To: *Members of the Legislative Commission on Pensions and Retirement*

From: *Sean Kelly, Deputy Director* *April 26, 2024*
Susan Lenczewski, Executive Director

Attachment: House Research Issue Brief, "Special Legislation," dated January 2020

IRS Correction Program and Special Legislation

Administrators and sponsors of tax-qualified retirement plans, including Minnesota's public pension plans, are able to correct errors made in the operation of the plan and in other circumstances under an IRS program called the Employee Plans Compliance Resolution System (EPCRS).[1] EPCRS has been available to plan administrators and plan sponsors in some form since the early 1990s. Authorizing administrators and sponsors to correct errors voluntarily when they are discovered has been, for decades, considered a better alternative than the only other option previously available, which is the disqualification of the plan in connection with an IRS audit and payment of a sometimes substantial penalty.

EPCRS is available to a pension plan administrator or plan sponsor, which is defined by EPCRS as "the employer that establishes or maintains a qualified plan for its employees."[2] EPCRS is available whether or not explicit authority to correct operational errors under EPCRS is included in the plan document or, in the case of Minnesota's public pension plans, in statute. Nonetheless, to make sure that pension plan administrators, employers, members, and governing boards were aware that EPCRS was available for voluntarily correcting errors, the statutes were amended in 2018 to add a new subdivision to Section 356.635 ("Internal Revenue Code Compliance"):

> *Subd. 13. **Correction of errors**. The executive director of each plan may correct an operational, demographic, employer eligibility, or plan document error as the executive director deems necessary or appropriate to preserve and protect the plan's tax qualification under section 401(a) of the Internal Revenue Code, including as provided in the Internal Revenue Service's Employee Plans Compliance Resolution System (EPCRS) or any successor thereto. To the extent deemed necessary by the executive director to implement correction, the executive director may:*
>
> *(1) make distributions;*
>
> *(2) transfer assets; or*
>
> *(3) recover an overpayment by reducing future benefit payments or designating appropriate revenue or source of funding that will restore to the plan the amount of the overpayment.*

---

[1] The most recent iteration of the EPCRS program can be found at IRS Revenue Procedure 2021-30.
[2] EPCRS Part III, Section 5.01, Paragraph (6), page 23 (IRS Rev. Proc. 2021-30).

EPCRS is a comprehensive package of correction programs available to pension and retirement plans that are intended to be "tax-qualified," that is, to satisfy applicable requirements in the Internal Revenue Code, but have not met those requirements for some period of time. The general principles underlying EPCRS can be summarized as follows:

- Sponsors and administrators are encouraged to establish procedures to ensure compliance with Code requirements.
- A plan failure, such as a failure involving plan operation, should be timely and efficiently corrected so that participants and members receive their expected retirement benefits.
- The IRS encourages voluntary correction of plan failures and will impose fees and sanctions on a retirement or pension plan in a limited, reasonable, and graduated way so as to encourage prompt correction.

EPCRS includes examples of how to correct plan operational errors, but is a specific error and correction are not addressed in an example, the general rule for correction applies: The method of correction should "restore the plan to the position it would have been in had the failure not occurred, including restoration of current and former participants and beneficiaries to the benefits and rights they would have had if the failure had not occurred." Further, in general, a failure must be fully corrected, regardless of whether the error occurred many years ago and regardless of whether the correction is "inconvenient or burdensome."

Why aren't the administrators, employers, and governing boards of Minnesota's public pension plans using EPCRS and the authority in Section 356.635 to correct operational errors that are the reason for many of the "special bills" introduced each session?

Special Legislation and the Commission

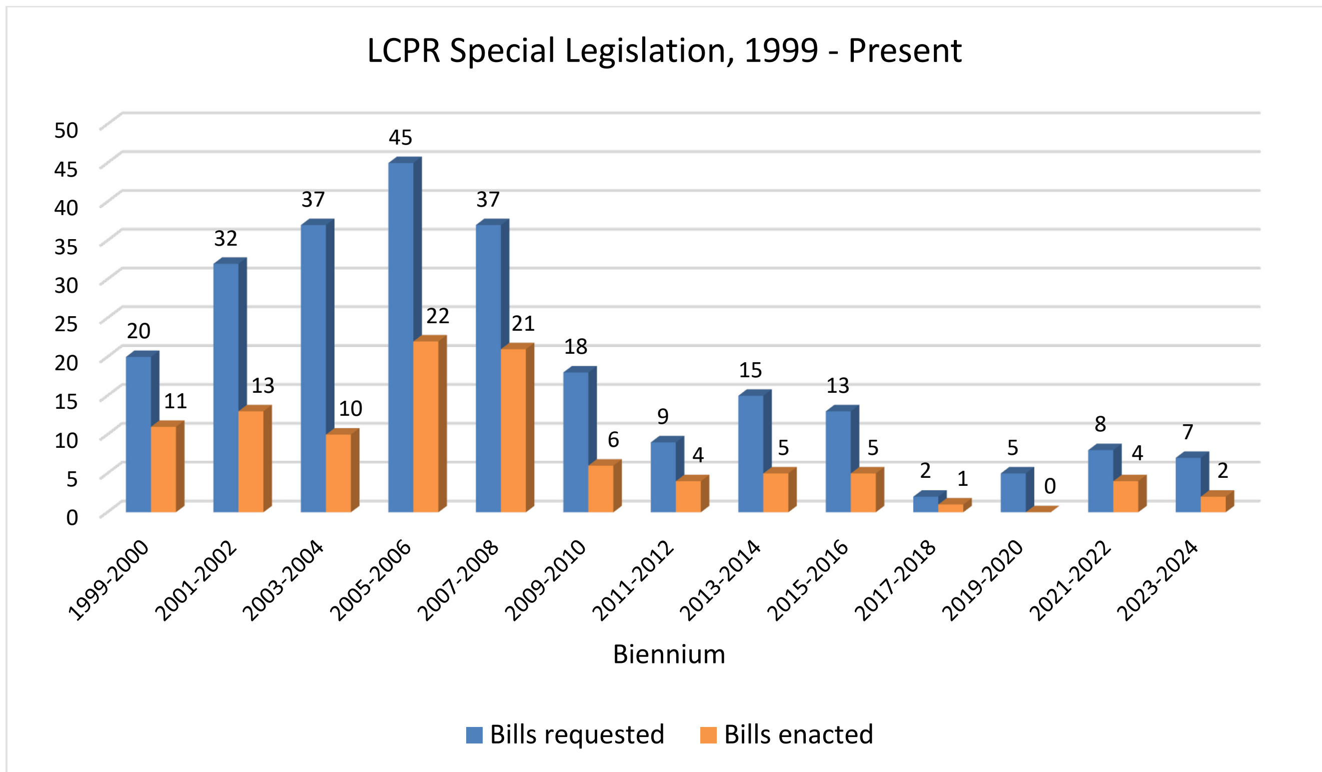
Legislation for the benefit of one individual are referred to as "special legislation" or "special laws." Special laws are unconstitutional if the issue can be addressed by a "general law," according to the Minnesota Constitution. The Minnesota Constitution, Article XII, Section 1, states:

> ***Section 1. Prohibition of special legislation; particular subjects****. In all cases when a general law can be made applicable, a special law shall not be enacted except as provided in section 2 [relating to local government legislation] . . . . The legislature shall pass no local or special law . . . granting to any private corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever. . . .*

For more information on the history and constitutionality of special legislation in Minnesota, see the attached brief from House Research.

LCPR staff maintains a database related to pension and retirement legislation, which dates back several decades, and includes information pertaining to special bills. Beginning with the 1999-2000 Biennium,

LCPR staff has received 248 requests for special bills, 104 of which have been enacted into law.[3] The chart below shows the number of special bill requests related to public pension benefits received by LCPR staff and the number of those special bills enacted into law beginning with the 1999-2000 biennium. The number of requests peaked in the mid-2000s, but the Commission continues to receive requests nearly every year.



Most of the time, only one special bill is introduced for an individual. However, the same special bill has been introduced for the same individual in successive legislative sessions if the earlier bills were not enacted. The chart below describes a few of the individuals for whom multiple special bills have been introduced and provides a brief description of the bills.

Individual	Number of Special Bills	Years	Description of Special Legislation	Status
Surviving spouse of a Minneapolis Fire Relief Association member	3	2006-2009	Authorizes a survivor benefit for the surviving spouse of a member, despite not meeting the two-year requirement for a post-retirement marriage.	Did not pass

[3] These numbers and the chart exclude special legislation permitting individuals to transfer retirement coverage and service credit from the Higher Education Individual Retirement Account Plan (IRAP), administered by Minnesota State Colleges and Universities, to the Teachers Retirement Association (TRA), because a general law is included in the 2024 Pension and Retirement Policy and Supplemental Budget Bill provides a more viable alternative to special legislation. As a result, requests for special legislation on this topic in the future are unlikely.

Individual	Number of Special Bills	Years	Description of Special Legislation	Status
Surviving spouse of a PERA P&F Plan member	3	2002-2008	Authorizes a survivor benefit for the surviving spouse of a deceased police chief who is ineligible for the benefit because the chief took a refund.	Did not pass
MSRS Correctional Plan Member	4	2003-2007	Authorizes a member to transfer past service credit from MSRS General to MSRS Correctional for a period of service as a stores clerk at a correctional facility.	Passed on the fourth attempt
MSRS General Plan member	3	2004-2006	Authorizes a member to purchase service credit for a period of employment at Bug-O-Nay-Ge-Shig school, which is not a covered public employer, to obtain Rule of 90 eligibility.	Did not pass

A Constituent's Route to Special Legislation

Constituents come to the legislature because the pension plan administrators and governing boards are not able to resolve the constituent's claim without violating a state statute governing the pension plan, such as a time limitation on taking the corrective action. In many cases, the constituent has received a denial of the constituent's claim from the pension system's executive director and has appealed that denial to the governing board. The board typically upholds the decision of the executive director, often after receiving a recommendation from an administrative law judge who engaged in a fact-finding hearing, for the reason that a particular state statute does not permit the corrective action.

At this point, the constituent has two options: appeal the decision of the pension plan's board by filing a lawsuit in the state's court of appeals or persuade the constituent's legislator to introduce a bill resolving the issue. One option is expensive, and the other is virtually free. Neither is a sure bet but, as indicated in the chart on page 3, the success rate for special legislation is about 50-50. It is a reasonable choice for a constituent to turn to the legislature for relief.

Negative Impacts of Special Legislation

Special legislation imposes the following burdens on constituents and legislators:

- Special legislation requires the individual to contact one or more legislators to assist with a personal matter, persuade the legislator to prepare and introduce legislation on behalf of the individual, and when the legislation is considered by the Commission and legislative committees, permit private details regarding the individual's employment and retirement circumstances to be disclosed in a public forum and in publicly available documents. After that, the resolution of the individual's problem is subject to the uncertain outcome of committee hearings, floor sessions, and the governor's veto.

- Special legislation requires the LCPR to act in a quasi-judicial capacity, rather than in a legislative capacity. To resolve an individual's problem through the legislative process, the LCPR must make factual and legal determinations and, in some cases, evaluate an individual's credibility. The legislature is typically not the proper venue for making such determinations, as an administrative or judicial forum is better suited to developing a factual and legal record.
- Special legislation can lead to unequal treatment between members of public pension plans by granting rights to the individual benefiting from special legislation that are not granted to other similarly situated members.
- Time and energy spent by legislators on special bills is likely time and energy better spent on a general legislative solution. General legislation is a more effective use of time and leads to fairer outcomes by resolving an underlying issue for all similarly situated members.

Correcting Constituent Issues Caused by Operational Error

Many of the constituent issues addressed by special legislation could likely have been resolved by the pension plan administrator taking action to voluntarily correct the issue, provided there is a way to disregard or interpret a statute that appears to interfere with correction.

For example, HF 4427 (Robbins)/SF 4622 (Limmer) will help the surviving spouse of a now deceased member of the MSRS State Patrol Plan. The trooper retired in April of 1998 and elected to receive his pension in the form of a single life annuity, which means that there was no benefit payable to his surviving spouse after his death. The trooper was married to the constituent from 1976 until his death in 2017.

Under the procedures and law in effect in 1998, MSRS was required to notify a member's spouse if the member had the option to elect single life or joint and survivor annuities and receive a signed acknowledgement from the spouse acknowledging receipt of a copy of the member's election. There is no record that MSRS provided the required notification to the spouse and no signed acknowledgement from the spouse. The election form, which has a line for a spouse's signature, was not signed.

In May of 2022, the constituent wrote to MSRS that she recently discovered the application and that she sought information on how to make a claim to receive survivor benefits. MSRS staff determined that the constituent was not eligible to receive a survivor annuity because the member had elected a single life annuity rather than an annuity with a survivor benefit. On appeal, the MSRS executive director affirmed the staff decision. The constituent appealed that determination to the MSRS board of directors, which referred the matter to the Office of Administrative Hearings. A fact-finding conference was conducted before an Administrative Law Judge (ALJ), who issued a recommendation to the board that the executive director's decision be upheld. The board upheld the executive director's determination.

The constituent contacted her legislators, who introduced HF 4427/SF 4622. Could this have been corrected under EPCRS?

Yes, especially when the guidance contained in the EPCRS is considered. There will always be a question in these circumstances about whether the member's election of a single life annuity would have changed to a joint and survivor annuity had the spouse received the required notice at the time of the

member's election. But, based on the constituent's commitment to pursuing all avenues to obtain the survivor benefit, it is reasonable to assume that had she known of the election of a single life annuity by her member-spouse, she at least would have an opportunity to get the election changed to a joint and survivor annuity.

Under current state law, not only is notice to the spouse required, but the spouse must give written consent to the election of an annuity that does not provide a survivor benefit. Current state law also provides a remedy when a spouse has not given written consent, which is to suspend payments and take actions necessary to comply with the consent provision. However, the fact that under current law there is a remedy does not necessarily mean that an error under prior law cannot be corrected.

Although not directly on point because a notice requirement is different than a requirement of actual written consent, EPCRS does provide an explanation regarding how to correct a failure to obtain spousal consent to a distribution that is not a joint and survivor annuity (most relevant language is shaded):

> *.07 Failure to obtain participant or spousal consent for a distribution subject to the participant and spousal consent rules.…The permitted correction method is to give each affected participant a choice between providing informed consent for the distribution actually made or receiving a qualified joint and survivor annuity. In the event that participant or spousal consent is required but cannot be obtained, the participant must receive a qualified joint and survivor annuity based on the monthly amount that would have been provided under the plan at his or her retirement date. This annuity may be actuarially reduced to take into account distributions already received by the participant. However, the portion of the qualified joint and survivor annuity payable to the spouse upon the death of the participant may not be actuarially reduced to take into account prior distributions to the participant. Thus, for example, if, in accordance with the automatic qualified joint and survivor annuity option under a plan, a married participant who retired would have received a qualified joint and survivor annuity of $600 per month payable for life with $300 per month payable to the spouse for the spouse's life beginning upon the participant's death, but instead received a single-sum distribution equal to the actuarial present value of the participant's accrued benefit under the plan, then the $600 monthly annuity payable during the participant's lifetime may be actuarially reduced to take the single sum distribution into account. However, the spouse must be entitled to receive an annuity of $300 per month payable for life beginning at the participant's death.*[4]

Correction in the case of the surviving spouse for whom HF 4427/SF 4622 was introduced would be to begin payment immediately of the survivor portion of a 50% joint and survivor annuity and a back payment for payments missed since the member's death. This would be consistent with the guidance in the example in EPCRS.

Encouraging Pension Plan Executive Directors to Use EPCRS

Many of the constituent issues addressed by special legislation in the past might have been resolved by the pension plan administrator voluntarily electing to correct the error and put the member or spouse

[4] EPCRS Appendix A, section .07, pages 93-94 (IRS Rev. Proc. 2021-30).

into the position the individual would have been had the error not occurred. In many cases, however, the executive director and the governing board had determined that they could not correct an error because a time limit had passed.

For example, in 2021, HF 13 (Johnson)/SF 83 (Koran) was introduced to permit two school bus drivers to purchase credit for a couple of months of past service with a school district that was missed due to the school district's failure to enroll the bus drivers when they were eligible for the PERA General Plan. Section 353.27, subdivision 12, prohibits PERA from commencing action to recover omitted employee and employer contributions after three years have passed from the end of the calendar year in which the contributions should have been made. Had the time limitation not applied, the employer and employee would have been able to make the missed contributions or PERA would have been able to recover the missed employee and employer contributions, resulting in the grant of past service credit and no need for the special legislation.

To eliminate this objection to correcting operational errors, the 2024 Pension and Retirement Policy and Supplemental Budget Bill includes a provision at Article 8, Section 12, which is a new Section 356.636, titled "Correction of Errors." This new section is a restatement of Section 356.635, subdivision 13, but is supplemented with additional language to provide the executive directors of the statewide pension funds and St. Paul Teachers more flexibility to correct operational errors. A new paragraph states:

> *(c) An executive director may correct an error under paragraph (a) or (b) without regard to any statute that imposes a time limitation on making such correction.*

In addition, the directors are required to report annually to the Commission on whether any errors were corrected during the prior calendar year and, if so, describe the error, the method of correction, and any associated cost.

If the executive directors begin to use this statute to correct operational errors and become familiar with the guidance on methods of correction provided in EPCRS, this statute, as amended, has the potential to reduce the need for special legislation and the time and energy spent by legislators and the Commission on special legislation.