

94-411 MAINE STATE RETIREMENT SYSTEM

CHAPTER 410 RETIREES RETURNING TO EMPLOYMENT AFTER  
RETIREMENT WITH THE SAME EMPLOYER

SUMMARY: This Chapter addresses the requirements and procedures that govern MainePERS retirees who return to employment after retirement with the same employer, as that term is defined in the rule.

1. **Effective date.** Except as otherwise specifically provided in a particular provision of this rule, the effective date of the rule is May 3, 2004.
2. **Definitions.** For purposes of this Chapter, the following terms are defined as follows:
  1. **“Normal Retirement Age.”** “Normal Retirement Age” means the age, years of service or combination of age and years of service at which a MainePERS member is eligible for service retirement benefits that are not subject to reduction.
  2. **“MainePERS employer.”** “MainePERS employer” means the State of Maine, each Maine school administrative unit, and each participating local district (PLD) whether or not the PLD is in the Consolidated Plan for PLDs.
  3. **“Employment after retirement with the same employer.”** “Employment after retirement with the same employer” means:
    - A. In all cases, employment after retirement with the MainePERS employer for whom a retiree last worked prior to retiring;
    - B. In the case of a retired State employee or retired teacher (as defined in 5 MRSA §§ 17001(40) and 17001(42), respectively), employment after retirement as either a State employee or a teacher with an MainePERS employer other than the MainePERS employer for whom the retiree last worked prior to retiring; or
- C. In the case of a participating local district (PLD) employee who retires from a PLD in the Consolidated Plan at the time of the retiree’s retirement, employment with any PLD that is in the Consolidated Plan at the time the retiree returns to employment.

**3. Applicability.**

1. In accordance with the applicable time periods set out in it, this rule applies to MainePERS members who retire with a MainePERS service retirement benefit and who return to employment after retirement with the same employer. Where a specific provision of the rule modifies this general applicability provision, this provision must be read as so modified.
2. In addition to the general applicability set out above in 1, this rule applies as follows to MainePERS members to whom 5 MRSA § 18252(6) applies:
  - A. To such members who have not reached Normal Retirement Age at retirement, all of the provisions of this rule apply, and such members may not exercise the election provided in § 18252(6) as provided therein until they reach Normal Retirement Age; and
  - B. To such members who have reached Normal Retirement Age at retirement, all of the provisions of this rule except Section 6 apply, and such members may exercise the election under § 18252(6) as provided therein.

**4. Waiver and Acknowledgement.**

1. A member who terminates employment and at the time of termination is eligible to retire, regardless whether the member has reached Normal Retirement Age, may choose:
  - A. To begin receiving MainePERS retirement benefits immediately, in exchange for foregoing additional accrual of service credit and possible increase in earnable compensation upon any return to employment after retirement with the same employer; or
  - B. To defer receiving retirement benefits, thereby continuing to be eligible to accrue additional service credit and possibly to increase earnable compensation upon any return to employment with the same employer.
2. To begin to receive immediate retirement benefits, every MainePERS member must sign a written statement prior to retirement in a form acceptable to MainePERS that acknowledges that the member knows and understands that he/she has this choice, and that he/she knowingly and voluntarily waives the right to accrue additional service credit and

possible increases in earnable compensation if he/she returns to employment after retirement with the same employer after commencement of retirement benefits. By signing the statement, the member waives all claims of whatever nature under federal or state law based on additional service credit not being accrued and possible increases in earnable compensation not being received if the member returns to employment after retirement with the same employer.

**5. Bona Fide Termination of Employment.**

1. For a member who has not reached Normal Retirement Age to be eligible to receive retirement benefits, federal law and rules require that the member have a bona fide termination of employment. Every member whose retirement becomes effective after the effective date of this rule, and who has not reached Normal Retirement Age at retirement, must be able to demonstrate that he/she had a bona fide termination of employment prior to retirement. A bona fide termination requires the following:
  - A. The member must not return to employment after retirement with the same employer for at least 30 calendar days after the termination of employment; and
  - B. At retirement, the member must certify to MainePERS that he/she did not have any discussion or negotiation prior to his/her termination that resulted in an explicit or implicit arrangement or expectation of future employment after retirement with the same employer.
2. Regardless whether a retiree has reached Normal Retirement Age, he/she must terminate employment in order to receive a retirement benefit and must not return to employment after retirement with the same employer before the effective date of his/her retirement.

**6. Restrictions on Retirement Benefit Payments.**

1. Notwithstanding a bona fide termination of employment, MainePERS is restricted by current federal law and rule from paying benefits to a retiree who has not reached Normal Retirement Age and who returns to employment after retirement with the same employer. For members whose retirement becomes effective after the effective date of this rule, the restrictions shall be as follows:

- A. When a retiree who has not reached Normal Retirement Age returns to employment after retirement with the same employer, MainePERS shall suspend the retiree's service retirement benefits, beginning the first day of the month following the retiree's return to employment. A retiree who returns to employment after retirement with the same employer without benefits suspension is responsible for repayment to MainePERS of the full amount of any retirement benefits that were subject to suspension but paid to the retiree.
  - B. The benefits suspension will remain in effect until the earlier of the retiree's attainment of Normal Retirement Age or the retiree's termination of his/her employment after retirement with the same employer. If the triggering event is termination, the retiree and the employer must each certify to and in the manner required by MainePERS that the retiree has terminated employment.
  - C. The benefits will be reinstated beginning the first day of the month following the month in which the event triggering reinstatement occurs. Monthly benefits paid after reinstatement will be increased by an actuarial adjustment accounting for the period of suspension.
  - D. A member whose retirement is effective no later than May 3, 2004 is not subject to these restrictions. A member whose retirement is effective no later than July 1, 2004 is not subject to the restrictions if the member has, no later than May 3, 2004, initiated the retirement process with MainePERS by submitting a written request for a service retirement benefits estimate specifying an effective date of retirement not later than July 1, 2004.
2. This section is not applicable to a retiree who returns to employment after retirement with the same employer if the retiree returns to employment for no more than 90 days in one year, which days may be consecutive. "Year" is defined to be consistent with MainePERS statutes and rules governing the employer with whom the retiree returns to employment.

**7. Inquiry, Certification and Reporting Requirements.**

- 1. An employer who provides retirement benefits through a MainePERS retirement plan or plans must:
  - A. Ascertain from records and/or by inquiry of the person whether any person employed by the employer is a MainePERS retiree who

has returned to employment after retirement, regardless whether the retiree has reached Normal Retirement Age and regardless whether the retiree's retirement became effective before or after the effective date of this rule; and

- B. Report to, and in the manner as required by MainePERS, any such retiree.
2. Every MainePERS retiree who has returned or does return to employment with the same employer, regardless whether the retiree has or has not reached Normal Retirement Age and regardless whether the retiree's retirement became effective before or after the effective date of this rule, must inform his/her employer that he/she is a MainePERS retiree returning to employment after retirement.
  3. Every MainePERS retiree to whom Section 6 is not applicable because of the exception established in Section 6(2) is responsible to ensure that he/she does not exceed the 90-day limitation on employment after retirement. Such retirees must comply with any related documentation and/or reporting requirements established by MainePERS.

8. **Compliance.**

Failure by any retiree who has not reached Normal Retirement Age to comply with Section 5, Section 7(2) or Section 7(3) of this rule will result in immediate suspension of the retiree's retirement benefit, if the retiree's noncompliance has prevented a timely suspension of benefits pursuant to Section 6 of this rule. The retiree must repay to MainePERS the amount of benefits paid, plus interest on that amount at the rate set by the Board for the purchase of service credit, during the period in which the retiree's benefit should have been suspended. MainePERS will collect the repayment owed from the retiree's retirement benefits whenever the benefits are no longer required to be suspended under Section 6. Monthly benefits paid after reinstatement will be decreased by an actuarial adjustment accounting for the overpayment of benefits. Instead of this adjustment, the retiree may elect to repay the amount due by making a lump sum payment of the repayment owed within 30 days of being notified by MainePERS that repayment is owed, which amount will not include interest.

STATUTORY AUTHORITY: 5 MRSA § 17103(4) and PL 2003, Chapter 387

EFFECTIVE DATE: April 17, 2004

AMENDED: August 30, 2009

### **Factual and Policy Basis for the Rule**

The genesis of Chapter 410 is the existence of a Maine law that on its face, and as initially interpreted and applied, is in conflict with relevant federal (IRS) law, rule and policy requirements applicable to the Retirement System's defined benefit retirement plans. The conflict is significant, in that the federal requirements are matters of "plan qualification." "Plan qualification" is fundamentally important to the Retirement System's members, retirees and employers. Favorable tax treatment of members' contributions, retirees' benefits and of the plans themselves depend on their being qualified plans.

The federal requirement, in summary, prohibits qualified plans from paying retirement benefits to retirees who retire before the point in time at which they are entitled to receive unreduced retirement benefits ("below normal retirement age") and who return to employment after retirement with the same employer while they are still below normal retirement age. (The federal requirement does not apply to retirees who are entitled to unreduced retirement benefits. A qualified plan can continue to pay retirement benefits to such retirees if and when they return to work with the same employer.) As discussed in the Comments and Responses section of this Basis Statement, while specific aspects of the interpretation and application to the public sector of this plan qualification requirement may be ambiguous or unsettled, the applicability of the basic requirement is not.

As enacted in 2001, the Maine law permitting Retirement System retirees to return to employment after retirement with the same employer with no effect on their retirement benefits did not distinguish between retirees who are entitled to receive unreduced retirement benefits and retirees who are not. The law was initially implemented by the Retirement System in accordance with the on-its-face language. In 2003, the law was amended to direct the Retirement System to adopt rules for its interpretation and application in accordance with the applicable federal requirements. The discordance between the federal requirements and state law had become evident and worrisome to the Retirement System and the System requested this amendment. Shortly after the amendment was enacted, the System proposed Chapter 410 in its initial form.

As initially proposed, Chapter 410 addressed only the plan qualification issue. It provided that payment of retirement benefits would be suspended for retirees who had not reached the point of entitlement to unreduced retirement benefits (retirees who

were “below normal retirement age”) when they returned to employment after retirement with the same employer. (Payment of benefits would be reinstated upon the earlier of the retiree’s reaching normal retirement age or again terminating employment, with an actuarial adjustment reflecting the time during which benefits had not been paid.) In requiring benefit suspension, the initial rule proposal did not distinguish between persons who had already retired below normal retirement age and when they returned to employment with the same employer were or would still be below normal retirement age, and such persons who had not yet retired. The System had no reliable information as to the numbers and situations of the already-retired and therefore had no basis for making such a distinction, which would in any event be problematic with respect to the federal requirements. Thus, Chapter 410 as initially proposed dealt only with the plan qualification issue, reflecting the System’s conclusion that not addressing that issue had become, as a matter of fiduciary responsibility, untenable.

### **Procedural History**

Rulemaking began at the October 9, 2003 meeting of the Board of Trustees of the Retirement System, when the Board accepted the staff recommendation that the initial proposal be sent to hearing. A public hearing was publicly noticed for the Board’s November 13, 2003 meeting. No person offered comments at the hearing and no written comments were received. The staff concluded that the public notice had gone unnoticed by individuals and organizations that could have been expected to have an interest in the proposed rule. To ensure their awareness of the proposal, the System mailed a description of the proposed rule to every one of its below normal retirement age retirees, sent the description to organizations it thought would have an interest and scheduled a second public hearing. The System also posted the proposed rule and the description on its website. The second public hearing, held on January 8, 2004 was attended by an estimated 250 people, 34 of whom provided comments. Approximately 97 written comments were received during the extended comment period, which ended on February 2, 2004. Commenters representing public sector employee and retiree organizations and those representing public sector entities stressed that they spoke or wrote on behalf of many affected individuals. It was evident at the hearing that the number of attendees affected by the proposed rule was not limited to the individuals who spoke.

Following the close of the comment period, System staff prepared a revised proposed rule that took into account the comments received, its own continuing analysis of the issues and its continuing discussions with the Maine Attorney General’s Office and the System’s pension benefits tax consultant, an experienced attorney specializing in the relevant areas of federal law, rule and policy with whom the staff had consulted ever since it had first become concerned about the federal-state discordance. The Board, following discussion, accepted the revised proposed rule and scheduled a public

hearing on it for March 11, 2004. While fewer persons attended this hearing and fewer oral and written comments were received, serious concerns with some of the effects of the revised proposed rule were expressed.

Following the close of the comment period on March 22, 2004, System staff prepared revisions to the revised proposed rule. As with the revised proposed rule itself, the revisions took into account commenters' concerns, further discussion by the Board following the March 11, 2004 public hearing, further analysis by staff and further discussion with the Attorney General's Office and pension benefits tax consultant. At the Board's meeting on April 8, 2004, the staff presented the revisions to the Board and recommended the adoption of Chapter 410 as revised. The Board, after discussion, accepted the staff recommendation, adopting the rule.

### **Comments and Responses to Comments**

Several commenters expressed the opinion that the System was wrong in its views that the basic plan qualification requirement applied to the public sector; of the IRS' position on applicability of the requirement; of the IRS' interpretation of the requirement with respect to the public sector and of the IRS' posture on enforcement of the requirement. These commenters urged that the System do nothing, or do nothing until the IRS took regulatory action, or do nothing until the IRS took some action against the System or State. Commenters expressing these views were: Richard A. Durost on behalf of Maine Principals Association; Gerald S. Clockedile on behalf of Maine School Management Association; James A. Houle, Esq.; Charles Jacobs; Edward Maroon; Robert Walker on behalf of Maine Education Association; James R. Walsh; and Carl Leinonen on behalf of the Maine State Employees Association.

As a matter of law, the System's legal advisors did not agree, for several reasons, that there was doubt as to the applicability to the public sector of the basic plan qualification requirement. With respect to specific aspects of the interpretation or application of requirement in the public sector, the IRS in 2002 requested public comment on "phased retirement" (Notice 2002-43) indicating that it was undertaking a review of its guidance in this area, in which it includes return to work after retirement. This review is still pending. Although it is not possible to know what the IRS will ultimately do, nothing in the IRS' request for comments suggests that it regards the basic plan qualification requirement as inapplicable to the public sector or that it is entertaining regulatory action that would absolve the public sector from the requirement. In light of the views of its legal advisors and its own research, analysis and understanding of the IRS' regulatory history and posture - including the heightened attention to the matter demonstrated by the IRS' request for public comment and its still ongoing review - the System concluded that neither doing nothing nor delaying any action was tenable, as a matter of fiduciary responsibility.

The vast majority of comments received at all stages of the rulemaking process addressed two very significant matters: (1) the effect of benefit suspension on those already retired; and (2) the effect of benefit suspension in public employment situations in which the availability of retirees returning to work was extremely important, if not essential.

Turning first to the effect of benefit suspension on already retired individuals, as stated earlier Chapter 410 as initially proposed required benefit suspension for all below normal retirement age retirees who returned to employment after retirement with the same employer, affecting equally those who had already retired and those who had not yet retired. Already-retired commenters on the initial proposal could not have been clearer or more emphatic about the impact that benefit suspension would have on them. They described how their planning, decision-making and subsequent action in retiring had depended entirely upon their understanding that they could return to employment after retirement with the same employer and continue to receive their retirement benefits. The commenters described many individual scenarios and situations, but all made the same basic point: their retirements had involved critical financial and life-plan assessments and by retiring they had put in place very significant financial and life-plan decisions, many irrevocable and many having both present and future implications and consequences. This point was made equally strongly by some individuals who, while not yet actually retired, had taken steps toward retirement that they could not now retrace, e.g., given notice of termination, made irrevocable financial or other commitments. Persons testifying orally and in writing to such reliance were Jim Anastasio; William Babb; Kerry Bailey; Steven Bailey; Cheryl S. Barrett; Gary Barrett; Robert W. Barton; David Bernier; Carol Bradgon; Kiley Bragdon; Donald Brown; Raymond R. Bussiere; James R. Carpenter; Peter J. Caruso; Robert O. Chase; John Clark; Louise Clement; Nancy N. Cooper; Richard W. Curley; Michael R. Curtis; Wanda P. Curtis; William D. Curtis; Susan Deschambault; John Desimone; John P. Donato; Ronald R. Ericson; Leonard A. Goeke, Jr.; Roger E. Goyette; James A. Houle, Esq. on behalf of several clients; Frank C. Hallett; Candace J. Hernandez; Olivia Han; Allen Irish; Charles Jacobs; Thomas Jamrog; Duane A. Jewell; Charles Johnson; David King; Steve King; Joanne Lebel; Rochelle Leder; Florence Hoover on behalf of Maine Association of Retirees; Edward Maroon; Warren Maxim; Jeffrey Merrill; Willis Merrill; James Morgan; David C. Morrill; Patrick Moynihan; Cathy Morrison; Martin J. Naas; Irene D. Nadeau; John Nicholas; Stuart Nichols; Tory Nilsen; Betty Pelletier; Gloria Pelletier; Robert M. Phillips; Jeff Pidot; Marc G. Poulin; Diane Pruett; Chris Queally; Linda Quintal; Jean E. Rioux; Walter Rumery; Mary Sauer; Richard B. Smith; Richard Spear; MA; Olivia Spencer; Deborah Thing; David N. Twombly; Jane Wadleigh; Jim White; Dennis R. Whitten; Judy Williams; Pat Wood; and William G. Zeimer.

These commenters' demonstration of their reliance presented both legal and policy issues. The legal issue – whether benefit suspension was legally foreclosed as to those who had acted in reliance – was at the very least a litigable issue. The policy issue was,

in summary, the fairness of superimposing benefit suspension after the fact in circumstances where it would wreak havoc on financial and life-plan arrangements made in good faith at a time when there was no reason to even consider benefit suspension as a possibility. The comments provided essential data and information on these legal and policy issues and the System, after consultation with its legal advisors, addressed them in the revised proposed rule by the provision that benefit suspension would be applicable only to those whose effective date of retirement was after May 3, 2004. The date was intended to address the reliance of those already retired and of those who, while not yet retired, had demonstrated reliance by putting retirement clearly and irrevocably in motion.

The May 3, 2004 date in the revised proposed rule also responded to the second group of commenters on benefit suspension. Some of these commenters were employers of retirees returned to work; some were commenters who were familiar with circumstances in which retirees returned to work were employed. These commenters were Gerald S. Clockedile on behalf of Maine School Management Association; Daniel F. Davis; Bruce Dobkowski; Richard A. Durost on behalf of Maine Principals Association; Michelle Fong; Roseanne Garf; Colleen Haskell; Gertrude Waldron LaPlante; Cathy Newell on behalf of Maine Adult Education Association; Ronald Silvia; Denise Darning Smith; Eugene W. Smith; Morton Soule; Phyllis R. Vail and Nancy E. Watson and Don Wills on behalf of the State of Maine. They provided information on the role in the public sector workforce of retirees returned to work. They stressed that the role was often a critical one, particularly, though not exclusively, in the public school workforce. They pointed out the effect that benefit suspension would have on the size of the available pool of such workers. With respect to the already-retired who had returned to work, they pointed out that these individuals would have to choose between continuing to work, with suspension of their retirement benefits, and leaving work. They noted that for those returnees who had returned in part-time and/or lower-paid positions, their retirement benefits represented the greater portion of their incomes and they could be expected to leave work. Similarly, some of these commenters argued that even if benefit suspension were only applied to future retirees, the pool of retired returnees could be expected to be substantially smaller because benefit suspension would make retiring and returning to work financially infeasible for many, if not most. In effect, these latter commenters were arguing against benefit suspension in any form.

Turning first to the latter comments, benefit suspension protects the qualified status of the Retirement System's plans. The System, as a fiduciary matter, declines to eliminate suspension and it remains in the adopted rule as to persons whose retirements are effective after the date(s) set in the rule (see below for further discussion). Turning to the comments as to the effect of benefit suspension on certain employers/employment circumstances, particularly though not exclusively in Maine public schools, the System, after further analysis and consultation with its legal advisors, further revised the

revised proposed rule. First, it clarified the definition of “same employer,” tracking the definition that it uses elsewhere in its work. Such consistency, according to its legal advisors, is important to the IRS in assessing issues of compliance with federal requirements. Second, having clarified that definition, it determined that maintaining the requisite consistency had consequences that were entirely unworkable with respect to, e.g., the employment of affected retirees as substitute teachers and the employment of certain seasonal employees, for example, snow plow operators employed by the State and municipalities. Creating a separate definition of “same employer” to address such real-world impossibilities was rejected because it would fly in the face of the IRS’ position on consistency and would create unacceptable confusion for employers and the System in the administration of the retirement plans. Instead, the rule addresses the real-world impossibility by identifying a very narrowly-defined set of employment circumstances in which benefit suspension does not apply. In the revised proposed rule, the criteria for this set were: (1) the provision of intermittent, on-call services; (2) to employers whose ordinary business operations depend on such services; and (3) providing such services for no more than 45 days in a year.

Significant comments were received on this provision in the revised proposed rule. These comments pointed out that related, similar and equally compelling employment circumstances were not covered by, or at least not clearly covered by, the provision as written. They also pointed out that it was unclear whether the 45 days could or could not be consecutive, and they argued that 45 days were too few and did not take into account circumstances in which the need for the services covered by the provision often arose, i.e., when a regular employee was on Family Medical Leave for the 12 weeks provided by the Family Medical Leave Act and the retiree was employed to cover the period of the leave. In response, the rule as adopted retains the provision and revises it by adding services in interim non-permanent assignments and appointments, by establishing a 60-day limitation on the covered services and by clarifying that the days may be consecutive. The rule also was revised to include specific language as to the responsibility to ensure that the criteria are met, including the tracking of the 60 day limitation. These responsibilities are the retiree’s, who is in the best, and in some circumstances only, position to know. Commenters on these issues were Larry Andrews; Jay Bartner; Steve Crouse on behalf of Maine Education Association; Beverly S. Doughty; Richard Durost on behalf of Maine Principals Association; Jeanne Edmunds; Representative Ed Finch, Maine Legislature; Don Ginard; Nancy Guignard; Linda Haskell; Dan Horton; Danny Johnston; Terry McCabe on behalf of Maine School Management Association; Elaine Morgan; M. Poulin; Norman Smith; John Wakefield on behalf of Maine Association of Retirees.

This second group of commenters also spoke to the May 3, 2004 date proposed in the revised proposed rule, particularly with respect to the effect of the date in the public schools. They pointed out that the date could be expected to result in the termination of employment by not-yet-retired teachers so late in the school year that it would be both

harmful to students' education and would make filling their positions very difficult. They, like others, argued that the date would not adequately capture all instances of similarly-compelling reliance. In response, the adopted rule retains the May 3, 2004 date and also provides that benefit suspension will not apply to persons whose retirement is effective no later than July 1, 2004, if those persons, no later than May 3, 2004, have initiated the retirement process with the Retirement System by a written request for a retirement benefit estimate specifying an effective date of retirement not later than July 1, 2004.

Comments were received on the following other matters. Some commenters raised issues of health insurance coverage (Wayne Suomi and Therese Theberge). Health insurance coverage, whether in active employment or in retirement, is not the purview of the Maine State Retirement System and the initial proposal, the revised proposed rule and the rule as adopted do not address health insurance matters. These matters are within the purview of the Legislature and /or employers. One commenter suggested that the actuarial adjustment of benefits on reinstatement of payment did not protect retirees or their beneficiaries or survivors in all circumstances (Carl Leinonen on behalf of Maine State Employees Association). The intent of the adjustment is to not penalize retirees, including beneficiaries and survivors of retirees, and the actuarial adjustment will be so applied. Some commenters felt that the rule and/or the federal plan qualification requirement were discriminatory as to, e.g., women or persons not covered by Social Security (Joanne Schueth and Stephen Walsh). To the extent discrimination or discriminatory effects may exist, the rule is not in itself discriminatory and is not the place where the matters raised by these commenters can be addressed. One commenter (Shirley Ezzy) offered the view that the rule allowed retirees returned to work to use the catch-up provision in section 457 deferred compensation plans. Whether the rule does so or not, the significance of such an effect is unclear, and the effect would be beyond the scope of the rule's purpose.

Some commenters argued for the return to the prior Maine law by which retirees who returned to employment after retirement were subject to limits on the amount of compensation that they could earn; another argued that the change to the current law was made only for the purpose of raising the compensation limits. (Nancy Guignard; Terry McCabe on behalf of Maine School Management Association; Carl Leinonen on behalf of the Maine State Employees Association). Only the Maine Legislature, not the System, could reinstate the prior law. However, the prior law, and the compensation-limit approach in general, are no less discordant with the federal plan qualification requirement than is the current law. The prior law did not prevent the payment of retirement benefits to below normal retirement age retirees so long as their compensation from work did not exceed the limits. The federal plan qualification requirement has no relationship to either the amount a retiree earns or the amount of time a retiree works.

One commenter (Gary Cummings) argued against allowing retirees to return to work at all. That, too, is a matter of legislative policy. The System understands the current law to reflect the legislative view that, as a matter of public policy, allowing retirees to return to work serves important public needs and goals with respect to State employees, teachers and employees of other MSRS public employers. Another commenter (David Fecteau) suggested that retirees who had acted in reliance be permitted to go back to their previous employment, with their retirement benefits stopped and forgiveness of benefits already paid to them. Maine law does not permit retirees to "un-retire." Therefore, the System cannot permit it by rule. In any event, their previous employment may no longer be available to retirees. Further, such a provision could have serious implications for the funding and administration of the retirement plans and, if considered by the Legislature, would require careful and thorough analysis.

Some commenters (Theo Bartash; David Fecteau; Stuart Nichols) specifically urged that the System take care to protect the qualified status of its plans. Other commenters also recognized the importance of that status. The System intends the rule as adopted to do so and believes that it does, while taking into account other compelling legal and policy issues. One commenter asked if the rule would be subject to further revision once the IRS had completed the review that is underway (Jim Morse). The System will continue to closely follow the IRS' work. The outcome of that work – the time frame for which is so unclear as to be unknown – may necessitate, or provide the opportunity for, amendment of the rule and the System will act appropriately. Another commenter suggested that, in light of the IRS review, a sunset provision be added to the rule (Dennis Keschl). Both the substance and the time frame for the results of the review are unknowable, so that writing a workable sunset provision is not possible.

Six members of the Maine Legislature provided written and/or oral comments on the necessity for the rule and expressed concern as to the rule's effects on individuals, public employers and the public, particularly with respect to the public schools (Representatives Ed Finch; Glenn Cummings; Carol Grose and Bonita Breault; Senators Carol Weston and Peggy Pendleton). Many other legislators discussed the rule and the related issues with System staff by telephone or in person, individually or in legislative committees or caucuses. The responses to comments set out in this Basis Statement address these legislators' comments and concerns.

Finally, some commenters on the revised proposed rule continued to argue that the System should take no action at all (Linda Haskell and Jeanne Edmunds). As discussed earlier in this Basis Statement, that is not a tenable course.

The rule as adopted clarifies that the federal requirement that a retiree's bona fide termination of employment must exist in order for a qualified plan to pay retirement benefits applies only to retirees who are below normal retirement age. The adopted

rule also clarifies and strengthens the requirements for inquiry, certification and reporting. These provisions have to do with demonstrating and enforcing compliance with the various federal requirements and are very important from that standpoint. Equally important, the required reporting will enable the System to assess the effect of the current Maine law on retirement plan funding and employer contribution costs. If the law has the effect of driving average age at retirement lower, the time over which plan benefits are funded will be shorter as a result and higher employer contributions will be required to fund the plan in an actuarially sound manner. A change in average age at retirement can meaningfully be seen only as a trend over time and, if such a trend is seen, its relationship to the ability to retire and return to work can only be assessed if the data required to be reported are available. Such an effect on average age at retirement is related to both retirement below normal retirement age and retirement at or above normal retirement age. The rule's reporting requirements apply to both of these retirement circumstances.

At its regular meeting held on April 8, 2004, Mr. Eldridge made the motion, seconded by Ms. Mercier, to adopt the rule on retirees returning to employment after retirement with the same employer. Voted unanimously by those Board members present.

**BASIS STATEMENT FOR AMENDMENTS ADOPTED AUGUST 13,  
2009/STATEMENT OF COMMENTS:**

This rule was noticed for public hearing on June 17, 2009. A public hearing was held on July 9, 2009. No members of the public presented testimony at the hearing and no written comments were submitted prior to or at the hearing or during the subsequent 10-day period for written comments. The public comment period closed on July 20, 2009.

The rule in its current form allows retirees who are younger than normal retirement age to return to work with the same employer without being subject to a penalty if they work 60 or fewer days per year ("year" is defined in the rule) in an intermittent on-call position or in a non-permanent interim position. The Joint Standing Committee on Labor requested the System's Board of Trustees to review this rule "in order that it represents the least restrictive rules to retirees in the system."

The System worked with its pension attorneys to ensure that any amendments to the rule would comport with federal laws and regulations in order for all the pension plans administered by the System to be qualified under federal law and be entitled to favorable tax treatment. The Internal Revenue Service (IRS) has not promulgated specific rules relating to retirees who have not attained normal retirement age and return to covered employment. Instead, it has published guidelines that each plan administrator must evaluate in light of its particular plan provisions and plan structure.

Based on advice of pension counsel, the System staff proposed that the Board amend the rule to increase the number of days that a retiree younger than normal retirement age can return to work without incurring a penalty from 60 to 90 days per year and that there be no restrictions on the type of positions covered under this rule. These changes conform with federal pension law guidelines and do not place any of the plans administered by the System in jeopardy of losing their tax qualified status. In considering the proposed amendments to this rule, the Board considered only those legal issues that affect plan qualification.

System staff also recommended several changes to the manner in which the return to work rule is administered, which resulted in additional amendments to the rule. Those amendments are as follows: (1) the manner in which overpaid benefits are recovered is changed such that, rather than withholding the entire benefit until recovery is made in full, an actuarial adjustment is made to future benefits; (2) the interest rate charged on the repayment of benefits is tied to the rate used for other types of repayments; and (3) noncompliance penalties charged to retirees and employers are eliminated.

At its regular meeting held on August 13, 2009, George Burgoyne made the motion, seconded by Ben Viola, to adopt the rule on retirees returning to employment after retirement with the same employer. Voted unanimously by those Board members present.