

## **EMPLOYEE TO FORFEIT EMPLOYER DC PLAN CONTRIBUTIONS FOR CERTAIN FELONIES**

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**House Bill 4131 as enacted**  
**Public Act 43 of 2017**  
**Sponsor: Rep. Jim Runestad**  
**House Committee: Judiciary**  
**Senate Committee: Judiciary**  
**Complete to 7-31-17**

**BRIEF SUMMARY:** House Bill 4131 amends the Public Employee Retirement Benefits Forfeiture Act so that employer contributions to a defined contribution system (such as a 401(k)), including earnings on those contributions, are among the retirement benefits forfeited if a member or retirant is convicted of or enters a nolo contendere plea that is accepted by the court for a felony arising out of service as a public employee. This applies to the misuse of public funds and accepting bribes. The bill also requires, rather than allows, a court to order forfeiture in certain cases. And the bill adds a new section to allow a court to freeze a retirement benefit subject to forfeiture.

**FISCAL IMPACT:** The bill would have an indeterminate fiscal impact, but could create savings for local and state public pension plans. There are no data available with which to estimate the number of potential forfeitures to which the new defined contribution provision might apply, and any savings would depend on the amount of employer contributions plus investment returns that had accumulated in any individual defined contribution (DC) plan. Currently in a forfeiture situation, the state deposits forfeited DC funds into a forfeiture account, which is the same account used to collect funds from employee DC accounts for employees who leave prior to vesting in their employer-paid benefits. These funds are then used to offset mandatory employer contributions, and thus create a savings to the state. Savings to local governments would depend on how the local pension plan treats forfeiture funds. The bill's provision that a judge "shall" rather than "may" order a forfeiture would presumably increase the funds retained by the system and would typically accumulate to the benefit of the whole pension plan.

### **THE APPARENT PROBLEM:**

Under the Public Employee Retirement Benefits Forfeiture Act, courts currently have discretion over whether to forfeit certain retirement benefits if a member of a public employee retirement system or retirant is convicted of a felony involving the misuse of public funds or taking bribes arising out of service as a public employee (or enters a nolo contendere plea accepted by the court for such a felony). Some people believe that such forfeiture should be mandatory, not optional, for these felony convictions, which are betrayals of the public trust. Taxpayers are frustrated by stories of public corruption, and disillusionment with government is accentuated when convicted officials are able to continue to collect public pensions. The law needs to be modified so that forfeiture also clearly applies to the contributions made by a public employer to a defined contribution

retirement plan, such as a 401(k), since they also qualify as publicly provided retirement benefits. Such amendments, proponents believe, would strengthen the act.

### ***THE CONTENT OF THE BILL:***

Under Section 3 of the Public Employee Retirement Benefits Forfeiture Act, a member or retirant who is convicted of or enters a nolo contendere plea accepted by the court for a felony arising out of service as a public employee is considered to have breached the public trust and may have rights to an otherwise vested retirement benefit and all accumulated contributions forfeited.

House Bill 4131 amends the Act to include “a benefit from employer contributions to a defined contribution plan” in the definition of “retirement benefit.” This means that the bill allows for the forfeiture of employer contributions to a defined contribution system (such as a 401(k)), including earnings on those contributions. However, this applies only to the retirement system of which the individual was a member or retirant at the time the felony was committed, and only to the system established by the entity affected by the felony.

Currently, under Section 4 of the Act, if a member or retirant is convicted of or enters a nolo contendere plea accepted by the court for a felony arising out of service as a public employee, the court may order forfeiture of specified retirement benefits. The bill instead specifies that the court shall order forfeiture, and the employee must have his or her rights to an otherwise vested retirement benefit forfeited. However, a court is only required to order forfeiture for a member or retirant whose conviction or plea occurs on or after the effective date of the bill.

#### ***“Felony arising out of service as a public employee”***

Under the Act, the phrase “felony arising out of [. . .] service as a public employee” means either or both: (1) A felony resulting from the misuse of public funds or (2) a felony resulting from the receipt of a bribe or other financial benefit in that person's capacity as a public employee. The bill does not amend this definition.

#### ***“Freezing” a benefit***

The bill further adds Section 4a to the Act, to allow a court to freeze any retirement benefit subject to forfeiture. A court has the option of issuing a freezing order upon a showing of probable cause that the retirement benefit is subject to forfeiture. A prosecuting agency (which means, in this section, the attorney general of this state or a designee, or the county prosecuting attorney or a designee) may file an ex parte application to freeze a member's or retirant's retirement benefit. The court may determine ex parte whether there is probable cause to grant the application and shall issue a freezing order if it finds both of the following:

- That a member's or retirant's retirement benefit is subject to forfeiture; and
- That notice to the member or retirant before a freezing of the retirement benefit would cause the loss of the retirement benefit subject to forfeiture.

If a court enters a freezing order, the clerk is required to deliver the order to the retirement system.

The bill makes complementary amendments to Section 5 to require the retirement system to comply with a court order freezing a retirement benefit as described in Section 4a.

Additionally, the bill replaces “person” with “individual” throughout the Act.

### ***BACKGROUND INFORMATION:***

Under the Public Employee Retirement Benefits Forfeiture Act, if a court decides to order forfeiture, the forfeiture order must contain, as appropriate:

- That what is forfeited is the portion of the member's or retirant's retirement benefit under a retirement system established by that person's employer at the time the act or acts that resulted in the felony were committed that accrued to that member or retirant on or after the date the first act that resulted in the felony was committed.
- That the member's or retirant's accumulated contributions standing to that person's credit in the individual account established for that purpose in the retirement system shall be refunded to the member or retirant.
- That the retirement system shall pay to an individual, if any, who would otherwise be a beneficiary of the member or retirant whose retirement benefit is being forfeited under this act an actuarially equivalent monthly retirement allowance at the age that member or retirant would have become eligible for unreduced retirement benefits under that retirement system.
- That the retirement system shall provide hospitalization and medical coverage insurance to the member or retirant whose retirement benefit is being forfeited under this act and to beneficiaries in the same manner and under the same restrictions as is provided to other retirants and beneficiaries of that retirement system.

### ***ARGUMENTS:***

#### ***For:***

The bill makes it clear that contributions made by employers to public employee defined contribution plans are to be treated in the same way as other retirement benefits are treated under the Public Employee Retirement Benefits Forfeiture Act. This is a simple extension of the current law, which was enacted so that public employees who had misused public funds and taken bribes in the course of their employment could have their retirement benefits taken away if the court deemed such action appropriate.

#### ***For:***

The bill strengthens current law by mandating the forfeiture of public pensions rather than making it optional—at the discretion of the courts. As noted earlier, taxpayers are frustrated by stories of public corruption, and disillusionment with government is aggravated when

officials convicted of crimes committed while in office are allowed to continue to collect public pensions. Mandatory forfeiture would make the law consistent.

***Against:***

Critics say that courts have this discretion for a reason, and it is to protect the vested right a member or retirant has in a retirement benefit. When the Public Employee Retirement Benefits Forfeiture Act was first passed, mandatory forfeiture was rejected, and the discretion provided the courts was seen as a way of treating each case on its own merits, including the circumstances of the convicted public officials and any future beneficiaries, and taking into account other punishment meted out to the offender.

Additionally, some say, a retirant or member is being subjected to double jeopardy under the Act, by receiving punishment for the felony in terms of imprisonment, fines, or probation, and then being subject to forfeiture of retirement benefits.

***Response:***

Proponents say that the Act does not create double jeopardy because there is a separate hearing for forfeiture of retirement benefits. This separate hearing satisfies proper due process.

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