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No Higher Calling

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The Constitutional Limitations of Public Employee Pension Reform Legislation

By William T. Payne and Stephen M. Pincus

Introduction

Governments have long used public pensions in order to encourage fidelity, longevity and early retirement when needed. Indeed, historical records of the practice dating back two millennia show Julius Caesar using public pensions to ensure that soldiers who had returned to Rome would remain faithful to the Republic.[1] However, as long as there have been public pensions, there have been concerns about governments fulfilling their obligations. For example, the Colonial Army was close to mutiny, protesting overdue pension payments, until General George Washington's personal intervention quelled the unrest.[2]

The recent recession has refocused attention on the issue of underfunded government pensions in the United States. While almost half of the states had fully funded pension systems in 2000, only four could make this claim by 2008.[3] It is estimated that states face a $1.2 trillion gap between what has been promised retirees in pension and retiree health benefits and what they have set aside.[4] Some states have near-full or fully funded pension systems (e.g., New York and Wisconsin), while states like Connecticut (62 percent of funding) and Massachusetts (63 percent) are severely underfunded. The funding levels of some city pension plans, such as Pittsburgh with a 29.6 percent funding ratio, make even the most poorly funded state pensions appear flush.[5]

During the 2009 and 2010 legislative sessions, a number of states enacted pension reform legislation to help shore up the health of their pension systems by reducing benefits and/or increasing contributions from active employees and employers. While it is clear that changes can be made for future hires, whether they can be made for current retirees or current workers who have not yet retired is less clear. Past pension reform initiatives

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have often been the subject of lawsuits brought by participants who claim that their right to pensions is vested and their benefits cannot be unilaterally decreased. This article highlights the legal landscape and practical considerations that government officials and their lawyers need to evaluate when proposing and passing pension reform legislation, and that pension participants and their advocates should weigh in deciding whether to challenge such reductions.

Background on Public Pensions

Defined contribution plans, such as 401(k) plans, now dominate the pension landscape in the private sector. Underfunding is never an issue with 401(k) plans because the retiree receives only what has been contributed and any investment returns. The risk is squarely on the worker if his or her investment choices do not perform up to expectations.

However, defined benefit plans still make up the bulk of the retirement plans in the public sector.[6] In a defined benefit plan, employees are promised a specific monthly benefit based upon a formula. To fund these pensions, both the employer and the employee typically contribute a percentage of the employee's salary into an investment pool. The employer invests the funds, assumes the market risk, and generally makes up the difference if assets are insufficient to pay the specific promised benefits.[7]

The promise of a guaranteed pension is a strong incentive for government workers to stay on their jobs. Upon meeting the particular plan's eligibility requirements (usually a combination of age and years of service) and termination of employment, retirees are entitled to a base benefit. The base benefit is calculated by multiplying a formula multiplier (usually between 1.5 percent and 2.5 percent) by the employee's highest salary (averaged over three to five years) and by the number of service years.[8]

Like Social Security, nearly all major public pension systems in the United States provide some form of periodic pension increase to compensate retirees for the anticipated effects of inflation. These increases can be in one of several forms, including a fixed annual percentage increase, an increase tied to the Consumer Price Index (usually with a cap), an increase based on investment returns beyond a designated level, or an ad hoc increase provided by the state legislature.[9]

While most public-sector employees also participate in Social Security, all public employees in several states and most public safety personnel in most states do not.[10]

Why the Current Underfunding?

In March 2010, the Pew Center on the States issued a comprehensive report on retirement benefits for public employees. The report listed several factors underlying the current underfunding of many state pension systems.

First, while plan actuaries determine every year the amount that the state should contribute to cover pension obligations for current and future retirees, most states have not made their "actuarially required contribution" over the years. Unlike employers in the private sector, which must follow ERISA's minimum funding requirements, most states are not required to prefund their plans at any level.[11] This complete discretion has permitted some states to "kick the can down the road" and put off making their required pension contributions year after year. For example, between 2002 and 2008, Colorado paid only between 50 percent and 70 percent of its actuarially required contribution, resulting in an additional $2.4 billion of its plan's underfunding.[12]

Second, the actuarial projections assume a certain rate of return on investments, ranging from 7 percent to 8.5 percent.[13] If actual investment returns are lower than these assumptions, the plan experiences a loss. When the stock market declines precipitously, the losses to a pension fund can be huge. For example, California's largest pension system, CalPERS, reported a loss of 24.8 percent of its investment portfolio during the fiscal year ending June 30, 2009.[14]

Finally, some states provided benefit increases or special enhanced

Practice Pointers

Types of Remedies — Under the Contract Clause claim, plaintiffs may obtain injunctive relief to bar the enforcement of the "pension reform." Even though monetary damages are not available against a state or its officials under the doctrine of sovereign immunity, under the Takings Clause of the federal Constitution, plaintiffs may obtain "just compensation" for the "taking of private property."[1] Although the Takings Clause generally cannot be invoked for an alleged taking of money, a cut in government retirement benefits constitutes an abridgement of a property right[2] akin to the improper retention of interest earned on lawyer trust accounts.[3] Statutory attorney fees may be available through 42 U.S.C. § 1983.

Which Court? — Because states and state agencies are immune from suit in federal court under the Eleventh Amendment,[4] claims for benefits under state pension plans must be brought in state court. Municipalities may be sued in either state or federal court.

Class Action — Employee benefits actions are frequently and routinely certified as proper class actions in the private sector,[5] and there is no apparent reason why the reasoning of these class action decisions should not apply in suits to recover public sector retiree benefits.[6]

Endnotes

1. U.S. Const. amend. V; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978) (Takings Clause applicable to states through Fourteenth Amendment).
2. *See* Prof'l Firefighters Ass'n of Omaha v. City of Omaha, 2010 WL 2426446, at *5 (D. Neb. June 10, 2010).
3. Phillips v. Wash. Legal Found., 524 U.S. 156 (1998).
4. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144–45 (1993).
5. *E.g.*, *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877 (6th Cir. 1997).
6. *E.g.*, *Prof'l Firefighters Ass'n of Omaha*, 2010 WL 2426446, at *5.

What About Public Sector Retiree Health Benefits?

Most states and many local governments have promised health care benefits for their retired workers.[1] These promises may be contained in statutes or ordinances or may have been collectively bargained. The level and duration of the retirement medical benefits to be paid vary greatly. Some governmental entities simply provide retirees access, without a subsidy, to the health plans provided to current employees; some require retirees to pay some or most of the cost of continuing coverage; and others provide lifetime benefits for retirees and their spouses, or benefits that last until they become eligible for Medicare.

As in lawsuits to recover pensions, a Contract Clause analysis is used to determine whether a government may reduce or eliminate retiree health benefits. Courts are less likely to find that a statute or ordinance provides for vested retiree health benefits than for pension benefits. For example, an employee working for the Commonwealth of Pennsylvania retired at a time that the state's employee handbook promised a retiree health care plan with no retiree premium. A year after the employee's retirement, the state eliminated the no-premium plan, resulting in a lawsuit. On appeal, the court found that the language of the handbook and the state employees' retirement code established that retired employees may participate in the state's health care plan but did not require the state to provide retirees with the option to retain the medical coverage that they had upon retirement, and that the state retirement statute provided the state with flexibility to determine the extent of medical coverage provided to retirees.[2]

Former union workers may be granted the right to retiree health benefits in the collective bargaining agreements (CBAs) entered into by their unions while they were working. Some courts infer that the parties intended that the benefits will survive the expiration of the CBA, absent language to the contrary such as a "Reservations of Rights" clause, which grants the employer the right to unilaterally modify or terminate retiree health benefits.[3] Some courts find that an entitlement to retiree health benefits does not survive the expiration of the CBA in the absence of a written, unambiguous expression of an intent to make the benefits "vested."[4] Some courts simply utilize traditional contract principles and apply no presumption for or against vesting.[5] If the contract language is unambiguous, a court determines whether the benefits are vested or not without conducting any additional analysis.

early-retirement programs, without funding them. For example, New Mexico lowered the requirements for a normal retirement: general employees can retire after 25 years at any age, and law enforcement personnel receive full benefits after 20 years at any age.[15] However, New Mexico failed to provide the extra funding needed to pay these increased benefits.

Recent Pension Reform Initiatives

During the 2009 and 2010 legislative sessions, a number of states passed pension reform legislation in an effort to help shore up the funding levels of their pension plans.[16] These reforms included the following:

- Raising employer and employee contribution rates
- Reducing or suspending cost-of-living adjustments
- Raising age and service requirements for normal retirement
- Restricting members from retiring and then later returning to state employment
- Restricting pension "spiking" in the last year of service
- Reducing benefits or instituting defined contribution plans for new hires

The ability of states to make these changes may be constrained by protections provided under state and federal constitutional provisions and governing case law. Traditionally, courts regarded a government pension "as a mere gratuity from a benevolent sovereign" that could be decreased or taken away even in retirement.[17] By the 1960s, however, most states had abandoned the gratuity approach and found that pensions are a form of deferred compensation and constitute a property right.[18]

Nine states have amended their state constitutions to explicitly provide protections for public pensions. For example, the Illinois Constitution now provides thus: "Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."[19] A New Mexico constitutional amendment similarly protects the "contractual right of public employees to receive accrued benefits according to the terms under which they accrued."[20]

In states that do not have pension-specific constitutional provisions, government workers and retirees have typically prevailed by relying upon the Contract Clause of the federal Constitution and, in many states, the Contract Clause of state constitutions. To determine whether a Contract Clause violation has occurred, two questions must be answered: Is there a contractual relationship? Does a change in law substantially impair that contractual relationship?[21] If the answer to these two questions is in the affirmative, the court must then consider whether the legislation is "reasonable and necessary to serve an important public purpose."[22]

Does a contractual relationship exist?

A statute "may be deemed a contract for purposes of the Contract Clause only if there is a clear indication that the legislature has intended to bind itself in a contractual manner."[23] The presumption is that a "law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise."[24]

A few states have found that although

If the language is ambiguous, courts will consider extrinsic evidence to determine the parties' intent, including the government's practice of continuing to provide retiree health benefits,[6] oral or written statements by the employer to retirees or prospective retirees explaining their future pension and insurance benefits, and the settlement proposals made during bargaining.[7]

If retirees have a vested right to retiree health benefits, governmental bodies may still have some flexibility to change retiree health plans even without a showing that the change is "reasonable and necessary." For example, the Supreme Court of Connecticut reviewed a city's attempt to change retiree medical coverage from a traditional indemnity plan to a managed care plan. The court found that although the retiree health benefits were vested, past CBAs had given the city the right to make limited modifications to the form, but not the substance, of the medical benefits plan.[8] The court then put the burden on the retirees to demonstrate that the benefits "are not substantially commensurate with the benefits provided under the agreements in effect at the time of the retirees' retirement, when viewing the group as a whole."[9] The court determined that although a managed health care plan is less flexible, a beneficiary could easily incur greater out-of-pocket costs under the old indemnity plan than under the new plan. As such, the court found that the new plan did not substantially reduce the provision of services or increase the costs to the group as a whole and, therefore, did not materially affect the substance of the vested benefit.[10]

Endnotes

1. Ninety-two percent of states and 61 percent of localities report providing health benefits for retirees. Ctr. for Local Gov't Excellence, At a Crossroads: The Financing and Future of Health Benefits for State and Local Government Retirees (July 2009).
2. Bernstein v. Pennsylvania, 617 A.2d 55, 412–13 (Pa. Comm. Ct. 1992); *see also* Davis v. Wilson County, 70 S.W.3d 724, 727–28 (Tenn. 2002) (no vesting pursuant to county resolution).
3. Navlet v. Port of Seattle, 194 P.3d 221, 233 (Wash. 2008); Roth v. City of Glendale, 614 N.W.2d 467, 472 (Wis. 2000).
4. *See, e.g.*, Haake v. Bd. of Educ., 925 N.E.2d 297 (Ill. App. Ct. 2010).
5. Poole v. City of Waterbury, 831 A.2d 211, 223 (Conn. 2003); Anchorage v. Gentile, 922 P.2d 248, 256 (Alaska 1996).
6. Myers v. City of Schenectady, 244 A.D.2d 845, 847 (N.Y. App. Div. 1997).
7. *Gentile,* 922 P.2d at 257.
8. *Poole,* 831 A.2d at 234.
9. *Id.* at 235.
10. *Id.*

pensioners may have acquired an important property interest or right in statutory retirement plans, the language of the statute does not create a "contract."[25] These states find that the legislature reserved to future legislatures the "power to modify prospective service retirement for employees to whom benefits are not then due."[26] Even if pensioners do not have formal contract protection in such states, they may have alternative theories available to them, including promissory estoppel[27] or violation of substantive due process.[28]

Most state courts have found that the language of their state pension statutes creates contractual rights protected under the Contract Clause. However, even if the statutory language is deemed a contract, a member of the pension system may not be protected until the contract right vests. Vesting is a form of a property right. Once it has been created and becomes nonforfeitable, "it is protected from the invasion of the Legislature" under the constitution.[29]

Depending on the state, vesting occurs at different points in the employee-employer relationship. In some states, when an employee begins work and starts making contributions to a pension plan[30] or after a certain number of years of employment,[31] the employee becomes vested in his retirement benefits. In these jurisdictions, any modification of pension rights must be reasonable and necessary to keep the system flexible and maintain the actuarial soundness of the system, and any disadvantage imposed on employees must be accompanied by comparable new advantages.[32]

Other states do not recognize vesting after "part performance": Courts in these states hold that vesting occurs either when the employee fulfills all the necessary requirements to be eligible for a pension[33] or actually retires.[34]

Because of these different vesting standards, a reduction in pensions that is legal in one state may be illegal in another. For example, the Minnesota Supreme Court has held that the state was permitted to temporarily raise the contribution rates for all active employees by 2 percent,[35] while a Pennsylvania appellate court found that a statute that increased employee contribution rates amounted to an unconstitutional impairment of contract.[36]

Is there a substantial impairment?

If the right to a pension benefit is vested and the pension is reduced by any significant amount, courts will find that there has been a substantial impairment.[37] This includes any reduction to the base benefit and the rate of any future increases. For example, the West Virginia Supreme Court found that the reduction of the pension cost-of-living adjustments from 3.75 percent to 2 percent for active state troopers who were eligible for retirement constituted a substantial impairment.[38]

Is it reasonable and necessary to serve an important public purpose?

Under some state constitutions, like that of Colorado, a governmental employer may not substantially impair a vested pension for any reason, including "actuarial necessity."[39] However, under the federal Constitution and most state constitutions, pension reform legislation can survive a constitutional attack if the substantial impairment is "reasonable and necessary to serve an important public purpose."[40]

When courts review pension

reform legislation, the usual "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."[41] In determining whether a substantial impairment is permissible under the Contract Clause, the existence of an important public purpose is not necessarily enough. Instead, courts must utilize a "balancing test" that measures the level of impairment against the importance of the public purpose.[42]

States have justified their pension reform legislation on the grounds that it is needed to preserve the health of the pension system. Some have argued that the pension system, rather than the state, is the guarantor of the pension obligation; and, thus, the state is not required to step in to pay the pensions if the fund is exhausted.[43]

However, the more traditional view is that a pension is a long-term debt of the state or municipality, no different from any other long-term obligation that the governmental entity enters into, such as a 30-year bond. Thus, courts look to the fiscal health of the state or municipality (not simply the pension system) to determine whether there are exigent circumstances warranting a cut in vested benefits. As the Supreme Court has explained,

> A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.[44]

The state has the burden of proof as to the "reasonable and necessary" defense. As part of this burden, the state must establish that there were no "evident and more moderate" policy alternatives available.[45] For example, in 2010, the state of Minnesota cut the cost-of-living adjustments for current and future retirees from a guaranteed 2.5 percent increase each year to between 0 percent and 2 percent, depending on the particular pension system.[46] Minnesota public sector retirees sued the state and the Minnesota State Retirement System, claiming that the legislation substantially impaired their right to have their benefits increased using former postretirement adjustment formulas in effect at the time of their retirements.[47]

The Minnesota retirees claimed that the legislation was not reasonable and necessary because the legislature did not pursue evident and more moderate alternatives. For example, the Minnesota State Retirement System, which covers state workers, would have saved the same amount of money by raising the employer contribution from 5 percent to 5.9 percent as it will save by cutting the retirees' cost-of-living adjustment. A 5.9 percent employer contribution rate would still be much less than the 8.7 percent national median employer contribution rate among state pension systems.[48] Retirees argued that, alternatively, the state could have lowered the level of benefits for new hires, as did several other states in 2010,[49] before cutting the benefits of those already retired.

No court has ever found that a government employer met its burden of establishing that a substantial impairment of vested pension benefits was reasonable and necessary. However, cases in which courts have upheld the ability of cities to impose wage reductions or freezes (contrary to labor contract provisions) provide a guide for what type of evidence a state may need in order to justify cutting vested pension benefits. For example, in one case, the city of Baltimore temporarily reduced salaries of all city employees by 1 percent as a result of an unanticipated budgetary shortfall. Even though the measure substantially impaired a labor contract, the court found that the actions did not violate the Contract Clause because the city had already resorted to cost-saving measures such as layoffs and early retirements, and the amount of the reduction was not greater than necessary to meet the anticipated shortfall.[50]

One legal question that courts have not yet addressed is the extent to which a public entity can claim a "reasonable and necessary" defense if it was the entity itself that caused the funding shortfall by failing to make necessary contributions to the pension system. For example, over the last ten years, the state of New Jersey and its local governmental units used "pension payment holidays" to save billions of dollars by not making the required contributions.[51] In addition, between 2001 and 2007, the state of New Jersey claimed to put aside money in a separate fund for increased benefits for teachers and state employees; but the fund was an "accounting illusion," and no such money was available — leading to fraud charges by the Securities and Exchange Commission.[52] In light of such actions, will courts permit these states to now claim that it is reasonable to cut vested pension benefits of those employees and retirees who faithfully made their required contributions into the pension plan? Or will courts not consider the causes of the underfunding and instead simply focus on whether there should be "shared sacrifice" requiring retirees to suffer reductions to help restore the funding levels?

Conclusion

Local and state governments will continue to face difficult policy decisions about how to shore up the funding levels of their pension systems. If contribution levels are to be raised, should the legislation apply only to new hires or to all current employees? If benefits are to be cut, should retirees or other vested participants be required to share in the sacrifice?

When cuts are made to vested benefits, it is likely there will be legal challenges. In addition to Minnesota, litigation is proceeding against the states of New Hampshire, Colorado and South Dakota over recent legislation cutting cost-of-living adjustments for retired state workers.[53] Government lawyers should closely watch the outcome of these cases to help advise their clients on these complex legal issues. ■

Endnotes

1. William Henry Glasson, History of Military Pension Legislation in the United States 24–42 (Columbia Univ. Press 1900).

2. Robert L. Clark, Lee A. Craig & Jack W. Wilson, A History of Public Sector Pensions in the United States 1 (Univ. of

Penn. Press 2003).

3. Jeffrey Keefe, Debunking the Myth of the Overcompensated Public Employee (Sept. 15, 2010) (EPI briefing paper).

4. Pew Ctr. on the States, The Trillion Dollar Gap (Feb. 2010) [hereinafter Pew Report], *available at* http://downloads.pewcenteronthestates.org/The_Trillion_Dollar_Gap_final.pdf.

5. Adam Brandolph, *Pittsburgh's Pension Funds Take a Hit*, Pittsburgh Trib.-Rev., Aug. 26, 2010, *available at* www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s_696651.html.

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7. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999).

8. Wis. Legislative Council, 2008 Comparative Study of Major Public Employee Retirement Systems 28–29 (rev. May 2010), *available at* www.legis.state.wi.us/lc/publications/crs/2008_retirement.pdf.

9. *Id.* at 32.

10. *Id*. at 25.

11. Minneapolis Teachers Retirement Fund Ass'n v. Minnesota, 490 N.W.2d 124 (Minn. Ct. App. 1992). *But see* Stone v. State, 664 S.E.2d 32 (N.C. Ct. App. 2008).

12. Pew Report, *supra* note 4, at 27.

13. *Id*. at 35; David Reilly, Pension Gaps Loom Larger, Wall St. J., Sept. 18–19, 2010, at A1.

14. CalPERS 2009 Annual Report 2 (2009), *available at* www.calpers.ca.gov/mss-publication/pdf/xAeMFz6gx0PeW_calpers-cafr-2009.pdf.

15. Pew Report, *supra* note 4, at 26.

16. Nat'l Conference of State Legislatures, 2010 Pension and Retirement Plan Enactments in 2010 State Legislatures, *available at* www.ncsl.org/?TabId=20836.

17. Police Pension & Relief Bd. of City & County of Denver v. Bills, 366 P.3d 581, 583 (Colo. 1961) (citing People *ex rel*. Albright v. Bd. of Trustees, 82 P.2d 765 (Colo. 1938)).

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19. Ill. Const. art. 13, § 5; *see* N.Y. Const. art V, § 7.

20. Pierce v. State, 910 P.2d 288, 297–98 (N.M. 1995).

21. Am. Fed'n of State, County & Mun. Employees, Local 2957 v. City of Benton, Ark., 513 F.3d 874, 879–80 (8th Cir. 2008); Porter v. City of Highland Park, 2006 WL 1479909, at *3 (Mich. Ct. App. 2006) (citing Gen. Motors Corp. v. Romein, 503 U.S. 181, 186 (1992)).

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23. State *ex rel*. Horvath v. State Teachers Ret. Bd., 697 N.E.2d 644, 653 (Ohio 1998) (citing Nat'l R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry. Co., 470 U.S. 451 (1985)).

24. *Nat'l R.R. Passenger Corp*., 470 U.S. at 465–66 (1985) (quotation omitted).

25. *See, e.g.*, Pineman v. Oechslin, 488 A.2d 803, 808 (Conn. 1985).

26. Spiller v. State, 627 A.2d 513, 516 (Me. 1993).

27. *See, e.g.*, Christensen v. Minneapolis Mun. Employees Ret. Bd., 331 N.W.2d 740, 746–48 (Minn. 1983) (decided before the legislature repealed language declaring pensions were not contracts).

28. Mayborg v. City of Bernard, 2006 WL 3803393 (S.D. Ohio Nov. 22, 2006).

29. Pierce v. State, 910 P.2d 288, 296 (N.M. 1995) (quotation omitted); *see also* Stephen R. Bruce, Pension Claims Rights and Obligations 187 (2d ed. 1993) ("When a participant has a vested or nonforfeitable right to accrued benefits it means the participant has a claim to payment, on either an immediate or deferred basis," which is "unconditional, and legally enforceable against the plan." (citing ERISA)).

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31. *See, e.g.*, N.J. Stat. Ann. § 43:3C-9.5 (2010) (vesting after five years of employment).

32. PERS Bd., State of Nev. v. Washoe County, 615 P.2d 972 (1980); *see* Bakenhaus v. City of Seattle, 296 P.3d 536 (1956).

33. *See, e.g.*, Baker v. Okla. Firefighters Pension & Ret. Sys., 718 P.2d 348 (Okla. 1986).

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35. AFSCME Councils 6, 14, 65 & 96, AFL-CIO v. Sundquist, 338 N.W.2d 560 (Minn. 1983).

36. AFSCME AFL-CIO v. Pennsylvania, 472 A.2d 746 (Pa. Commonw. Ct. 1984).

37. City of Charleston v. Pub. Serv. Comm'n of W. Va., 57 F.3d 385, 395 (4th Cir. 1995) (noting that statutes causing a "fundamental change" in a pension contract are considered "substantial impairments") (citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 246 (1978)).

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46. 2010 Minn. Laws ch. 359, art. 1, §§ 76–81.

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49. *See, e.g.*, 2010 Utah Laws 266 (S.B. 63), § 25 (establishing defined contribution and hybrid plans for new hires).

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53. *See* Justus v. Colorado, 2010cv1589 (Denver, Colo. Dist. Ct. 2010); Am. Fed'n of Teachers v. New Hampshire, 09-e-0290 (Merrimack, N.H. Super. Ct. 2009); Tice v. South Dakota, 10-225 (Hughes, S.D. Cir. Ct. 2010); Stephen C. Fehr, *States Test Whether Public Pension Benefits Can Be Taken Away*, Stateline.org (Aug. 10, 2010), *available at* www.stateline.org/live/details/story?contentId=504503.