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MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

PERS BENEFIT DIVISIONS IN DIVORCES

The Oregon Public Employees Retirement System (PERS) is the largest public employer retirement plan in Oregon. In 2003, the Oregon State Legislature enacted remedial legislation to curb PERS benefit growth that threatened to exceed the ability of state and local governments to fund future benefit payments.

Litigation challenging the remedial legislation is now pending before a special master, who will report his findings and recommendations to the Oregon Supreme Court. Although no one can predict the outcome of the pending litigation, some or all of the 2003 legislation could be invalidated. Until the litigation is resolved, PERS benefit valuations will be problematic, and divisions of PERS benefits will be more complex.

1. **Uncertainties in Valuing PERS Benefits in Divorces**. Until the Oregon Supreme Court rules, uncertainty over the future of PERS translates to uncertainty in establishing present values of PERS benefits. Should a valuation expert assume that the remedial legislation will be upheld or overturned? Some experts have concluded that PERS benefit valuations may vary between 20 and 30 percent, depending on the results of the litigation. Until the litigation is decided, equal divisions of PERS benefits between divorcing parties will equalize each party's risk of an adverse impact on PERS benefit valuations.

2. **Selecting the PERS Division Date**. In response to the PERS remedial legislation, PERS is not presently accounting for guaranteed income on PERS Tier One member accounts. If certain portions of the legislation are overturned, PERS has informed practitioners that PERS divisions expressed in terms of post-12/31/02 account balances *will not* be recalculated to restore guaranteed income on the portion of PERS accounts awarded to the PERS member's spouse.

   Some experts suggest the following method to preserve the spouse's claim to guaranteed income, if restored in the future. Post-12/31/02 PERS divisions using a division of the PERS member's account balance can be expressed as an equivalent 12/31/02 account balance division, factoring in post-12/31/02 member contributions. As an example, suppose a PERS member had an account balance of $100,000 as of 12/31/02, and made contributions of $6,000 to his or her member account balance during 2003. A 50/50 division of the member's PERS account balance as of 12/31/03 can be converted to an equivalent 12/31/02 account balance division, as follows:

$100,000	(12/31/02 member account balance)
+ $6,000	(2003 contributions)
$106,000	
÷ 2	
$ 53,000	Portion of member's 12/31/02 member account balance to be awarded to member's spouse, equivalent to 12/31/03 division

Remember that PERS member account balance divisions must be expressed as of a member's year-end account balance. As an example, a direction to PERS to divide a PERS member's account balance as of 12/15/03 will result in PERS performing the calculation as of 12/31/02, with the unintended result that member contributions during 2003 will be excluded from the division. The unintended exclusion can be remedied in this example by adding the appropriate portion of the 2003 contributions (in this example, 23/24 of the contributions) back into the 2002 account balance, and performing the member account balance division as of 12/31/02.

Remember, also, that employer matching contributions must be expressly included in the instrument used to divide a PERS member's account balance, if the PERS member's spouse is to have the benefit of the matching contributions.

3. **2004 and Subsequent Member Contributions**. Starting in 2004, PERS member contributions will flow into a new Individual Account Program (IAP) account. The funds will pass through PERS but will be administered by a third party, without the employer money match (if this aspect of the remedial legislation is upheld). The IAP account system is in its infancy, but apparently will require separate attention in the instrument used to divide a PERS member's account balance.

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