# WEST VIRGINIA CODE CHAPTER 51 ARTICLE 9

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## §51-9-1. Establishment.

There is hereby established a judges' retirement system for the purpose and to be administered as hereinafter provided.

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**§51-9-1a. Definitions.**

(a) Notwithstanding any other provision of this code to the contrary, as used in this article, the term "judge", "judge of any court of record", or "judge of any court of record of this state" means, refers to, and includes judges of the several family courts, circuit courts, judges of the Intermediate Court of Appeals, and justices of the Supreme Court of Appeals.

(b) "Actuarially equivalent" or "of equal actuarial value" means a benefit of equal value computed upon the basis of the mortality table and interest rates as set and adopted by the retirement board in accordance with the provisions of this article: *Provided*, That when used in the context of compliance with the federal maximum benefit requirements of section 415 of the Internal Revenue Code, "actuarially equivalent" shall be computed using the mortality tables and interest rates required to comply with those requirements.

(c) "Beneficiary" means any person, except a member, who is entitled to an annuity or other benefit payable by the retirement system.

(d) "Board" means the Consolidated Public Retirement Board created pursuant to §5-10D-1 *et seq*. of this code.

(e) "Bona fide separation from service upon retirement" means that a retirant has completely terminated any employment relationship with the Supreme Court for a period of at least 60 consecutive days from the effective date of retirement and without a prearranged agreement to return to employment with the Supreme Court. For purposes of this definition, an employment relationship includes employment in any capacity, whether on a permanent, full-time, part-time, substitute, per diem, temporary or leased employee basis.

(f) "Employer error" means an omission, misrepresentation or deliberate act in violation of relevant provisions of the West Virginia Code or of the West Virginia Code of State Rules or the relevant provisions of both the West Virginia Code and of the West Virginia Code of State Rules by the participating public employer that has resulted in an underpayment or overpayment of contributions required.

(g) "Final average salary" means the average of the highest 36 consecutive months' compensation received by the member as a judge of any court of record of this state.

(h) "Internal Revenue Code" means the Internal Revenue Code of 1986, as it has been amended.

(i) "Member" means a judge participating in this system.

(j) "Plan year" means the 12-month period commencing on July 1 of any designated year and ending the following June 30.

(k) "Required beginning date" means April 1 of the calendar year following the later of: (1) The calendar year in which the member attains the applicable age as set forth in this

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paragraph; or

(2) The calendar year in which he or she retires or otherwise separates from covered employment.

The applicable age is:

(A) Seventy-two, if the individual attains age 72 prior to January 1, 2023;

(B) Seventy-three, if the individual attains age 72 after December 31, 2022, and attains age 73 before January 1, 2033; or

(C) Seventy-five, if the individual attains age 74 after December 31, 2032; provided that the applicable age shall be determined in accordance with the provisions of §401(a)(9) of the Internal Revenue Code and the Treasury Regulations thereunder, as the same may be amended from time to time.

(l) "Retirant" means any member who commences an annuity payable by the plan.

(m) "Retirement system" or "system" means the Judges' Retirement System created and established by this article. Notwithstanding any other provision of law to the contrary, the provisions of this article are applicable only to family court judges, circuit judges, judges of the Intermediate Court of Appeals, and justices of the Supreme Court of Appeals in the manner specified in this article.

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**§51-9-1b. Statement of legislative intent, policy and finding.**

The decision and opinion of the state Supreme Court of Appeals in the case of *In re Judge Dostert*, which was rendered on November 7, 1984, and other decisions and opinions of that court based upon the *Dostert* decision have served to make substantial and fundamental changes in the retirement system for judges as established by the Legislature under the provisions of this article. These substantial and fundamental changes have served to or resulted in (i) expanding and greatly easing the requirements necessary to qualify to receive retirement annuity benefits from the system, (ii) making many persons eligible for retirement annuity benefits from the system at an earlier date than would have been the case under the provisions of the article, (iii) unjustly increasing the amount of retirement annuity benefits to be received by certain judges or justices would or will receive and (iv) altering or reducing the authority of the State Auditor as the primary administrator of the judges retirement fund and of the Governor to determine the eligibility of persons seeking to claim retirement annuity benefits from the fund and placed these functions within the province of the court administrator; thus removing the statutory authority of public officers outside the judicial branch of state government to determine the eligibility of judges and justices to receive such benefits or to see to the financial stability and soundness of the fund or to ensure fiscal accountability with respect thereto.

The Legislature hereby declares that the *Dostert* decision and the subsequent decisions of the Supreme Court of Appeals which were based upon the *Dostert* decision were not and do not constitute sound legal principles, in that they have served to rewrite contractual arrangements found to exist by the Supreme Court of Appeals in the case of *Wagoner v. Gainer* decided on June 15, 1981, and, further, usurped the authority of the Legislature to determine or formulate the public policy of this state as required by article V, section 1 and article VI, section 1 of the Constitution of West Virginia and further usurped the authority of the Legislature to set judicial compensation.

The Legislature hereby states and finds that its intent and policy recognizes a compelling state interest is present in carrying out its Constitutional responsibilities of establishing, determining and setting reasonable compensation guidelines and amounts for judicial officers, by law, and of protecting the fiscal responsibility and soundness of the moneys required for payment into the trust fund, as a part of the judicial branch budget request, which is determined by benefits payable from the judicial retirement system, and which judicial budget request may not be reduced by the Legislature, Constitutionally.

The amendments now made to the provisions of this retirement system by the Legislature are made within the original and continuing framework of such system and with the benefits hereunder being directed toward those meeting the strict and fundamental requirements of career judicial service on the bench, of military service and service as a prosecuting attorney as granted by this article.

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## §51-9-2. Judges' retirement fund created; composition.

As a part of the judges' retirement system, there is hereby created a Judges' Retirement Fund which shall be made up of and into which shall be paid

(a) Percentage contributions from salaries of judges as provided in section four of this article;

(b) Gifts and bequests to the fund and any accretions and accumulations which may properly be paid into and become a part of the fund;

(c) Specific appropriations to the fund made by the Legislature of the State of West Virginia and by any county court or courts of the state;

(d) Interest on the investment of any part or parts of the fund;

(e) Any other moneys, available and not otherwise expended, which may be appropriated or transferred to the fund.

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**§51-9-3. Custody, permissible investment and administration of retirement system trust fund; State Auditor's authority as administrator and trust fund fiduciary; refunds required, including interest; federal qualification requirements.**

(a) The State Treasurer shall be the custodian of the fund and of any investment securities of the retirement system and shall give a separate and additional bond for the faithful performance of his or her duties as such custodian. The Governor shall fix the amount of such bond which shall be approved as to sufficiency and form by the Attorney General and shall be filed in the office of the Secretary of State. The premium on such bond shall be paid from the fund.

(b) In a manner and to an extent consonant with sound administrative principles, the state Board of Investments shall have authority to invest such fund in interest-bearing securities of the United States of America, of the State of West Virginia and of any political subdivision thereof or such other investments as may be authorized or permitted by the provisions of article six, chapter twelve of this code.

(c) The State Auditor shall be the primary fiscal officer, responsible for the records and administration of the trust fund, including budgetary matters incident to the authority vested in him or her with respect to judicial department appropriations under article VI, section fifty-one of the Constitution of West Virginia. The State Auditor shall also, as trust fund fiduciary, independently determine anew, in a substantive sense and as a check and balance, any information concerning eligible service years, required money contributions, computation of judge's retirement benefit or spousal benefit or any other substantive element of qualification supplied or certified to the State Auditor by any other public officer, including the supreme court administrator or the chief executive, toward proper final review before issuance of a state warrant in payment of any benefit under the judges' retirement system.

(d) Through June 30, 1991, the State Auditor shall be the primary fiscal officer, responsible for the records and administration of the trust fund, including budgetary matter incident to the authority vested in him or her with respect to judicial department appropriations under article VI, section fifty-one of the Constitution of West Virginia. The State Auditor shall also, as trust fund fiduciary, independently determine anew, in a substantive sense and as a check and balance, any information concerning eligible service years, required money contributions, computation of judge's retirement benefit or spousal benefit or any other substantial element of qualification supplied or certified to the State Auditor by any other public officer, including the supreme court administrator or the chief executive, toward proper final review before issuance of a state warrant in payment of any benefit under the judges' retirement system. From July 1, 1991 and thereafter, the funds shall be administered by the Consolidated Public Retirement Board created by article ten-d, chapter five of this code.

(e) In respect of any credited service heretofore acquired under the Dostert decision and subsequent related decisions, the State Auditor shall make refund to any person heretofore



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making payment to acquire such service credit, primary or derivative, in the amount so earlier paid, together with interest at the same rate such sum actually earned because of its investment by the Auditor or treasurer, as the case may be, in the consolidated pension pool or with the interest such sum would have earned if timely invested in such pool, whichever amount of interest be greater.

(f) The retirement system is intended to meet the federal qualification requirements of Section 401(a) and related sections of the Internal Revenue Code as applicable to governmental plans. Notwithstanding any other provision of state law, the board shall administer the retirement system to fulfill this intent for the exclusive benefit of the members and their beneficiaries. Any provision of this article referencing or relating to these federal qualification requirements shall be effective as of the date required by federal law. The board may promulgate rules and amend or repeal conflicting rules in accordance with the authority granted to the board pursuant to section one, article ten-d, chapter five of this code to assure compliance with the requirements of this section.

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## §51-9-3a. Specification of actuarial assumptions.

The board at its first meeting in each calendar year or as soon thereafter as may be practicable shall adopt and specify actuarial assumptions for the system, which assumptions shall become part of the terms of this system.

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**§51-9-4. Required percentage contributions from salaries; any termination of required contributions prior to actual retirement disallowed; leased employees; military service credit; maximum allowable and qualified military service; qualifiable prosecutorial service.**

(a) Every person who is now serving or shall hereafter serve as a judge of any court of record of this state shall pay into the Judges' Retirement Fund six percent of the salary received by such person out of the State Treasury: *Provided*, That when a judge becomes eligible to receive benefits from such trust fund by actual retirement, no further payment by him or her shall be required, since such employee contribution, in an equal treatment sense, ceases to be required in the other retirement systems of the state, also, only after actual retirement: *Provided, however*, That on and after January 1, 1995, every person who is then serving or shall thereafter serve as a judge of any court of record in this state shall pay into the Judges' Retirement Fund nine percent of the salary received by that person: *Provided further*, That consistent with the salary increase granted to judges of courts of record during the 2005 regular legislative session and to changes effectuated in judicial retirement by provisions enacted during the third extraordinary legislative session of 2005, on and after July 1, 2005, every person who is then serving or shall thereafter serve as a judge of any court of record in this state shall pay into the Judges' Retirement Fund ten and one-half percent of the salary received by that person: *And provided further*, That on and after July 1, 2013, except as provided in subsections (b) and (c) of this section, every person who is then serving or shall thereafter serve as a judge of any court of record in this state and who elects to participate in this retirement system shall pay into the Judges' Retirement Fund seven percent of the salary received. Any prior occurrence or practice to the contrary, in any way allowing discontinuance of required employee contributions prior to actual retirement under this retirement system, is rejected as erroneous and contrary to legislative intent and as violative of required equal treatment and is hereby nullified and discontinued fully, with the State Auditor to require such contribution in every instance hereafter, except where no contributions are required to be made under any of the provisions of this article.

(b) On and after July 1, 2014, every person who is serving or shall hereafter serve as a judge of any court of record of this state and who elects to participate in this retirement system shall contribute to the fund an amount determined by the board. This amount will be based on the annual actuarial valuation prepared by the State Actuary: *Provided*, That the contribution will be no less than seven percent or no more than 10 and one-half percent of the participant's annual compensation.

(c) On or after July 1, 2027, every person who is serving or shall hereafter serve as a judge of any court of record of this state and who elects to participate in this retirement system shall contribute to the Judges' Retirement Fund seven percent of the salary received.

(d) On or after July 1, 2013, and each year thereafter, the board shall provide the annual actuarial valuation and the annual actuarially required contribution prepared by the State Actuary for use by the courts of this state for legislative appropriation to the Legislature's Joint Committee on Government and Finance and the Joint Committee on Pensions and

Retirement: *Provided*, That in any year that the State Actuary determines that the funding level of the Judges' Retirement Fund exceeds 125 percent, the board shall provide the annual actuarial valuation prepared by the State Actuary and a statement of the current funding level of the fund to the Legislature's Joint Committee on Government and Finance and the Joint Committee on Pensions and Retirement. Notwithstanding any provision of this code to the contrary, neither the court nor the Legislature shall be required to make a contribution to the fund when the funding level exceeds 125 percent. For purposes of this subsection, the funding level is determined by dividing the assets of the fund by the sum of the assets of the fund and the unfunded accrued liability of the fund.

(e) An individual who is a leased employee shall not be eligible to participate in the system. For purposes of this system, a "leased employee" means any individual who performs services as an independent contractor or pursuant to an agreement with an employee leasing organization or other similar organization. If a question arises regarding the status of an individual as a leased employee, the board has the final power to decide the question.

(f) In drawing warrants for the salary checks of judges, the State Auditor shall deduct from the amount of each such salary check six percent thereof, which amount so deducted shall be credited by the Consolidated Public Retirement Board to the trust fund: *Provided*, That on or after January 1, 1995, the amount so deducted and credited shall be nine percent of each such salary check: *Provided, however*, That consistent with the salary increase granted to judges of courts of record during the 2005 regular legislative session and to changes effectuated in judicial retirement by provisions enacted during the third extraordinary legislative session of 2005, on or after July 1, 2005, the amount so deducted and credited shall be ten and one-half percent of each such salary check: *Provided further*, That on and after July 1, 2013, except as provided in subsection (b) of this section, the amount so deducted and credited shall be seven percent of each salary check: *And provided further*, That on and after July 1, 2014, the amount so deducted and credited will be determined by the board: *And provided further*, That on and after July 1, 2027, the amount so deducted and credited shall be seven percent of each salary check.

(g) Any judge seeking to qualify military service to be claimed as credited service, in allowable aggregate maximum amount up to five years, shall be entitled to be awarded the same without any required payment in respect thereof to the Judges' Retirement Fund.

(h) Notwithstanding the preceding provisions of this section, contributions, benefits and service credit with respect to qualified military service shall be provided in accordance with Section 414(u) of the Internal Revenue Code. For purposes of this section, "qualified military service" has the same meaning as in Section 414(u) of the Internal Revenue Code. The Retirement Board is authorized to determine all questions and make all decisions relating to this section and may promulgate rules relating to contributions, benefits and service credit pursuant to the authority granted to the retirement board in §5-10D-1 of this code to comply with Section 414(u) of the Internal Revenue Code.

(i) Any judge holding office as such on the effective date of the amendments to this article



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adopted by the Legislature at its 1987 regular session who seeks to qualify service as a prosecuting attorney as credited service, which service credit must have been earned prior to the year 1987, shall be required to pay into the Judges' Retirement Fund nine percent of the annual salary which was actually received by such person as prosecuting attorney during the time such prosecutorial service was rendered prior to the year 1987 and for which credited service is being sought, together with applicable interest. No judge whose term of office shall commence after the effective date of such amendments to this article shall be eligible to claim any credit for service rendered as a prosecuting attorney as eligible service for retirement benefits under this article, nor shall any time served as a prosecutor after the year 1988 be considered as eligible service for any purposes of this article.

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## §51-9-5. Election not to participate, contribute, or be a member; authorized transfers of service credit by a judge; duplicate use of service credit prohibited.

(a) Notwithstanding any provisions of this article, any judge may in writing notify the Auditor within thirty days after he or she takes office, or, if he or she is in office, on the date this article becomes effective, then within thirty days from such latter date, that such judge elects not to become a member or make any payments or contributions to the trust fund, in which event every judge, so electing, shall not thereafter at any time be entitled to receive any retirement pay or benefits under provisions of this article, and any deduction that may have theretofore been made from the salary of such judge and paid into the fund shall be refunded without interest, to him or her by the Auditor by warrant drawn on the trust fund. Any judge who has so elected not to become a member or not to contribute, shall nevertheless thereafter be permitted to become such member, contribute and become eligible for retirement benefits by paying into the Judges' Retirement Fund all contributions such judge would have been required to pay into the fund, together with interest thereon at a rate to be determined by the State Auditor as reasonable for such prior periods, as if such judge had not previously elected not to be a member and not to contribute.

(b) There may be transfers of service credit on proper basis between the judges' retirement system and the Public Employees Retirement System, where such service credit constitutes qualified and eligible credit under the recipient system's statutes, in order to allow full flexibility of choice of option by a judge or judicial member; but in no case shall benefits be receivable from more than one of such state retirement systems, nor shall any service credit be usable more than once and then only in the finally chosen state retirement system.

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## §51-9-6. Eligibility for and payment of benefits.

(a) Except as otherwise provided in sections five, six-d, twelve and thirteen of this article, and subject to the provisions of subsection (e) of this section, any person who is now serving, or who shall hereafter serve, as a judge of any court of record of this state and shall have served as such judge for a period of not less than sixteen full years and shall have reached the age of sixty-five years, or who has served as judge of such court or of that court and other courts of record of the state for a period of sixteen full years or more (whether continuously or not and whether said service be entirely before or after this article became effective, or partly before and partly after said date, and whether or not said judge shall be in office on the date he or she shall become eligible to benefits hereunder) and shall have reached the age of sixty-five years, or who is now serving, or who shall hereafter serve, as a judge of any court of record of this state and shall have served as such judge for a period of not less than twenty-four full years, regardless of age, shall, upon a determination and certification of his or her eligibility as provided in section nine hereof, be paid from the fund annual retirement benefits, so long as he or she shall live, in an amount equal to seventy-five percent of the annual salary of the office from which he or she has retired based upon such salary of such office and as such salary may be changed from time to time during the period of his or her retirement and the amount of his or her retirement benefits shall be based upon and be equal to seventy-five percent of the highest annual salary of such office for any one calendar year during the period of his or her retirement and shall be payable in monthly installments: Provided, That such retirement benefits shall be paid only after such judge has resigned as such or, for any reason other than his or her impeachment, his or her service as such has ended: Provided, however, That every such person seeking to retire and to receive the annual retirement benefits provided by this subsection must have served a minimum of twelve years as a sitting judge of any such court of record: Provided further, That every individual who is appointed or elected for the first time as judge of a court of record of this state after July 1, 2005, who subsequently seeks to retire and to receive the annual retirement benefits provided by this subsection must have served a minimum of fourteen years as a sitting judge of any court of record.

(b) Notwithstanding any other provisions of this article with the exception of sections twelve-a and twelve-b, any person who is now serving or who shall hereafter serve as a judge of any court of record of this state and who shall have accumulated sixteen years or more of credited service, at least twelve years of which is as a sitting judge of a court of record, and who has attained the age of sixty-two years or more but less than the age of sixty-five years, may elect to retire from his or her office and to receive the pension to which he or she would otherwise be entitled to receive at age sixty-five, but with an actuarial reduction of pension benefit to be established as a reduced annuity receivable throughout retirement: Provided, That every individual who is appointed or elected for the first time as judge of a court of record of this state after July 1, 2005, who subsequently seeks to retire and to receive the annual retirement benefits provided by this subsection must have served a minimum of fourteen years as a sitting judge of any court of record. The reduced percentage (less than seventy-five percent) actuarially computed, determined and established at time of retirement

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in respect of this reduced pension benefit shall also continue and be applicable to any subsequent new annual salary set for the office from which such judge has retired and as such salary may be changed from time to time during the period of his or her retirement.

(c) In determining eligibility for the benefits provided by this section, active full-time duty (including leaves and furloughs) in the Armed Forces of the United States shall be eligible for qualification as credited military service for the purposes of this article by any judge with twelve or more years actual service as a sitting judge of a court of record, such awardable military service to not exceed five years: Provided, That in determining eligibility for the benefits provided by this section for every individual who is appointed or elected for the first time as judge of a court of record of this state after July 1, 2005, active full-time duty (including leaves and furloughs) in the Armed Forces of the United States qualifies as credited service for the purposes of this article for any judge with fourteen or more years actual service as a sitting judge of a court of record of this state, the awardable military service not to exceed five years.

(d) If a judge of a court of record who is presently sitting as such on the effective date of the amendments to this section enacted by the Legislature at its regular session held in the year 1987 and who has served for a period of not less than twelve full years and has made payments into the Judges' Retirement Fund as provided in this article for each month during which he or she served as judge, following the effective date of this section, any portion of time which he or she had served as prosecuting attorney in any county in this state shall qualify as years of service, if such judge shall pay those sums required to be paid pursuant to the provisions of section four of this article: Provided, That any term of office as prosecuting attorney, or part thereof, commencing after December 31, 1988, shall not hereafter in any way qualify as eligible years of service under this retirement system. For purposes of this article, eligible service as a "prosecuting attorney" or as a "prosecutor" does not include any service as an assistant prosecuting attorney. The amendment to this subsection during the third extraordinary session in the year 2005 is not for the purpose of changing existing law but is intended to clarify the intent of the Legislature as to existing law regarding eligibility for benefits for service as a prosecuting attorney since its initial enactment and this clarification shall be applied retrospectively to the effective date of this section and any predecessor acts in which service as a prosecuting attorney was initially determined by statute to qualify as eligible years of service under the retirement system provided by this article.

(e) Any retirement benefit accruing under the provisions of this section shall not be paid if otherwise barred under the provisions of article ten-a, chapter five of this code.

(f) Notwithstanding any other provisions of this article, forfeitures under the system shall not be applied to increase the benefits any member would otherwise receive under the system.

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## §51-9-6a. Eligibility benefits; service and retirement of judges over sixty-five years of age.

Any judge of a court of record of this state who shall have served for a period of not less than eight full years after attaining the age of sixty-five years and who shall have made payments into the Judges' Retirement Fund as provided in this article for each month during which he or she served as such judge following the effective date of this section, shall be subject to all the applicable terms and provisions of this article, not inconsistent with the provisions hereof, and shall receive retirement benefits in an amount equal to seventy-five percent of the annual salary of the office from which he or she has retired based upon such salary of such office as such salary may be changed from time to time during the period of his or her retirement and the amount of his or her retirement benefits shall be based upon and be equal to seventy-five percent of the highest annual salary of such office for any one calendar year during the period of his or her retirement and shall be payable in monthly installments. If such judge shall become incapacitated to perform his or her said duties before the expiration of his or her said term and after serving for six years thereof, and upon the acceptance of his or her resignation as in this article provided, he or she shall be paid the annual retirement benefits as herein provided so long as he or she shall live. The provisions of this section shall prevail over any language to the contrary in this article contained, except those provisions of sections twelve-a and twelve-b of this article: Provided, That no individual who is appointed or elected for the first time as judge of a court of record of this state after July 1, 2005, is eligible for retirement under this section.

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**§51-9-6b. Annuities for surviving spouses and surviving dependent children of judges; automatic escalation and increase of annuity benefit; proration designation by judge permitted.**

(a) There shall be paid, from the fund created or continued by section two of this article, or from such funds as may be appropriated by the Legislature for such purpose, an annuity to the surviving spouse of a judge, if such judge at the time of his or her death is eligible for the retirement benefits provided by any of the provisions of this article, or who has, at death, actually served five years or more as a sitting judge of any court of record of this state, exclusive of any other service credit to which such judge may otherwise be entitled, and who dies either while in office or after resignation or retirement from office pursuant to the provisions of this article. Said annuity shall amount to forty percent of the annual salary of the office which said judge held at his or her death or from which he or she resigned or retired. In the event said salary is increased or decreased while an annuitant is receiving the benefits hereunder, his or her annuity shall amount to forty percent of the new salary: Provided, That with respect to any individual who is appointed or elected for the first time as judge of a court of record of this state after July 1, 2005, any annuity to the surviving spouse of the judge shall be an amount equal to forty percent of the judge's final average salary: Provided, however, That the annuitant is not entitled to an increase in benefits by virtue of any increase in the salaries of the offices of circuit court judge or Justice of the Supreme Court of Appeals. The annuity granted hereunder shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month for which the annuity shall have accrued. Such annuity shall commence on the first day of the month in which said judge dies and shall, subject to the provisions of subsection (b) of this section, terminate upon the death of the annuitant or shall terminate upon the remarriage of the annuitant.

(b) If there be no surviving spouse at the time of death of a judge who dies after serving five years or more as a sitting judge of any court of record and such judge leaves surviving him any dependent child or children, such dependent child or children shall receive an amount equal to twenty percent of the annual salary of the office which said judge held at the time of his or her death: Provided, That the total of all such annuities payable to each such child shall not exceed in the aggregate an amount equal to forty percent of such salary. Such annuity shall continue as to each such child until: (i) He or she attains the age of eighteen years; or (ii) attains the age of twenty-three years so long as such child remains a full-time student. The Auditor shall by legislative rule establish the criteria for determining a person's status as a full-time student within the meaning and intent of this subsection. In the event there are surviving any such judge three or more dependent children, then each such child's annuity shall be proratably reduced in order that the aggregate annuity received by all such dependent children does not exceed forty percent of such salary and the amount to be so received by any such child shall continue throughout the entire period during which each such child is eligible to receive such annuity. The provisions of this subsection shall also apply to those circumstances and situations wherein a surviving spouse of a deceased judge shall die while receiving benefits pursuant to subsection (a) of this section and who shall

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leave surviving dependent children of such deceased judge who would be entitled to benefits under this subsection as if they had succeeded to such annuity benefits upon the death of such judge in the first instance. In the event the salary of judges is increased or decreased while an annuitant is receiving benefits pursuant to this subsection, the annuities payable shall be likewise increased or decreased proportionately to reflect such change in salary: Provided, however, That with respect to any individual who is appointed or elected for the first time as judge of a court of record of this state after July 1, 2005, any annuity to any children of the judge shall be calculated with respect to the judge's final average salary: Provided further, That the child is not entitled to an increase in benefits by virtue of any increase in the salaries of the offices of circuit court judge or Justice of the Supreme Court of Appeals. The annuities granted hereunder shall accrue monthly and shall be due and payable in monthly installments on the same day as surviving spouses' benefits are required to be paid. Such annuities shall commence on the first day of the month in which any such dependent child becomes eligible for benefits hereunder and shall terminate on the last day of the month during which such eligibility ceases.

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## §51-9-6c. Limitations on benefit increases.

(a) The state shall not increase any existing benefits or create any new benefits for any retirees or beneficiaries currently receiving monthly benefit payments from the system, other than an increase in benefits or new benefits effected by operation of law in effect on the effective date of this article, in an amount that would exceed more than one percent of the accrued actuarial liability of the system as of the last day of the preceding fiscal year as determined in the annual actuarial valuation for the plan completed for the Consolidated Public Retirement Board as of the first day of the following fiscal year as of the date the improvement is adopted by the Legislature.

(b) If any increase of existing benefits or creation of new benefits for any retirees or beneficiaries currently receiving monthly benefit payments under the system, other than an increase in benefits or new benefits effected by operation of law in effect on the effective date of this article, causes any additional unfunded actuarial accrued liability in any of the West Virginia state sponsored pension systems as calculated in the annual actuarial valuation for the plan during any fiscal year, the additional unfunded actuarial accrued liability of the system shall be fully amortized over no more than the six consecutive fiscal years following the date the increase in benefits or new benefits become effective as certified by the Consolidated Public Retirement Board. Following the receipt of the certification of additional actuarial accrued liability, the Governor shall submit the amount of the amortization payment each year for the system as part of the annual budget submission or in an executive message to the Legislature.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, the computation of annuities or benefits for active members due to retirement, death or disability as provided for in the system shall not be amended in such a manner as to increase any existing benefits or to provide for new benefits.

(d) The provisions of this section terminate effective July 1, 2009teen: Provided, That if bonds are issued pursuant to article eight, chapter twelve of this code, the provisions of this section shall not terminate while any of the bonds are outstanding.

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## §51-9-6d. Adjusted annual retirement benefit calculations.

In calculating the annual retirement benefits under section six of this article for any individual who is appointed or elected for the first time as judge of a court of record of this state after July 1, 2005, the judge shall receive retirement benefits in an amount equal to seventy-five percent of the individual's final average salary. The individual is not entitled to an increase in benefits by virtue of any increase in the salaries of the offices of circuit court judge or Justice of the Supreme Court of Appeals.

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## §51-9-7. Ineligibility to receive pay or benefits.

A judge who retires under the provisions of any section of this article and accepts the pay or benefits payable under this article shall, while receiving said pay or benefits, be permitted to hold any public office or trust for which the judge receives compensation from the State of West Virginia. If, after retirement under the provisions of this article, a judge is elected or appointed to any public office or trust for which he or she receives any salary or other compensation from the State of West Virginia, the retired judge is not eligible to participate in any other pension plan maintained by the State of West Virginia, nor accrue additional years of credited service under this system or any other state pension system. A judge who retires because of disability and accepts the pay or benefits payable under this article because of his or her disability shall not, while receiving said pay or benefits because of his or her disability, be permitted to practice law. If, after disability retirement under the provisions of this article and while receiving pay or benefits payable under said article because of his or her disability, he or she shall enter the practice of law, his or her pay or benefits under this article because of his or her disability shall be suspended for such time only as he or she shall be engaged in the practice of law.

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## §51-9-8. Retirement upon disability.

(a) Whenever a judge of a court of record of this state, who is not disqualified from participation herein as provided in section five of this article, who shall have served for ten full years, or if over the age of sixty-five years, who shall have served at least six years as a judge of a court of record, shall become physically or mentally incapacitated to perform the duties of his or her office as judge during the remainder of his or her term and shall make a written application to the Governor for his or her retirement, setting forth the nature and extent of his or her disability and tendering his or her resignation as such judge upon condition that upon its acceptance he or she be retired with pay under the provisions of this article, the Governor shall make such investigation as the Governor shall deem advisable and, if the Governor shall determine that such disability exists and that the public service is suffering and will continue to suffer by reason of such disability, the Governor shall thereupon accept the resignation and, by written order filed in the office of the Secretary of State, direct the retirement of the judge for the unexpired portion of the term for which such judge was elected or appointed. The Secretary of State shall thereupon file a certified copy of such order with the State Auditor. When so accepted, said resignation shall create a vacancy in such office of judge, which shall be filled by appointment or election as provided by law. The retired judge shall thereupon be paid annual retirement pay during the remainder of his or her unexpired term in an amount equal to the annual salary he or she was receiving at the time of his or her disability retirement, which annual retirement pay, so long as it shall be paid to him or her, shall be in lieu of any and all retirement benefits such judge may otherwise have received under provisions of this article: Provided, That when the payment of such full salary as disability retirement pay shall have terminated with the close of his or her term of office, such judge, even though he or she shall not have arrived at the age of sixty-five years, shall, so long as the disability determined by the Governor continues to exist, be paid the retirement benefits for which provision is made in section six of this article: Provided, however, That in the event any such judge shall die during the continuation of his or her disability, then such judge's surviving spouse shall receive the benefits to which he or she would have been entitled pursuant to the provisions of section six-b of this article and subject to the limitations thereon: Provided further, That any judge becoming a new member of this retirement system on or after April 1, one thousand nine hundred eighty-seven, and retiring upon disability retirement subsequent to such date shall be paid upon the basis of seventy-five percent of highest annual salary, with allowable salary increase, as provided in section six of this article during all disability retirement receipt periods.

(b) Any other provision of this section to the contrary notwithstanding, no judge shall be eligible pursuant to this section unless such judge is also disabled to such an extent so as to preclude such judge from engaging in the practice of law during all of the period of such disability.

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## §51-9-9. Determination of eligibility for benefits.

Before any person is entitled to retirement benefits under the provisions of this article, he or she shall submit proof of his or her eligibility for retirement benefits to the Governor. If the judge is still sitting, he or she shall at the same time tender to the Governor his or her resignation as judge to the Governor upon condition that, if the resignation is accepted, he or she will be paid retirement benefits as provided in this article. Upon request for retirement by a sitting judge, the Governor shall investigate to the extent he or she deems advisable to determine the judge's eligibility. If the Governor determines that such person is entitled to retirement benefits under the provisions of this article, the Governor shall accept the resignation and certify the facts and the amount of retirement benefits to be paid to the judge upon retirement by a written order filed in the office of the Secretary of State. The Secretary of State shall, upon receipt of the order, file a certified copy of the order with the State Auditor, the Governor's office, the Supreme Court of Appeals' administrative office and the Consolidated Public Retirement Board. After accepting the judge's resignation, a vacancy is created in the office of the retiring judge which shall be filled by appointment or election as provided by law.

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## §51-9-10. Services of senior judges and justices.

(a) The Legislature finds that:

(1) Section seven, article VIII of the Constitution of West Virginia expressly requires the Legislature to fix judicial salaries by statute, providing that: "[j]ustices, judges and magistrates shall receive the salaries fixed by law".

(2) Occasionally, circumstances may require the extended assignment of senior judges and justices, necessitating the Legislature to prescribe such circumstances when the limitations on compensation of senior judges and justices receiving retirement benefits may be exceeded.

(b) The Legislature recognizes and acknowledges the authority of the West Virginia Supreme Court of Appeals to recall retired circuit court judges, family court judges, judges of the Intermediate Court of Appeals, and justices of the Supreme Court of Appeals for temporary assignment and to create a panel of such senior judges and justices to serve in certain circumstances including, but not limited to, serving temporarily in the event of a protracted illness or medical condition, lengthy suspension, or other unfilled vacancy; serving temporarily in a circuit to assist with an excess of pending matters identified by the administrative director through statistical analysis; mentoring or assisting a sitting judge as directed by the administrative director; serving temporarily in a circuit in the event of a recusal or disqualification of a judge or justice; serving as a child protection commissioner pursuant to §49-4-118 of this code; serving as a law clerk for a circuit judge, a judge of the intermediate court of appeals, or a justice of the Supreme Court of Appeals; or presiding over cases as a member of the mass litigation or business court: *Provided*, That extended assignment of retired judges and justices must not be utilized in such a way as to threaten the qualified status of the Judges' Retirement System under applicable provisions of the Internal Revenue Code, including Treasury Regulation §1.401(a)-1(b)(1) requiring that a qualified plan must be established primarily to provide payment of definitely determinable benefits to its employees after retirement or attainment of normal retirement age.

(c) Senior intermediate court judges, circuit court judges, and justices recalled and assigned to service shall receive per diem compensation set by the Supreme Court of Appeals, but not to exceed $430 for each day actually served: *Provided*, That the combined total of per diem compensation and retirement benefits paid to a senior judge or justice during a single calendar year may not exceed the annual salary of a sitting circuit judge, except as set forth in subsection (d) of this section.

(d) Notwithstanding subsection (c) of this section, for purposes of maintaining judicial efficacy and continuity in judicial decision making, a senior judge or justice may continue to receive per diem compensation after the combined total of per diem compensation and retirement benefits paid to the senior judge or justice during that calendar year exceeds the annual salary of a sitting circuit judge if the Chief Justice of the Supreme Court of Appeals enters an administrative order certifying there are certain extraordinary circumstances

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involving the necessary absence of a sitting judicial officer because of a protracted illness or medical condition, or a lengthy suspension which necessitate the extended assignment of the senior judge or justice. Immediately upon entering such an order, the Chief Justice shall submit copies of the order to the State Auditor and the State Treasurer.

(e) In addition to the per diem compensation authorized by this section, senior judges and justices recalled to service may be reimbursed for their actual and necessary expenses incurred in the performance of their duties.

(f) Senior family court judges recalled and assigned to service shall receive per diem compensation set by the Supreme Court of Appeals, but not to exceed $325 for each day actually served: *Provided*, That the combined total per diem compensation and retirement benefits paid to a senior family court judge during a single calendar year may not exceed the annual salary of a sitting family court judge, except as set forth in subsection (d) of this section. In addition to the per diem compensation authorized by this section, senior family court judges recalled to service may be reimbursed for their actual and necessary expenses incurred in the performance of their duties.

(g) Notwithstanding any provision of this article to the contrary, a retirant who becomes employed by the Supreme Court after the effective date of his or her retirement must have a bona fide separation from service upon retirement to be eligible for an annuity under the retirement system. If a retirant fails to have a bona fide separation from service upon retirement or if such retirant or the participating public employer fails to comply with subsection (h) of this section in a manner satisfactory to the board, then the member's retirement shall be voided and the member shall repay to the system the gross amount of all annuity payments received related to such voided retirement. The board may take any actions necessary or appropriate in accordance with the provisions of §51-9-18 to recover such annuity payments so that an in-service distribution is not deemed to have been made.

(h) Prior to any retirant subsequently becoming reemployed by the Supreme Court, whether on a permanent, full-time, part-time, substitute, per diem, temporary or leased employee basis, the Supreme Court shall notify the board and the retirant, in writing, if and when any such potential employment will negatively impact the retirant's retired status or benefits. Upon the retirant's acceptance of such employment, the participating public employer shall notify the board, in writing, of the retirant's subsequent employment. The retirement board may also require of retirants and the Supreme Court such reports, forms and verifications as it deems necessary to ensure that a bona fide separation from service from retirement has occurred.

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## §51-9-11. Monthly payments.

The retirement benefits and retirement pay, as herein provided, shall be paid in equal monthly installments upon the warrant of the State Auditor drawn on the Judges' Retirement Fund. If at any time moneys in said fund are insufficient to meet the orderly requirements of the retirement system, payments hereunder shall then be made from funds in the State Treasury appropriated and otherwise available for such purposes.

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## §51-9-12. Refunds.

Any judge of a court of record of this state whose services have terminated, otherwise than by retirement under provisions of this article, shall, upon his written demand, or the written demand of his personal representative, filed with the State Auditor, by a proper warrant of the State Auditor drawn on the fund, be refunded, without interest, any and all money paid by or for said judge into the fund. Such repayment shall terminate all rights of said judge to participate thereafter at any time in the benefits and pay of the retirement system, without prejudice, however, to his right to reenter the system after a subsequent appointment or election to a qualified judgeship, but without credit for any prior years of service: Provided, however, That should a retired judge die, without leaving a widow surviving, while receiving retirement benefits under the provisions of this article, and before he has received from the Judges' Retirement Fund an amount equal to, or in excess of, sums paid by him into such fund, or should the widow, as defined by section six-b of this article, who is entitled to an annuity under the provisions of section six-b die or remarry while receiving annuity benefits, and before she and her husband have received from the Judges' Retirement Fund an amount equal to, or in excess of, sums contributed by him to such fund, then, and in either of these events, the State Auditor shall, upon the written demand of the personal representative of the judge or widow, as the case may be, filed with the State Auditor, by a proper warrant drawn on the fund, refund, without interest, to the estate of such judge or such widow, as the case may be, an amount equal to the difference between the sums contributed to the fund by or for such judge and the amount of such retirement benefits and annuities paid to him and his widow.

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**§51-9-12a. Federal law maximum benefit limitations.**

Notwithstanding any other provision of this article or state law, the board shall administer the retirement system in compliance with the limitations of Section 415 of the Internal Revenue Code and regulations under that section, to the extent applicable to governmental plans (hereafter sometimes referred to as the "415 limitation(s)" or "415 dollar limitation(s)"), so that the annual benefit payable under this system to a member shall not exceed those limitations. Any annual benefit payable under this system shall be reduced or limited if necessary to an amount which does not exceed those limitations. The extent to which any annuity or other annual benefit payable under this retirement system shall be reduced as compared with the extent to which an annuity, contributions or other benefits under any other defined benefit plans or defined contribution plans required to be taken into consideration under Section 415 of the Internal Revenue Code shall be reduced, shall be proportional on a percentage basis to the reductions made in such other plans administered by the board and required to be so taken into consideration under Section 415, unless a disproportionate reduction is determined by the board to maximize the aggregate benefits payable to the member. If the reduction is under this retirement system, the board shall advise affected members of any additional limitation on the annuities or other annual benefit required by this section. For purposes of the 415 limitations, the "limitation year" shall be the calendar year. The 415 limitations are incorporated herein by reference, except to the extent the following provisions may modify the default provisions thereunder:

(a) The annual adjustment to the 415 dollar limitations made by Section 415(d) of the Internal Revenue Code and the regulations thereunder shall apply for each limitation year. The annual adjustments to the dollar limitations under Section 415(d) of the Internal Revenue Code which become effective: (i) After a retirant's severance from employment with the employer; or (ii) after the annuity starting date in the case of a retirant who has already commenced receiving benefits, will apply with respect to a retirant's annual benefit in any limitation year. A retirant's annual benefit payable in any limitation year from this retirement system shall in no event be greater than the limit applicable at the annuity starting date, as increased in subsequent years pursuant to Section 415(d) of the Internal Revenue Code and the regulations thereunder.

(b) For purposes of this section, the "annual benefit" means a benefit that is payable annually in the form of a straight life annuity. Except as provided below, where a benefit is payable in a form other than a straight life annuity, the benefit shall be adjusted to an actuarially equivalent straight life annuity that begins at the same time as such other form of benefit, using factors prescribed in the 415 limitation regulations, before applying the 415 limitations. No actuarial adjustment to the benefit shall be made for: (1) Survivor benefits payable to a surviving spouse under a qualified joint and survivor annuity to the extent such benefits would not be payable if the member's benefit were paid in another form; (2) benefits that are not directly related to retirement benefits (such as a qualified disability benefit, preretirement incidental death benefits and post-retirement medical benefits); or (3) the inclusion in the form of benefit of an automatic benefit increase feature, provided the form of benefit is not subject to Section 417(e)(3) of the Internal Revenue Code and would otherwise



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satisfy the limitations of this article, and the plan provides that the amount payable under the form of benefit in any limitation year shall not exceed the limits of this article applicable at the annuity starting date, as increased in subsequent years pursuant to Section 415(d) of the Internal Revenue Code. For this purpose an automatic benefit increase feature is included in a form of benefit if the form of benefit provides for automatic, periodic increases to the benefits paid in that form.

(c) Adjustment for benefit forms not subject to Section 417(e)(3). -- The straight life annuity that is actuarially equivalent to the member's form of benefit shall be determined under this subsection if the form of the member's benefit is either: (1) A nondecreasing annuity (other than a straight life annuity) payable for a period of not less than the life of the member (or, in the case of a qualified preretirement survivor annuity, the life of the surviving spouse); or (2) an annuity that decreases during the life of the member merely because of: (i) The death of the survivor annuitant (but only if the reduction is not below fifty percent of the benefit payable before the death of the survivor annuitant); or (ii) the cessation or reduction of Social Security supplements or qualified disability payments (as defined in Section 411(a)(9) of the Internal Revenue Code). The actuarially equivalent straight life annuity is equal to the greater of: (I) The annual amount of the straight life annuity (if any) payable to the member under the plan commencing at the same annuity starting date as the member's form of benefit; and (II) the annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the member's form of benefit, computed using a five percent interest rate assumption and the applicable mortality table defined in Treasury Regulation §1.417(e)-1(d)(2) (Revenue Ruling 2001-62 or any subsequent Revenue Ruling modifying the applicable provisions of Revenue Ruling 2001-62) for that annuity starting date.

(d) Adjustment for benefit forms subject to Section 417(e)(3). -- The straight life annuity that is actuarially equivalent to the member's form of benefit shall be determined under this subsection if the form of the member's benefit is other than a benefit form described in subdivision (c) of this section. The actuarially equivalent straight life annuity shall be determined as follows: The actuarially equivalent straight life annuity is equal to the greatest of: (1) The annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the member's form of benefit, computed using the interest rate specified in this retirement system and the mortality table (or other tabular factor) specified in this retirement system for adjusting benefits in the same form; (2) the annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the member's form of benefit, computed using a five and a half percent interest rate assumption and the applicable mortality table defined in Treasury Regulation §1.417(e)-1(d)(2) (Revenue Ruling 2001-62 or any subsequent Revenue Ruling modifying the applicable provisions of Revenue Ruling 2001-62) for that annuity starting date; and (3) the annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the member's form of benefit, computed using the applicable interest rate defined in Treasury Regulation §1.417(e)-1(d)(3) and the applicable mortality table defined in Treasury

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Regulation §1.417(e)-1(d)(2) (the mortality table specified in Revenue Ruling 2001-62 or any subsequent Revenue Ruling modifying the applicable provisions of Revenue Ruling 2001-62), divided by 1.05.

(e) Benefits payable prior to age sixty-two. --

(1) Except as provided in paragraphs (2) and (3) of this subdivision, if the member's retirement benefits become payable before age sixty-two, the 415 dollar limitation prescribed by this section shall be reduced in accordance with regulations issued by the Secretary of the Treasury pursuant to the provisions of Section 415(b) of the Internal Revenue Code, so that the limitation (as so reduced) equals an annual straight life benefit (when the retirement income benefit begins) which is equivalent to an annual benefit in the amount of the applicable dollar limitation of Section 415(b)(1)(A) of the Internal Revenue Code (as adjusted pursuant to Section 415(d) of the Internal Revenue Code) beginning at age sixty-two.

(2) The limitation reduction provided in paragraph (1) of this subdivision shall not apply if the member commencing retirement benefits before age sixty-two is a qualified participant. A qualified participant for this purpose is a participant in a defined benefit plan maintained by a state, or any political subdivision of a state, with respect to whom the service taken into account in determining the amount of the benefit under the defined benefit plan includes at least fifteen years of service: (i) As a full-time employee of any police or fire department organized and operated by the state or political subdivision maintaining the defined benefit plan to provide police protection, firefighting services or emergency medical services for any area within the jurisdiction of such state or political subdivision; or (ii) as a member of the Armed Forces of the United States.

(3) The limitation reduction provided in paragraph (1) of this subdivision shall not be applicable to preretirement disability benefits or preretirement death benefits.

(4) For purposes of adjusting the 415 dollar limitation for benefit commencement before age sixty-two or after age sixty-five (if the plan provides for such adjustment), no adjustment is made to reflect the probability of a member's death: (i) After the annuity starting date and before age sixty-two; or (ii) after age sixty-five and before the annuity starting date.

(f) Adjustment when member has less than ten years of participation. -- In the case of a member who has less than ten years of participation in the retirement system (within the meaning of Treasury Regulation §1.415(b)-1(g)(1)(ii)), the 415 dollar limitation (as adjusted pursuant to Section 415(d) of the Internal Revenue Code and subdivision (e) of this section) shall be reduced by multiplying the otherwise applicable limitation by a fraction, the numerator of which is the number of years of participation in the plan (or one, if greater), and the denominator of which is ten. This adjustment shall not be applicable to preretirement disability benefits or preretirement death benefits.

(g) The application of the provisions of this section shall not cause the maximum annual

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benefit provided to a member to be less than the member's accrued benefit as of December 31, 2008 (the end of the limitation year that is immediately prior to the effective date of the final regulations for this retirement system as defined in Treasury Regulation §1.415(a)-1(g)(2)), under provisions of the retirement system that were both adopted and in effect before April 5, 2007, provided that such provisions satisfied the applicable requirements of statutory provisions, regulations, and other published guidance relating to Section 415 of the Internal Revenue Code in effect as of December 31, 2008, as described in Treasury Regulation §1.415(a)-1(g)(4). If additional benefits are accrued for a member under this retirement system after January 1, 2009, then the sum of the benefits described under the first sentence of this subdivision and benefits accrued for a member after January 1, 2009, must satisfy the requirements of Section 415, taking into account all applicable requirements of the final 415 Treasury Regulations.

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## §51-9-12b. Federal minimum required distributions.

The requirements of this section apply to any distribution of a member's or beneficiaries' interest and take precedence over any inconsistent provisions of this retirement system. This section applies to plan years beginning after December 31, 1986. Notwithstanding anything in the retirement system to the contrary, the payment of benefits under this article shall be determined and made in accordance with §401(a)(9) of the Internal Revenue Code and the federal regulations promulgated thereunder as applicable to governmental plans, including without limitation the minimum distribution incidental benefit (MDIB) requirement of §401(a)(9)(G) and the regulations thereunder, and the incidental benefit rule of §1.401-1(b)(1)(i) of the regulations. Any term used in this article has the same meaning as when used in a comparable context in §401(a)(9) of the Internal Revenue Code and the federal regulations promulgated thereunder unless a different meaning is clearly required by the context or definition in this article. The following provisions apply to payments of benefits required under this article:

(a) The payment of benefits under the retirement system to any member shall be distributed to him or her not later than the required beginning date, or be distributed to him or her commencing not later than the required beginning date, in accordance with regulations prescribed under §401(a)(9) of the Internal Revenue Code, over the life of the member or over the lives of the member and his or her beneficiary or over a period not extending beyond the life expectancy of the member and his or her beneficiary: *Provided*, That the requirements of this section may not be construed to grant a right to a form of benefit which is not otherwise available to a particular member under this retirement system. Benefit payments under this section shall not be delayed pending, or contingent upon, receipt of an application for retirement from the member.

(b) If a member dies after distribution to him or her has commenced pursuant to this section but before his or her entire interest in the retirement system has been distributed, then the remaining portion of that interest shall be distributed at least as rapidly as under the method of distribution being used at the date of his or her death.

(c) If a member dies before distribution to him or her has commenced, then his or her entire interest in the retirement system is to be distributed by December 31 of the calendar year containing the fifth anniversary of the member's death, unless the provisions of subsection (d) of this section apply.

(d) If a member dies before distribution to him or her has commenced, and the member's interest is eligible to be paid in the form of a survivor annuity to a designated beneficiary, distributions are to be made over the life of that beneficiary or over a period certain not greater than the life expectancy of that beneficiary, commencing on or before the following:

(1) December 31 of the calendar year immediately following the calendar year in which the member died; or

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(2) If the member's sole designated beneficiary is either the surviving spouse or a former spouse who, as an alternate payee under a Qualified Domestic Relations Order, is receiving 100 percent of the survivor benefit, distributions are to commence on or before the later of:

(A) December 31 of the calendar year in which the member would have attained the applicable age as set forth in the definition of required beginning date provided in §51-9-1a of this code; or

(B) December 31 of the calendar year immediately following the calendar year in which the member died.

(e) If a member dies before distribution to him or her has commenced and the survivor annuity provisions of subsection (d) of this section are not applicable, any designated beneficiary who is eligible to receive a distribution pursuant to the provisions of subsection (c) of this section may elect to have life expectancy treatment apply to the distribution for purposes of determining whether any portion of the distribution is an eligible rollover distribution: *Provided*, That any such election shall not delay the required distribution of the deceased member's entire interest in the retirement system beyond December 31 of the calendar year containing the fifth anniversary of the member's death as required by subsection (c) of this section: *Provided, however*, That the election is timely made in a form acceptable to the board on or before the following:

(1) December 31 of the calendar year immediately following the calendar year in which the member died; or

(2) If the member's sole designated beneficiary is either the surviving spouse or a former spouse who, as an alternate payee under a Qualified Domestic Relations Order, is receiving 100 percent of the survivor benefit, election of life expectancy treatment must be made on or before the earlier of:

(A) The later of: (i) December 31 of the calendar year immediately following the calendar year in which the member died; or (ii) December 31 of the calendar year in which the member would have attained the applicable age as set forth in the definition of required beginning date provided in §51-9-1a of this code; or

(B) October 31 of the calendar year containing the fifth anniversary of the member's death.

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**§51-9-12c. Direct rollovers.**

(a) Except where otherwise stated, this section applies to distributions made on or after January 1, 1993. Notwithstanding any provision of this article to the contrary that would otherwise limit a distributee's election under this system, a distributee may elect, at the time and in the manner prescribed by the board, to have any portion of an eligible rollover distribution that is equal to at least $500 paid directly to an eligible retirement plan specified by the distributee in a direct rollover. For purposes of this section, the following definitions apply:

(1) "Eligible rollover distribution" means any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include any of the following: (i) Any distribution that is one of a series of substantially equal periodic payments not less frequently than annually made for the life or life expectancy of the distributee or the joint lives or the joint life expectancies of the distributee and the distributee's designated beneficiary, or for a specified period of ten years or more; (ii) any distribution to the extent such distribution is required under Section 401(a)(9) of the Internal Revenue Code; (iii) the portion of any distribution that is not includable in gross income determined without regard to the exclusion for net unrealized appreciation with respect to employer securities; (iv) any hardship distribution described in Section 401(k)(2)(B)(i)(iv) of the Internal Revenue Code; and (v) any other distribution or distributions expected to total less than $200 during a year. For distributions after December 31, 2001, a portion of a distribution shall not fail to be an eligible rollover distribution merely because the portion consists of after-tax employee contributions which are not includable in gross income. However, this portion may be paid only to an individual retirement account or annuity described in Section 408(a) or (b) of the Internal Revenue Code, or (for taxable years beginning before January 1, 2007) to a qualified trust which is part of a defined contribution plan described in Section 401(a) or (for taxable years beginning after December 31, 2006) to a qualified trust or to an annuity contract described in Section 403(a) or (b) of the Internal Revenue Code that agrees to separately account for amounts transferred (including interest or earnings thereon), including separately accounting for the portion of the distribution which is includable in gross income and the portion of the distribution which is not so includable, or (for taxable years beginning after December 31, 2007) to a Roth IRA described in Section 408A of the Internal Revenue Code.

(2) "Eligible retirement plan" means an individual retirement account described in Section 408(a) of the Internal Revenue Code, an individual retirement annuity described in Section 408(b) of the Internal Revenue Code, an annuity plan described in Section 403(a) of the Internal Revenue Code, or a qualified plan described in Section 401(a) of the Internal Revenue Code, that accepts the distributee's eligible rollover distribution: Provided, That in the case of an eligible rollover distribution prior to January 1, 2002, to the surviving spouse, an eligible retirement plan is limited to an individual retirement account or individual retirement annuity. For distributions after December 31, 2001, an eligible retirement plan also means an annuity contract described in Section 403(b) of the Internal Revenue Code and an eligible plan under Section 457(b) of the Internal Revenue Code which is maintained



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by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into the plan from this system. For distributions after December 31, 2007, an eligible retirement plan also means a Roth IRA described in Section 408A of the Internal Revenue Code: Provided, That in the case of an eligible rollover distribution after December 31, 2007, to a designated beneficiary (other than a surviving spouse) as such term is defined in Section 402(c)(11) of the Internal Revenue Code, an eligible retirement plan is limited to an individual retirement account or individual retirement annuity which meets the conditions of Section 402(c)(11) of the Internal Revenue Code.

(3) "Distributee" means a judge or former judge. In addition, the judge's or former judge's surviving spouse and the judge's or former judge's spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in Section 414(p) of the Internal Revenue Code, with respect to governmental plans, are distributees with regard to the interest of the spouse or former spouse. For distributions after December 31, 2007, "distributee" also includes a designated beneficiary (other than a surviving spouse) as such term is defined in Section 402(c)(11) of the Internal Revenue Code.

(4) "Direct rollover" means a payment by the system to the eligible retirement plan.

(b) Nothing in this section may be construed as permitting rollovers into this system or any other system administered by the board.

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**§51-9-12d. Rollovers and transfers to purchase service credit or repay withdrawn contributions.**

(a) This section applies to rollovers and transfers as specified in this section made on or after January 1, 2002. Notwithstanding any provision of this article to the contrary that would otherwise prohibit or limit rollovers and plan transfers to this system, the retirement system shall accept the following rollovers and plan transfers on behalf of a member solely for the purpose of purchasing permissive service credit, in whole and in part, as otherwise provided in this article or for the repayment of withdrawn or refunded contributions, in whole and in part, with respect to a previous forfeiture of service credit as otherwise provided in this article: (i) One or more rollovers within the meaning of Section 408(d)(3) of the Internal Revenue Code from an individual retirement account described in Section 408(a) of the Internal Revenue Code or from an individual retirement annuity described in Section 408(b) of the Internal Revenue Code; (ii) one or more rollovers described in Section 402(c) of the Internal Revenue Code from a retirement plan that is qualified under Section 401(a) of the Internal Revenue Code or from a plan described in Section 403(b) of the Internal Revenue Code; (iii) one or more rollovers described in Section 457(e)(16) of the Internal Revenue Code from a governmental plan described in Section 457 of the Internal Revenue Code; or (iv) direct trustee-to-trustee transfers or rollovers from a plan that is qualified under Section 401(a) of the Internal Revenue Code, from a plan described in Section 403(b) of the Internal Revenue Code or from a governmental plan described in Section 457 of the Internal Revenue Code: Provided, That any rollovers or transfers pursuant to this section shall be accepted by the system only if made in cash or other asset permitted by the board and only in accordance with policies, practices and procedures established by the board from time to time. For purposes of this section, the following definitions apply:

(1) "Permissive service credit" means service credit which is permitted to be purchased under the terms of the retirement system by voluntary contributions in an amount which does not exceed the amount necessary to fund the benefit attributable to the period of service for which the service credit is being purchased, all as defined in Section 415(n)(3)(A) of the Internal Revenue Code.

(2) "Repayment of withdrawn or refunded contributions" means the payment into the retirement system of the funds required pursuant to this article for the reinstatement of service credit previously forfeited on account of any refund or withdrawal of contributions permitted in this article, as set forth in Section 415(k)(3) of the Internal Revenue Code.

(b) Nothing in this section shall be construed as permitting rollovers or transfers into this system or any other system administered by the retirement board other than as specified in this section and no rollover or transfer shall be accepted into the system in an amount greater than the amount required for the purchase of permissive service credit or repayment of withdrawn or refunded contributions.

(c) Nothing in this section shall be construed as permitting the purchase of service credit or repayment of withdrawn or refunded contributions except as otherwise permitted in this

article.

WV Legislature

## §51-9-13. Disqualification for pay and benefits.

No judge of a court of record of this state, who has become physically incapacitated to perform the duties of his office as judge and who has remained so for one year without making application for retirement and submitting his resignation as provided in section eight hereof, shall be entitled to retirement pay or retirement benefits under the provisions of any section of this article.

WV Legislature

## §51-9-14. Moneys exempt from execution, etc.; unassignable and nontransferable; exception for certain domestic relations orders.

The moneys in the Judges' Retirement Fund, the right of any judge to participate in the pay and benefits of the retirement system and the right of any judge to a refund of payments or contributions made to the fund shall not be subject to execution, garnishment, attachment or any other process whatsoever except that the benefits or contributions under this system shall be subject to "qualified domestic relations orders" as that term is defined in Section 414(p) of the Internal Revenue Code with respect to governmental plans; and shall be unassignable and nontransferable.

WV Legislature

## §51-9-15. County commissioners excluded.

Commissioners of county commissions, or of any tribunal established in lieu thereof, are excluded from the retirement pay and retirement benefits herein provided.

WV Legislature

## §51-9-16. Severability of article and amendments thereto.

If any section, subsection, clause, phrase or requirement of this article or if any section, subsection, clause, phrase or requirement of this article as amended by the Legislature at its regular session held in the year one thousand nine hundred eighty-seven, if for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions. The Legislature hereby declares that it would have passed this article, and each section, subsection, sentence, clause or phrase and requirement thereof, including any amendments thereto adopted by the Legislature at its regular session held in the year one thousand nine hundred eighty-seven, irrespective of the fact that any one or more sections, subsections, clauses, phrases or requirements be declared unconstitutional.

WV Legislature

## §51-9-17. Benefits not forfeited if system terminates.

If the retirement system is terminated or contributions are completely discontinued, the rights of all members to benefits accrued or contributions made to the date of such termination or discontinuance, to the extent then funded, may not be forfeited.

WV Legislature

**§51-9-18. Correction of errors; underpayments; overpayments.**

(a) *General rule*. — Upon learning of any errors, the board shall correct errors in the retirement system in a timely manner whether the individual, entity or board was at fault for the error with the intent of placing the affected individual, entity and retirement board in the position each would have been in had the error not occurred.

(b) *Underpayments to the system*. — Any error resulting in an underpayment to the system, may be corrected by the member or retirant remitting the required employee contribution or underpayment and the participating public employer remitting the required employer contribution or underpayment. Interest shall accumulate in accordance with the legislative rule 162 CSR 7 concerning retirement board refund, reinstatement, retroactive service, loan and correction of error interest factors and any accumulating interest owed on the employee and employer contributions or underpayments resulting from an employer error shall be the responsibility of the participating public employer. The participating public employer may remit total payment and the employee reimburse the participating public employer through payroll deduction over a period equivalent to the time period during which the employer error occurred. If the correction of an error involving an underpayment to the system will result in the system correcting an erroneous underpayment from the system, the correction of the underpayment from the system shall be made only after the board receives full payment of all required employee and employer contributions or underpayments, including interest.

(c) *Overpayments to the retirement system by an employer*. —When mistaken or excess employer contributions, including any overpayments have been made to the retirement system by a participating public employer, the board, upon learning of the error, shall credit the participating public employer with an amount equal to the overpayment, to be offset against the employer's future liability for employer contributions to the system. If the employer has no future liability for employer contributions to the retirement system, the board shall refund the erroneous contributions directly to the employer. Earnings or interest shall not be returned, offset or credited to the employer under any of the means used by the board for returning employer overpayments to the retirement system.

(d) *Overpayments to the retirement system by an employee*. — When mistaken or excess employee contributions or overpayments have been made to the retirement system, the board, upon learning of the error, shall have sole authority for determining the means of return, offset or credit to or for the benefit of the individual making the mistaken or excess employee contribution of the amounts, and may use any means authorized or permitted under the provisions of section 401(a), *et seq*. of the Internal Revenue Code and guidance issued thereunder applicable to governmental plans. Alternatively, in its full and complete discretion, the board may require the participating public employer employing the individual to pay the individual the amounts as wages, with the board crediting the participating public employer with a corresponding amount to offset against its future contributions to the plan. If the employer has no future liability for employer contributions to the retirement system, the board shall refund said amount directly to the employer: *Provided*, That the wages paid



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to the individual shall not be considered compensation for any purposes of this article. Earnings or interest shall not be returned, offset, or credited under any of the means used by the board for returning employee overpayments.

(e) *Overpayments from the retirement system*. — If any error results in any member, retirant, beneficiary, entity or other individual receiving from the system more than he would have been entitled to receive had the error not occurred the board, upon learning of the error, shall correct the error in a timely manner. If correction of the error occurs after annuity payments to a retirant or beneficiary have commenced, the board shall prospectively adjust the payment of the benefit to the correct amount. In addition, the member, retirant, beneficiary, entity or other person who received the overpayment from the retirement system shall repay the amount of any overpayment to the retirement system in any manner permitted by the board. If the member, retirant, beneficiary or other person who received the overpayment is deceased and an annuity or lump sum benefit is still payable, the amount of the overpayment shall be offset against the benefit payment owed in a manner consistent with the board's error correction policy. Interest shall not accumulate on any corrective payment made to the retirement system pursuant to this subsection.

(f) *Underpayments from the retirement system*. — If any error results in any member, retirant, beneficiary, entity or other individual receiving from the retirement system less than he would have been entitled to receive had the error not occurred, the board, upon learning of the error, shall correct the error in a timely manner. If correction of the error occurs after annuity payments to a retirant or beneficiary have commenced, the board shall prospectively adjust the payment of the benefit to the correct amount. In addition, the board shall pay the amount of such underpayment to the member, retirant, beneficiary or other individual in a lump sum. Interest shall not be paid on any corrective payment made by the retirement system pursuant to this subsection.

(g) *Eligibility errors*. — If the board finds that an individual, employer, or both individual and employer, participating in the system is not eligible to participate, the board shall notify the individual and his or her employer of the determination, and terminate participation in the system. Any erroneous payments to the system shall be returned to the employer and individual in accordance with the methods described in subsections (c) and (d) of this section and any erroneous payments from the system to such individual shall be returned to the system in accordance with the methods described in subsection (e) of this section. Any erroneous service credited to the individual shall be removed. If the board determines that an individual or employer, or both, has not been participating in the system, but was eligible to and required to be participating in the system, the board shall as soon as practicable notify the individual and his or her employer of the determination, and the individual and his or her employer shall prospectively commence participation in the retirement system as soon as practicable. Service credit for service prior to the date on which the individual prospectively commences participation in the system shall be granted only if the board receives the required employer and employee contributions for such service, in accordance with subsection (b) of this section, including interest.

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