CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

The Agenda

Vol. XXXVI, No. 3 THE FLORIDA BAR Summer 2016

Florida Statutes Governing Police and Firefighter Pension Plans: A Historical Perspective

by Jim Linn and Glenn E. Thomas, Lewis Longman & Walker

Overview

Chapters 175 and 185 establish a revenue sharing program whereby participating local governments can receive a portion of the state excise tax on property and casualty insurance premiums collected in their jurisdiction to fund pension benefits for firefighters and police officers. Chapter 175 was originally enacted in 1939 to provide an incentive – access to premium tax revenues – to Florida cities to encourage them to establish retirement plans for firefighters. Fourteen years later, in 1953, Chapter 185 was enacted to provide a similar funding mechanism for municipal police officers. Special fire control districts became eligible to participate under Chapter 175 in 1993. Both chapters provide for the establishment of defined benefit retirement plans for firefighters and police officers, and set standards for operation and funding of those plans.

Currently more than 350 police and firefighter pension plans in Florida receive premium tax revenues pursuant to Chapters 175 and 185, Florida Statutes. These plans had nearly $12 billion in combined assets as of September 30, 2014. In 2015,

See "Florida Statutes," page 13

Chair's Report

by Jeannine S. Williams

Working in the City of St. Petersburg, I am extremely familiar with the importance of bridges. St. Petersburg residents recognize the importance of our many bridges for evacuation purposes, but the daily dependence on these same bridges can sometimes go unnoticed. This year, the City, County and Local Government Law Section will focus on building new bridges and further developing existing bridges to keep the various generations of local government lawyers connected.

We will create and implement a mentorship program to connect young lawyers with, shall we say, "seasoned" government lawyers. I have been a mentor to a number of elementary and high school students for more than a decade. It is mind boggling how much I learn from the relationships. As much life and work wisdom we have to give, we have much to learn about newer technologies and fresh perspectives on the law. I hope that when we contact you about this exciting program you will welcome the opportunity of a mutually beneficial relationship.

Most of you reading this newsletter are members of the Section. I am a PK (southern term for preacher's kid), but will resist preaching to the choir too much. Suffice it to say that there are many benefits to being a member. Take advantage of the gifts of the

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INSIDE:

CHAIR'S REPORT
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Local Government Law Desk Book, electronic mailing list (list serve), live CLEs, Facebook page updates, and this newsletter to utilize the resources of government lawyers who truly understand what you face on a daily basis.

I am excited to serve as chair of this great Section and grateful for the many past chairs who have served and continue to serve our Section. We have a great history of past leadership who remain actively involved. Our immediate past chair, Mark Moriarty, is a perfect example. After providing excellent leadership as chair, he is continuing to serve the Section by working on our website and list serve to assure connection among our members. The goal is that all government lawyers have the ability to tap into our great resources and legacy of leadership.

Feel free to contact me with your ideas and interest in serving the Section. I welcome your input. Additionally, there are plenty of opportunities to share your wisdom and lessons learned. Please contact Craig Leen regarding Agenda newsletter articles, David Miller regarding Florida Bar Journal articles and Amanda Coffey regarding Stetson Law Review articles. More information is available on our website - locgov.org and Facebook page (search locgov). I'm looking forward to crossing bridges with you all!

This newsletter is prepared and published by the City, County and Local Government Law Section of The Florida Bar.

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Changes to Regulations Governing Overtime Exemptions Are Coming!

by Benjamin W. Bard, Esq., and Gregory A. Hearing, Esq., Thompson, Sizemore, Gonzalez & Hearing, P.A., Tampa, Florida

Many employers are familiar with, and routinely utilize, a set of exemptions to the overtime requirements imposed by the Fair Labor Standards Act ("FLSA") commonly referred to as "white collar" exemptions, which cover certain executive, administrative, professional, outside sales and computer employees. The current regulations governing overtime compensation require employees who fall under these exemptions to be paid on a salary basis earning at least $23,660.00 per year or $455.00 per week.[1] On December 1, 2016, new regulations promulgated by the United States Department of Labor ("DOL") will take effect that will dramatically raise the salary level required to meet the salary basis necessary to classify employees as exempt from the overtime provisions of the FLSA.[2] Specifically, employees will have to be paid $47,476.00 per year or $913.00 per week to meet the required threshold and be considered overtime exempt.[3] Unlike the current regulations, which have remained static since their implementation, the new regulations contain an automatic mandate to update the salary amount necessary to qualify for "white collar" exemptions every three years.[4] These regulatory changes will affect millions of employees and cause substantial changes for employers, including state and local governments.[5] This article will discuss these changes and the options available to state and local governments.

The implementation of the new DOL regulations will require employers who currently rely on "white collar" exemptions to review their employees' wage classifications and consider whether changes will need to be made to them in order to achieve compliance with the new regulations, all the while maintaining a viable compensation structure for their organizations.[6] To provide a foundation for such a review, employers would be well-advised first to determine the potential cost of overtime for their salaried exempt employees under the new regulations and compare such costs with the coming increased salary requirement. To do so, employers will need to calculate their salaried employees' regular rate of pay and the corresponding overtime wage for any hours worked over forty in a workweek.

Generally, the regular rate of pay is determined by dividing the amount of compensation paid in a particular workweek by the number of hours an employee actually worked during the same week.[7] That regular rate must then be multiplied by one and a half to ascertain the proper wage to be paid for any overtime hours worked during that workweek.[8] The regular rate of pay cannot be set by the employer, and is dependent on the compensation received and hours worked by an employee in a particular week.[9] Where an employee is paid a salary for a set number of hours, however, the regular rate of pay is calculated by dividing the set number of hours into the employee's weekly salary.[10] Thus, to get an approximation of the cost of a currently-exempt employee's potential overtime compensation, an employer could divide the employee's weekly salary by the average number of hours that employee works and use that regular rate of pay to determine possible overtime wages. For example, if an employee is paid $600.00 per week for a weekly average of fifty hours, the regular rate of pay would be $12.00 per hour and the overtime hourly rate would be $18.00. Because the employee has already received straight-time pay intended as compensation for the fifty hours worked, the approximate additional overtime cost would be half-time pay for the ten hours worked in excess of forty, which totals $60.00.[11]

Having calculated overtime compensation which may be owed to employees under the new regulations, as well as having examined the hours actually worked by their employees, employers can then compare the cost of providing such compensation with other payment structures and decide the appropriate course of action for their organizations. For exempt employees whose compensation is close to the new salary threshold, it may make sense to raise their salaries to continue to take advantage of the exemption under which they are currently classified.[12] This is particularly so given that employees with higher salaries would have a correspondingly higher regular rate of pay and, consequently, higher overtime compensation in the event they routinely work over forty hours in a workweek. For exempt employees with lower salaries, the more prudent solution may be to reclassify those employees as non-exempt and pay them on an hourly basis. Such reclassification, however, would require recording employees' hours and choosing between multiple options, or a combination of those options, to accommodate the potential overtime cost which could result from the new regulations.[13] For example, employers may decide to more tightly control authorization of overtime, reapportion work among employees to avoid the need for overtime, reduce hours for nonexempt employees, or simply accept the new cost and pay overtime compensation for additional hours worked by its employees. When making this decision, employers should also keep in mind potential reaction from employees, who, despite being newly eligible for overtime compensation, may view the transition of their compensation from a salary basis to an hourly basis as a demotion or obstacle to their professional development. In such event, a loss of employee morale could lead to recruitment and retention challenges.

In addition to raising salaries, revising overtime policies, or reclassifying employees as nonexempt, the

continued, next page

regulations governing the FLSA allow employers to pay an employee with fluctuating hours on a salary basis where there is an understanding that the employee will be paid that salary for all hours worked.[14] In order to implement such a pay structure, however, the salary received by the employee must be an amount that provides the employee with compensation in excess of the applicable minimum wage.[15] Employees must also receive additional compensation for overtime hours worked, but that compensation is paid at a rate of one half the employee's regular rate of pay, rather than the time and a half rate typically applied to calculate overtime compensation.[16] In light of that limitation on overtime compensation and the retention of pay on a salary basis, this may be a palatable solution for both employer and employee.

Moving beyond potential solutions common to all employers, there are a few solutions to this problem which are available only to state and local governments. In particular, public employers are allowed to compensate employees for overtime hours worked through compensatory time rather than monetary payment. The FLSA "provides an element of flexibility to State and local government employers and an element of choice to their employees or the representatives of their employees regarding compensation for statutory overtime hours."[17] In order to utilize this payment structure, however, the compensatory time provided to an employee in place of monetary payment "must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work."[18] There must also be an agreement or understanding between the employer and employee, either through collective bargaining or individually, to the substitution of compensatory time for overtime pay.[19] When dealing with individual employees, the agreement does not have to be in writing, but there must be some record of its existence.[20] "An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay."[21] The effect of such a notice is to create a presumed agreement or understanding, so long as the affected employee makes no objection to the use of compensatory time to meet overtime pay obligations.[22] The employer, in its sole discretion, may pay overtime compensation in cash, even if there is an agreement or understanding between employer and employee to substitute compensatory time of case overtime compensation.[23]

The use of compensatory time in this manner is limited to 240 accrued hours for employees not engaged in public safety activity and 480 accrued hours for those employees who are engaged in public safety activity.[24] As a condition to using compensatory time in this manner, employers are required to grant that time to an employee within a "reasonable period," which is determined on a case-by-case basis considering factors such as "(a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (a) the availability of qualified substitute staff."[25] An employer may, however, deny a request for time off where it would be "unduly disruptive," which means that the employer must "in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services."[26]

State and local governments should also keep in mind that the new regulations do not change the exclusion from overtime requirements of elected officials, members of those officials' personal staff, employees of state and local legislative branches, as well as "officials in policymaking positions who are selected or appointed by the elected public officials and certain advisers to such officials."[27] In order to qualify for this exclusion, however, employees cannot be employed under civil service laws utilized by their agency or governmental entity employer.[28] Some of these employees may also fall under the category of "highly-compensated" employees, who, under the new regulations, will be exempt from the overtime provisions of the FLSA if they earn a salary in excess of $134,004.00 per year.[29]

The new regulations also do not affect the statutory and regulatory provisions which allow for complete exemption of public employees "employed in fire protection activities [or] law enforcement activities" for public agencies with less than five employees, as well as a partial exemption for fire protection or law enforcement employees paid on a "work period" basis.[30] The partial exemption allows governmental agencies to pay those public safety employees based on a work period of not less than seven and not more than twenty-eight days and avoid overtime compensation until the employee works in excess of a set number of hours. Fire protection employees can work 212 hours in twenty-eight days before overtime compensation must be paid.[31] Law enforcement employees can work 171 hours in the same period without any required overtime pay.[32] For purposes of work periods shorter than twenty-eight days, the number of hours an employee can work before incurring overtime is proportional to the length of the work period and in the same ratio as the maximum amount for twenty-eight-day work periods.[33] To facilitate that calculation, the DOL has provided a ratio of 7.57 hours per day for fire protection employees and 6.11 hours per day for law enforcement employees.[34] When considering the utility of these exemptions, it is important to note that they apply only to those employees actually engaged in fire protection or law enforcement and not to "civilian" employees or support staff.[35]

Considering these options and conducting a detailed and fact-intensive review of pay policies and employee classifications ahead of the implementation of the new DOL overtime regulations will be a difficult task for any employer. The budgetary concerns of public agencies make such a process even more challenging. In light of the potential for costly litigation over particular employees' exempt status or an investigation by the DOL regarding the application of exemptions throughout a particular work unit, state and local governments should make a special effort

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CHANGES
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to ensure compliance, paying particular attention to the exceptions, exemptions and exclusions provided specifically for them under the FLSA.

***Gregory A. Hearing** is a shareholder at Thompson, Sizemore, Gonzalez & Hearing, P.A. He has practiced management labor and employment law for his entire career representing local and national management clients in a variety of matters before courts, arbitrators and state and federal administrative agencies.*

***Benjamin W. Bard** is an associate at the same firm. His practice is in representation of both public and private sector employers in all matters related to labor and employment law.*

Endnotes:

1 See 29 C.F.R. § 541.600(a).

2 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 80 Fed. Reg. 32,405 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541).

3 Id.

4 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 80 Fed. Reg. at 32,505.

5 Although the DOL originally proposed altering the standards related to duties which must be performed in order to qualify as exempt, the final rule contains no such alterations. As such, the focus in this article is on potential responses to the increased salary threshold.

6 The DOL has issued its own guidance for state and local governments. See United States Department of Labor, *Overtime Final Rule and State and Local Governments*, http://www.dol.gov/sites/default/files/overtime-government.pdf.

7 29 C.F.R. § 778.113(a).

8 29 U.S.C. § 207(a)(1); 29 C.F.R. §§ 778.107, 778.13(a).

9 See 29 C.F.R. § 778.108.

10 29 C.F.R.§ 778.113

11 In the event that such a salaried employee works overtime hours beyond those for which the salary is intended to compensate, additional pay for those hours would be required at the full overtime rate of one and a half times the regular rate. See 29 C.F.R.§ 778.113.

12 The new overtime regulations also allow for the inclusion of nondiscretionary bonuses, incentive payments, and commissions to calculate whether an employee meets the salary level requirement. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 80 Fed. Reg. at 32,423.The current regulations do not allow such payments to be included in an employee's salary for purposes of determining exempt status.

13 For nonexempt employees, employers must retain records of, among other things, an nonexempt employee's work hours, workweek, regular rate of pay, straight-time earnings, and overtime compensation. See 29 C.F.R. § 516(2).

14 29 C.F.R. § 778.114(a).

15 Id.

16 Id.

17 29 C.F.R. § 553.20.

18 Id.

19 29 U.S.C. § 207(o)(2)(A).

20 29 C.F.R. 553.23(c)(1).

21 29 C.F.R. 553.23(c)(1).

22 Id.

23 See 29 C.F.R. § 553.26(a).

24 29 U.S.C. § 207(o)(2)(B).

25 29 C.F.R. 553.25(b)-(c).

26 29 C.F.R. § 553.25(d).

27 29 C.F.R. §§ 553.11(a), 553.12(a).

28 29 C.F.R. § 553.11(c).

29 Employees who receive at least this salary amount are deemed exempt if they "customarily and regularly perform any one or more of the exempt duties or responsibility of an executive, administrative or professional employee . . . ." 29 C.F.R. § 541.601(a).

30 See 29 U.S.C. §§ 207(k), 213(b)(20).

31 29 U.S.C. §§ 207(k); 29 C.F.R. § 553.201.

32 Id.

33 29 C.F.R. § 553.230(a)-(b).

34 29 C.F.R. § 553.230(c).

35 See 29 C.F.R. §§ 553.210, 553.211.

2016–2017 CALENDAR

CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

October 20 – 21, 2016
- **42nd Annual Public Employment Labor Relations Forum**

Rosen Shingle Creek, Orlando

October 20, 2016
- **Executive Council Meeting**

Rosen Shingle Creek, Orlando

January 26, 2017
- **The Florida Bar Winter Meeting**
- **Executive Council Meeting**

Gaylord Palms, Orlando

May 11, 2017
- **City, County and Local Government Law Certification Review Course**
- **Public Finance in Florida 2017**
- **Executive Council Meeting**

Caribe Royale, Orlando

May 12, 2017
- **40th Annual Local Government Law in Florida Annual Meeting**

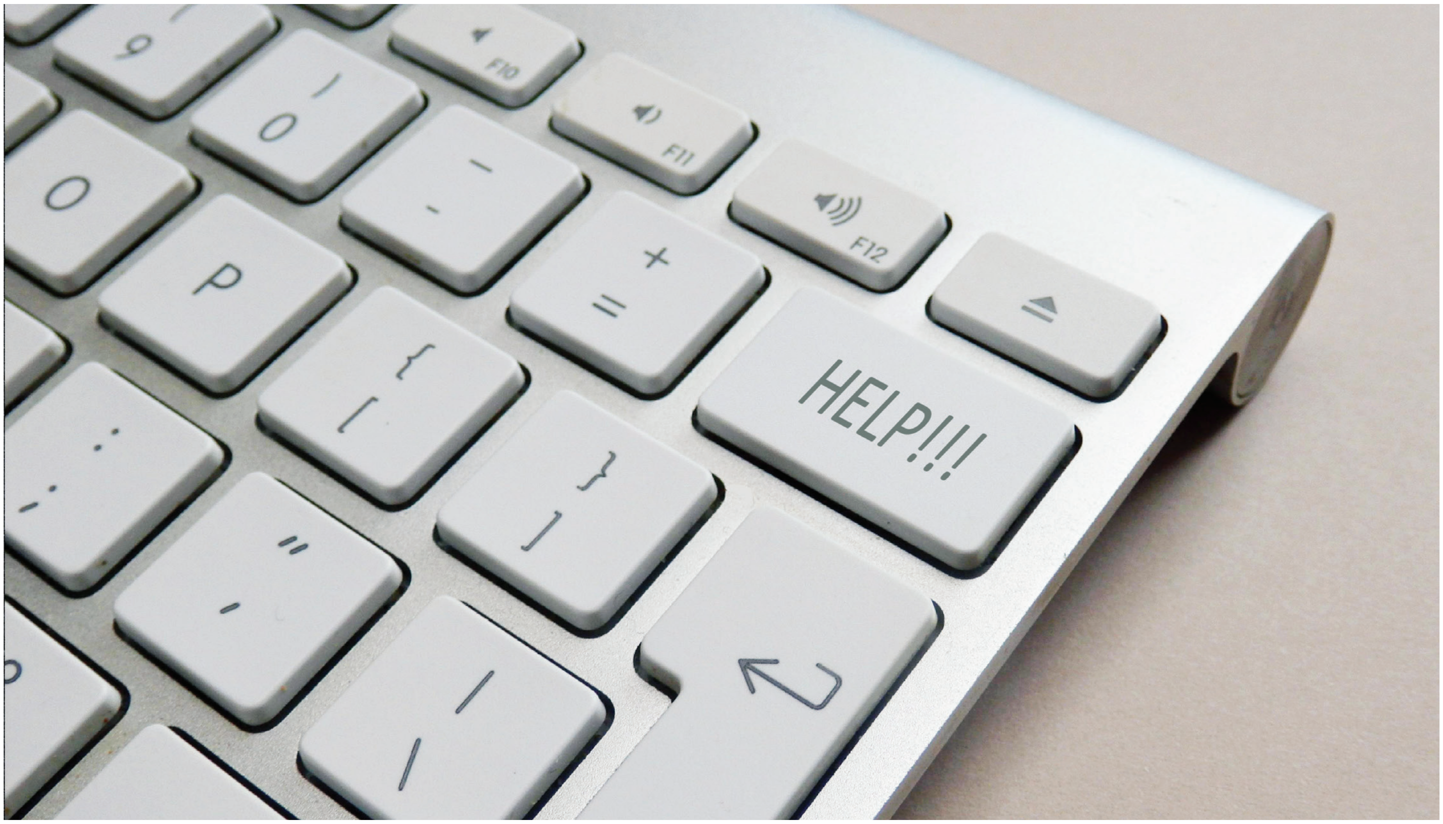
Caribe Royale, Orlando

May 13, 2017
- **40th Annual Local Government Law in Florida**

Caribe Royale, Orlando

June 23, 2017
- **Executive Council Meeting – The Florida Bar Annual Convention**

Boca Raton Resort & Club



The Practice Resource Institute

The Florida Bar's most comprehensive resource for running your law practice.

The Florida Bar's Practice Resource Institute is designed to help Florida lawyers with law office operations and to assist members' use of technology. This new digital resource is available on The Florida Bar's website, where members can:

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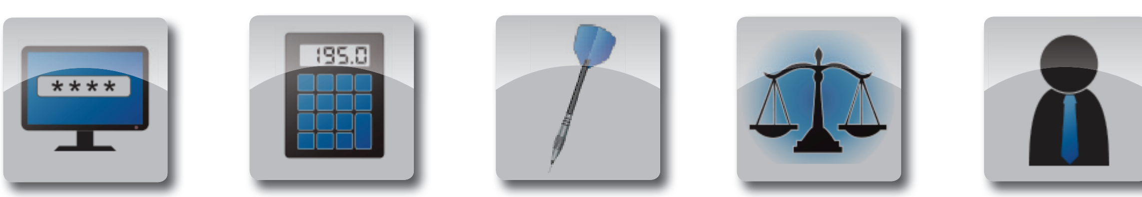

Technology | Finance | Marketing | New Practice | Management

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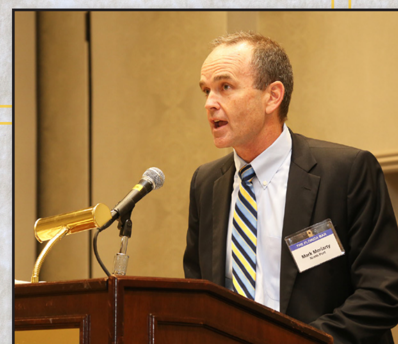
Luncheon

Secretary/Treasurer Robert Teitler and wife Marlene

City, County and Local Government Law Section – Annual Meeting

Award Winner Marion Radson



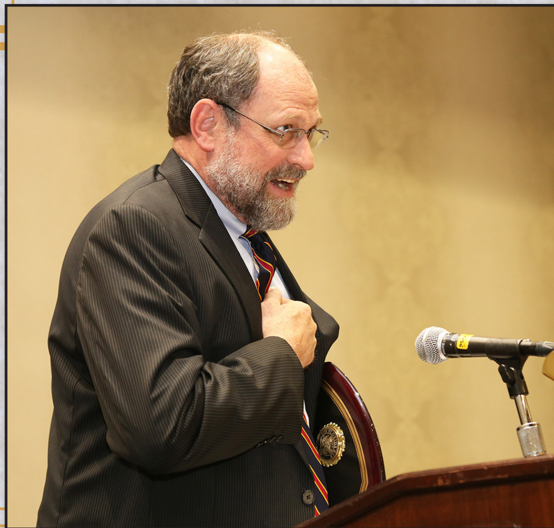
Chair Mark Moriarty

Paul S. Buchman Award Winner Grant Alley

Chair Service Award Winner Andrew Lannon

Chair Service Award Winner Craig Leen

H. Hamilton “Chip” Rice, Jr. Award Winner,
Herbert “Herb” W.A. Thiele



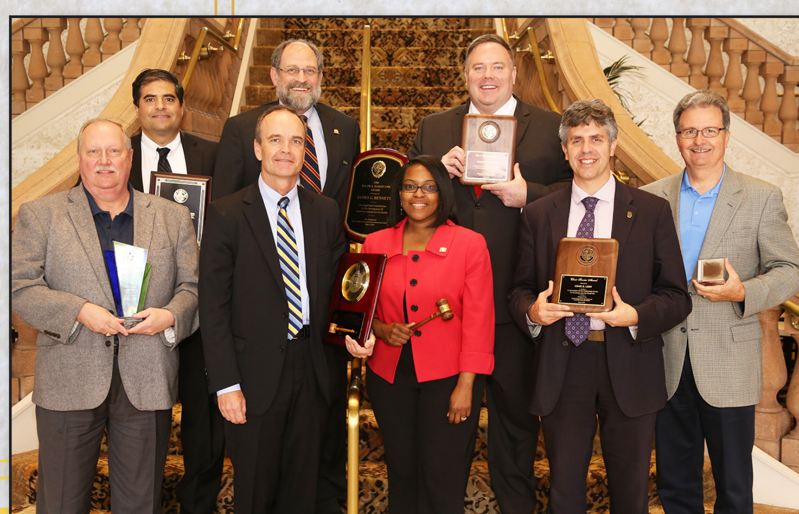
James Bennett, Winner of the Ralph A. Marsicano Award

Ralph A. Marsicano Award, presented by Susan Churuti to James Bennett

Chair-elect Jeannine Williams

Chair Award to Mark Moritarty by Jeannine Williams

"Passing the Gavel" Chair Mark Moritarty to Char-elect Jeannine Williams



Award Winners

The Florida Bar Continuing Legal Education Committee, the City, County and Local Government Law Section and the Labor and Employment Law Section present the

42nd Annual Public Employment Labor Relations Forum

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

October 21-22, 2016

Rosen Shingle Creek
9939 Universal Blvd.
Orlando, FL
407/996-9939

Course No. 2246R

Schedule of Events

Friday, October 21, 2016

10:30 a.m. – 11:00 a.m.
Late Registration

11:00 a.m. – 11:10 a.m.
Welcome
Glenn E. Thomas, Program Chair, Tallahassee

11:10 a.m. – 12:00 p.m.
Public Employment Relations Commission (PERC) Trends and Hot Topics
Gregg Morton, Hearing Officer, PERC, Tallahassee
William Salmon, Hearing Officer, PERC, Tallahassee

12:00 p.m. – 12:50 p.m.
Title VII and the Florida Civil Rights Act (FCRA) – Issues and Trends
Robert Sniffen, Sniffen & Spellman, Tallahassee

12:50 p.m. – 1:45 p.m.
Lunch (Included in Registration)

1:45 p.m. – 2:35 p.m.
Collective Bargaining Update
David Miller, Bryant Miller Olive, Miami

2:35 p.m. – 3:25 p.m.
Who's the Boss? Employee vs Independent Contractor
Andy Hament, Ford and Harrison, LLP, Melbourne

3:25 p.m. – 3:35 p.m.
Break

3:35 p.m. – 4:25 p.m.
Federal 11th Circuit and Florida Public Sector Update
J. Evan Gibbs, Constangy, Brooks, Smith and Prophets, LLP, Jacksonville

4:25 p.m. – 5:15 p.m.
Special Magistrate Overview and Update
Panel: Robert Moberly, Arbitrator/Mediator/Special Magistrate, Moderator
Richard Siwica, Egan Lev & Siwica PA and
Jennifer Cowan, Lewis, Longman and Walker, PA

5:20 p.m. – 6:30 p.m.
Section Meetings (All Members Welcome)

6:30 p.m. – 7:30 p.m.
All Members' Reception (Included in Registration)

Saturday, October 22, 2016

8:40 a.m. – 8:45 a.m.
Welcome
Glenn E. Thomas, Program Chair, Tallahassee

8:45 a.m. – 9:35 a.m.
Do's and Don'ts in Hearing, Arbitration and Mediation
Panel: Mike Mattimore, Allen Norton & Blue, PA and
Andrew Axelrad, General Counsel, Dade County PBA

9:35 a.m. – 10:25 a.m.
Police and Firefighter Investigations
Erin Jackson, Thompson, Sizemore, Gonzalez & Hearing, PA, Tampa

10:25 a.m. – 10:35 a.m.
Break

10:35 a.m. – 11:25 a.m.
FRS and Pension Update
Glenn E. Thomas, Lewis, Longman & Walker, PA

11:25 a.m. – 12:15 p.m.
Sunshine Law and Public Records: "Ethical Considerations for Labor & Employment Law Practitioners"
Patricia Gleason, Attorney General's Office, Tallahassee

CITY, COUNTY & LOCAL GOVERNMENT LAW SECTION

Jeannine Williams, St. Petersburg — Chair
Robert L. Teitler, Ft. Lauderdale — Chair-elect

LABOR AND EMPLOYMENT LAW SECTION

Leslie W. Langbein, Miami Lakes — Chair
Zascha Blanco Abbott, Miami — Chair-elect
J. Ray Poole, Jr., Jacksonville — Legal Education Director

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Evett Louise Simmons, Port Saint Lucie, Chair
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FACULTY & STEERING COMMITTEE

Glenn E. Thomas, Tallahassee — Program Co-Chair
Gregg Morton, Tallahassee — Program Co-Chair

CLE CREDITS

CLER PROGRAM

(Max. Credit: 11.0 hours)
General: 11.0 hours   Ethics: 1.0 hour

CERTIFICATION PROGRAM

(Max. Credit: 11.0 hours)
City, County & Local Government: 11.0 hours
Labor & Employment Law: 4.0 hours
State & Federal Gov't & Administrative Practice: 11.0 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

Registration

REFUND POLICY: A $25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. Registrants who do not notify The Florida Bar by 5:00 p.m., October 17, 2016 that they will be unable to attend the seminar, will have an additional $135 retained. Persons attending under the policy of fee waivers will be required to pay $135.

HOTEL RESERVATIONS: A block of rooms has been reserved at the Rosen Shingle Creek Hotel, at the rate of $189 single/double occupancy. To make reservations, call the Rosen Shingle Creek directly at 1-866-996-6338. Reservations must be made by 9/29/16 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

Register me for the "42nd Annual Public Employment Labor Relations Forum" Seminar

ONE LOCATION: (314) ROSEN SHINGLE CREEK (October 21-22, 2016)

TO REGISTER OR ORDER AUDIO CD, DVD OR COURSE BOOKS BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

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REGISTRATION FEE (CHECK ONE):

❑ Member of the City, County and Local Government Law Section or the Labor and Employment Law Section: $385
❑ Non-section member: $425
❑ Full-time law college faculty or full-time law student: $280
❑ Persons attending under the policy of fee waivers: $135

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

METHOD OF PAYMENT (CHECK ONE):

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Name on Card: ______________________________ Billing Zip Code: ______________________________

Card No. ____

❑ Enclosed is my separate check in the amount of $35 to join the City, County and Local Government Law Section. Membership expires June 30, 2017.

❑ Enclosed is my separate check in the amount of $40 to join the Labor and Employment Law Section. Membership expires June 30, 2017.

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

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+ TAX $______ TOTAL $ _______

❑ DVD (2246D)
(includes Electronic Course Material)
$435 plus tax (section member)
$475 plus tax (non-section member)
+ TAX $______ TOTAL $ _______

more than $147 million in premium tax revenues was distributed to local firefighter and police pension plans pursuant to Chapters 175 and 185. Funding for police and firefighter pension plans established pursuant to Chapters 175 and 185 comes from four main sources:

1. Earnings on pension fund investments. Investment earnings are the largest source of funding for police and firefighter pension plans.
2. Premium tax – the net proceeds from the state excise tax on premiums paid for property insurance (for firefighter pensions) and casualty insurance (primarily automobile insurance, for police pensions), based on the taxes collected in each participating city and district.
3. Employee contributions – typically set in the plan as a fixed percentage of pay, generally ranging between 1% and 11% of employee compensation. Many plans provide for employer "pick-up" of employee contributions, which allows for contributions to be made in pre-tax dollars.
4. Employer contributions – by law, the local government plan sponsor is ultimately responsible for all pension plan assets and liabilities, and is required to fund employee pension plans on a sound actuarial basis. Art. X, Section 14, Fla. Constitution; Sec. 112.66(8), F.S. This means the local government must annually pay the difference between total required contributions as determined by an actuary, and the sum of all the other contributions. Employer contributions can vary widely from year to year based on investment performance, payroll changes, unanticipated retirements, inflation and changes in actuarial assumptions.

To qualify for premium tax revenues, local pension plans must meet the applicable requirements of Chapters 175 and 185. Responsibility for overseeing and monitoring these plans lies with the Division of Retirement, but day-to-day operational control rests with local boards of trustees.

There are two types of pension plans described in Chapters 175 and 185: "chapter plans" and "local law plans." Chapter plans adopt or incorporate by reference the specific provisions of the chapters. Local law plans, on the other hand, meet certain minimum requirements in the law, but may vary significantly from the chapter plan requirements in numerous respects. Many local law plans provide benefits that, in the aggregate, substantially exceed the chapter minimums, but may not meet each and every minimum benefit or standard applicable to chapter plans. The overwhelming majority of police and fire pension plans in Florida are local law plans (there are currently more than 350 local law plans, compared to fewer than 17 chapter plans).

1986 Amendments and Subsequent Legal Challenges

In 1986 the Legislature completely revised Chapters 175 and 185, F.S., in Chapters 86-41 and 86-42, Laws of Florida. In revising both chapters, the Legislature attempted to clarify its intent to protect pension funds and to establish minimum standards for operation and funding of plans by adding a legislative declaration of intent in Sections 175.021 and 185.02:

> Therefore, the Legislature declares that it is a proper and legitimate state purpose to provide a uniform retirement system for the benefit of police officers as hereinafter defined, and intends, in implementing the provisions of s. 14, Art. X of the State Constitution as they relate to municipal police officers' retirement trust fund systems and plans, that such retirement systems or plans be managed, administered, operated, and funded in such manner as to maximize the protection of police officers' retirement trust funds. This chapter hereby establishes minimum standards for the operation and funding of municipal police officers' retirement trust fund systems and plans.

Local governments challenged the constitutionality of the 1986 amendments. The First District Court of Appeal affirmed the trial courts' determination that the 1986 law did not violate the constitution, stating in relevant part:

> Chapters 175 and 185 create a purely voluntary program whereby municipalities may receive state-collected taxes, imposed on property and casualty insurance premiums, with which to fund retirement programs for local police and firefighters. In exchange for receipt of these funds, the Legislature has established certain criteria under which the funds must be operated and managed. The cities may opt into or out of such plans at their discretion. As the program is not mandatory as to any cities' participation, we find nothing that renders the amended statutes to be facially unconstitutional.

In November 1986, the Department of Insurance – the agency then charged with administering Chapters 175 and 185 – proposed a number of new rules to implement the statutes amended by the 1986 legislation. The rules essentially applied all the minimum requirements contained in Chapters 175 and 185 to both chapter plans and local law plans. The validity of these rules was also challenged by the Florida League of Cities and others. A hearing officer upheld the validity of all but two of the proposed rules.

On appeal, the hearing officer's ruling was reversed. Florida League of Cities v. Department of Insurance, 540 So.2d 850 (Fla. 1st DCA 1989), rev. denied, 545 So. 2d 1367 (Fla. 1989). The First District Court of Appeal reviewed each section of the statutes, and found that some sections were expressly applicable to all plans, while other sections were silent as to their applicability. The court concluded that

> Had the Legislature intended that all minimum standards and procedures set forth in Chapter 175, including those silent as to local law plans, be applied to such local plans, it most assuredly would have expressly said so.

The First District Court of Appeal held that most of the proposed rules were invalid because the provisions in Chapters 175 and 185 governing chapter plans were not expressly applicable to local law plans, and

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thus did not preempt municipal home rule powers with respect to local law plans.

Enforcement Activity and Legislation after the League of Cities Case

In 1990 and 1991, the Department of Insurance withheld premium tax revenues from a number of cities because, in the Department's view, the cities' pension plans did not comply with various provisions of Chapters 175 and 185. These cases were eventually settled, and the Department continued to distribute premium tax funds to local law plans with the understanding that the disputed issues would be better resolved through rulemaking. Several rule workshops were held, but the Department did not initiate rulemaking.

In 1993, state oversight of local police and fire pension plans was transferred to the Division of Retirement. The Division withheld premium tax revenues from a number of local law plans in 1995, asserting the plans did not comply with various provisions of Chapters 175 and 185. Several cities challenged the Division's action through the administrative hearing process. The hearing officer ruled in favor of the cities, and directed the Division to release the premium tax monies and pay the cities' attorney's fees. The following year the Division of Retirement supported legislation developed by police and fire unions to rewrite Chapters 175 and 185.

State police and fire unions, with support from the Division of Retirement, pushed for the pension law rewrite in 1996 and 1997, and finally obtained passage of a bill in 1998. The 1998 legislation was vetoed by Governor Chiles, primarily because of internal inconsistencies in the bill. Despite continued heavy opposition from local governments, the bill was revised and passed early in the 1999 session, and codified as Chapter 99-1, Laws of Florida.

1999 Legislation

Chapter 99-1, Laws of Florida was the first bill signed into law by Governor Bush. The 132 page bill significantly amended Chapters 175 and 185. Prior to the 1999 law, cities were largely free to bargain with local police and fire unions, or provide for their non-unionized police and firefighters, the pension benefits that best fit the priorities and needs of the city and its police officers and firefighters. The 1999 law made virtually all provisions of Chapters 175 and 185 expressly applicable to local law plans. The intent of the new law was clearly expressed in Sections 175.021(2) and 185.01(2) as follows:

> This chapter hereby establishes, for all municipal and special district pension plans now or hereinafter provided for under this chapter, including chapter plans and local law plans, minimum benefits and minimum standards for the operation and funding of such plans, hereinafter referred to as firefighters' [police officers'] retirement trust funds. The minimum benefits and minimum standards set forth in this chapter may not be diminished by local charter, ordinance, or resolution or by special act of the Legislature, nor may the minimum benefits or minimum standards be reduced or offset by any other local, state, or federal plan that may include police officers in its operation, except as provided under s. 112.65.

The 1999 law required cities to comply with specific "minimum benefit" and "extra benefit" standards to be eligible for premium tax revenues. The new law also contained a number of new requirements for plan administration and funding. The law mandated compliance with the minimum and extra benefit requirements only to the extent of additional premium tax revenues received after 1998 (i.e., revenues in excess of the 1998 amount). Those cities found not to be in compliance with the new law would have future premium tax revenues withheld.

"Extra Benefits" – Chapter 99-1 also required that all premium tax revenues be used in their entirety to provide extra benefits to firefighters and police officers. "Extra benefits" were defined as benefits in addition to or greater than the statutory minimums and benefits provided to general employees. However, local law plans in effect on October 1, 1998 were required to comply with the extra benefit provision only <u>after</u> the minimum benefit standards were satisfied, and then only to the extent that "subsequent additional premium tax revenues" became available.

As interpreted by the Division of Retirement, premium tax revenues in excess of the 1999 amount had to be used to provide extra benefits, regardless of whether the plan already provided substantial benefits above the statutory minimums and regardless of the financial condition of the plan.

Effects of the Great Recession of 2007-2010

For several years beginning in 2007, Florida cities and districts faced an extremely challenging combination of declining revenues and increasing costs. One of the largest and fastest growing costs facing local governments was the cost of employee pension plans. Florida law requires that public employee pension benefits be funded on a sound actuarial basis. Employers generally must contribute an amount determined by the plan's actuary, based on the following:

- The value of promised benefits
- Allocated over 30 years
- Actuarial assumptions (salary increase, rate of return, mortality, etc.)

Because the majority of pension funding is assumed to come from investment earnings as opposed to contributions, one of the most important assumptions is the rate of return on the investment of plan assets. Before the recession, most public pension plans assumed a rate of return of 8.0% or more. If this assumption was not met, actuarial losses usually resulted, leading to an increase in unfunded actuarial liabilities and increased contributions. Because the level of employee contributions is fixed, employer contributions must necessarily increase.

Most public pension plans had investment losses of between 10% and 15% for the year ending

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September 30, 2008, and had modest investment gains for the year ending 9/30/09. Actuaries typically employ a five-year "smoothing" technique to soften the effects of significant actuarial losses resulting from investment shortfalls. Because of the smoothing, most plans had to achieve an investment return of 11% or 12% for each of the five years following 2008 to avoid further actuarial losses. This did not happen for many plans, and significant increases in unfunded liability and employer contributions ensued.

Plan sponsors looking for ways to reduce pension costs started to understand one of the main problems with Chapters 175 and 185. Because of the restrictive nature of Chapters 175 and 185, it was difficult, if not impossible, to enact any cost-saving measures even when agreed to by the unions. Many of the most obvious methods of reducing pension costs were nearly impossible to implement. For instance, the only way to increase employee contributions was to do so with approval of the union and in conjunction with a benefit increase. As a result, employers were unable to share the burden of increasing pension costs with their employees.

Moreover, plan sponsors could not access premium tax revenues over the frozen amount or "excess premium tax reserves" to reduce the cost of benefits (even costs associated with previously implemented "extra benefits") without implementing even more extra benefits, which would result in even more additional costs to be borne by the plan sponsor. And if a local government attempted to reduce any pension benefit below what was in place in 1999, or join the Florida Retirement System, it would become ineligible for all future premium tax revenues.

2012 "Naples Letter"

In 2012 the City of Naples implemented pension reform for its police officers. The police union agreed to the pension reform effort. As part of the reform, pension benefits were reduced prospectively to below the 1999 level. The Division of Retirement informed the city that as a result of the benefit reductions it would no longer be eligible for Chapter 175 and 185 premium tax revenues – more than $500,000 per year. Naples Mayor John Sorey wrote a letter to Governor Scott questioning the Division of Retirement's interpretation.

In August 2012 the Florida Division of Retirement issued a letter to the City of Naples concerning the City's eligibility for future premium tax revenues under Chapter 185. The Naples letter reflected a significant change in the Division's longstanding position concerning a city's eligibility to receive premium tax revenues. The Division had taken the position for many years that if a city reduced any pension benefit below the statutory minimum benefits or below the plan benefits in effect in 1999, the city would be ineligible for future premium tax revenues. In the Naples letter, the Division of Retirement acknowledged that its prior interpretation "appears inaccurate." The letter stated that for local law plans in effect on October 1, 1998, chapter minimum benefits must be provided only to the extent they can be funded with premium tax revenues in excess of the amount received for 1997. Once there are sufficient additional premium taxes to fund the chapter minimum benefits, any subsequent additional premium tax revenues must be used to provide extra benefits. In essence, the new interpretation allowed cities to provide benefits below the chapter minimums and below the benefits in effect in 1999, if there are insufficient additional tax revenues to fund extra benefits.

The Naples letter resulted in many cities implementing pension reform measures that would not have been possible under the Division of Retirement's prior interpretation. Police and firefighter unions immediately embarked on a campaign to revise Chapters 175 and 185, to nullify the Naples letter.

2015 Legislative Changes

After unsuccessful attempts to enact legislation amending Chapters 175 and 185 in 2013 and 2014, police and firefighter unions achieved their goal in 2015 with the enactment of Senate Bill 172. SB 172 contained completely new rules for the use of premium tax revenues, as well as an option for deviation from the rules by mutual consent of the city/special district and the union representing the affected employees (or a majority of plan members if there is no union). The revisions in SB 172 marked the most significant changes to Chapters 175 and 185 since 1999.

Premium Tax Revenues – Default Rules: SB 172 established new default rules for the use of premium tax revenues. These rules governed the manner in which all premium tax revenues were to be allocated. Effective October 1, 2015 for plans where collective bargaining does not apply, or upon entering into a collective bargaining agreement on or after July 1, 2015 where collective bargaining does apply, premium tax revenues were to be applied as follows:

- "Base premium tax revenues" means, for plans in effect on October 1, 2003, the amount received for calendar year 2002 and distributed in 2003. For plans created between October 1, 2003 and March 15, 2015, base premium tax revenues means the tax collections during the second year of participation. Base premium tax revenues must be used to fund the chapter minimum benefits (same as current minimums except the minimum multiplier is increased from 2.0% to 2.75%), or benefits in excess of the minimums, as determined by the city or special district. In other words, base premium tax revenues may be used to reduce city/district pension contributions.
- Premium tax revenues above the 2002 amount up to the amount received for calendar year 2012 (distributed in 2013) must be used to fund benefits in excess of the minimum benefits. In most cases, the amount of premium tax revenues received in 2013 may be used to reduce city/district pension contributions (subject to confirmation by the plan actuary that the value of benefits provided above the statutory minimums exceeds the difference between the 2003 and 2013 amounts).
- Premium tax revenues above the 2012 amount: 50% must be used

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to fund minimum benefits or benefits in excess of the minimums as determined by the city or special district (i.e., reduce city/district contributions); and 50% must be placed in a defined contribution "share plan" to provide additional benefits to police officers and firefighters.

- Any accumulations of premium tax revenues that have not been applied to fund benefits in excess of the minimum benefits (i.e., excess reserve amount): 50% must be used to fund the share plan, and 50% must be applied to reduce the unfunded actuarial liabilities of the plan. Any amount in excess of the amount required to fund unfunded actuarial liabilities must be used to fund special benefits.
- For pension plans created after March 1, 2015, 50% of the premium tax revenues must be used to fund defined benefits, and 50% must be used to fund defined contribution benefits.

Deviation from the Default Rules by Mutual Consent – The above default rules may be modified by mutual consent of the city/special district and the union representing the affected employees (or a majority of plan members if there is no union) as long as the plan continues to meet the minimum benefits and standards of Chapters 175 and 185. A mutually agreed deviation could include the use of future premium tax revenues, as well as accumulations of past premium tax revenues that have not been applied to fund benefits in excess of the minimum benefits. A mutually agreed deviation could be made if a plan did not meet the minimum benefits as of October 1, 2012, as long as the same level of minimum benefits is maintained. An existing arrangement for the use of premium tax revenues in a special act plan or a plan in a "supplemental plan municipality" (defined as a city with a supplemental plan in place as of December 1, 2000) is considered to be a mutually agreed deviation. A mutually agreed deviation must continue until modified or revoked by subsequent mutual consent.

Benefit Reduction – benefits in excess of the minimum benefits (excluding any supplemental plan benefits in effect on September 30, 2014) may be reduced as long as the plan continues to meet the minimum benefits and standards in Chapters 175 and 185. However, if benefits are reduced the amount of premium tax revenues that were previously used to fund the benefits in excess of the minimums before the reduction must be used as follows: 50% to fund minimum benefits or benefits in excess of the minimums as determined by the city or special district; and 50% must be placed in a defined contribution plan. However, no benefits can be reduced if the plan does not meet the new 2.75% minimum multiplier before the reduction.

Grandfather Clause – Prior to 2015, many cities and special districts obtained an opinion letter from the Division of Retirement concerning the use of premium tax revenues to fund minimum benefits. Those cities relied on this interpretation (referred to commonly as the "Naples letter," after the first city to receive it) in plan funding and restructuring of plan benefits. As a result, SB 172 provides that a city or special district that implemented or proposed changes to a local law pension plan based on the Division of Retirement's interpretation of Chapters 175 and 185 (the Naples Letter) on or after August 14, 2012 and before March 3, 2015, may continue such changes in effect until the earlier of October 1, 2018 or the effective date of a collective bargaining agreement that modifies the changes. The city or special district's reliance on the Division of Retirement's interpretation would have to be evidenced by a letter from the Division, or a collective bargaining agreement or proposal dated before March 3, 2015.

Defined Contribution "Share Plan" – Cities and special districts with a Chapter 175 or 185 defined benefit pension plan must also establish a defined contribution "share plan" component effective October 1, 2015 for non-collectively bargained plans, or upon entering into a collective bargaining agreement on or after July 1, 2015. The share plan may or may not receive any funding, depending on the application of other provisions in the bill relating to the use of premium tax revenues.

"Deemed to Comply" Status – To be eligible to receive an annual distribution of premium tax revenues, a city/district generally must comply with the minimum benefits and standards set forth in Chapters 175 and 185. However, sections 175.351(2) and 185.35(2) state: "Local law plans created by special act before May 27, 1939, are deemed to comply with this chapter." The deemed to comply provision was retained in the 2015 legislation.

There are no reported cases concerning a local government's ability to make changes to a "deemed to comply" pension plan that are inconsistent with the requirements of Chapters 175 and 185. However, the Division of Retirement has recognized that pension plans in four cities satisfy the "deemed to comply" criteria: Miami, Miami Beach, Coral Gables and Jacksonville. In letters to each of these cities, the Division has approved plan changes that were inconsistent with the requirements of Chapters 175 and 185. In a 2012 letter confirming the "deemed to comply" status of the City of Jacksonville police and fire pension fund, the Division of Retirement noted that the statutes "appear to provide great deference to such plans."

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