

EQUITY FOR SURVIVING SPOUSES ACT (ESSA)
Revised Summary for NYSBA Executive Committee, September 7, 2022

As part of the New York social contract, we expect our law will protect the retirement plan benefits of married individuals in a manner that recognizes marriage as an economic partnership. In particular, New York elective share law lets a surviving spouse of a retirement plan participant elect to receive one third of the participant/employee's death or survivor benefits paid by the plan.

The current elective share law is seriously flawed. The tragedy of a death of a New York public employee may be compounded by a surviving spouse then learning that he/she/they will receive no post-death retirement plan benefits, and, in the worst case, be left impoverished, but in many cases, be forced to retrench financially. This is because there may be no survivor benefits for the surviving spouse to elect to receive, and the plan may pay all the death benefits to a judgment proof person.

The Equity for Surviving Spouses Act (ESSA) would eliminate this unfairness. Under ESSA, a public employee's surviving spouse would, absent a written waiver by the surviving spouse on a plan form, receive from New York public employee plans either a survivor annuity, whose payments equal to at least half of the employee's periodic payments, or at least half of the employee's death benefits.

The ESSA approach encourages, but does not require, New York public employees to discuss their retirement plan benefits with their spouses. No discussion is required if the employee's spouse will be entitled to at least half of the employee's plan benefits.

By enhancing the current surviving spouse protections for New York public employees, ESSA would ensure that fewer surviving spouses would find their middle-class households thrown into poverty or be forced to downsize. ESSA's use of a one-half interest rather than a one-third interest is based on the expectation that married individuals share equally their employment earnings and retirement benefits.

ESSA will increase the fairness and equity for surviving spouses of New York public employees by following the tried-and-true 40-year path of ERISA, as amended by the Retirement Equity Act of 1984, that now protect the surviving spouses of more than 140 million private employees. ESSA will eliminate such troubling anomalies as the surviving spouse of a janitor employed by Metropolitan Hospital, a public hospital, having fewer protections than the surviving spouse of a janitor employed by Mt. Sinai Hospital, a private hospital six blocks away. With ESSA, the surviving spouses of employees of New York public entities will have the same protections as surviving spouses of New York employees of private and federal entities.

Thus, we ask the NYSBA Executive Committee to approve ESSA.

Modules Used to Generate ESSA, Including Effective Date Provisions as of September 7, 2022

Death Benefit Module

NY w/o NYC ESSA Section 2: Section 512 of the Education Law

i. Notwithstanding any other provision of this section to the contrary, at least one-half of the death benefits payable under this section, including any accumulated contributions remaining at the time of the member's death, payable under this section shall be paid to the member's surviving spouse, if any, unless the member elects that the surviving spouse receive less than one-half of the death benefits, and:

1. (A) the member's surviving spouse consents, after the date of the member's marriage, in writing to the member's election;
- (B) the spousal survivor written consent is on a plan form addressed to the member, and the form sets forth:
 - (i) the amount of the member's death benefits,
 - (ii) the entitlement of the surviving spouse to at least half of the death benefits,
 - (iii) the surviving spouse's right to prevent any future member elections regarding the member's death benefits without the surviving spouse's consent unless the consent of the surviving spouse expressly permits member elections without any further consent by the surviving spouse, and
 - (iv) the fact that consenting to the member's election would result in the surviving spouse receiving no death benefits or less death benefits than the surviving spouse would otherwise be entitled under this subdivision;
- (C) the consent includes an acknowledgement that the surviving spouse understands the surviving spouse's entitlement to be paid at least one-half the death benefits absent the surviving spouse's consent to the member's election, and that the surviving spouse's consent would eliminate or reduce these death benefit payments;
- (D) the consent includes a signature by the surviving spouse that was witnessed by either a notary public or a representative of the retirement system; and

- (E) the completed consent and the member's election are received by the system before the member's death;
2. the member and the surviving spouse were legally separated when the member's election was filed with the retirement system;
 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of the member's death;
 4. it is established to the satisfaction of the retirement board of the system that surviving spouse could not have been located if the member had been willing and able to exercise due diligence to locate the surviving spouse on the date of the member's death, and, on the date the member's election was filed with the retirement system if the member was then married to the surviving spouse;
 5. there is no surviving spouse.

j. Notwithstanding any other provision of this section to the contrary, a member's election must comply with the terms of subdivision i of this section to be effective.

k. If the retirement board of the system acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in—

1. relying on a consent referred to in paragraph one of subdivision i of this section, or
2. making a determination that at least one of paragraphs two, three, four, or five of subdivision i of this section is true,

then such consent or determination shall be treated as valid for purpose of discharging the retirement system and the board from liability to the extent of payments made pursuant to such action. These discharges shall not deprive the surviving spouse of any right to which the surviving spouse would otherwise be entitled from any party other than the retirement system or the board.

Annuity Benefit Module

NY w/o NYC ESSA Section 3: Section 513 of the Education Law

5. Notwithstanding any other provision of this section to the contrary, a member's retirement allowance payable under this section shall be paid as Option 3, so that upon his or her death, if the member has a surviving spouse who was married to the member on the date the member filed his or her retirement application, or on the date the member filed his or her last effective option selection, if any, whichever is later, the surviving spouse shall be paid for life survivor benefit payments, each of which is equal to at least one-half the amount of the member's retirement allowance payments payable under this section unless the member elects that the surviving spouse receive either no survivor benefit payments or survivor benefit payments, each of which is less than one-half of the amount of the member's retirement allowance payments, and:

- a.
 - (i) the member's surviving spouse consents, after the date of the member's marriage, in writing to the member's election;
 - (ii) the spousal survivor written consent is on a plan form addressed to the member and the form sets forth:
 - (A) the amount of the Option 3 monthly benefit entitlements of the member and of the spouse,
 - (B) the time each individual would be entitled under Option 3 to those benefits,
 - (C) the surviving spouse's right to prevent any future member elections regarding the member's survivor benefits without the surviving spouse's consent unless the consent of the surviving spouse expressly permits member elections without any further consent by the surviving spouse, and
 - (D) the fact that consenting to the member's survivor benefit election would result in the surviving spouse receiving no survivor benefits or smaller survivor benefits than the surviving spouse would otherwise be entitled under this subdivision;
 - (iii) the consent includes an acknowledgement that the surviving spouse understands the surviving spouse's entitlement to life survivor benefit payments, each of which is equal to at least one-half the amount of the member's retirement allowance payments absent the surviving spouse's consent to the member's election, and that the surviving spouse's consent would eliminate or reduce those survivor benefits would eliminate or reduce those survivor benefits;
 - (iv) the consent includes a signature by the surviving spouse that was witnessed by either a notary public or a representative of the retirement system; and
 - (v) the completed consent and the member's election are received by the system

- before the payability date;
- b. the member and the surviving spouse were legally separated when the member's election was filed with the retirement system;
 - c. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date the member's election is filed with the retirement system;
 - d. it is established to the satisfaction of the retirement board of the system that the surviving spouse could not have been located if the member had been willing and able to exercise due diligence to locate the surviving spouse on the date the member's retirement application was filed with the retirement system, unless the date when the member's last effective option selection filed with the retirement system was later, in which case, the surviving spouse could not have been located by the member with due diligence to locate the surviving spouse between the date the member's retirement application was filed with the retirement system, and the date the member's last effective option selection was filed with the retirement system; or
 - e. there is no surviving spouse.

6. Notwithstanding any other provision of this section to the contrary, a member's election must comply with the terms of subdivision five of this section to be effective.

7. If the retirement board of the system acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in—

- a. relying on a consent referred to in paragraph a of subdivision five of this section, or
- b. making a determination that at least one of paragraphs b, c, d, or e of subdivision five of this section is true,

then such consent or determination shall be treated as valid for purpose of discharging the retirement system and the board from liability to the extent of payments made pursuant to such action. These discharges shall not deprive the surviving spouse of any right to which the surviving spouse would otherwise be entitled from any party other than the retirement system or the board. To the extent the retirement system and the board were completely discharged for any annuity benefit payments that the system made to the member in excess of what the member would have been entitled under Option 3 if the member's beneficiary had been the surviving spouse, such excess payments shall be called Discharged Payments. The retirement system may recover the actuarial equivalent of those Discharged Payments, computed using the plan's actuarial factors, from the surviving spouse with offsets against the system's monthly annuity benefit payments to

the surviving spouse payable under this section, but may not thereby reduce any of those benefit payments by more than 10%.

Effective Date and Scope of Coverage Provision

NY w/o NYC ESSA Section 14

Section 14. This act shall take effect for all benefit payments beginning after December 31 of the year immediately after the year the bill is enacted other than those payments made pursuant to a benefit designation executed before such date. This act shall not change the law pertaining to a prenuptial agreement or a postnuptial agreement executed on or before December 31 of the year immediately after the year the bill is enacted. This act shall not change the law pertaining to a domestic relations order or a support order.



HERITAGE ADMINISTRATIVE SERVICES

September 7, 2022

Albert Feuer, Esq.
Chair, Life Insurance and Employee Benefits Committee
Trusts & Estates Law Section
New York State Bar Association
110-45 71st Road—Suite 7M
Forest Hills, NY 11375

Re: Equity for Surviving Spouses Act (ESSA)

Dear Mr. Feuer:

In your role as Chair of the ESSA Subcommittee of the Committee on Life Insurance and Benefits of the Trusts & Estates Law Section of the New York Bar Association, you asked for my opinion about the impact of the Equity for Surviving Spouses Act (ESSA) on (1) the administrative burdens, if any, to the eight New York public employee retirement plans to which ESSA would apply, (2) the employer contributions by the government sponsors of these plans, and (3) the benefits provided by these plans.

You informed me ESSA would extend to the surviving spouses of New York public employees who are participants, often called members, of the eight New York public employee retirement plans (NY Employee Plans) the protections that have been provided to surviving spouses of private-sector pension plan participants since 1984 by Section 205 of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

In my opinion, (1) the cost of the administrative burdens, if any, placed on plans to comply with the ERISA surviving spouse protections are *de minimis*, (2) those costs do not materially increase the employer contributions to those plans, and (3) those costs do not materially reduce the value of the benefits provided by those plans.

I have examined two of the New York Employee Plans in detail, and these three conclusions apply to these plans. Thus, ESSA may be expected to have a similar impact on the remaining six NY Employee Plans to which it would apply, the governments contributing to those plans, and the benefits provided by those plans. The materials described below that I reviewed are consistent with those conclusions.

Heritage Administrative Services LLC
100 Crossways Park West, Suite 413, Woodbury, NY 11797
Phone: 631-423-0405 • Fax: 631-423-9656

Purpose of Opinion

I understand that you plan to present this letter to the Executive Committee of the Trusts & Estates Law Section of the New York State Bar Association, and to the Executive Committee of the New York State Bar Association, and may post the letter on the websites for either or both of these entities, in support of your efforts to have ESSA enacted.

My Professional Qualifications

I have had more than thirty years' experience advising and helping to administer pension plans subject to Section 205 of the Employee Retirement Income Security Act of 1974, as amended (ERISA). I am aware of the costs of administering these plans consistent with ERISA requirements, including, but not limited to, compliance with the ERISA Section 205 surviving spouse protections.

I customarily determine on at least an annual basis the employer contributions that must be made to fund the benefits of ERISA defined benefit employer pension plans. I also frequently determine upon request from plan sponsors whether a proposed plan change would have a material effect on the plan's funding requirements, *i.e.*, the employer contribution amounts, or the plan benefits.

I am a member of the American Academy of Actuaries, American Society of Enrolled Actuaries (ASEA), American Society of Pension Professionals and Actuaries (ASPPA), Conference of Consulting Actuaries (CCA), and Society of Actuaries (SOA). I served six years on the Leadership Council and one year as Vice President of the American Society of Enrolled Actuaries (ASEA), a national actuarial organization. I am the Executive Editor of the ASEA Monthly, an e-newsletter for the actuaries of ASEA. I am enrolled by the Joint Board for the Enrollment of Actuaries. I am now the Senior Co-chair of the Exam Writers Committee for Exam EA-2L, the legal exam, and 1 of 3 exams required to become an Enrolled Actuary.

I am qualified to practice with respect to qualified retirement plans and to render the actuarial opinion contained in this letter under the American Academy of Actuaries qualification standard. My objectivity is not impaired by any relationship between you and Heritage Administrative Services LLC., my employer.

ESSA Would Protect Surviving Spouses, Using ERISA Section 205 as a Model

You informed me that the New York right of election law may, under certain circumstances, give the surviving spouse of a member of a NY Employee Plan a right to one-third of the member's death benefit and one-third of the member's survivor benefit. ESSA would enhance these surviving spouse protections with protections similar to those that are currently offered by private plans that are subject to Section 205 of ERISA

Section 205 of ERISA provides that a pension plan participant's surviving spouse is entitled to monthly survivor annuity benefits at least equal to half the monthly annuity payments to the participant, unless the surviving spouse waives such entitlement in writing on plan forms. Those protections also provide that a plan participant's surviving spouse is entitled to at least half of the participant's death benefit unless the surviving spouse waives such entitlement in writing on a plan form. Those protections generally apply to most defined benefit and defined contribution pension plans sponsored by private employers, but not to government plans.

I have consistently found:

- The cost of the administrative burdens, if any, that those ERISA Section 205 surviving spouse protections place on these plans is *de minimis*.
- The cost of complying with the ERISA Section 205 surviving spouse protections, when paid directly by the plan, does not materially affect the employer contribution amounts to those plans by the employers sponsoring those plans.
- These compliance costs also do not materially affect the total value of the plan benefits.

ESSA would protect surviving spouses by enacting protections that are modeled on ERISA Section 205:

- Absent a written waiver by a surviving spouse, ESSA would give the surviving spouse of a participant (member) of the NY Employee Plans at least one-half of the member's death benefit, and a survivor annuity, whose monthly annuity payments would be at least one-half of the monthly annuity retirement payments to the member.
- ESSA would govern all benefit payments from the NY Employee Plans beginning after December 31 of the year immediately after the year ESSA is enacted. ESSA would not govern payments made pursuant to a benefit designation executed before the effective date or payments subject to a domestic relations order or to a support order.
- ESSA's surviving spouse waiver requirements would be similar to those of ERISA Section 205, including the requirement that the surviving spouse's waiver be on a notarized plan form.

Documents that I Reviewed and Relied on for this Opinion

You provided me with information about ESSA and the documents from two NY Employee Plans: (1) The New York State Teachers Retirement System (NYSTRS), which provides benefits for New York public school teachers who are not employed by New York City, and (2) the New York City Police Pension Fund (NYPD Fund), which provides benefits for uniformed members of the New York City Police Department. My opinion is based upon the completeness and accuracy of your representations and on any facts and assumptions set forth below. If these assumptions are not correct, then the opinion may not be valid. I have made no

independent investigation of any representations and express no opinion regarding their accuracy and completeness.

(1) NYSTRS

You informed me that the NYSTRS is not subject to ERISA or its surviving spouse protections. You informed me that under the terms of the NYSTRS, the member has several benefit options, including a single life annuity, *i.e.*, an annuity for the life of the participant, and a joint and 50% survivor annuity, in which the participant's beneficiary would be entitled to monthly survivor annuity benefits equal to half the monthly annuity payments to the participant. You showed me the beneficiary application for these benefits that must be notarized.

You informed me that, under the terms of the NYSTRS, the default retirement benefit form, however, is a single life annuity for the life of the plan participant, and the participant's spouse need not be informed of the participant's choice of benefit form or beneficiaries. You informed me that under the terms of the NYSTRS, the default death benefit beneficiary is the participant's estate, and the participant's spouse need not be informed of the participant's choice of beneficiary or beneficiaries. You informed me that the NYSTRS complies with the state requirement to provide annual notices of member beneficiary choices. You showed me the beneficiary application for these death benefits, and that application must be notarized.

You provided me with these documents relating to NYSTRS:

- The NYSTRS Actuarial Valuation Report as of June 30, 2021, https://nystrs.org/NYSTRS/media/PDF/Library/Publications/Actuarial_Valuation_Rpt_6-30-21.pdf
- The NYSTRS Actuarial Valuation Report as of June 30, 2020, https://nystrs.org/NYSTRS/media/PDF/Library/Publications/Actuarial_Valuation_Rpt_6-30-20.pdf
- The NYSTRS Actuarial Valuation Report as of June 30, 2019, https://nystrs.org/NYSTRS/media/PDF/Library/Publications/Actuarial_Valuation_Rpt_6-30-19.pdf
- Copies of a chain of emails between you and Ms. Yiselle Ruoso, Senior Managing Counsel – Benefits & Legislation, Office of the General Counsel of the NYSTRS, beginning on May 25, 2022, and ending on July 15, 2022.

I reviewed the three valuations, all the reports mentioned by Ms. Ruoso in those emails, and Ms. Ruoso's responses in the emails, including the referenced plan beneficiary designation forms.

Considering the information and documents that you provided, I would expect that any administrative burdens (both transitional and post-transitional) on NYSTRS by the enactment of the ESSA spousal protections would be *de minimis* for NYSTRS. For the 2021 fiscal year,

annual benefit payments of NYSTRS were \$7,717,251,000, and annual administration costs were \$55,492,000. The most recent total administrative costs are substantially less than 1% of the benefit payments, so any reasonable estimate of the ESSA marginal administrative cost increase would be a small fraction of that amount, and thus a *de minimis* plan cost. Furthermore, if NYSTRS were a private plan becoming subject to the spousal protections of Section 205 of ERISA, any reasonable estimate of the ESSA marginal administrative cost increase similarly would not materially affect the employer contribution amounts to the plan or the total value of the plan benefits.

(2) NYPD Fund

You informed me that the NYPD Fund provides benefits for uniformed New York City Police Department members and is not subject to ERISA or its surviving spouse protections. You informed me that under the terms of the NYPD Fund, the participant, who is called a plan member, has several benefit options, including a single life annuity, *i.e.*, an annuity for the life of the participant, and a joint and 50% survivor annuity, in which the participant's beneficiary would be entitled to monthly survivor annuity benefits equal to half the monthly annuity payments to the participant. You showed me the beneficiary application for these benefits that must be notarized.

You informed me that, under the terms of the NYPD Fund, the default retirement benefit form, however, is a single life annuity for the life of the plan participant, and the participant's spouse need not be informed of the participant's choice of benefit form or beneficiaries. You informed me that under the terms of the NYPD Fund, the default death benefit beneficiary is the participant's estate, and the participant's spouse need not be informed of the participant's choice of beneficiary or beneficiaries. You informed me that the NYPD Fund complies with the state requirement to provide annual notices of member beneficiary choices. You showed me the beneficiary application for these benefits, and that application must be notarized.

You provided me with these documents relating to the NYPD Fund:

- The Fiscal Year 2021 Actuarial Valuation Report for the NYPD Fund, https://www1.nyc.gov/assets/actuary/downloads/pdf/POLICE_Fiscal_Year_2021_Actuarial_Valuation_Report.pdf
- The Fiscal Year 2020 Actuarial Valuation Report for the NYPD Fund, https://www1.nyc.gov/assets/actuary/downloads/pdf/POLICE_Fiscal_Year_2020_Actuarial_Valuation_Report.pdf
- The Fiscal Year 2019 Actuarial Valuation Report for the NYPD Fund, https://www1.nyc.gov/assets/actuary/downloads/pdf/POLICE_Fiscal_Year_2019_Actuarial_Valuation_Report.pdf
- Copies of the August 12, 2022 and August 2, 2022 letters to you from Ms. Nicole Giambarrese, the General Counsel, Record Access Officer of the NYPD Fund.

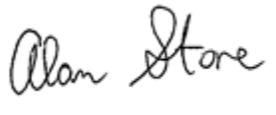
I reviewed the three valuations, all the reports and documents mentioned by Ms. Giambarresse in those letters, including the referenced plan beneficiary designation forms, and the fund procedure for dealing with a possible right of election claim to plan death benefits.

Considering the information and documents that you provided, I would expect that any administrative burdens (both transitional and post-transitional) on the NYPD Fund by the enactment of the ESSA spousal protections would be *de minimis* for the NYPD Fund. For the 2021 fiscal year, annual benefit payments of the NYPD Fund were \$3,841,319,000, and annual administration costs were \$33,558,460. The most recent total administrative costs are substantially less than 1% of the benefit payments, so any reasonable estimate of an ESSA marginal administrative cost increase would be a small fraction of that amount, and thus a *de minimis* plan cost. Furthermore, if the NYPD Fund were a private plan becoming subject to the spousal protections of Section 205 of ERISA, any reasonable estimate of an ESSA marginal administrative cost increase similarly would not materially affect the employer contribution amounts to the plan or the total value of the plan benefits.

Conclusions

Based on the information and documents that you provided and that I reviewed about NYSTRS and the NYPD Fund and the fact that ESSA's administrative impact on the NYSTRS and the NYPD Fund should be consistent with that of plans subject to the ERISA Section 205 requirements, I expect the costs of the administrative burdens (both transitional and post-transitional), if any, that would be imposed on these two plans by the enactment of the ESSA spousal protections, to be a *de minimis* plan cost, and not materially affect the employer contributions to the plans or the total value of the plan benefits.

Sincerely,

A handwritten signature in cursive script that reads "Alan Stone". The signature is contained within a thin black rectangular border.

Alan C. Stone, ASA, EA, MSPA, MAAA

Memo to: NYSBA Executive Committee

From: Albert Feuer, Chair, Life Insurance and Employee Benefits Committee, NYSBA Trusts & Estates Law Section

Re: Equity for Surviving Spouses Act (ESSA)

Response to Letter of June 7, 2022 to Executive Committee from Office of General Counsel, New York State Teachers Retirement System (NYSTRS Memo)

Date: July 20, 2022

Each of the four concerns expressed in the NYSTRS letter about the ESSA proposal may be readily allayed:

I: ESSA is consistent with the New York State Constitution protections for public employee retirement benefits.

Section 7 of article V of the New York State Constitution provides that, after July 1, 1940, "membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

The Court of Appeals unanimously rejected a New York State constitutional diminishment challenge to the equitable distribution division of New York State pension benefit annuity payments between a government employee and the employee's spouse in *Majauskas v. Majauskas*, 61 N.Y.S.2d 481 (1984). The Court rejected the attack because "the pension of the employee spouse is not diminished [by the equitable distribution division] in the sense that the pension fund will pay any lesser amount." *Id.*, at 493. In particular, the plan was directed to pay a portion of a police officer's pension annuity benefits to the officer's former spouse. *Id.*, at 493. ESSA, which also does not diminish any public pension fund's benefit payments, is similarly consistent with the same constitutional section.

ESSA is consistent with *Roddy v. Valentine*, 268 N.Y. 228 (1935) the only decision mentioned in the NYSTRS Memo. The Court of Appeals therein held prior to the enactment of the New York State constitutional that prohibits the diminishment of any public pension fund's benefit payments, that the pension benefits for a New York public employee may be revoked by statute at any time before the employee begins to receive retirement benefits, but may not be revoked by statute after the receipt of the benefits. *Id.*, at 232. In particular, a law could not suspend a pensioner's pension benefit payments, which began before the law's effective date, because the pensioner returned to work for a public entity after the enactment of the law. *Id.*, at 230-231. ESSA similarly provides that it is applicable only to those who were not receiving retirement benefits as of the effective day of the ESSA. *See* Modules Used to Generate ESSA, Including Effective Date Provisions as of June 3, 2022 at 5.

II. Almost forty years of experience with the surviving spouse protections under ERISA that are similar to ESSA show that there are no serious obstacles to the implementation of those protections

The Employee Retirement Income Security Act of 1974 (ERISA), has had surviving spouse provisions at ERISA § 205, 29 U.S.C. § 1055, since the 1984 introduction of the Retirement Equity Act of 1984. ERISA has anti-assignment provisions, ERISA § 206(d), 29 U.S.C. § 1056(d), similar to those for New York public pension plan benefits. Between 1984 and 2019, the number of participants, subject to those rules, has grown each year from almost 74 million to more than 141 million. *See Private Pension Plan Bulletin Historical Tables and Graphs 1975-2019*, U.S. DEPT OF LABOR (Sept. 2021), at 5, <https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf>. Thus, there is no shortage of experience of the interplay between the surviving spouse provisions and the anti-assignment provisions. There is abundant evidence that neither ESSA nor the New York anti-assignment laws, in isolation or in concert, would pose serious obstacles to the implementation to ESSA.

Moreover, the New York Court of Appeals unanimously dismissed an anti-assignment challenge to the application of a separation agreement providing an individual's former spouse with all of the individual's Teachers Retirement System of the City of New York death benefits. *Kaplan v. Kaplan*, 82 N.Y.2d 300 (1993). The court's dismissal was based on the reliance of the agreement on the equitable distribution rules that, in turn, recognize the close interrelationship between support and property distribution awards. *Id.*, at 305-307. The court observed at 307 that "[m]oreover, excepting support obligations from the anti-assignment statute's reach prevents that legislation from becoming an instrument to deprive those intended beneficiaries from receiving the funds." A similar statement could be made about the intended surviving spouse beneficiaries of ESSA.

III. ESSA is consistent with existing New York domestic relations law.

ESSA provides that it "shall not change the law pertaining to a domestic relations order or a support order." *See Modules Used to Generate ESSA, Including Effective Date Provisions as of June 3, 2022* at 5. For example, if there is a domestic relations order giving a member's prior spouse rights to the member's survivor or death public pension benefits, ESSA will not affect those rights. Thus, ESSA does not affect existing domestic relations law or the manner by which that law divides pension benefits between the current spouses and former spouses of a member of a pension plan for New York public employees.

IV. The NYTRS extensively tracks the marital status of members, and any additional administrative burdens associated with ERISA are counterbalanced by the need to give effect to the ESSA surviving spouse policies

This has not been an undue burden for the private plans with more than 140 million participants that have been doing this for almost forty years.

Furthermore, the NYSTRS already monitors marital status for many of its members. The only survivor beneficiaries who are entitled to cost-of-living allowances are a member's surviving spouses. Thus, the NYSTRS must monitor whether a beneficiary is a surviving spouse in order to know whether the beneficiary is entitled to such an allowance. Significant proportions of the members choose the joint and survivor and benefit form of benefit. Approximately one third of the NYSTRS retirees choose such benefit for the period from 2017-2021. *See New York Teachers' Retirement System Comprehensive Annual Financial Report: Fiscal Years Ended June 30, 2021 and 2020*, at 116, <https://www.nystrs.org/Library/Publications/Annual-Reports/2021AR.pdf>. The retirement beneficiary designation thus asks whether a beneficiary is the member's spouse. *See NYSTRS RET-54 (9/20)*, at 3 and 4, <https://www.nystrs.org/NYSTRS/media/PDF/Forms/ret-54.pdf>. Accidental death benefits are payable to the member's surviving spouse, if any, so there needs to be a plan procedure for determining whether there is such a surviving spouse.

The unanimous *Kaplan* New York State Court of Appeal's responded at 307 to the objection by the Teachers Retirement System of the City of New York about the administrative burden that the equitable distribution rules imposed on that plan by analogizing the equitable distribution rules to the ERISA surviving spouse protections as follows:

Nonetheless, any increased administrative costs are counterbalanced by the need to give effect to and further the policies underlying the enactment of equitable distribution concepts, such as protecting a former spouse's ownership interest in pension benefits accrued during the marriage, ensuring continued reliance on bargained-for separation agreements negotiated with those principles in mind, and avoiding the "heavy burden that will be imposed on the public treasury if dependent spouses and children cannot enforce support rights and must instead resort to [public] assistance" (*American Tel. & Tel.*, 592 F2d, at 125) [referring to the ERISA surviving spouse protections].

A fortiori, this argument would apply to any additional administrative burden imposed on the same public employee plans by ESSA, which protects a New York public employee's surviving spouse's interest in the employee's benefits in the same manner as the referenced ERISA protections.



Trusts and Estates Law Section

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1. NYS Retirement Pension assistance for surviving spouse?

0 Recommend



[Regina Brandow](#)

Posted 2 days ago

Reply

Hello, I hope everyone is enjoying their August.

I received a call today regarding a spouse's pension paperwork. Spouse died from COVID in the midst of retiring/Covid in 2021; spouse was completing his pension paperwork where his application was approved; however the "Options" paperwork was completed but not

submitted within the 30 days due to spouse passing; beneficiary widow having COVID, NYS retirement system not available responding, etc.

The surviving spouse is seeking counsel to represent her at a hearing as to why she should be entitled to his pension. Anyone familiar with these issues and or can recommend someone who can assist?

Thank you in advance.

Regina Brandow

Please hit reply all to ensure all parties necessary are in communication.

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Certified Impartial Hearing Officer by NY State Education Department

Certified by OPWDD in Benefits & Entitlements

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2. RE: NYS Retirement Pension assistance for surviving spouse?

0 Recommend



Albert Feuer

Posted yesterday

Reply ▼

Dear Regina,

All eight defined benefit pension plans for New York public employees provide that the default retirement benefit payment form is a single life annuity. Thus, it would appear because the employee's fatal illness prevented a timely filing of the employee's choice of a joint and survivor annuity, the surviving spouse lost not only her husband but her survivor benefits. This could be particularly devastating for both a young full-time mom and an elderly widow, if either is financially dependent on her late husband's earnings.

Our Section has drafted a proposed Equity for Surviving Spouses Act (ESSA) that would prevent this gross unfairness. ESSA would amend New York law to provide that the default retirement benefit from the New York public employee pension plans would be a joint and 50% survivor benefit. This would give surviving spouses of New York public employees protections similar to those granted by federal law for almost forty years to the surviving spouses of what are now more than 140 million American private and federal employees. The Section is now seeking support for ESSA from the New York State Bar Association.

Best wishes,

Albert

Albert Feuer
Law Offices Of Albert Feuer
110-45 71st Road Suite 7M

Forest Hills NY
(718) 263-9874

➤ Original Message

3. RE: NYS Retirement Pension assistance for surviving spouse?

0 Recommend



Bruce Steiner

Posted yesterday

Reply ▼

They should fix that so it's the same for state and local employees as for Federal and private company employees.

It's unlikely that he chose to work for the state rather than for a private company or the Federal government for the purpose of being able to take a single life annuity without his wife's consent.

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ALSO ADMITTED IN NJ AND FL

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➤ Original Message

4. RE: NYS Retirement Pension assistance for surviving spouse?

0 Recommend



Regina Brandow

Posted 13 hours ago

Reply ▼

In this case, it is devastating for an elderly widow and I trust the NYSBA will support ESSA. I agree with Bruce regarding NYS ees signing on not for only a single life. These ees signed on for the benefits provided to themselves, their spouses and family members.

According to the widow, the ee submitted the paperwork, not once, but twice. During the 2nd submission, the ee passed suddenly from COVID.

These cases do not allow a substantial compliance theory, only a strict threshold? Is there no equity argument here?

Regina Brandow
Brandow Law
Melville, NY.

► Original Message

5. RE: NYS Retirement Pension assistance for surviving spouse?

0 Recommend



Albert Feuer

Posted an hour ago

Reply ▼

Dear Regina,

Thanks for the additional information about the surviving spouse. I would advise her to seek assistance from legal aid attorneys with the requisite expertise to review the facts and determine if a substantial compliance argument may be effective in her case.

However, even if the woman is able to obtain survivor benefits, ESSA is still needed to eliminate a gross unfairness. Under the current law many surviving spouses are left in dire straits because the default benefit form from those public plans is a single life annuity rather than a joint and 50% survivor benefit, and the default was in place at the time of the employee's death.

ESSA, as federal law has done for forty years, would not merely provide that the default benefit from any of the eight defined benefit pension plans for New York public employees would be a joint and 50% survivor benefits. It would also similarly provide that this entitlement could only be waived by the surviving spouse, and then only by filing a plan waiver form executed during the marriage. This would prevent a public employee from choosing a single life annuity deliberately or inadvertently without the consent or knowledge of the employee's surviving spouse.

Bruce correctly observed that some New York public employees would prefer that their survivor spouses receive none of their pension plan's survivor benefits. They lost that battle in 1992 when New York made those benefits subject to the surviving spouse's right of election. ESSA addresses a significant flaw in a surviving spouse's current elective share rights. A public employee's survivor benefits may now be eliminated without the knowledge or consent of the employee's spouse. Federal law has not permitted this to be done to surviving spouses of private employees for forty years.

Best wishes,

Albert

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August 18, 2022

TO: Members of the Executive Committee

FROM: NYSBA Committee on Legal Aid

RE: COLA comment in support of Trusts and Estates Law Sections Affirmative Legislative Proposal – New York State Equity for Surviving Spouses Act

The Committee on Legal Aid (COLA) would like to co-sponsor the Trusts and Estates Law Sections Affirmative Legislative Proposal – New York State Equity for Surviving Spouses Act. As representatives of legal services programs that represent persons living in economic hardship, we often see the results of this inequity. At present, surviving spouses can be left completely unaware that their spouse chose a single-life annuity, which leaves the surviving spouse without any pension income upon the death of the employee. The consequences of this decision are horrific, often throwing what was a middle-class household into one of poverty. For all the above reasons, and those outlined in the memo by the New York State Bar Trusts & Estates Law Section, we lend our support to this bill.