



**Legal Opinion L-2004-05**  
**March 30, 2004**

U.S. Railroad Retirement Board  
844 North Rush Street  
Chicago Illinois, 60611-2092

Phone: (312) 751-7139  
TTY: (312) 751-4701  
Web: <http://www.rrb.gov>

**TO** : Dorothy A. Isherwood  
Director of Programs

**FROM** : Steven A. Bartholow  
General Counsel

**SUBJECT** : Public Law 108-203  
The Social Security Protection Act of 2004  
Tier I Public Pension Offset

This is in response to a request from the Labor Member's office that I review the effect which receipt of a pension from public employment will have on the potential spouse annuity in view of the amendments to the Social Security Act by the Social Security Protection Act of 2004.

As you know, section 2(c) of the Railroad Retirement Act provides annuities for the spouses and divorced spouses of railroad employees who are entitled to employee annuities under section 2(a)(1) of the Act. The amount of spouse and divorced spouse annuities is defined as "the amount provided under section 4 of this Act." Section 4(a)(1) in turn provides that:

(a)(1) The annuity of a spouse or divorced wife of an individual [employee] under section 2(c) of this Act shall be in an amount equal to the amount (before any reduction on account of age and before any deductions on account of work) of the wife's insurance benefit or the husband's insurance benefit to which such spouse or divorced wife would have been entitled under the Social Security Act if such individual's service as an employee \* \* \* had been included in the term "employment" as defined in that Act.

Entitlement to spouse and divorced spouse benefits under the Social Security Act is established by sections 202(b)(wives and divorced wives), and 202(c)(husbands and divorced husbands) of that Act. The Social Security Amendments of 1977 (Public Law 95-216)(91 Stat. 1509) amended those sections to provide that a spouse or divorced spouse benefit must be offset by the amount of:

"any monthly periodic benefit \* \* \* which is based upon her [or his] earnings while in the service of the Federal Government or any State (or political subdivision thereof \* \* \*) if, on the last day she [or he] was employed by such entity, such service did not constitute 'employment' \* \* \* [covered by the Social Security Act]. P.L. 95-216 § 334 (91 Stat. at 1544)

In Legal Opinion L-79-293, the General Counsel reviewed changes made to those sections and concluded that new sections 202(b)(4) and 202(c)(2) of the Social Security Act, as amended, required that the tier I component of spouse annuities must be reduced by any "public pension" which the spouse annuitant may receive. The amount of the offset required was later reduced from 100 percent of the public pension to two-thirds of the public pension in 1983. See section 337 of Public Law 98-21, the Social Security Amendments of 1983 (97 Stat. 65 at 131). This is



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the public pension offset computation required by current regulations of the Board at 20 CFR 226.31.<sup>1</sup>

Under the law as formerly in effect, both the Railroad Retirement Board and the Social Security Administration interpreted the "last day employed" in the literal sense. Thus, where a public employee worked in a position not covered by the Social Security Act, but transferred to a position in employment subject to social security coverage prior to retirement, if that employment used the services under both the covered and noncovered employment in determining last day worked for the public pension, then both the Social Security Administration and the Board would not apply any public pension offset to a spouse benefit payable to the retired public employee. See Board Order 02-78, rendered May 21, 2002, quoting the Social Security Program Operations Manual, section 026080102.

The Social Security Protection Act of 2004 has now amended the Social Security Act with respect to receipt of a pension based on non-social security covered public employment to replace the "last day" rule. Section 418 of the 2004 Act relocates the public pension offset language from duplicate sub-sections in each entitlement section for spouses, surviving spouses and divorced spouses or surviving divorced spouses to new section 202(k)(5). Insofar as is relevant here, section 202(k)(5)(A) as amended requires the social security benefit to be offset by two-thirds of a public pension:

which is based upon such individual's earnings while in the service of the Federal Government or any State (or political subdivision thereof \* \* \*) if, during any portion of the last 60 months of such service ending with the last day such individual was employed by such entity—

(i) such service did not constitute 'employment' as defined \* \* \* [as covered social security employment]. (emphasis added).

Where previously the benefit reduction depended upon the status of the spouse's employment on the "last day", the law as amended now applies to the social security benefit of a spouse or survivor who has a "portion of a month" of work covered by a public pension within the five years preceding his or her last day of work for a public employer. Essentially, the period which determines whether the offset applies has been changed from the last day to the last five years. This five year period is now the basis for determining whether the tier I annuity component as calculated under sections 4(a)(1) and 4(f)(1) of the Railroad Retirement Act should be reduced for the public pension offset as well.

Recognizing the significance of this change, Congress ameliorated the impact of the change in three ways. First, Congress has provided that the amendment takes effect with benefit applications filed after the month of enactment. Any social security benefit application filed prior to April 2004 will remain subject to the former law (i.e., whether the spouse benefit is reduced for a public pension will be determined by reference to the employment on the last day).<sup>2</sup> In the near term, Congress has further provided that new 202(k)(5)(A) "shall not apply in connection with monthly periodic benefits of any individual based on earnings while in [dual-covered social security and public] service described in section 202(k)(5)(A) if \* \* \* if the last day of such service

<sup>1</sup> The public pension offset also applies to the tier I component of survivor annuities, see Board regulations at 20 CFR 228.18, and any increase in the employee annuity under the social security over-all minimum guaranty provision (section 3(f)(2) of the Railroad Retirement Act) which is attributable to inclusion of the railroad employee's spouse.

<sup>2</sup> I note that regulations of the Board allow an application to be filed up to three months before the date an annuity can begin. 20 CFR 217.9(b). This exception thus applies to any who may become eligible in the next three months, if an application is filed before April 1, 2004.



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occurs before July 1, 2004.” See section 418(c)(1) of P.L. 108-203. Thus, any public employee otherwise subject to the spouse benefit public pension offset may retire from public employment under the “last day” rule through June 30, 2004.

For those public employees who file for social security benefits after March 2004 and retire from public employment after June 2004, Congress has allowed one last exception in the form of a “transitional rule”. P.L. 108-203 § 418(c)(2). Under the transitional rule, the 60 month period during which the spouse may not have worked in non-covered public employment may be reduced to as little as one month by the number months the public employee worked before the enactment date of the amendment (March 2, 2004) in service which is covered under the Social Security Act and is also used to determine the last day worked under the public pension system. An important limitation on the transitional rule requires that all months of the reduced period must fall after the enactment date. It appears the transitional rule operates as in the following example: A public employee who is subject to the new 60 month rule has worked in 12 months of public employment also covered by the Social Security Act prior to March 2004. Ordinarily, if any of the last 60 months of public employment were not covered by social security, the employee would fail the test for exemption, and the social security benefit would be offset by the public pension. However, because the employee served 12 months in a dual-covered position, the 60 month period is reduced to 48 months (60 minus 12). To avoid the public pension offset, the employee must not have worked in non-covered public service in any of the last 48 months counting forward from March 2, 2004. If the employee had worked 30 months prior to enactment, the period would be 30 months forward from March 2, 2004, and so forth.<sup>3</sup>

In sum, spouse, divorced spouse, and surviving spouse and surviving divorced spouse annuities are subject to a tier I offset for a public pension under new section 202(k)(5)(A) of the Social Security Act, unless the railroad retirement annuity application was filed prior to April 2004 or unless the railroad retirement beneficiary leaves public employment under the previous last day rule before July 2004. A railroad retirement annuitant who does not meet either of the foregoing must serve 60 months in employment covered by the Social Security Act, unless the 60 month period may be reduced as described under the transitional rule.

I hope the foregoing discussion will be of assistance to you.

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<sup>3</sup> It appears that this provision may address certain State public pension systems which transferred the employee to a social security covered position for a year prior to retirement. See: United States General Accounting Office, GAO-02-950,

<sup>3</sup> (cont'd)

Revision to the Government Pension Offset Exemption Should be Considered, Report to the Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives, (August 2002), at 3 (noting that in Georgia, teachers generally agreed to work for approximately one year in a position covered by Social Security.)