

MAJOR POLICY SHIFTS

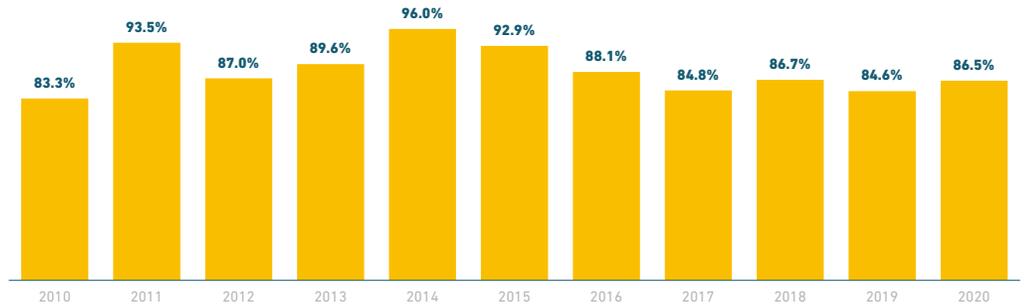
2011

H.B. 81

For DPERS new hires, the Delaware General Assembly (1) increased the regular retirement age from 62 to 65; (2) increased the employee contribution rate on total annual salary above \$6,000 from 3% to 5%; (3) excluded overtime pay from the determination of final average salary used to calculate benefits; (4) increased the statutory vesting (years-of-service) requirement from 5 to 10 years; and (5) increased the penalty for early retirement from 0.2% to 0.4% of the employee's pension for each month before age 60 an employee is retired.

FUNDED RATIO

The graphic below covers the following retirement system: Delaware Public Employees' Retirement System (DPERS).



LEGAL ENVIRONMENT FOR FUTURE POLICY EFFORTS

The following analysis applies to legislative efforts affecting active and retired **non-public officers**.

Legislative efforts impacting active or retired **public officers** (e.g., elected officials and judges) are **unfavorable** except by constitutional amendment due to salary and emoluments protections in the Delaware Constitution (see State Provisions and discussion of the *Stiftel v. Malarkey* decision on the reverse side). Legislative efforts confined to new hires rarely face significant legal challenges.

What are some policy options?	Were there relevant policy shifts for active employees or retirees?	Have there been legal challenges?	What are the legal prospects for future changes?*
INCREASE EMPLOYEE CONTRIBUTIONS	NO	NO	<ul style="list-style-type: none"> • FAVORABLE as to active employees who have not met the years-of-service requirement • UNDEVELOPED as to active employees who have met the years-of-service requirement • N/A as to retirees
DECREASE OR ELIMINATE COST-OF-LIVING ADJUSTMENTS	NO	NO	<ul style="list-style-type: none"> • N/A as to retirees and active employees; COLAs are ad hoc by legislative approval, removal of previously granted COLA would likely be treated unfavorably
CHANGE VESTING PERIOD	NO	NO	<ul style="list-style-type: none"> • FAVORABLE as to active employees who have not met the years-of-service requirement • N/A as to active employees who have met the years-of-service requirement and as to retirees
CHANGE BENEFIT CALCULATION	NO	NO	<ul style="list-style-type: none"> • FAVORABLE as to active employees who have not met the years-of-service requirement • UNDEVELOPED as to active employees who have met the years-of-service requirement • UNFAVORABLE as to retirees
INCREASE RETIREMENT AGE	NO	NO	<ul style="list-style-type: none"> • FAVORABLE as to active employees who have not met the years-of-service requirement • UNDEVELOPED as to active employees who have met the years-of-service requirement • N/A as to retiree

* **FAVORABLE** indicates that the issue survived litigation in the past and/or there is a permissive legal environment for the change.
* **UNFAVORABLE** indicates that the issue did not survive litigation in the past and/or there is a non-permissive legal environment the change.
* **UNDEVELOPED** indicates that the issue has not been litigated and/or the current legal environment is unclear as to what the outcome would be.

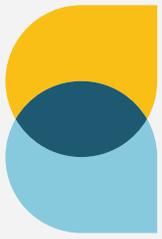
DISCLAIMER: Equable is not necessarily recommending any of the policy concepts listed above. Some of them may be good ideas, bad ideas, or involve trade-offs between various stakeholders. This document only provides information about the likely legal outcomes of pursuing different policy concepts by stakeholders. The document does not constitute legal advice or representation, and the authors are not liable for any actions taken relying on this information.



DELAWARE

LEGAL ENVIRONMENT FOR PENSION POLICIES

As of August 2021



DELAWARE STATE LAW CONTEXT

State Provisions

The State of Delaware relies on the federal constitution for its analysis of contract impairment —

U.S. CONSTITUTION ARTICLE I, SECTION 10: “No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contract . . .”

DELAWARE CONSTITUTION ARTICLE XV, SECTION 4: “No law shall extend the term of any public officer or diminish his salary or emoluments after his election or appointment.”

Key Opinions

IN RE STATE EMPLOYEES’ PENSION PLAN, 364 A.2D 1228 (DEL. 1976)

The Board of Pension Trustees sought a protective order regarding compliance with specific legislation that granted pension eligibility and payments under the State Employees’ Pension Plan (SEPP) and State Employees’ Retirement Fund to individual retirees who had not otherwise met generally applicable SEPP eligibility requirements. The specific legislation entitled the named retirees to pension benefits that they would not otherwise have been qualified to receive under the generally applicable plan requirements. The Delaware chancery court held that the specific legislation violated the rights of former and present state employees under the U.S. Constitution’s Contract Clause. The court held that contributory pensions are part of the employee’s compensation and that retirees and current employees who have met the retirement eligibility requirements have vested contractual rights that are “entitled to protection against unreasonable modification.” *In re State Employees’ Pension Plan*, 364 A.2d at 1235. The court further reasoned that the payments authorized by the special legislation were purely gratuitous since the named individuals were already retirees and that the payments did not, therefore, further the purpose of the pension plan and fund. *Id.* at 1236. The modifications were unreasonable because the legislature made them to the retirees with “no standards or guidelines except, perhaps, gratitude or compassion.” *Id.*

The court left undecided the question of what, if any, contract rights extend to active employees who have not yet met the eligibility requirements. See *Id.* at 1235 (“It is unnecessary for us to reach the question of whether other employees have vested contract rights under the Plan.”).

STIFTEL V. MALARKEY, 384 A.2D 9 (DEL. 1977)

Active judges claimed that the legislature’s removal of salary supplements unlawfully diminished their “salary or emoluments” under Article XV, Section 4 of the Delaware Constitution. H.B. 1274 excluded elected officials, judiciary, and board members from salary supplements granted to state employees. The Delaware Supreme Court held that the judges’ rights vested when they had been appointed and that “[n]othing short of a constitutional amendment” could override the protection. *Stiftel v. Malarkey*, 384 A.2d 9 at 15. A fixed formula for increases had the same constitutional protection as a specific salary increase. *Id.* at 16. The court noted that it would be “immaterial . . . whether the cut which such an official might fear would be of the salary or emoluments applicable at the commencement of his term or provided later.” *Id.* at 15. This language indicates that the same analysis would restrict efforts to reduce retirement benefits.

MARVEL V. DANNEMANN, 490 F. SUPP. 170 (D. DEL. 1980)

Active judiciary members brought a challenge under the Contracts Clause of the U.S. Constitution (Article I, Section 10) to a 1976 amendment to Delaware Code Title 29, Section 5601, which increased active judiciary member contribution rates and reduced the share of plan costs that public funds would bear. The U.S. District Court of Delaware struck down the amendment as an unconstitutional impairment of the employees’ contract rights in the plan. The court assessed whether the impairment could be constitutionally upheld as “reasonable and necessary to serve an important public purpose.” *Marvel v. Dannemann*, 490 F. Supp. 170 at 176. In the absence of any showing by the state that circumstances had substantially changed or that the state was unable to meet current or future obligations under the pension plan, the amendment did not qualify as reasonable or necessary. The court noted that the plan allowed for contributions from the state’s general fund for any amount necessary to meet the financial commitments, meaning that the state could legally meet its obligations even if the plan funds alone didn’t cover them. *Id.* at 177.

FOR MORE INFORMATION

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