Indiana decision in which the court held that rights vest only upon retirement.[106]

Based on *Atchison*, Missouri might argue that MPER and MOSERS benefits may be changed up until the date an employee retires. This is consistent with the position taken by Louisiana. The Louisiana Constitution protects "accrued" benefits,[107] and the Louisiana Supreme Court has interpreted "accrued" to mean due and payable, once a member has satisfied all the conditions for retirement.[108]

Although this position is plausible,[109] it seems likely that Missouri courts will conclude that MOSERS and MPERS protect members' rights in earned pension benefits.[110] Importantly, MOSERS/MPERS describe pension benefits as a form of deferred compensation for services performed. As the Washington State Supreme Court has explained, where a retirement pension "amounts to delayed compensation for services rendered" an employee's "continued employment constitutes consideration for the promise to pay the pension."[111] Further, the statutory reference to "then existing rights" seems to encompass more than rights at retirement, and the statutory protection for those rights would be meaningless if the state could modify benefits up until retirement.[112]

Alternatively, the Missouri Supreme Court could conclude that MOSERS and MPERS protect earned benefits, but only once the statutory vesting period has been satisfied. Other states, for example, have concluded that pension changes can be made when employees have so few years of service that they cannot show detrimental reliance.[113] MOSERS/MPERS members who have satisfied the service credit vesting requirement[114] are guaranteed a deferred retirement, once retirement age is attained.[115] One could argue that until the statutory vesting period is met the only "then existing right" an employee has is to a refund of any contribution paid.[116]

As a policy matter, an approach that protected earned benefits for (at least) vested members is in line with the general assembly's express provision that pensions are a form of deferred compensation and

with the reasonable expectations of plan participants. As deferred compensation, benefits would be a part of the employment package that cannot retroactively be diminished. As a form of deferred salary, then pension benefits, like wages, ought to be tied to specific periods of service.[117]

*Permissible Pension Reforms.* In sum, Missouri's ability to modify benefits under MOSERS/MPERS can be described as follows. For members who have "completed all of the necessary steps for the immediate payment of benefits," those benefits are fully accrued and vested and cannot be modified.[118] For all current employees, MOSERS/MPERS appears to authorize the general assembly to modify benefits on a prospective basis for future work performed. Practically speaking, this means that the state may decrease benefits by making any number of reforms—increasing contributions, reducing COLAs, or increasing retirement ages, to name a few—but only for services rendered after the effective date of the amendment. When employees retire, their benefits might be calculated pro rata on the number of years they worked under each pension package.[119]

MOSERS/MPERS, however, also forbids alterations to the "then existing rights" of current members. There are three possible approaches Missouri courts could take to determine what "then existing rights" includes. Missouri courts could decide that such rights do not fully accrue and finally vest until retirement eligibility and thus that Missouri may modify pension benefits retroactively. Missouri courts could decide that then existing rights includes all benefits earned for periods of previous service. Finally, Missouri courts could decide that earned-benefit rights accrue upon meeting the service credit vesting requirement. The reference to pension benefits as "deferred compensation" for prior work makes the latter two options more likely.

*B. PSRS and PEERS*

*Does a Contract Exist?* The Missouri Supreme Court has held that PSRS creates a contractual relationship between employees and the state.[120] In particular, PSRS grants "specific contractual rights in the members of the Retirement System to obtain specific benefits upon compliance with the terms."[121] This conclusion was based on the statute as a whole, and in particular, a provision titled "effect of change of law."[122]

The statutory provisions governing school districts with a population less than 300,000 and the PEERS statute do not contain the same existing-rights clause. School districts with plans under these statutes may argue that they do not create contractual interests between the districts and their employees. They can argue that the general assembly intended for the statutes to operate differently, as evidenced by its different provisions.[123] On the other hand, beneficiaries can point to the rest of the statutory framework, and in particular, the general vesting guarantee of a deferred pension and protection from garnishment and attachment, and argue that the retirement system was intended to be a cohesive whole and that they too have a contractual relationship.

*Scope of Contract.* With respect to the scope of the contract, or what benefits are protected, the PSRS statutes for the two larger school districts are expansive, seeming to protect both earned and potential benefits and thus forbidding both retroactive and prospective modifications.

***The Missouri Supreme Court has held that PSRS creates a contractual relationship between employees and the state.***

**Because PSRS protects both earned and potential benefits for middle and large school district employees, employers may not detrimentally change the pension benefits package in a substantial way.**

Sections 169.510 and 169.370.2 provide:

> No alteration, amendment or repeal of [this act] shall be deemed to affect the rights of members of any retirement system established thereunder with reference to deposits previously made, or to reduce *any accrued or potential benefits* to those who are members at the time when such alterations, amendments, or repeal became effective or to reduce the amount of any retirement allowance then payable.124

In *State ex rel. Phillip*, the Missouri Supreme Court concluded that this language created "contractual rights to *potential* benefits under the Retirement System."[125] Thus, once an employee-member has begun to perform, and given consideration in the form of a contribution, a potential benefit "cannot be taken away by legislative action."[126] The PSRS statute thus protects both earned and potential benefits once an employee has begun work.

The scope of contractual rights is a more difficult question for the smallest school districts and for PEERS. Neither of the relevant statutes expressly provides for the protection of accrued or potential benefits. Instead, these provisions contain the general vesting guarantee of a deferred pension and protect retirement benefits from garnishment and attachment. Missouri courts may find that the statutes operate as a cohesive whole and do not subject employees to varying levels of pension protection based on the school district for which they work. In such a case, employees of the smallest school districts and PEERS members also would be entitled to protection for potential benefits. The difficulty with this view is that the governing statutes are very different. And given the Missouri Supreme Court's emphasis on specific statutory language, the court may be persuaded that the absence of the potential benefits clause matters.

If so, the court's analysis of contract scope will depend upon the specific terms of the pension plan. Given the express protection of potential benefits elsewhere in the statute, and the presumption in favor of allowing prospective changes, the state has a strong argument that potential benefits are not statutorily protected. The general assembly, the argument might go, knew how to protect prospective rights, and chose not to, perhaps intending to protect the funding integrity of small districts and PEERS. Given the trend in Missouri to view pension benefits as deferred compensation, the courts may well find that the retirement statutes protect earned benefits, perhaps subject to a vesting period. This would permit forward-looking, but not retroactive, modifications.[127]

*Permissible Pension Reform.* Because PSRS protects both earned and potential benefits for middle and large school district employees, employers may not detrimentally change the pension benefits package in a substantial way. It is unlikely that Missouri courts would allow a reduction in the benefits multiplier or an increase in retirement age, for example. Given the express protection of "potential" benefits, and the *Phillip* court's focus on an employee's partial performance, it is also unlikely that the Missouri courts will recognize any distinction between vested and non-vested members or allow modification of benefits up until the five-year vesting period.

PSRS administrators still maintain some flexibility in preserving fund integrity since the PSRS statute requires them to set contribution rates based on "an actuarial valuation of the system."[128] Contribution rates may thus increase (as they have in the past) in order to ensure financial stability of the pension system. Further, the COLA provisions give the Board of Trustees varying degrees of discretion in setting COLA rates.[129]

With respect to the smallest school district and PEERS, the state may have more flexibility to modify pension benefits on at least a prospective basis. But this will depend upon whether courts view the PSRS/PEERS plans as a coordinated framework or instead rely on statutory distinctions between the size of school district and the type of employee.

*C. LAGERS*

*Does a Contract Exist?* The Missouri Supreme Court has not determined whether the Missouri Local Government Employees Retirement System (LAGERS) creates contractual interests. Unlike other statutory pension systems, LAGERS does not contain a specific existing-rights provision prohibiting certain sorts of modifications. But the statute does contain several provisions that might support a finding—once again in line with the theory of pensions as deferred compensation—of a contractual relationship. Once a member is vested, LAGERS guarantees a deferred benefit whether or not they continue their employment with a LAGERS employer. LAGERS further provides that an employer may change its benefit program once every two years. If an employer increased benefits, the increase will apply to past and future service for current employees.[130] If an employer decreases benefits, however, the decrease applies *only to future services* for current employees; past service is calculated at the higher level.[131] Further, in a provision titled "contractual rights"—the LAGERS statute clarifies that retirement benefits cannot be subject to garnishment, bankruptcy, or attachment.[132] The Missouri Supreme Court would look at the statute as a whole to determine whether it indicated an intention on the part of the general assembly to create a contract.

In light of the Missouri Supreme Court's trend toward viewing pensions as a form of deferred compensation, and the specific statutory language of LAGERS (in particular, the provision forbidding the decrease of benefits for past services) the court is likely to find LAGERS members have contractual rights.

*Scope of Contract.* If Missouri courts conclude that a contract exists, the terms of LAGERS suggest that prospective changes are permissible, while certain retroactive changes may not be. The statute allows local employers to modify its elections as to the particular menu of retirement benefits it wishes to provide, thus signaling that *prospective changes* for the future work of current employees are permissible. With respect to two elections, however, LAGERS specifies that an employer's election for calculating final average salary and the multiplier may not reduce benefits for previous work. The smaller benefit "shall be applicable only to credited service for employment rendered from and after the effective date of such coverage."[133] These provisions contemplate an earned benefits theory of pension reform, allowing an employer to modify certain prospective benefits—the final average salary election and the benefits multiplier—but requiring

***If Missouri courts conclude that a contract exists, the terms of LAGERS suggest that prospective changes are permissible, while certain retroactive changes may not be.***

***The trend in Missouri, as elsewhere, is to view pension benefits as a form of deferred compensation.***

them to credit previous service under the prior pension formulas.

*Permissible Pension Reform.* Under the statute, employers are permitted to make certain prospective changes to pension benefits, even for current employees. Employers may, for example, decrease the multiplier for work on a going-forward basis. Past work, however, must be compensated based on the higher multiplier. The LAGERS statute also allows for flexibility as to cost-of-living adjustments which may be decreased or eliminated: If the board determines that COLA increases "are jeopardizing the financial solvency of the system," the board shall suspend the adjustments.[134]

A more difficult question exists for factors not specifically identified by the statute, such as retirement age. If LAGERS creates contractual interests, then those interests, depending upon the date they vest, may prevent the general assembly from increasing the retirement age for current employees. Again, there are three approaches available. Missouri courts could follow the California Rule and conclude that a contract, including the retirement age, is formed the date of employment and may not be changed. Alternatively, Missouri courts could determine that LAGERS pension rights do not accrue until retirement eligibility, and the state is free to increase the retirement age.[135] Finally, Missouri courts could decide that rights accrue upon completion of the five-year service credit requirement and that once this requirement has been met the retirement age may not be modified.

## CONCLUSION

The trend in Missouri, as elsewhere, is to view pension benefits as a form of deferred compensation. Federal and state contract clauses require reviewing courts to analyze the specific language of a retirement statute to identify contractual interests. Such an approach gives both parties the benefit of their bargain. In creating various retirement systems, the general assembly has not used a one-size-fits-all approach. It has tailored its language and the resulting contractual terms to the needs of each system. In so doing, it has built in a large measure of flexibility, preserving in most cases the authority for a later legislature to modify benefits for services rendered after the effective date of the modification. This comports with general contract clause principles which presume that a contract may be modified prospectively.

Meaningful reform may be necessary to secure the retirement futures of Missouri's employees and the financial stability of the state. In addressing pension reform, Missouri's courts must pay close heed to the specific terms of retirement statutes and also to the contract clause principle that future legislatures ordinarily retain authority to make prospective policy decisions.

## NOTES

[1] Costrell and Podgursky, "Peaks, Cliffs, and Valleys."

[2] Eucalitto, "Promises Made, Promises Broken."

[3] *Id.*

[4] *Id.*

[5] Biggs, "Public Employee Pensions in Missouri."

[6] *Id.* Without reform, economists predict that Missouri will be unable to meet its future pension liabilities without either abnormally high investment returns or large taxpayer contributions.

[7] *See, e.g.*, *Kanerva*, 13 N.E.3d at 1228 (striking down comprehensive pension reform).

[8] Monahan, *Statutes as Contracts?*

[9] *State ex rel. Phillip*, 262 S.W.2d at 569, 576.

[10] *Id.* at 576.

[11] Monahan, *supra* note 8, at 1034-37.

[12] *See Yeazell*, 402 P.2d at 541, 534-44.

[13] For due process purposes, property includes a legal entitlement that arises from a contract.

[14] Beermann, *The Public Pension Crisis*. The takings clause would protect pension benefits in the event the court determined no contract clause violation existed because the modification was reasonable and necessary.

[15] U.S. Const. art. I, § 10; Mo. Const. art. I, § 13.

[16] *U.S. Trust Co.*, 431 U.S. at 1, 23.

[17] *Id.*

[18] *Nat'l R.R. Passenger Corp.,* 470 U.S. at 451, 465-66.

[19] *Id.* at 466.

[20] *Id.* at 472.

[21] *See Allied Structural Steel Co.*, 438 U.S. at 234, 246.

[22] *El Paso*, 379 U.S. at 497, 514-15.

[23] *Id.*

[24] *U.S. Trust Co.*, 431 U.S. at 21.

[25] *Id.* at 25.

[26] *Id.* at 29-31.

[27] Monahan, *Public Pension Plan Reform.*

[28] *See, e.g.*, *Betts*, 582 P.2d at 614, 617.

[29] *Id.* As Professor Amy Monahan notes, however, California does occasionally allow substantial pension reform before retirement but only where such reform is a "reasonable and necessary" impairment and where the disadvantaged employee is provided "comparable new advantages." Monahan, *supra* note 27, at 628-29 (quoting *Betts*, 582 P.2d at 617). Often the comparable new advantage results in a higher pension benefit. *Id.* at 631.

[30] *Klamm*, 126 N.E.2d at 487, 489; *State ex rel. Horvath*, 697 N.E.2d at 644, 654-55; *see also Atchison*, 343 S.W.2d at 25, 34.

[31] *Klamm*, 126 N.E.2d at 489.

[32] *See, e.g., Ass'n of Prof'l & Technical Emps.*, 398 N.W.2d at 436, 439.

***Meaningful reform may be necessary to secure the retirement futures of Missouri's employees and the financial stability of the state.***

[33] Alaska Const. art. XII, § 7; Ariz. Const. art. XXIX, § 1; Haw. Const. art. XVI, § 2; Ill. Const. art. XIII, § 5; La. Const. art. X, § 29; Mich. Const. art. IX, § 24; N.Y. Const. art. V, § 7. *See also* Monahan, *supra* note 27, at 618-22 (surveying state constitutions that protect past and future benefit accruals).

[34] N.Y. Const. art. V, § 7.

[35] *See* Civil Serv. Employees Ass'n Inc., Local 1000 v. Regan, 525 N.E.2d 1 (N.Y. 1988).

[36] *Ass'n of Prof'l & Technical Emps.*, 398 N.W.2d at 439 ("the Legislature cannot diminish or impair accrued financial benefits but . . . it may properly attach new conditions for earning financial benefits which have not yet accrued").

[37] Chun v. Emps.' Ret. Sys., 607 P.2d 415, 421 (Haw. 1980).

[38] La. Const. art. X, § 29.

[39] *Smith*, 851 So.2d at 1100, 1106-07.

[40] *See supra* notes 34–35 and accompanying text.

[41] *See supra* notes 30-31, 39 and accompanying text.

[42] *See supra* notes 36–38 and accompanying text.

[43] *Beard*, 379 S.W.3d at 167, 170. A property rights–based theory to pension changes under the Missouri Constitution is "premised upon the assumption" that a member is "entitled to receive retirement benefits based upon her contract with the State and [was] deprived of these benefits." *Id.* Barring an unusual finding that a substantial impairment of a contract is not prohibited by the contract clause because of necessity, the due process and takings clauses do not add much to pension law in Missouri.

[44] *Police Ret. Sys. of Kansas City*, 529 S.W.2d at 388, 393-94.

[45] *See State ex rel. Breshears*, 362 S.W.2d at 571, 575; *Atchison*, 343 S.W.2d at 25, 34; *State ex rel. Phillip*, 262 S.W.2d at 569, 576.

[46] *See Fraternal Order of Police Lodge No. 2*, 8 S.W.3d at 257, 264; *see also Neske*, 2005 WL 5480888 (Missouri courts still "cleave to the old view that [as a general rule] a pension . . . is a gratuitous allowance").

[47] *E.g.*, *Neske*, 2005 WL 5480888.

[48] *See Atchison*, 343 S.W.2d at 34.

[49] *See State ex rel. Heaven*, 45 S.W. at 1099, 1099-1100.

[50] *See State ex rel. Sanders*, 480 S.W.2d at 888, 892-93. The concept of pensions as prohibited gratuities still exists, however, when benefits are increased for *retired* employees. *Police Ret. Sys. of Kansas City*, 529 S.W.2d at 388, 391 (finding such increases unconstitutional).

[51] *Kansas City*, 529 S.W.2d at 391.

[52] *Id.*

[53] *Id.*

[54] Even though *State ex rel. Phillip* 262 S.W.2d at 569, 577 is the authority most often cited for the proposition that Missouri follows the gratuity approach, that case noted the judicial trend to view pension plans as part and parcel of a contractual compensation arrangement. And more importantly, the court went on to carefully analyze the pension plan at issue—the Public Education Retirement System—and to determine that its terms created a contract. *Id.*

[55] *State ex rel. Phillip*, 262 S.W.2d at 577.

[56] *See State ex rel. Breshears*, 362 S.W.2d at 571, 575-76.

[57] *Id.* at 576. *See also Beard*, 379 S.W.3d at 167, 170-71 (assuming that MOSERS constitutes a contractual relationship).

[58] *State ex rel. Phillip*, 262 S.W.2d at 574-76.

[59] *Id.*

[60] *Id*. at 577.

[61] *Id*. *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 470, 504. ("[W]e begin by identifying the precise contractual right that has been impaired and the nature of the statutory impairment.")

[62] *Id*.

[63] *Beckemeyer*, 2013 WL 5629373, at *11.

[64] *State ex rel. Chicago, B & Q R.R. Co.*, 334 S.W.2d at 54, 57.

[65] *State ex rel. Phillip*, 262 S.W.2d at 571. This statutory amendment undertook a massive reworking of the pension system, excluding categories of employees regardless of whether they had vested rights and operating both prospectively and retroactively (although the statute intended to create a replacement system). Under the prior statute, "employee" was defined to include "any [full-time] person regularly employed by the board of education." In 1953, the general assembly amended the definition of employee to mean "any teacher regularly employed by the board of education" and to exclude particular positions like "building trade mechanics." *Id.* For all members no longer deemed employees—regardless of how long they had been employed or whether their rights were vested—"all further rights or benefits thereunder, except the right to the amount of accumulated contributions, shall terminate." *Id.* at 572. In place of the prior retirement system, school districts were supposed to create an "Equity Fund" and to transfer prior contributions to said fund. *Id.*

[66] *Id*. at 578.

[67] *Id*.

[68] *Id*. at 577.

[69] *Id*. at 579-80.

[70] *Id*. at 580-81.

[71] MoDOT, "Comprehensive Annual Financial Report for Fiscal Year Ended June 30, 2012."

[72] Schweich, "Survey of Public Employee Retirement Systems in Missouri."

[73] *Id*.

[74] Final average pay is the average of a member's highest 36 consecutive months of pay.

[75] Mo. Ann. Stat. § 104.103. The COLA increase is based on the Consumer Price Index. For members employed before August 28, 1997, the annual COLA is statutorily set between 4 percent and 5 percent. Once the total COLA increase equals 65 percent of the initial benefit (the COLA cap), the rate will be 80 percent of CPI with a maximum of 5 percent. Beneficiaries employed on or after August 28, 1997, are entitled to a cost-of-living adjustment when the consumer price index increases. The rate is equal to 80 percent of the increase in the CPI with an annual maximum of 5 percent. Mo. Ann. Stat. § 104.1045 (West).

[76] The statute categorizes districts by population: districts with populations under 300,000, districts with populations from 400,000-700,000, and districts with populations over 700,000. The statute, presumably inadvertently, does not deal with districts with populations between 300,000 and 400,000. Because the funding formula is identical, PSRS treats members identically regardless of the size of district employer. Thus, an employee who changes school districts does not change her retirement benefit package—though her benefits may increase as a function of a salary increase.

[77] Public School and Public Education Employment Retirement System of Missouri, "2013 Comprehensive Annual Financial Report."

[78] *Id*. at 40.

[79] Mo. Ann. Stat. § 169.030.1.

[80] Mo. Ann. Stat. §§ 169.060.1, 169.301.1.

[81] The retirement requirements for mid-size school districts are age 60 (with vesting service credit), at any age with 30 years of service, and the Rule of 80. Mo. Ann. Stat. § 169.030. For larger school districts, the

retirement requirements include age 65 (with vesting service credit), 30 years of service, and the Rule of 85. Mo. Ann. Stat. § 169.460.1.

[82] Final average salary equals the monthly average of the highest 36 months of consecutive service (including employer-paid health, dental, and vision insurance premiums).

[83] The PSRS multiplier for members who meet the requirements for full retirement is 2.5 percent. Mo. Ann. Stat. § 169.070.1(1). The PEERS multiplier for full retirement benefits is 1.61 percent.

[84] For school districts with populations under 300,000, the statute is quite specific. If there is a 2 percent or more increase in CPI, then the COLA shall increase by 2 percent; if there is an increase in CPI of 5 percent or more, then the COLA increase shall be 5 percent. Mo. Ann. Stat. § 169.070.13. If the increase is less than 5 percent, however, the board has discretion as to the rate of increase. The statute institutes an 80 percent lifetime cap. If there is a reduced cost of living, no COLA increase shall be awarded, and the Board of Trustees may retroactively decrease prior adjustments. Mo. Ann. Stat. § 169.070.13-14. For mid-size and large school districts, the PSRS statute grants the Board of Trustees discretion as to the award of COLA benefits. Mo. Ann. Stat. §§ 169.324.3(2), 169.471.1. Mid-size school districts do not guarantee COLAS, and the Board has discretion to increase benefits. Mo. Ann. Stat. § 169.324. For large school districts, there is a COLA based on CPI index between 0 and 3 percent. The board has discretion to increase benefits, including COLA benefits. Mo. Ann. Stat. § 169.471.1.

PEERS members must wait longer for cost-of-living adjustments, which begin the fourth January following their retirement. The governing statutes provide that if the cost of living increases by 5 percent more, then COLAs are to be increased by 5 percent. Mo. Ann. Stat. § 169.670.2. If the cost of living is less than 5 percent, the Board of Trustees has discretion to determine the percentage increase, limited by the 5 percent cap. *Id.* If the cost of living decreases, there is to be no COLA increase, and the board may decrease previous cost-of-living adjustments. Mo. Ann. Stat. § 169.670.2, 3. PEERS members are also subject to the 80 percent lifetime COLA cap.

In April 2011, the Board of Trustees issued a system-wide policy memo that set the COLA rate for all PERS/PEERs members. To help restore funding stability to the system, the board set the COLA at 2 percent for all size of school districts and for all PEERS members for years in which inflation is between 0 percent and 5 percent.

[85] Mo. Ann. Stat. § 70.630 (West).

[86] Missouri Lagers, "44th Comprehensive Annual Financial Report."

[87] *See* Mo. Ann. Stat. § 70.655.

[88] To calculate final average salary, employers choose either a 36- or 60-month time period within the last 10 years.

[89] Every member retired for a full 12 consecutive months is eligible. Mo. Ann. Stat. § 70.655. COLAs are based on the consumer price index and capped at 4 percent a year. *Id.* A cost-of-living adjustment is discretionary: if the board determines that COLA increases "are jeopardizing the financial solvency of the system," the board shall suspend the adjustments. Mo. Ann. Stat. § 70.655.10.

[90] *State ex rel. Phillip*, 262 S.W.2d at 569, 577.

[91] *See* Monahan, *supra* note 27, at 631 (no court has upheld on this ground when there is a substantial impairment); *State ex rel. Phillip,* 262 S.W.2d at 579-80.

[92] *Police Ret. Sys. of Kansas City*, 529 S.W.2d at 388, 391 (holding retroactive COLA increase unconstitutional as to retirees).

[93] *Id*. at 392.

[94] Article III, Section 39(3), prohibits the award of "*any* extra compensation . . . after service has been rendered or a *contract has been entered into and performed in whole or in part*" (emphasis added). The constitutional text refers to partial performance of a contract and might be read to prevent any enhancement of a current contract once performance has begun. Indeed, the Missouri Supreme Court concluded as much in a non-pension case. In *Kizor v. City of St. Joseph*, the court held that the city of St. Joseph could not

increase the compensation it paid to a garbage hauler midway through a 10-year contract because this would amount to "extra" or add on compensation and violate Art. III, § 39(3). 329 S.W.2d at 605, 608.

[95] *Missouri State Emps.' Ret. Sys.*, 738 SW.2d at 118, 120. "The increased entitlement," the court wrote, "is a part of their compensation for current and continuing services." *Id*. at 121.

[96] *Neske*, 218 S.W.3d at 417, 421-22, overruled on other grounds *by King-Willmann*, 361 S.W.3d at 414.

[97] *Id*. at 423.

[98] *Breshears*, 362 S.W.2d at 571, 575-76.

[99] Mo. Ann. Stat § 104.540 (West); *Breshears*, 362 S.W.2d at 574. *See also Beard*, 379 S.W.3d at 167, 170-71 (assuming that MOSERS constitutes a contractual relationship).

[100] Mo. Ann. Stat § 104.540 (West); *Breshears*, 362 S.W.2d at 576.

[101] *See, e.g., U.S. Trust Co.*, 431 U.S. at 1, 18.

[102] *Atchison*, 343 S.W.2d 25.

[103] *Id*. at 34.

[104] *Id*.

[105] *Klamm*, 126 N.E.2d 487.

[106] *Atchison*, 343 S.W.2d at 34. *Beard*, 379 S.W.3d 167, 170-71, decided in 2012, can also be read to suggest that a member's rights do not fully vest or accrue until retirement. *Beard* held that, under the terms of the MOSERS' "contract," a member was "not eligible to receive her retirement benefits until she retired." *Id.* at 170. Because the member in that case passed away before she retired, no benefits were due. *Id.* at 171.

[107] La. Const. art. X, § 29; *Smith*, 851 So.2d at 1100, 1106.

[108] *Smith*, 851 So.2d at 1106.

[109] Monahan, *supra* note 8, at 1032-33 (suggesting Missouri follows this approach). *Atchison*, 379 S.W.3d at 170-71, and *Beard*, 343 S.W.2d at 26-27, however, can be distinguished. *Atchison* involved a different statute, and the only question at issue in *Atchison* was whether retirees were entitled to future benefits. Further, the decision and the case law it cites are grounded in the outdated principle that pensions are mere gratuities; a principle that the text of MOSERS/MPERS rebuts. *Id.* at 34 (relying on *Klamm*, 126 N.E.2d 487). As for *Beard*, that case involves not a legislative modification of benefits, but a member who fails to meet the requirements for benefits.

[110] *See State ex rel. Phillip*, 262 S.W.2d at 569 (rights accrue after partial performance under PERS).

[111] *Jacoby*, 468 P.2d at 666, 669.

[112] Indeed, the Missouri Supreme Court has suggested that active MOSERS members have certain rights that may not be altered. *State ex rel. Breshears*, 362 S.W.2d at 571, 575-76. In that case, the Missouri Supreme Court wrote that active members "have certain vested interests, extending at least to all payments which have been made into the retirement fund to the present time . . . the legislature may alter, amend or repeal the law, but only subject to the rights existing at that time." *Id*. at 576.

[113] *Booth*, 456 S.E.2d at 167, 184-86; *see also Petras*, 464 A.2d at 894, 896 (holding that no vested right for completing two years of service in 30-year vesting plan).

[114] Vesting requirements have changed over the years. Members who terminated employment prior to August 13, 1976, a 20-year service requirement was in effect. From August 13, 1976, through May 31, 1981, a 15-year service requirement with no age limit or a 10-year service requirement at age 35 was in effect. From June 1, 1981, through September 27, 1992, a 10-year service requirement was in effect. Since September 28, 1992, a five-year service requirement has been in effect. Mo. Ann. Stat. § 104.035.

[115] Mo. Ann. Stat. § 104.100.

[116] *See* Mo. Ann. Stat. §§ 104.050.2, .3 (if you terminate before vesting, accrued service credit is forfeited).

[117] Buck, "Legal Obstacles to State Pension Reform."

[118] *State ex rel. Breshears*, 362 S.W.2d at 571, 575. *See Atchison*, 343 S.W.2d at 25; *State ex rel. Police Ret. Sys. of St. Louis*, 224 S.W.2d at 68, 72.

[119] Buck, *supra* note 117, at 28.

[120] *State ex rel. Phillip*, 262 S.W.2d at 569, 575.

[121] *Id*. at 578.

[122] *Id*. at 576 (relying on Mo. Ann. Stat. § 169.510.2). The PSRS provisions governing the largest two school districts each contain an express prohibition on altering existing rights. For 700,000 and over entitled "effect of change of law." Mo. Ann. Stat. § 169.510.2. For 400,000 to 700,000 entitled "alteration of existing rights" prohibited. Mo. Ann. Stat. § 169.370.2.

[123] *See Black's Law Dictionary* (9th ed. 2009) (*Expressio unius est exclusio alterius* is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative."); *see, e.g.*, *Babbitt*, 515 U.S. at 687, 724 (Scalia, J., dissenting).

[124] Mo. Ann. Stat. §§ 169.510.2, 169.370.2 (emphasis added).

[125] *State ex rel. Phillip*, 262 S.W.2d at 578 (emphasis added).

[126] *Id*.

[127] *See, e.g.*, *Ass'n of Prof'l & Technical Emps.*, 398 N.W.2d at 436, 439.

[128] Mo. Ann. Stat. § 169.030.4(3).

[129] Another potential reform would involve transitioning Missouri's teachers into the federal Social Security System. When Social Security was created in 1935, state employees were excluded because of constitutional concerns about imposing a federal tax on the states. In 1950, Congress amended the Social Security Act to allow voluntary state participation. And Congress now requires a plan with equivalent or better benefits in order for employers to continue to opt-out. Thirteen states, including Missouri, still exempt some state employees, including Missouri's teachers. Most participants in PERS do not pay into social security, and they do not receive benefits. Those that do pay into PSRS at a two-thirds rates and receive two-thirds the PSRS benefit. Some states, Maine in particular, have considered transitioning teachers to Social Security and meeting pension obligations with a combination of state and federal pensions. Because the PSRS statute protects potential benefits, this would require the combined benefits to be at least as generous as the current plan. Thus, Missouri and its teachers would be required to pay into the Social Security system and also to continue funding PSRS. This would require legislative changes in the PERS statutes and also that Missouri implement legislation to add its teachers to the social security system.

[130] Mo. Ann. Stat. § 70.656.1 (final average salary); Mo. Ann. Stat. § 70.655.4 (multiplier).

[131] Mo. Ann. Stat. § 70.655.9.

[132] Mo. Ann. Stat. § 70.695 ("The right of a person to an allowance, to the return of accumulated contributions, the allowance itself, any allowance option, and any other right accrued or accruing under the provisions of sections 70.600 to 70.755, and all moneys belonging to the system shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency laws, or to any other process of law whatsoever, and shall be unassignable, except as is specifically provided in sections 70.600 to 70.755[.]").

[133] Mo. Ann. Stat. § 70.656.1 (final average salary); Mo. Ann. Stat. § 70.655.4 (multiplier).

[134] Mo. Ann. Stat. § 70.655.10.

[135] *See Atchison*, 343 S.W.2d at 25, 34.

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