Legal INSIGHTS
Ottosen DiNolfo Hasenbalg & Castaldo, Ltd.
Volume 28, No. 2 ~ Summer 2021

Court Addresses Conflict of Overlapping PSEBA and Medicare Benefits

by Shawn P. Flaherty

On May 11, 2021, the Illinois Appellate Court for the First District issued an opinion on the issue of the interplay of benefits for persons who are eligible for health insurance benefits from Medicare and from an employer under the provisions of the Public Safety Employee Benefits Act (PSEBA) in *McCaffrey v. Village of Hoffman Estates*, 2021 IL App (1st) 200395. The court examined the PSEBA's offset clause deeper than any previously reported decision, while leaving the analysis open for legislative clarification.

Background

Section 10(a) of PSEBA provides in pertinent part that the employer of a police officer or firefighter "who suffers a catastrophic injury or is killed" in the line-of-duty "shall pay the entire premium of the employer's health insurance plan for the injured employee, the injured employee's spouse, and for each dependent child" 820 ILCS 320/10(a). The Act also provides that "health insurance benefits payable from any other source shall reduce benefits payable under this Section."

Plaintiff Paul McCaffrey served as a police officer for the Village of Hoffman Estates until he suffered a severe injury, which resulted in the award of a line-of-duty disability pension. In February 2006, the Village granted the Plaintiff's application for PSEBA health insurance benefits for him, his wife and dependent son.

During the period in which they received Village-paid health insurance premiums, Plaintiff's wife and son both became eligible for the federal Medicare health insurance program based upon their disabilities. In 2018, the Village learned about the dual coverage and informed the Plaintiff that it would cease paying PSEBA health insurance benefits for the wife and son, and seek recoupment for the premiums and for up to three years of payments for the period of the dual coverage. The Village's rationale for this cancellation was that the Medicare benefits constituted benefits payable from another source.

Plaintiff challenged the Village's decisions to terminate PSEBA benefits and recoup past premium payments. The trial court granted the Village's motion to dismiss the complaint finding that the Village was not obligated to pay the premiums for Plaintiff's wife and son when they were eligible for Medicare.

Analysis

On appeal, the Plaintiff alternatively argued that the trial court erred because: (1) Plaintiff retained a "current employment status" and therefore Medicare was only a secondary payer of health benefits; (2) mere access to Medicare was insufficient to reduce the health insurance benefits paid under PSEBA; and (3) the Village was obligated to provide at least the basic health insurance benefit as agreed to in the CBA with the police union.

The court rejected each of these arguments. First, the court agreed with the trial court that Plaintiff did not retain a "current employment status" with the Village simply because the Village might summon the Plaintiff to submit to a fitness for duty examination or to be recalled to duty in an emergency situation pursuant to Section 3-116 of the Illinois Pension Code. After a full review of the federal Secondary Payer Act and the corresponding regulations, the court rejected that argument and did not find that this language created any current employment status. The court found that an employee whose active employment ended due to disability is not in a business relationship with the employer simply by virtue of

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Overlapping PSEBA

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receiving employer-paid health benefits during the period of disability.

Plaintiff next argues that because his wife opted out of disability benefits for a period of time, that her expenses were not payable from another source. The court denied this argument, citing *Pyle v. City of Granite City*, 2012 IL App (5th) 110472, for the proposition that mere eligibility for Medicare will relieve the obligation of the employer to provide PSEBA health insurance benefits. The court found that the Village was relieved from paying the health insurance benefits for the wife even for the period that the wife chose not to take advantage of the Medicare benefits. The court then clarified that "reduce" as defined in PSEBA should normally mean a diminishment of a benefit, but would actually result in an elimination of the benefit when the PSEBA recipient is in Medicare.

The court also rejected Plaintiff's argument that the collective bargaining agreement between the Village and police union would control how "basic coverage" should be defined and that its existence in the CBA would trump the statutory language on reduction of PSEBA payment for payments from another source. The court cited a lack of framework in the PSEBA statute for determining how the reduction of benefits is to take place, either through collective bargaining or unilateral employer action. The court suggested that this is a matter best left for the legislature, and it therefore declined to defer to the CBA as a substitute for legislative intent.

Conclusion

The *McCaffrey* case may prove to be a noteworthy addition to the PSEBA jurisprudence in that it is the first reported decision to delve into what is meant by the clause that other pension benefits paid from any other source shall "reduce benefits" payable. While the court suggests that legislative clarification on this point is welcome, it shares a commonly-held management belief that a reduction of PSEBA benefits would result in the elimination of PSEBA benefits for an individual when the individual is eligible for Medicare. This question still remains outstanding for individuals who receive health insurance benefits from another private source. The *McCaffrey* decision ensures that municipalities and fire protection districts are responsible for this PSEBA expense only when it is the primary benefit to individuals who do not have other coverage.

Lawsuit Challenges Pension Asset Consolidation

by John E. Motylinski

In 2019, the Illinois General Assembly passed Public Act 101-0610, which required downstate police and firefighter local pension funds' assets to be consolidated into statewide funds for investment purposes. Since then, the Firefighters Pension Investment Fund (FPIF) and the Illinois Police Officers' Pension Investment Fund (IPOPIF) have geared up to receive those investment funds and go to work. Recently, however, the consolidation encountered its first legal challenge—a class action lawsuit claiming Public Act 101-0610 unconstitutional.

On February 23, 2021, eighteen police and firefighter pension funds, as well as individual active and retired members of these funds, filed a complaint against Governor Pritzker, the two new consolidated pension investment funds, and others in the Kane County Circuit Court. The plaintiffs are seeking to certify the lawsuit as a class action. If successful, the lawsuit's outcome would apply to every downstate police and firefighter pension fund in Illinois.

The 22-page complaint alleges the consolidation violates three provisions of the Illinois Constitution: (1) the Pension Protection Clause; (2) the Contracts Clause; and (3) the Takings Clause. However, each of these claims revolve around the same general premise. The plaintiffs claim that they "had a contractual and enforceable right to exclusively manage and control their investment expenditures and income, including interest dividends, capital gains, and other distributions on investments," which the consolidation has infringed upon.

In Illinois, there is a rich body of law concerning interference with pension rights and benefits. Article XIII, Section 5, of the Illinois Constitution, commonly known as the "Pension Protection Clause," provides that "[m]embership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Ill. Const. 1970, art. XIII, § 5. From this, the Illinois Supreme Court has held that public employees have an inviolable contractual right to their vested pension benefits, which cannot be diminished or impaired. Therefore, legislation that diminishes these benefits will usually be struck down.

The case of B*uddell v. Board of Trustees, State University Retirement System of Illinois*, 118 Ill. 2d 99, 101 (1987) is a prime example of such an improper legislative diminution of pension benefits. There, the plaintiff joined the pension fund in 1969. Five years later, the Illinois General Assembly amended the Pension Code to limit military service credit to those who applied before September 1, 1974. Later still, the plaintiff tried to apply for military service credit, but was denied because he had not applied before the deadline. The Illinois Supreme Court found that the plaintiff had a substantive and vested right to apply for military service credit because there was no limit on applying for such credit when he joined the pension fund.

In the recent case challenging the consolidation, the plaintiffs follow the example of *Buddell* by maintaining that Public Act 101-0610 has similarly deprived their vested pension benefits. As the plaintiffs articulate one example, a retired-beneficiary participant previously "had the benefit of a 2.1% vote (1 out of 47) for the one beneficiary selected member" of his pension fund, "and thus, effectively a 0.43% say regarding the Board's selection of an investment manager or advisor." However, "[a]s a result of Public Act 101-0610, he will only have the benefit of a 1/8,830 vote (1 out of 8,830) for the one beneficiary-selected member of the nine-person Permanent Board" of the Firefighters' Pension Investment Fund, which equates to "just a 0.0013% say regarding the Permanent Board's selection of an investment manager or advisor." The plaintiffs also claim that their vested benefits have been diminished because the consolidation law requires each downstate pension fund to ultimately "bear all costs of transition, up to $15,000,000, plus interest."

The case is expected to be resolved in the circuit court on initial motions. On June 25, 2021, the Defendants filed motions to dismiss the Plaintiffs' amended complaint, and the court has given the Plaintiffs until August 4, 2021, to respond to these motions. Once the trial court issues its ruling, the case will likely be appealed by the losing party. The Illinois Supreme Court may decide to review the case thereafter.

Meanwhile, the asset consolidation process is proceeding. FPIF recently notified local funds of their asset transfer dates which begin October 1, 2021. However, that process may be interrupted if a court issues an order staying the transfer of assets.

New Conviction Record Law Provides More Due Process to School District Applicants

by Maureen A. Lemon

Recent amendments to the Illinois Human Rights Act limit the ability of most Illinois employers to use an individual's criminal conviction record as a disqualifying reason to deny employment to that applicant. As explained below, Illinois school districts may continue to deny employment to individuals who have been convicted of specific crimes. However, school districts must now provide such individuals greater due process before denying them a job due to a disqualifying criminal conviction.

Illinois school districts may employ only individuals who are of 'good character.' Section 10-21.9(c) of the Illinois School Code prohibits Illinois school districts from employing individuals who have been convicted of one of the criminal offenses listed in 105 ILCS 5/21B-80(c), including enumerated sex offenses, first degree murder, or a Class X felony. (105 ILCS 5/10-21.9(c)) An individual who has been convicted of a drug offense is precluded from being employed in an Illinois school district until at least seven years have passed since the end of the sentence related to the drug offense.

To ensure that individuals disqualified by a prior criminal conviction are not employed in schools, each school district must complete a criminal history records check on each employee and each student teacher in the district. The check consists of two parts:

1. **Performing a fingerprint-based criminal history records check on each person employed within the district and student teachers.** The check must be completed through the Illinois State Police database for an individual's Criminal History Records Information (CHRI) and through the Federal Bureau of Investigation's national crime information databases.
2. **Checking the following two Illinois offender databases for each applicant being considered for employment and, if hired, repeatedly at least once every five years throughout the individual's employment: The Statewide Sex Offender Registry and the Statewide Murderer and Violent Offender Against Youth Registry.** The school district must ensure that these same checks are completed on contracted individuals with daily, direct contact with students.

Since 2010, it has been a violation of the Act for an employer to base employment decisions on an individual's arrest unless the employer had information indicating that the person actually engaged in the conduct for which they were arrested. 775 ILCS 5/2-103. Effective March 23, 2021, the Act was amended by adding a section on "Conviction Records." 775 ILCS 5/2-103.1. It is now a civil rights violation for any employer to use a conviction record as a basis to refuse to hire or take other adverse employment action against an individual.

Three exceptions to the general rule regarding the use of conviction records are when (1) there is a substantial relationship between one or more of the previous crimes and the employment sought or held; (2) the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public; or (3) otherwise authorized by law.

While the first two exceptions may be invoked in certain scenarios (e.g., a payroll clerk has been convicted for embezzlement), the third exception remains a key exception for school districts to invoke. Because the Illinois School Code explicitly prohibits certain individuals from being employed by school districts due to certain conviction records, this new law regarding criminal conviction records will not have a significant impact on whom the School District can hire. Yet, the recent amendment to the Act requires ALL employers to send written notice to a job applicant of a preliminary decision that the applicant's conviction record disqualifies the candidate from employment, and to provide the job applicant an opportunity to correct the conviction record.

For purposes of this new requirement, a "conviction record" is defined as any "information indicating that a person has been convicted of a felony, misdemeanor

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Court Upholds Constitutionality of Term-Limits Provision

by James G. Wargo

The Illinois Appellate Court recently upheld the constitutionality of the term-limits provision of the Illinois Municipal Code as applied to a 2016 referendum approved by the voters of the Village of Broadview, limiting the number of terms a person may serve as village president.

In *Buchanan v. Jones*, 2012 IL App (1st) 210169, the court was faced with interpreting the legal effect of the term limits provision in Section 3.1-10-17 of the Illinois Municipal Code on a previously approved term limits referendum by the residents of the Village of Broadview. (65 ILCS 5/3.1-10-17) That section of the Municipal Code was added July 19, 2019, while the referendum was approved at the November 8, 2016 General Election. Section 3.1-10-17 provides that the imposition of term limits by referendum, ordinance, or otherwise on elected municipal officials must be prospective only. It specifically applies to all term limits imposed by municipalities approved on or after November 8, 2016.

Prior to the decision in *Buchanan*, the Illinois Supreme Court upheld the constitutionality of Section 3.1-10-17 as applied to a 2020 proposed referendum but did not rule on its application to earlier adopted term limits referenda. *Burns v. Municipal Officers Electoral Board of the Village of Elk Grove Village*, 2020 IL 125714. Burns involved a challenge to a petition seeking to place a referendum question on the election ballot at the March 17, 2020 General Primary Election. The proposed referendum provided that "no person shall be eligible to seek nomination or election to, or to hold elected office in the Village of Elk Grove Village where that person has held the same elected office for two (2) or more consecutive, four (4) year terms."

An objection petition to the proposed referendum was filed with the Village's electoral board. The electoral board sustained the objection on the grounds that the petition was in violation of Section 3.1-10-7. On judicial review, the circuit court declared Section 3.1-10-17 unconstitutional because the statute "unlawfully applied retroactively to term limits referenda that had already been approved by the voters in other municipalities since 2016."

On direct appeal to the Illinois Supreme Court, the court upheld the constitutionality of Section 3.1-10-17 and affirmed the electoral board's decision that the proposed referendum was invalid. However, the court did not render an opinion as to the retroactive application of Section 3.1-10-17 and left open possible constitutional challenges to any term limits referenda passed by other municipalities from November 8, 2016 to July 19, 2019.

That is where *Buchanan* comes in. In that case, a registered voter filed an objection petition to Sherman Jones' nomination papers for the office of Village President for the Village of Broadview. The objection was predicated on a November 8, 2016 referendum ("2016 Referendum") approved by the voters that "no person shall be eligible to seek election to or hold the office of Village President where that person has been previously elected to the office of Village President of the Village of Broadview for two (2) consecutive full four (4) year terms." The objector argued that Jones was not eligible to be a candidate pursuant to the 2016 Referendum since he had previously been elected Village President for two terms prior to the enactment of the referendum.

The Village's electoral board dismissed the objection and ordered Jones' name to appear on the ballot at the April 6, 2021 Consolidated Election. The electoral board found that any terms served by Jones prior to the approval of the 2016 Referendum could not be used to determine his eligibility to run for Village president at the upcoming election.

On judicial review, the circuit court affirmed the electoral board's decision finding Section 3.1-10-17 of the Illinois Municipal Code to be constitutional. The objector filed an expedited appeal to the appellate court arguing that Section 3.1-10-17 impermissibly nullified the voter's approval of the 2016 Referendum.

On appeal, the First District Appellate Court upheld the constitutionality of Section 3.1-10-17 as to Broadview's 2016 Referendum. In applying the statutory language to the 2016 Referendum, the court noted that the referendum was "silent as to whether service as village president prior to the referendum's adoption is to be considered in the calculation of consecutive terms." In light of this silence, the court concluded that Section 3.1-10-17(a) requires the imposition of term limits under the referendum to be applied prospectively. The court reasoned that Section 3.1-10-17 "merely places a limitation on the manner in which term limits are calculated in elections taking place" after the statute's effective date on July 19, 2019.

Is a Website a Place of Public Accommodation?

by Ericka J. Thomas

The Americans with Disabilities Act (42 U.S.C.A. §§ 12101 *et seq*.) protects the rights of individuals with disabilities with respect to public accommodations and facilities. Title III of the ADA, which applies to places of public accommodation, prohibits discrimination against individuals "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." The ADA mandates an equal opportunity to participate in or benefit from the goods and services offered by a place of public accommodation, but does not guarantee that an individual with a disability must achieve an identical result or level of achievement as persons without disabilities.

To determine whether a requested modification is necessary under the ADA, public accommodations must start by considering how their facilities are used by nondisabled guests and then must take reasonable steps to provide disabled guests with a like experience. When Congress passed the ADA, in 1990, the Internet was in its infancy. However, Congress intended that the ADA address not only physical barriers but also communication barriers. This has required ADA cases to consider rapidly changing technology.

This issue is illustrated in the case of *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1270 (11th Cir. 2021). In *Gil*, a legally blind grocery store patron brought an action against a grocery chain alleging a violation of the ADA based upon its website. The patron asserted that the website was inaccessible to visually impaired customers because it was incompatible with screen reader software, which visually impaired patrons use to vocalize the content of websites. This particular patron had tried to refill prescriptions on the website and was unable to do so. The patron asserted that Winn-Dixie had violated the ADA because visually impaired individuals were not provided with "full and equal enjoyment of the services...provided through the website." After years of litigation and a verdict in favor of the patron after a bench trial, the case reached the 11th Circuit Court of Appeals.

The 11th Circuit initially determined that the patron had standing to bring a claim under Article III of the ADA because he had suffered an "injury in fact" by being unable to access the Winn-Dixie website. The court noted that the patron was not able to avail himself of certain services and products available only on the website, which created his injury in fact. The court then turned to the question of whether a website is a "place of public accommodation" under Title III of the ADA. The court noted that neither the ADA nor the Department of Justice, who is responsible for promulgating regulations to implement the ADA, have included websites in their list of "public accommodations." Accordingly, based upon the plain language of Title III of the ADA, "public accommodations" are limited to actual physical places and do not include websites. The court held that the plaintiff's inability to access and communicate with the website itself was not a violation of Title III of the ADA.

The court then considered whether the inability to access the Winn-Dixie website created an "intangible barrier" that prevented the plaintiff from accessing a good, service, or privilege of the Winn-Dixie physical stores. After considering that the Winn-Dixie website had limited functionality and that all interactions that were initiated on the website had to be completed in store (i.e., physically picking up a prescription, redeeming coupons, etc.), the court concluded that the plaintiff's inability to access the website did not create an "intangible barrier" to plaintiff's full enjoyment of Winn-Dixie's goods and services. Plaintiff could still go to the physical stores and have the same access to the goods and services as non-disabled patrons. The court pointed out that the plaintiff had been a patron of the physical stores for over fifteen years and had no issues gaining full access to all goods and services.

The court continued by noting that although the website may provide time saving benefits, these benefits are not necessary to ensure access to all available

goods and services. Title III only requires that public accommodations provide equal access. Ultimately, the court reversed the verdict and stated "Absent congressional action that broadens the definition of "places of public accommodation" to include websites, we cannot extend ADA liability to the facts presented to us here, where there is no barrier to the access demanded by the statute."

Although the court ruled in favor of Winn-Dixie in the *Gil* case, it is notable that the circuits are split as to whether a plaintiff alleging a Title III violation relating to a website has to show a nexus between the website and a physical location. Courts in the First, Second, and Seventh Circuits have found that the ADA can apply to a website even without a connection to a physical space. Courts in the Third, Sixth, Ninth, and Eleventh Circuits, in contrast, have concluded that places of public accommodation must be physical spaces and "that goods and services provided by a public accommodation must have a sufficient nexus to a physical place in order to be covered by the ADA." Because of the extreme split between the circuits, this issue is ripe to be addressed by the U.S. Supreme Court in the next few years.

Save the Date

Ottosen DiNolfo School Law Conference

Tuesday September 14, 2021

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New Conviction Record

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or other criminal offense, placed on probation, fined, imprisoned, or paroled. . . ."

Once a preliminary decision is made that a conviction record disqualifies an applicant from employment, the written notice to the applicant must contain:

- The applicable conviction(s) and the employer's reasoning for disqualifying the applicant;
- A copy of the conviction history report; and
- An explanation of the applicant's right to respond before the preliminary decision is final. The response may include, but is not limited to, challenging the accuracy of the conviction record or presenting mitigation evidence. (775 ILCS 5/2-103.1(C)(1) and (2)).

The employee/applicant shall be given at least five business days to respond, after which time the school district must consider any information submitted by the applicant before making its final employment decision. If the school district decides to disqualify or take adverse action against the applicant, the school district must send written notice of its final decision to the candidate. This notice must include:

- The disqualifying conviction(s) and reasoning for the employment decision;
- Any internal procedure to challenge the employment decision; and
- The right to file a charge with the Illinois Department of Human Rights. (775 ILCS 5/2-103.1(3))

While these recent amendments may not result in different employment decisions, they will result in additional paperwork for your Human Resource Department. We are available to assist you to interpret background checks, determine if a particular conviction record disqualifies an individual from being employed within the school district, and prepare the preliminary and final notices required by the recent amendments to the Illinois Human Rights Act.

Selling Real Estate? Consider Deferring Your Gain Under Section 1031

by Craig D. Hasenbalg and Michael Castaldo III

Whenever a taxpayer sells business or investment property at a price that is higher than the taxpayer's basis in the property, capital gain tax must be paid on the difference. However, Section 1031 of the Internal Revenue Code ("IRC") provides an exception to this rule and allows a taxpayer to postpone paying tax on the gain if the proceeds from the sale are reinvested as part of a qualifying "like-kind exchange." One common misperception about exchanges, however, is that any gain incurred disappears forever. This is not the case. Instead, IRC Section 1031 allows for the deferral of gain, not its complete elimination.

To accomplish a Section 1031 exchange, there must be an exchange of "like-kind" properties. Section 1031 defines "like-kind" as real estate (and only real estate) that is held for productive use in a trade or business or for investment purposes. Properties are of like-kind if they are of the same nature or character, even if they differ in grade or quality. Therefore, real properties typically qualify as being of like-kind regardless of whether they are improved or unimproved. Farmland and sky-scrappers are "like-kind" properties, just as an apartment complex with many units and a house rented to a single tenant are "like-kind." Regardless, the rule is the same: any gain from the sale of real estate that is part of a properly structured exchange is deferred if the proceeds of sale are reinvested in other like-kind property. If, as part of the like-kind exchange, the taxpayer also receives other (not like-kind) property or money, gain must be recognized to the extent of the other property or money received. Losses, however, cannot be recognized, making Section 1031 particularly unattractive is the real estate to be sold has a tax basis higher than the price.

The simplest type of Section 1031 exchange is a simultaneous swap of one property for another. Deferred exchanges (where relinquished property is sold before any replacement property can be purchased) are more complex but allow flexibility. To qualify as a Section 1031 exchange, a deferred exchange must be distinguished from the case of a taxpayer simply selling one property and using the proceeds to purchase another property (which is a taxable transaction). Rather, in a deferred exchange, the disposition of the relinquished property and acquisition of the replacement property must be mutually dependent parts of an integrated transaction constituting an exchange of property. Even more complex than a deferred exchange, exists the reverse exchange. A reverse exchange involves the acquisition of replacement property through an exchange accommodation titleholder, with whom it is parked for no more than 180 days. During this parking period the taxpayer disposes of its relinquished property to close the exchange.

Under the Tax Cuts and Jobs Act, Section 1031 now applies only to exchanges of real property and not to exchanges of personal or intangible property. An exchange of real property held primarily for sale still does not qualify as a like-kind exchange. A transition rule in the new law provides that Section 1031 applies to a qualifying exchange of personal or intangible property if the taxpayer disposed of the exchanged property on or before December 31, 2017 or received replacement property on or before that date. Thus, effective January 1, 2018, exchanges of machinery, equipment, vehicles, artwork, collectibles, patents and other intellectual property and intangible business assets generally do not qualify for non-recognition of gain or loss as like-kind exchanges. However, certain exchanges of mutual ditch, reservoir or irrigation stock are still eligible for non-recognition of gain or loss as like-kind exchanges.

The Section 1031 tax-deferred exchange can be a useful tool for investors and business owners by creating an alternative way to raise cash when buying certain property. Whether simple or complex, a Section 1031 exchange has extremely strict timelines and deadlines in order to successfully defer the tax on any gain. If you have any questions about or think you may be able to benefit from a successful like-kind exchange, please reach out to the attorneys at Ottosen DiNolfo Hasenbalg & Castaldo Ltd. to learn more.

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