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Layman v. State: The South Carolina Supreme Court's Response to Retroactive Legislation and the Establishment of a New Principle on Statutorily Created Employment and Retirement Contracts

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Lollar: Layman v. State: The South Carolina Supreme Court's Response to R
**LAYMAN V. STATE: THE SOUTH CAROLINA SUPREME COURT'S
RESPONSE TO RETROACTIVE LEGISLATION AND
THE ESTABLISHMENT OF A NEW PRINCIPLE ON STATUTORILY
CREATED EMPLOYMENT AND RETIREMENT CONTRACTS**

I. INTRODUCTION

On May 4, 2006, the South Carolina Supreme Court issued its ruling in *Layman v. State*,¹ a breach of contract action in response to the July 1, 2005 enactment of the State Retirement System Preservation and Investment Reform Act² (Act 153). In this decision, the court held that the statute that created the Teacher and Employee Retention Incentive Program³ (TERI) established a statutory contract between the state and participants who elected the program prior to July 1, 2005 (old TERI participants).⁴ Further, the court held that the specific provisions of Act 153, which required the old TERI participants to start making retirement system contributions, constituted unlawful retroactive legislation effectively resulting in a breach of contract on the part of the State with regard to section 9-1-2210 of the South Carolina Code.⁵ As a result, the court ordered the State to refund the contributions withheld from those TERI participants with interest.⁶ Although the court explicitly stated that it did not base its decision in *Layman* on “general principles of contract law,”⁷ the case reveals the court’s willingness to employ elements of private contract law to determine whether the legislature intended to create fixed contractual rights through statutory enactments, marking a significant change from state precedent.⁸

1. 368 S.C. 631, 630 S.E.2d 265 (2006).

2. Act No. 153, 2005 S.C. Acts 1697 (codified at S.C. CODE ANN. § 9-1-2210 (Supp. 2006)). The Act was adopted on June 6, 2005, signed by the Governor on June 10, 2005, and became effective July 1, 2005. *Id.* at 1729.

3. S.C. CODE ANN. § 9-1-2210 (Supp. 2004) (amended 2005).

4. *Layman*, 368 S.C. at 639, 630 S.E.2d at 269.

5. *Id.* at 640, 630 S.E.2d at 270.

6. *Id.* at 644, 630 S.E.2d at 272.

7. *Id.* at 640, 630 S.E.2d at 270.

8. See *Ken Moorhead Oil Co. v. Federated Mut. Ins. Co.*, 323 S.C. 532, 542–44, 476 S.E.2d 481, 486–88 (1996) (holding that in the absence of an express contractual obligation mandating the state to distribute funds in a particular way for the plaintiff’s benefit, there was no interference by the state with the plaintiff’s reasonable expectations and thus no violation of the State or Federal contracts clause); *Alston v. City of Camden*, 322 S.C. 38, 46, 471 S.E.2d 174, 178 (1996) (holding that the mandatory language found in city ordinances describing terms of employment did not constitute express contractual language and thus the ordinances were subject to modification by the state); *S.C. Pub. Serv. Auth. v. Summers*, 282 S.C. 148, 154, 318 S.E.2d 113, 116 (1984) (finding statutorily created contractual rights where they are unambiguously and expressly found in the language of the legislation).

This Note focuses on the implications of this decision in South Carolina regarding retirement and employment benefits legislation for state employees, state agencies, and state law makers. Part II provides a brief background of the statutory scheme surrounding the legislation at issue, an overview of the court's decision, and a summary of the rationale and principles applied by the court in its holding. Part III delineates the three factors the court relied on in *Layman* to find that the TERI statute created a contract between the state and TERI participants and argues, by incorporating principles generally associated with contract law, that the court broadened the scope of when a statute creates a legally binding contract. Part IV of this Note discusses the legislative implications of this decision and provides some recommendations for future legislation. Part V concludes.

II. THE DECISION

A. Background: The South Carolina Retirement System, the TERI Program, and the Working Retiree Statute

The statutory origins of the South Carolina Retirement System date to 1945 when the state passed legislation creating retirement benefits for public employees.⁹ Today, all South Carolina state employees are required to participate in the State Retirement System (system).¹⁰ On January 1, 2001, the General Assembly enacted legislation referred to as “the old TERI statute,”¹¹ establishing a program enabling state employees to continue to work for up to five years after electing to retire.¹² Participation in the TERI program is voluntary,¹³ and during the TERI period, the state places the employee's retirement benefits into an interest-free escrow account.¹⁴ The state employer must continue to pay into the system for each TERI participant during the participant's period of enrollment.¹⁵ Once enrolled, the old TERI participants still worked and were paid just as before they elected to participate in the TERI program.¹⁶ However, because they were technically retired, the old TERI participants did not have to make contributions to the retirement system and stopped accruing service credit during their enrollment.¹⁷ Additionally, enrolling in the TERI program renders participants ineligible for the state's group life

9. See South Carolina Retirement System, Act No. 157, 1945 S.C. Acts 212, 234.

10. S.C. CODE ANN. § 9-1-420 (1986).

11. Act No. 1, § 2.A.1, 2001 S.C. Acts 2, 26–33.

12. S.C. CODE ANN. § 9-1-2210 (Supp. 2004) (amended 2005).

13. *Id.* § 9-1-2210(A).

14. *Id.* § 9-1-2210(B). TERI participants' retirement benefits are considered fixed on the date they elect to participate in the program and are calculated based on the service credit and the member's average final compensation at the time the program period begins. *Id.* § 9-1-2210(A).

15. *Id.* § 9-1-2210(B).

16. See *id.* § 9-1-2210(A).

17. *Id.* § 9-1-2210(D).

insurance and disability retirement benefits.¹⁸ According to estimates presented by the State in *Layman*, approximately 12,000 people participated in TERI in 2004.¹⁹

South Carolina also maintains another mechanism for retiree employment.²⁰ Under the “old working retiree statute,” state employees who had been retired for at least sixty days could take a job with a state employer and maintain their monthly retirement benefits, so long as their salaries did not exceed \$50,000.²¹ Unlike TERI participants, working retirees are able to receive their salaries as well as their retirement benefits.²² Similar to the old TERI statute, however, the original terms of the old working retiree statute did not allow a working retiree to accrue additional service credits, and in return, the participants were not required to make further contributions to the system after reemployment.²³

On July 1, 2005, Act 153 went into effect, amending several statutes relating to the operation of the system.²⁴ The provision of Act 153 at the heart of the dispute in *Layman* required the TERI participants to begin making contributions to the retirement system of 6.25% of their gross pay.²⁵ Act 153 also mandated that working retirees under the old working retiree statute begin making contributions to the retirement system.²⁶

B. Procedural History and Facts

The South Carolina Supreme Court granted the petitioners’ motion for original jurisdiction in *Layman* and certified a class action, with the class consisting of: (1) all persons who elected TERI before July 1, 2005, who were employed by a state employer (old TERI participants); and (2) all retired members of the system who returned to employment covered by the state retirement system before July 1, 2005, as provided in section 9-1-1790 (old working retirees).²⁷ The court also ordered the State to transfer all of the retirement system contributions withheld from the old TERI participants and old working retirees since the time Act 153 went into effect into an interest bearing account for the duration of the litigation.²⁸

18. *Id.*

19. Brief of Petitioners at 8, *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006) (No. 26146) (citation omitted).

20. S.C. CODE ANN. § 9-1-1790 (Supp. 2004) [hereinafter “old working retiree statute”] (amended 2005) (The 2005 amendment rewrote subsection (a), deleting the provision limiting the salary potential of the working retiree to \$50,000).

21. *Id.*

22. *Id.*

23. *Id.*

24. State Retirement System Preservation and Investment Reform Act, Act No. 153, 2005 S.C. Acts 1697, 1729 (codified at S.C. CODE ANN. § 9-1-2210 (Supp. 2006)).

25. *Id.* § 2 at 1705, 1707.

26. *Id.* § 7 at 1709.

27. *Layman v. State*, 368 S.C. 631, 637, 630 S.E.2d 265, 268 (2006).

28. *Id.*

The petitioners' primary legal argument was that, before July 1, 2005, the statutory provisions of the old TERI program and the old working retiree statute constituted legally binding contracts between the State and the class members.²⁹ The petitioners based this argument on general principles of contract law.³⁰ Specifically, they asserted "the statutory provisions of the TERI program and the retirement system's treatment of working retirees constituted a contractual offer, and upon acceptance by the employee, constituted a binding contract with the state of South Carolina."³¹

In response to the petitioners' claims, the State argued that precedent mandates a strong presumption against legislation having created contractual obligations.³² In addition, the State countered that the petitioners' primary argument that the statute gave rise to a contract had no merit because the court had never applied principles of private contract law to determine the existence of statutory contracts.³³

The South Carolina Supreme Court held that the old TERI statute created a legally binding contract, and the State breached this contract by forcing the old TERI participants, through Act 153, to make contributions to the retirement system.³⁴ The court ordered the State to return all retirement system contributions withheld from the old TERI participants with interest and mandated that the State be enjoined from collecting any further contributions from these participants in the future.³⁵ Because the court found that the old TERI statute created a legally binding contract, it did not address the petitioners' estoppel, takings, or due process claims.³⁶ With regard to the working retirees claim, the court held that the old working retirees statute did not contain "the same contractually significant language as utilized in the old TERI statute."³⁷ "[The] old working retiree statute [did] not evidence an intent by the legislature to be bound to any terms related to the [statute]."³⁸

29. *Id.*; Brief of Petitioners, *supra* note 19, at 10. The Petitioners also argued that the State should be estopped from requiring the class members to make contributions to the system and that the enactment of Act 153 represents an unconstitutional taking and deprivation of the class members' property without due process of law, in violation of both the South Carolina and Federal constitutions. *Layman*, 368 S.C. at 636, 630 S.E.2d at 268.

30. Brief of Petitioners, *supra* note 19, at 12 (citations omitted).

31. *Id.* at 10; *see Layman*, 368 S.C. at 637, 630 S.E.2d at 268.

32. Brief of Respondents at 12–13, *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006) (No. 26146).

33. *Id.* at 14.

34. *Layman*, 368 S.C. at 642, 630 S.E.2d at 271.

35. *Id.* at 644, 630 S.E.2d at 272.

36. *Id.* at 643, 630 S.E.2d at 272.

37. *Id.* at 643, 630 S.E.2d at 271.

38. *Id.* The court granted the State's request for decertification of the class and remanded the individual petitioners' breach of contract claims under the old working retiree statute, noting that some of these petitioners may have claims based on individual contracts with their employers as well as estoppel arguments. *Id.* at 643, 630 S.E.2d at 271. In an order published following the decision, the court denied the petitioners' motion for payment of attorney's fees according to the common fund doctrine and remanded the issue of whether the petitioners are entitled to recover reasonable attorney's

C. *Holding and Reasoning*

In *Layman*, the court's analysis focused on determining legislative intent through the express language in the old TERI statute. The court held that the old TERI statute contained explicit language that evidenced the legislature's intent to create a binding contract: "While our rule has been, and continues to be, that statutes do not create contracts that bind the State, the State may not utilize such significant contractual language and disregard its plain meaning and practical effect."³⁹ As the court stated, "Far from simply describing the terms of old TERI participants' employment, . . . [t]he old TERI statute fixed obligations, required affirmative actions by both the State and old TERI program participants, and contained contractually significant language."⁴⁰

The court distinguished *Layman* from its decision in *Alston v. City of Camden*.⁴¹ Most importantly, the court noted that *Alston* dealt with "fringe benefits" set forth in a city ordinance, whereas *Layman* dealt with a statute creating a defined employment program.⁴² The court also pointed out that the employees in *Alston* had a reasonable expectation that their benefits might be subject to unilateral modification, whereas the terms of the old TERI statute required state employees to elect to participate in the TERI program and consent to its limitations in order to receive the benefit of working for the state at full salary without contributing to the retirement system.⁴³ Finally, the court noted that "[u]nlike the city ordinance in *Alston*, Act 153 sought to materially alter terms which formed a substantial part of the basis for the bargain struck between the State and old TERI participants."⁴⁴

After evaluating the language in the statute, the obligations inferred from its terms, and the distinctions between the old TERI program and the city ordinance in *Alston*, the court concluded that the legislature intended the old TERI statute to constitute a legally binding contract.⁴⁵ Accordingly, the court held that the specific provisions of Act 153 that required the old TERI participants to make contributions to the retirement system constituted an unlawful breach of contract by the State.⁴⁶

fees to be taxed as court costs against the State and the retirement system. *Id.* at 648, 630 S.E.2d at 274 (order disposing of post-hearing motions). On remand, the circuit court ordered the State to pay almost \$8.7 million in legal fees to the petitioners' attorneys. Order Granting Attorney's Fees at 10, *Layman v. State*, Civ. Action No. 05-CP-40-2785 (Cir. Ct. Feb. 14, 2007) (Breedon, J.). The defendants have filed a motion to reconsider. Defendants' Amended Motion to Alter or Amend Judgment, *Layman v. State*, Civ. Action No. 05-CP-40-2785 (Cir. Ct. Mar. 5, 2007).

39. *Id.* at 639, 640, 630 S.E.2d at 270.

40. *Id.* at 639, 630 S.E.2d at 269.

41. *Id.* at 640, 630 S.E.2d at 270 (citing *Alston v. City of Camden*, 322 S.C. 39, 45, 471 S.E.2d 174, 177 (1996)).

42. *Id.* (citing *Alston*, 322 S.C. at 48, 471 S.E.2d at 179).

43. *Id.* at 639, 640–41, 630 S.E.2d at 269–70 (citing *Alston*, 322 S.C. at 48, 471 S.E.2d at 179).

44. *Id.* at 640, 630 S.E.2d at 269.

45. *Id.* at 642, 630 S.E.2d at 271.

46. *Id.* at 640, 630 S.E.2d at 269–70.

III. ANALYSIS

A. *The Layman Factors: When Does a South Carolina Statute Create a Contract Between the State and State Employees?*

Despite the court's assertion in *Layman* that its decision was not grounded in "general principles of contract law,"⁴⁷ the opinion suggests a new willingness of the court to employ elements of private contract law to determine whether the legislature intended to create fixed contractual rights through statutory enactments—a clear shift from precedent. The court in *Layman* effectively established a three-part test to determine whether legislation affecting retirement or employment benefits creates a legally binding contract between the state and state employees: (1) does the statute contain express contractual language indicating the existence of a mutual obligation; (2) does the statute require affirmative actions by both the state and state employees; and (3) do the terms of the statute outline a defined employment program or merely general terms of employment subject to unilateral modification by the government employer? In an effort to fully understand and articulate the law established in *Layman* and its effect on future litigation, it is necessary to further examine the three requirements of a statutory contract as recognized by the court.

1. *Does the Statute Contain Express Contractual Language Indicating the Existence of a Mutual Obligation?*

In *Layman*, the court acknowledged its adherence to the general principle established by the United States Supreme Court in *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*: "Generally, statutes do not create contractual rights. However, if the statute indicates that the legislature intended to bind itself contractually, a contract may be found to exist."⁴⁸ The South Carolina court noted that the first indication of legislative intent is the language utilized in the statute.⁴⁹ In a previous South Carolina case addressing the issue of contractually binding statutory language, *S.C. Public Service Authority v. Summers*, the court held that contractual rights are created by statute only when they are expressly found in the language of the legislation.⁵⁰ The statutory language at issue in *Summers* stated the following:

The State of South Carolina *does hereby pledge to agree with any person, firm or corporation . . .* acquiring the notes, bonds,

47. *Id.* at 640, 630 S.E.2d at 270.

48. *Id.* at 637–38, 630 S.E.2d at 268 (internal citation omitted) (citing Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465–66 (1985)).

49. *Id.* at 638, 630 S.E.2d at 269 (citing S.C. Pub. Serv. Auth. v. Summers, 282 S.C. 148, 154, 318 S.E.2d 113, 116 (1984)).

50. *Summers*, 282 S.C. at 154, 318 S.E.2d at 116.

evidence of indebtedness or other obligations to be issued by the Public Service Authority for the construction of any project, that the State *will not alter or limit the rights hereby vested in the Public Service Authority* until the said notes, bonds, evidence of indebtedness or other obligations, together with the interest thereon, are fully met and discharged. . . .⁵¹

The State argued in *Layman* that, given the precedent established in *Summers*, nothing within the language of the old TERI program nor the old working retiree statute evidenced an intent of the General Assembly to create contractual rights.⁵² The State's argument centered on the fact that neither the old TERI statute nor the old working retiree statute specified that it was a "contract" or contained terms "typically associated with contractual relationships, such as 'covenant' or 'pledge.'"⁵³ Rejecting this argument, the court held that language utilized in several provisions of the old TERI statute was sufficient to satisfy the express contractual language requirement.⁵⁴ The court referred to several specific provisions of the old TERI statute:

(A) [A] . . . member who is *eligible* [to retire under TERI]. . . and *complies* with the *requirements* of this article *shall agree*⁵⁵

(B) During the specified program period, receipt of the member's normal retirement benefit is deferred. The member's [] monthly benefit *must be placed* in the system's trust fund on behalf of the member.⁵⁶

. . . .
(D) *A program participant is retired from the retirement system as of the beginning of the program period. A program participant makes no further employee contributions to the system, accrues no service credit during the program period, and is not eligible to receive group life insurance benefits or disability retirement benefits.*⁵⁷

The *Layman* decision demonstrates that the court has broadened the scope of what it considers to be expressly contractual language to include any

51. *Id.* at 154, 318 S.E.2d at 116 (emphasis added) (quoting S.C. CODE ANN. § 58-31-30 (1976)).

52. See Brief of Respondents, *supra* note 32, at 14 (citing *Summers*, 282 S.C. at 154, 318 S.E.2d at 116).

53. *Id.* at 15. The State also argued that the old TERI statute utilizes "the term 'program,' which connotes transience and flexibility not generally associated with immutable obligations." *Id.*

54. *Layman*, 368 S.C. at 639, 630 S.E.2d at 269.

55. *Id.* (citing S.C. CODE ANN. § 9-1-2210(A) (Supp. 2004) (amended 2005)).

56. *Id.* at 638, 630 S.E.2d at 269 (citing S.C. CODE ANN. § 9-1-2210(B) (Supp. 2004) (amended 2005) (emphasis added)).

57. *Id.* (citing S.C. CODE ANN. § 9-1-2210(D) (Supp. 2004) (amended 2005) (emphasis added)).

language that is indicative of the existence of a mutual obligation. Contrary to the State's presumption in *Layman*, the Court no longer requires that language "typically associated with contractual relationships"⁵⁸ be used to create a statutory contract.⁵⁹ This Note describes the broadening of South Carolina case law regarding statutorily based contracts; however it is important to recognize that the court's decision in *Layman* remains limited, particularly in light of the court's insistence that "statutes do not create contracts that bind the State."⁶⁰ Although *Layman* indicates an expansion of the kinds of statutory language that may give rise to a contract, the presumption against statutes creating contracts still remains strong.⁶¹ In *Alston*, for example, the court noted that mandatory language in city ordinances describing terms of employment does not fall within the purview of express contractual language.⁶² The court suggested that this type of "mandatory language is just as consistent with an intent to have a uniform policy as with an intent to enter into contracts."⁶³ Moreover, in *Layman*, the court was clear in concluding to the contrary, holding that the language utilized in the old working retiree statute "did not evidence intent by the legislature to be bound to any of its terms."⁶⁴

2. *Does the Statute Require Affirmative Actions by Both the State and the State Employees?*

In addition to finding contractually significant language in the old TERI statute, the court also emphasized that the statute "fixed obligations [and] required affirmative actions by both the State and old TERI program participants."⁶⁵ The old TERI statute permitted participants to continue working for up to five years; however, the participants gave up the opportunity to accrue further service credit.⁶⁶ Accordingly, although old TERI participants were eligible to receive salary increases during their five year TERI period, each participant's retirement benefits became fixed at the date the participant elected to take part in the program.⁶⁷ The legislature designed the old TERI program to confer a mutual benefit; the state promised that the old TERI participants would not have to make further contributions to the System, and in return it "was able

58. See Brief of Respondents, *supra* note 32, at 15.

59. See *Layman*, 368 S.C. at 639, 638 S.E.2d at 269.

60. *Id.* at 641, 638 S.E.2d at 270.

61. *Id.* at 644, 630 S.E.2d at 272 ("[O]ur decision today is a very narrow one which affects only those TERI participants who joined the old TERI program, originally enacted in 2001, prior to July 1, 2005").

62. *Alston v. City of Camden*, 322 S.C. 39, 47, 471 S.E.2d 174, 178 (1996).

63. *Id.*

64. *Layman*, 368 S.C. at 643, 630 S.E.2d at 271.

65. *Id.* at 639, 630 S.E.2d at 269.

66. *Id.* (summarizing S.C. CODE ANN. § 9-1-2210 (Supp. 2004) (amended 2005)).

67. *Id.*

to retain a large number of experienced and well-trained employees” for an extended period of time.⁶⁸

In the court’s consideration of this aspect of the old TERI statute, it applied well-established principles of contract law and recognized that “once the bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration.”⁶⁹ Act 153 required the current TERI participants to start making contributions of 6.25% of their gross income to the retirement system; however, it did not change the fact that these participants were not eligible to accrue additional service credits or receive any other offsetting benefit during their period of participation.⁷⁰ The court found that the terms of the old TERI statute created a bilateral contract rather than a unilateral agreement.⁷¹ Accordingly, the court held that the State could not unilaterally alter its agreement with the old TERI participants without their mutual consent and additional consideration.⁷²

3. *Do the Terms of the Statute Outline a Defined Employment Program or Merely General Terms of Employment Subject to Unilateral Modification?*

In *Alston*, the court affirmed the general principle that “public employees generally have no contractual rights in their employment merely by virtue of a statute describing the terms of that employment.”⁷³ However, in *Layman* the court found that when a statute does more than describe the terms of employment, this general principle does not apply.⁷⁴ In finding that the terms of the old TERI statute were distinguishable from the city ordinance in *Alston*, the court noted that the old TERI statute did not merely describe the terms of employment but instead specified eligibility and enrollment criteria as well as the benefits and procedures for an employment program.⁷⁵ Contrary to the court’s assertion that its decision was based exclusively on statutory interpretation, the court applied principles of contract law in noting that, “[u]nlike the city ordinance in *Alston*, Act 153 sought to materially alter terms which formed a substantial part of the basis for the bargain struck between the State and old TERI participants.”⁷⁶

The court also considered additional factors in deciding how to classify the old TERI statute. These factors included whether or not the employment

68. *Id.*

69. *Id.* at 640, 630 S.E.2d at 269.

70. State Retirement System Preservation and Investment Reform Act, Act No. 153, 2005 S.C. Acts 1697, 1702, 1705 (codified at S.C. CODE ANN. § 9-1-2210 (Supp. 2006)).

71. *Layman*, 368 S.C. at 640, 630 S.E.2d at 270.

72. *Id.* at 640, 630 S.E.2d at 269–70.

73. *Alston v. City of Camden*, 322 S.C. 39, 45, 471 S.E.2d 174, 177 (1996).

74. *Layman*, 368 S.C. at 640, 630 S.E.2d at 270.

75. *Id.* at 640–41, 630 S.E.2d at 270.

76. *Id.* at 640, 630 S.E.2d at 270.

program was voluntary, as well as whether or not the employees who elected the program had a reasonable expectation that their benefits might be subject to unilateral modification.⁷⁷ Because the old TERI participants voluntarily elected to have their retirement benefits determined at the time of TERI enrollment and willingly gave up the ability to accrue additional service credit, these participants possessed a reasonable expectation that the benefit of not having to make further retirement contributions would go unchanged.

This analysis of what constitutes a statutorily based contract under South Carolina case law following *Layman* may raise doubts as to whether the court has departed from its previously affirmed policy rationale as expressed in *Alston* on this issue: “Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.”⁷⁸ However, the court’s holding in *Layman* can still be reconciled with this policy rationale as a South Carolina statute will only create a contract when the legislature intends to create a contract, the terms of the statute clearly and unequivocally indicate a mutual obligation, and the state employees who are covered under the statute possess a “reasonable expectation” that the terms are not subject to change.

IV. SOUTH CAROLINA LEGISLATIVE IMPLICATIONS AND RECOMMENDATIONS

Layman clearly indicates the South Carolina legislature cannot retroactively amend the statutes that set the required contributions to the retirement system,⁷⁹ however, the decision raises the question as to what other terms and conditions of public employment are beyond the legislature’s authority to modify. In *Layman*, the court recognized that “[i]t is fully within the power of the legislature to make changes to laws that impact future participants, but . . . the State breached its contract with the old TERI participants by changing the terms of the existing statutory agreement after participants agreed to those terms by electing to retire.”⁸⁰ The court suggested that Act 153 “should have exempted old TERI participants from all portions of Act 153 related to the new TERI program, instead of applying *new* legislation to *old* TERI participants.”⁸¹

One lesson the South Carolina General Assembly should draw from *Layman* is that any well-drafted future legislation should incorporate express clauses notifying potential beneficiaries that the General Assembly retains its power to amend the law or certain provisions of the law.⁸² This recommendation has been

77. *Id.* at 640, 630 S.E.2d at 270.

78. *Alston v. City of Camden*, 322 S.C. 39, 46, 471 S.E.2d 174, 178 (1996) (quoting *Nat’l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985)).

79. *Layman*, 368 S.C. at 644, 630 S.E.2d at 272.

80. *Id.*

81. *Id.* at 640 n.7, 630 S.E.2d at 270 n.7.

82. *See, e.g., Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 54 (1986) (discussing how words of reservation made amendment permissible).

expressed in multiple jurisdictions regarding similar issues of retroactive legislation.⁸³ The United States Supreme Court has also recognized this legislative recommendation:

Legislation outlining the terms on which private parties may execute contracts does not on its own constitute a statutory contract, but is instead an articulated policy that, like all policies, is subject to revision or repeal. Indeed, lest there be any doubt in these cases about Congress' will, Congress "expressly reserved" its rights to "repeal, alter, or amend" the Act at any time.⁸⁴

Another consideration is that adjudication of issues regarding retroactive legislation results in inefficient use of the state's judicial and legislative resources. For example, in *Layman* the court noted that, at the same time as the litigation, a bill was introduced in the legislature which, if passed, would override the Act 153 provisions disputed in *Layman*.⁸⁵ In other words, the bill would have had the same effect as the court's decision, with the exception of the actual refund to the state employees. In addition, litigation against the State could deplete public financial resources. Upon remand of *Layman*, the circuit court ordered the State to pay the petitioners' attorneys almost \$8.7 million in legal fees, one of the highest awards in South Carolina history.⁸⁶ In order to satisfy this judgment, the State may have to use "funds set aside to pay pensions, including cost-of-living adjustments, or ask[] taxpayers to pay" for the fees directly.⁸⁷

V. CONCLUSION

The *Layman* decision is significant because it broadens the standard regarding what constitutes a statutorily created contract in South Carolina. Although the court asserts that it does not apply general principles of contract law to determine if a statute creates a contract, *Layman* suggests the court will apply a test that incorporates components of general contract law to resolve the

83. See, e.g., *Murray County Sch. Dist. v. Adams*, 461 S.E.2d 228, 230–31 (Ga. Ct. App. 1995) (citations omitted) (noting that any attempt to reduce or terminate benefits for government employees that are established by a statute or ordinance is prohibited by the Impairment of Contracts Clause, but where the statute itself provides that it is subject to legislative change, it may be amended, as no vested right to unchanged benefits is created).

84. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985) (construing the Rail Passenger Service Act, 45 U.S.C. § 541 (1976) (repealed 1994)).

85. *Layman*, 368 S.C. at 642, 630 S.E.2d at 271 (citing H. 4544, 116th Gen. Assem., 2nd Reg. Sess. (S.C. Jan. 31, 2006)).

86. See *supra* note 38; Ben Werner, *State to Appeal \$8.7 Million Legal Fee*, MYRTLE BEACH SUN NEWS, Mar. 2, 2007; see also Opinion, *Excessive Attorney Fee Highlights Flaw in Law, Lawmakers*, THE STATE, Mar. 8, 2007.

87. Werner, *supra* note 86 (quoting Mike Sponhour, State Budget and Control Board spokesman).

question of whether the legislature meant to establish contractual rights through the enactment of statutes. The factors the court will consider include whether the statute contains language indicative of a mutual obligation, whether the statute requires both the state and the state employee to take specific action to create the relationship, and whether the terms of the statute define a particular employment program. The holding in *Layman* also suggests that future South Carolina legislation should contain express language indicating whether or not it is subject to modification or amendment, particularly when legislation affects state retirement and employment benefits.

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