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State and Local Government Pensions: In What Circumstances Can Governments Reduce Pension Benefits?

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Some states and localities allow no reductions in pensions after an employee's date of hire, and others permit complete flexibility. In between are the majority of jurisdictions, which allow pension reductions in limited circumstances. The rules allowing reductions continue to be tested and to produce new precedent. In the "laboratory" of federalism, state and local cases and rules like those described here are the "experiments" that, over time and through study and comparison, should evolve to increase the fairness and predictability of laws governing public pension plan reductions. The legal protections for pension benefits of public sector employees and private sector employees have one common denominator: complexity. The source and the effect of the complexity are different for public sector pensions, however. While private sector pension laws regulate cut-backs in pension plan benefits in great detail, public sector pension protections are less detailed and, in many states and localities, less predictable in application. A state or local government's ability to reduce pensions may be more restricted or less restricted than in the private sector. This article provides an overview of issues relevant to determining under what circumstances, and to what extent, a state or local government pension benefit formula may be reduced. Given the complexity and importance of this topic for the pension plan participants, for the sponsoring governments, and for taxpayers, the relevant law will continue to be tested and to evolve. It is hoped that this article may serve as a starting point for further detailed analysis in any specific situation, and as a guide to the types of issues that deserve careful examination when a state or local government adopts or attempts to change the terms of a pension plan it sponsors for its employees.

Why There Is a Lack of Uniformity in Governmental Pension Protections

The legal protections and constraints that apply to pension plans of state and local governments are not as uniform as those that apply to private sector pensions, for several reasons. First, the pension provisions of the Internal Revenue Code (IRC) have only limited applicability to governmental pensions. In particular, the anti-cutback rules of IRC Section 411(d)(6) are inapplicable, and the only vesting requirements under federal law are the limited rules that were in effect under the IRC before September 1, 1974. The Employee Retirement Income Security Act of 1974 (ERISA) does not apply, and the Pension Benefit Guaranty Corporation (PBGC) has no jurisdiction over governmental pensions. A primary source of national law for state and local pensions is the contract clause of the US Constitution, which provides that "[n]o state shall enter into any...Law impairing the Obligation of Contracts."1 The case law demonstrates, however, that application of the contract clause of the US Constitution to state and local pension obligations varies greatly. To further complicate and differentiate the laws relevant to different jurisdictions, state constitutions include varying protections for public pensions. A majority of state constitutions include contract clauses similar to the US Constitution, and eight state constitutions have provisions that address pension protections participants in state and local pension plans. In addition, several state constitutions address other aspects of governmental pension security, such as funding of the pension system, protection of the pension assets, and management of the pension system. (For a helpful comparison of state constitutional provisions, see NEA Issue Brief on Pension Protections in State Constitutions, June 2004.) As a result of all of these varying laws, state and local pension plan participants do not all enjoy the same level of protection from benefit reductions. The remainder of this article examines the primary factors that determine the outcome of a legal claim that a state or local pension benefit may not be reduced.

When Does a Public Pension Benefit Become a "Vested" Right?

To comply with the vesting requirements of IRC Section 411, a governmental pension plan must fully vest benefits upon a participant's attainment of normal retirement age and upon a partial or complete termination of the plan, but in either case only to the extent the plan has sufficient assets to fund benefits.2 These requirements provide significantly weaker vesting protection to governmental pension plan participants than the rules applicable to private sector pension plans. Unlike private sector plans, the IRC does not require governmental pension plans to meet minimum funding standards or to vest an employee's benefit after a specified number of years of service. To fill this gap in applicable tax laws, state and local pension plan participants must look to other legal sources. State-Level Developments BENEFITS LAW JOURNAL 67 VOL. 20, NO. 4, WINTER 2007 State laws provide for vesting at varying times in a pension plan participant's career, from full vesting in the future application of a benefit formula to no vesting.

The Strictest Approach: Contract Rights Guarantee Future Application of Benefit Formula in Effect upon Hire or First Contribution to the Plan

Under a minority of state constitutions, statutes, and court rulings, an employee's right to a pension benefit formula vests upon hire, and the vested right includes the ability to accrue pension benefits into the future according to the pension formula in effect when the employee first becomes a member of the retirement system. The state constitutions of Alaska, Illinois, New York, and Arizona have been interpreted to require this result.3 In New Hampshire, the pension formula becomes a protected right when the individual becomes a permanent state employee.4 Georgia cases give employees a vested right to continue under the pension formula in effect when the employee commences contributions to the pension plan and performs services covered by the pension plan.5

The right to future accrual of a pension, for a lifetime of employment, is the most generous pension vesting right possible for employees and the most daunting fiscal commitment for pension plan sponsors. When vesting is interpreted to guarantee an unchanged benefit formula from the start of covered employment through retirement, a legislature's decision to establish or improve a public pension plan creates a liability that may extend 60 or more years into the future. The financial consequences of such benefits may last far beyond the period for which approving legislative body can be held accountable, and beyond the time to which actuarial projections reliably extend. Under these laws, a pension formula may be reduced only for employees hired after the reduction is adopted.

A Second Approach: Contract Rights Permit Reasonable Modifications to Pensions Before Retirement or Before Satisfaction of Benefit Eligibility Requirements

The California Rule: No Changes to Pension Contract Permitted After Retirement

Court decisions in California and several other states have allowed some flexibility in the pension "contract." California courts have allowed changes to pension benefits for those who have not retired, subject to the requirement that "such modification must be reasonable." To be "reasonable," according to California courts, the pension changes "must bear some material relation to the theory

State-Level Developments BENEFITS LAW JOURNAL 68 VOL. 20, NO. 4, WINTER 2007 of a pension system and its successful operation," and changes "which result in a disadvantage to employees should be accompanied by comparable new advantages" to "the particular employee whose own vested pension rights are involved."6 Comparing the California rule to the guaranteed contract described in the preceding section of this article, one commentator has written: "Thus California's public employees, unlike their counterparts in New York, are not entitled to any particular terms of a pension plan but only to the substance of the benefit which they could reasonably expect to receive."7

Modified California Rule: No Changes to Pension Contract Permitted After Eligibility to Retire

Several courts have extended the California concept to vest an employee's right earlier than retirement. These courts give an employee the vested right to continue coverage under an unchanged pension plan once the employee has satisfied the plan's service and or age requirements for receipt of a pension benefit (even if the employee has not yet retired, as the California cases require). For example, Tennessee and Pennsylvania cases have prohibited reduction in pension formulas for both past and future service of those who complied with all conditions necessary to be eligible for a pension before the change, *Harvey v. Retirement Board of Allegheny County, 8 and Blackwell v. Quarterly County Court of Shelby County.* 9 Similarly, Colorado courts apply "full vesting" to participants who have retired or are eligible to retire, but "limited vesting" to participants not eligible to retire, explaining limited vesting as follows:

> "although prior to their eligibility to retire the pension could be changed, it could not be abolished nor could there be a substantial change of an adverse nature without a corresponding change of a beneficial nature. An employee's pension rights prior to his eligibility to retire may be modified for the purpose of keeping the pension system flexible to permit adjustments in accord with changing conditions if at the same time the basic integrity of the plan is still maintained" and "if these changes strengthen or better" the plan or "if they are actuarially necessary."10

Preliminary Issue in Applying Contract Law to

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Vesting: What Is the Scope of the Pension Contract?

In order to apply contract law to pension rights under either the "California" rules: or the "modified California rule" described in the State-Level Developments BENEFITS LAW JOURNAL 69 VOL. 20, NO. 4, WINTER 2007 preceding two paragraphs, a court must first find that the pension documentation was intended to create a contract regarding the specific pension matter at issue: Early cases applying contract law to governmental pension rights address this preliminary issue in grand but general terms, as illustrated by this statement in Hickey v. Pension Board of City of Pittsburg: 11
. . . when Thomas Hickey started contributing to the city pension fund in 1915, there appeared on the horizon not the slightest suggestion of a cloud to imperil the pension, toward which he was faithfully to plod for 31 years....Whether it be in the field of sports or in the halls of the legislature it is not consonant with American traditions of fairness and justice to change the ground rules in the middle of the game.

These general notions of "fairness," "ground rules," and cloudless skies have been refined to more specific concepts of contractual rights in subsequent public pension case law. For example, the frequently cited 1978 California decision in Betts v. Board of Administration of the Public Employees' Retirement System examined the scope of the employee's "earned . . . contractual expectation" when applying contract law. Recent cases involving the Oregon Public Employee Retirement System illustrate how detailed the analysis of the scope of the contractual right has become in the early 21st century. The Ninth Circuit applied federal law, "which requires us to find a 'clear indication' of the Oregon legislature's intent that the State be contractually bound by the provisions of PERS that the Employees urge us to find are contractual promises." Both the Ninth Circuit Court of Appeals and the Oregon Supreme Court found that selected provisions of the pension statute "did not establish clearly and unambiguously that the legislature intended to promise members" a vested contractual right to benefits.12 The Strunk decision carefully examines each pension provision that is alleged to create a statutory contractual obligation and provides a thorough discussion of the steps required to analyze contract impairment in those instances where a contract exists. As a starting point for this analysis, the Strunk decision (at 1075) explains that it must answer three questions:

1. "Is there a state contract?;
2. If so, what are its terms?; and

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3. What obligations do the terms provide?" Under this more detailed analysis, changes to the pension plan are possible to the extent the terms of the pension documents do not State-Level Developments BENEFITS LAW JOURNAL 70 VOL. 20, NO. 4, WINTER 2007 create a contract and to the extent the terms of the pension documents permit change.

Because the application of contract law to governmental pension rights has evolved into a detailed search for the existence, terms, and obligations of a pension contract, it is in the interests of all involved to avoid ambiguity and stress clarity in pension documentation. For many of the pension documents that may yet be subjected to court review, it is too late to improve on written evidence of the original intent. But for those public pension provisions yet to be written in jurisdictions where contract law will apply to determine vested rights, drafters should clearly state whether or not, and how, a pension provision may be amended. This intent should also be communicated to plan participants. In the absence of clarity, if interested parties must turn to arcane legal theories to establish the existence or absence of contractual intent after the fact, the predictability and perceived fairness of the pension system will suffer.

A Third Approach: Property Rights, Not Contract Rights, Apply

Some courts and commentators have declared it illogical to call a pension a contractual right and yet allow changes to the contract. As stated in Spina v. Consolidated Police and Firemen's Pension Fund Commission: 13
"it seems odd to say the State may unilaterally rewrite its own contract or rewrite contracts between its municipal agents and others. We think it more accurate to acknowledge the inadequacy of the contractual concept." Instead, according to the New Jersey Supreme Court, "we think the employee has a property interest in an existing fund which the State could not simply confiscate" and which is "secured from arbitrary action..."

The New Mexico State Constitution is the sole constitution to specify that pensions are property rights. It grants a "vested property right with due process protections under the applicable provisions of the New Mexico and United States constitutions" to employees who meet "the minimum service requirements" of a state or local retirement plan, and adds that "nothing in this section shall be construed to prohibit modifications to retirement plans that enhance or preserve the actuarial soundness of an affected trust fund or individual retirement plan."14

See Public Employee Pensions in Times of Fiscal Distress, 15 and Piller v. State: Determining the Nature of Public Employees' Rights to Their Pensions, 16 for further discussion of the merits of applying property rights, rather than contract rights, to public pensions.

A Fourth Approach: Vested Right Apply to Benefit Formula for Past Accruals Only

Some states limit the vested pension promise to benefits accrued to the date of an amendment. An example of such vesting appears in the Texas Constitution, which states with regard to pensions other than the statewide system, and excluding certain localities, that accrued pension benefits may not be reduced for those who were eligible to receive the benefits (or would have been eligible if they had terminated employment) before the effective date of the change.17 A different description of the protections for past pension accruals appears in Wisconsin Statutes section 40.19(1), which states in regard to the statewide pension plan that "there shall be no right to further accrual of benefits nor to future exercise of rights for service rendered after the effective date of any amendment or repeal deleting the statutory authorization for the benefits or rights," and which allows the state to require "forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights and benefit of equal or greater value to the participant."

The Least Restrictive Approach: No Vested Rights

A minority of courts consider governmental pensions as a "gratuity" that is not vested before payment. Indiana applies contract rights to voluntary pensions, but considers mandatory pensions a gratuity to which no contractual rights apply,18 Arkansas considers a retirement benefit a "gratuitous allowance" if the employee did not contribute.19 In Texas, the right to a benefit from a statewide pension system "is predicated upon the anticipated continuance of existing laws, and is subordinate to the right of the Legislature to abolish...or diminish the accrued benefits."20 The view that a public sector pension is a gratuity originated with the US Supreme Court decision in Pennie v. Reis, 21 Although Pennie is still valid precedent at the federal court level, it does not control interpretation of state law.

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Required Vesting upon Partial Plan Termination

The laws cited in the preceding paragraphs address vesting in a benefit formula, but do not address the funding required for payment of the benefit. A guaranteed benefit formula does not necessarily carry with it a guaranteed funding source. For example, although Illinois provides strict constitutional protections for a pension benefit formula, "The framers of the Illinois Constitution were careful to craft in the pension protection clause an amendment that would create a contractual right to benefit, while not freezing the politically sensitive area of pension financing."22 The topic of legal safeguards for the funding of public pension plans (i.e., the question of how much money must be put in public pension funds and how that money is protected) is beyond the scope of this article. For discussion of funding issues in law journal articles, see Of Public Pensions, State Constitutional Contract Protection, and Fiscal Constraint, 23 Public Employee Pension Funds: A Cautionary Essay,24 and Public Employee Pensions in Times of Fiscal Distress. 25 The following paragraphs take the amount of the plan's assets as a given, and instead consider how a pension benefit reduction may affect the allocation of available pension funds among benefits accrued before the reduction.

Treasury Regulation Section 1.401-6 states that upon the complete or partial termination of a pension plan benefits are nonforfeitable "to the extent funded." A partial termination may occur when pension "benefits or employer contributions are reduced."26 Thus, under federal tax law, the very event that could cause participants to lose pension benefits—a reduction in the benefit formula—may also trigger vesting of benefits. But tax law requires vesting upon partial termination only to the extent the benefits of affected participants are "funded." This federal tax rule could have a complex interaction with the terms of the pension plan if the pension plan includes provisions for allocation of plan assets upon partial termination of the plan. Some governmental pension plans include a hierarchy for allocating assets in the event of a partial or complete termination of the plan. If the pension plan document contains an asset allocation hierarchy that differs from the vesting rules applicable to the plan under state or local law, the plan's hierarchy may create an obligation to fund more categories of plan participants' benefits than would otherwise be required under state or local law.

For example, consider the result if a pension plan document includes an asset allocation hierarchy upon partial termination that funds benefits in the following order: (1) retired participants receiving benefits, (2) terminated participants who have satisfied the service but not age requirements to receive benefits, (3) active participants who have satisfied the service requirements to receive benefits, (4) other active participants. Assume that local laws fully vest the pension benefits of those participants who are retired or who have achieved the requisite age and service to retire. Because the plan document's funding hierarchy upon partial termination does not correspond to the local legal protections, a partial termination could result in a requirement to fund benefits at a level higher than required by local law. In this example, the plan's second funding category is more inclusive than local law vesting protections because it includes all terminated participants who have satisfied the service requirements to receive benefits, but local law only protects those who have satisfied both age and service requirements State-Level Developments BENEFITS LAW JOURNAL 73 VOL. 20, NO. 4, WINTER 2007 to receive benefits. Also, the plan's third funding category includes some participants who are protected under local law; i.e., those who have satisfied the age and service requirements to retire and receive benefits but are still working. To satisfy the terms of the governing plan document and local law regarding vested pension rights, the plan may have to fund benefits through the third funding category upon partial or complete termination. If the plan's funding categories were instead written to coordinate with local legal requirements, the plan would place those with required age and service in the first funding category, and the partial or complete termination provisions would not create this potential additional pension funding liability.

Application of State and Local Laws Restricting Debt

Vested pension rights create liability for the sponsoring government that may raise issues under statutory or constitutional restrictions on the sponsoring government's financial commitments. Before adopting a new or improved pension benefit, state and local laws limiting long-term financial commitments should be examined, as they may invalidate the funding or vesting of the pension benefit. Such a challenge was unsuccessful in Hanson v. City of Idaho Falls27 because the court concluded the pension plan's liability was not the type of indebtedness limited by the state constitution. The exact wording of a financial limitation is critical. For example, the Colorado Constitution's "TABOR" limitation requires voter approval of "creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocable and held for payments in all future fiscal years," but it excepts "adding new employees to existing district pension plans."28 The application of financial limitations of this type to various pension liabilities may hinge on future court interpretation, but should be considered before any pension improvement is adopted or considered vested.

Specific Aspects of a Public Pension Benefit That May Be "Vested"

The different criteria for "vesting" of pension benefits, as described in the preceding sections of this article, leave open the question of which specific benefit rights under a pension plan are considered vested. Pension benefit calculations have many elements that may result in a benefit reduction if changed. The following paragraphs provide examples of how courts have applied vesting to various detailed elements of a pension benefit plan. The results in these cases vary due to the factors discussed earlier in this article. State-Level Developments BENEFITS LAW JOURNAL 74 VOL. 20, NO. 4, WINTER 2007

1. Minimum age and service. Increase in minimum retirement age accompanied by increase in benefit amount was upheld in Amundson v. Public Employees' Retirement System. 29 Increases in minimum retirement age and service requirements were held constitutional as applied to those hired before the change in Spina v. Consolidated Police and Firemen's Pension Fund Commission. 30
2. Actuarial assumptions and calculation of optional forms of payment. Legislation mandating application use of updated actuarial assumptions that decreased benefits was upheld as consistent with the state statute in Strunk v. Public Employees Retirement Board. 31 Birnbaum v. NY State Teachers Retirement System32 and Sheffield v. Alaska Public Employees Assn. 33 prohibited use of updated actuarial assumptions that decreased benefits.
3. Disability payments. Disability benefits may be changed for those whose disability did not occur until after the change; i.e., the plan provision in effect at the time of the injury applies.34 Disability benefits are governed by the plan in effect at the time the application is filed or the time the Pension Board acts on the application, not at the time of injury.35 Disability rules in effect at time of retirement for disability apply.36 Under requirements of state statute, disability benefit rules were held to be vested at date of hire in Welter v. City of Milwaukee. 37

4. Death benefits and surviving spouse benefits. Decrease in benefit formula accompanied by increase in death benefit and payments to surviving spouse was upheld in City of Downey v. Board of Administration, Public Employees Retirement Ss. 38 A change requiring that death benefits be paid to surviving spouse, rather than a beneficiary named by the participant, was held unconstitutional as applied to a participant who entered the pension plan before the change, when the plan allowed the participant to select a non-spouse beneficiary in Public Employees' Retirement System v. Porter. 39
5. Cost-of-living calculation. City's elimination of cost-of-living supplemental benefit plan for those employed but not yet retired at the time of the plan change was held unconstitutional in Calabro v. City of Omaha. 40 A pension plan amendment limiting cost-of-living adjustments to pension benefits to 3 percent could not be applied to an employee who had earned a vested right to a pension before the amendment was adopted, even though the employee did not retire until after the effective date of the amendment.41 State-Level Developments BENEFITS LAW JOURNAL 75 VOL. 20, NO. 4, WINTER 2007
6. Retiree benefits. A reduction in retiree benefits was held unconstitutional, even for benefits that were increased after retirement in Nicholas v. State of Nevada, 42 but retirees were held to have no contract right to benefits added after retirement and reductions in those post-retirement benefit increases were upheld in Pasadena Police Officers Association v. City of Pasadena. 43 Retirees were protected from plan termination in Newcomb v. Ogden City Public School Teachers' Retirement Commission44 and from benefit reductions under new law regarding employment during retirement in Johnson v. Utah State Retirement Board. 45
7. Compensation measurement. A modification to the compensation definition used to calculate pensions was upheld because the detriment was offset by advantages in Lyon v. Flourney. 46 A change in the definition of compensation to use a three-year average, rather than a one-year average, was upheld where previously accrued benefits were protected with only an "insubstantial" reduction (no more than $250 per year) in Soucy v. Board of Trustees of the Maine State Retirement System.47
8. Employee contribution rates. An increase in employee contributions with no increase in benefits was held unconstitutional for those who, before the increase, acquired a contract right in the plan because of "continued employment over a reasonable period of time during which substantial services are furnished to the employer, plan membership is maintained,

and regular contributions into the fund are made" in Singer v. City of Topeka. 48 An increase in employee contributions was also held unconstitutional as applied to those hired before the contribution increase in Oregon State Police Officers' Assn. v. State of Oregon49 and Allen v. Long Beach. 50 A retroactive increase in employee contributions in exchange for increased benefits was upheld in Burlington Fire Fighters' Association v. City of Burlington. 51 A new law requiring working retirees to contribute to the pension plan was not unconstitutional because prior law did not create a contractual right for retirees to avoid contributions.52

Between Guarantee and Gratuity: The Problem of Uncertainty

The laws described in this article create a perplexing and dangerous minefield for uninformed employers and employees. Between State-Level Developments BENEFITS LAW JOURNAL 76 VOL. 20, NO. 4, WINTER 2007 the extremes of a guarantee upon hire or a gratuity contingent until retirement, there is a wide middle ground of "reasonableness" where pension benefits may or may not be protected from reduction under state or local law. In the sometimes politically charged debates over public pensions, it may not be possible to reach the ideal of a secure and predictable match of pension benefit liabilities and supporting assets. But the goal of all involved must be to fulfill reasonable pension expectations. That goal can be approached only if all parties understand the complexity of the legal commitment a pension creates. This article explains some of the basic concepts that should be explored when attempting to reach such an understanding.

NOTES

1. US Const. Art. I, S 10.
2. Treas. Reg. § 1.401-6.
3. Hammond v. Hoffbeck, 627 P.2d 1052 (Al. 1981): Di Falco v. Board of Trustees, 521 N.E.2d 923 (Ill. 1988), and Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541 (1965).
4. Gilman v. Cheshire County, 493 A.2d 485 (N.H. 1985).
5. Swann v. Bd. of Trustees, 360 S.E.2d 395 (1987). 6. Betts v. Board of Administration of the Public Employees’ Retirement System, 582 P.2d
6. 14 (Cal. 1978).
7. 90 Harv. L. Rev. at 996.

8. 141 A.2d 197 (Pa. 1958) (applying this protection to employees with at least ten years of credited service).
9. 622 S.W.2d 535 (Tenn. 1981).
10. Police Pension and Relief Board of City and County of Denver v. Bills, 366 P.2d 581 (Co. 1961).
11. 378 Pa. 300, 106 A.2d 238 (Pa. 1954).
12. Robertson v. Kulongoski, No. 04-35898 (9th Cir. Oct. 24, 2006), quoting Strunk v. Public Employees Retirement Board, 108 P.3d 1058 (Or. 2005).
13. 197 A.2d 169 (N.J. 1964).
14. N. M. Const. Art. XX, § 22.
15. 90 Harv. L. Rev. 992 (1977).
16. 46 Me. L. Rev. 355 (1994).
17. TX Const., Art.16, § 66.
18. Haverstock v. Indiana Public Employees Retirement Fund, 490 N.E.2d 357 (1986).
19. Arkansas Tech University v. Link, 341 Ark 495, 17 S.W.3d 809 (2000).
20. Cook v. Employees Retirement Sys., 514 S.W.2d 329, 331 (Tex. Ct. App. 1974).
21. 132 US 464 (1889). State-Level Developments BENEFITS LAW JOURNAL 77 VOL. 20, NO. 4, WINTER 2007
22. Sklodowski v. Illinois, 182 Ill.2d 220, 695 N.E.2d 374 (1998).
23. 69 Temple L. Rev. 1059 (1996).
24. Lab. L.J. 700 (1990).
25. 90 Harv. L. Rev. 992 (1977).
26. Treas. Reg. § 1.401-6(b)(2).
27. 92 Idaho 512, 446 P.2d 634 (1968).
28. CO. CONST. Article X, § 20(4)(b).
29. 30 Cal. App. 3d 856, 106 Cal. Rptr. 759 (1973).
30. 41 N.J. 391, 197 A.2d 169 (N.J. 1964).
31. 108 P.3d 1058 (Or. 2005).
32. 176 NYS 2d 984 (NY 1958).
33. 732 P.2d 1083 (Alaska 1987).
34. Davis v. Mayor and Alderman of the City of Annapolis, 98 Md. App. 707, 635 A.2d 36 (1994).
35. City of Iowa v. White, 253 Iowa 41, 111 N.W.2d 266 (1961).
36. Pitts v. City of Richmond, 235 Va. 16, 366 S.E.2d 56 (1988).
37. 214 Wis. 2d 485, 571 N.W.2d 459 (1997).
38. 47 Cal. App. 3d 621, 121 Cal. Rptr 205 (1975).
39. 763 So.2d 845 (Miss. 2000).

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40. 247 Neb. 955, 531 N.W. 541 (1995).
41. Nash v. Boise City Fire Department, 104 Idaho 803, 663 P.2d 1105 (1983).
42. 116 Nev. 40, 992 P.2d 262 (2000).
43. 147 Cal. App. 3d 695, 195 Cal. Rptr. 339 (1983).
44. 121 Utah 503, 243 P.2d 941 (1952).
45. 770 P.2d 93 (1988).
46. 271 Cal. App. 2d 774, 76 Cal. Rptr. 869 (1969).
47. 456 A.2d 1279 (1983).
48. 227 Kan. 356, 607 P.2d 467 (1980).
49. 323 Or. 356, 918 P.2d 765 (1996); Opinion of the Justices, 362 Mass. 847, 303 N.E.2d 320 (Mass. 1973).
50. 45 Cal. 2d 128, 287 P.2d 765 (1955).
51. 149 Vt. 293, 543 A.2d 686 (1988).
52. Layman v. South Carolina, 368 S.C. 631, 630 S.E.2d 265 (2006)