UTAH TRANSIT AUTHORITY

UTA

669 West 200 South

Salt Lake City, UT 84101

To: Legislative Transportation Interim Committee

From: Carlton Christensen, Board Chair, Utah Transit Authority

Carolyn Gonot, Executive Director, Utah Transit Authority

Date: September 30, 2019

Re: Report on UTA's Retirement Benefits

Background:

Senate Bill 136 required Utah Transit Authority (UTA) to present a report to the Legislature's Transportation Interim Committee regarding UTA's retirement benefits. The report was to include:

(a) The feasibility of becoming a participating employer and having retirement benefits of eligible employees and officials covered in applicable systems and plan administered under Title 40, Utah State Retirement and Insurance Benefit Act;
(b) Any legal or contractual restrictions on any employees that are party to a collectively bargained retirement plan; and
(c) A comparison of retirement plans offered by the UTA and similarly situated public employees, including the costs of each plan and the value of the benefit offered.

In January, UTA issued a request for proposal (RFP) to procure a firm to conduct the study. UTA received no responses. Feedback from potential vendors noted the financial feasibility and legal analysis were too broad for one firm to complete. UTA then split the study into two portions and issued an RFP for the financial feasibility portion of the report. The contract was awarded to AON. UTA procured Thompson Coburn, LLP to conduct the legal analysis, with review by the Attorney General's Office.

Report Overview:

Both vendors conducted an analysis on the feasibility of moving from UTA's current defined benefit program to Utah Retirement Systems (URS) Tier 2 Plans. Each of these plan summaries were prepared by AON and are provided in Attachment A of this memo. Given the complexity of both the legal and financial analysis, the reports are submitted as two separate documents from the respective vendors. Thompson Coburn, LLP's legal report is submitted as attachment B and AON's financial report is submitted as attachment C of this memo. Both vendors conducted an analysis of the following three methods of transitioning to URS:

1. New Hires Only: Current employees remain in UTA plan. Hires after January 1, 2021 participate in URS.
2. "Soft" Freeze UTA Benefit: All employees enter URS. Current employees start participating in URS with UTA plan benefit increasing with future salary growth only. Hires after January 1, 2021 participate in URS.

3. "Hard" Freeze UTA Benefit: Current employees start participating in URS with UTA plan benefit frozen as of January 1, 2021. Hires after January 1, 2021 participate in URS. (Hard freezes are not common in public sector retirement plans and are primarily used to transition to a defined contribution-only approach.)

AON's report also showed a comparison of retirement plans offered by other transit authorities in an effort to satisfy part (c) of the requirements specified in SB 136.

Highlights of the Report:

Legal Analysis (Thompson and Coburn, LLP):

The Utah Public Transit District Act requires UTA to bargain with the union representing employees with respect to pension and retirement provisions. The legal analysis concluded there is a strong likelihood that the Amalgamated Transit Union (ATU) 382 will litigate. Section 13 (c) of the Federal Transit Act provides for labor protections as a condition to the receipt of grants from the Federal Transit Administration. The ATU has previously raised concerns under Section 13 (c) in the context of state pension legislation, therefore it is expected the ATU would object to federal grants under Section 13 (c) through the Department of Labor. Of most concern is the potential for federal grants to be delayed or denied due to these objections. These analyses are complex and are detailed in the Thompson Coburn, LLP report on pages 6-12.

Financial Analysis (AON):

The financial analysis shows little retirement income replacement benefit difference between UTA's current Defined Benefit plan and the URS Tier 2 Hybrid System. While UTA's pension multiplier is higher than URS Tier 2 Hybrid Plan, the cost-of-living-adjustment (COLA) in the URS Tier 2 Hybrid Plan increases the benefit to a comparable income replacement level. These findings are detailed in AON's report summary pages 7-10, as well as in the body of AON's main report. Analysis of the financial impacts of moving UTA to URS Tier 2 are different under each transition method and are detailed in the AON report summary pages 5-7 as well as in the main body of the report.

Conclusion:

While UTA would have concerns about any major changes to its retirement programs, our staff is still analyzing the information and scenarios in the report. As the legislature reviews this report and evaluates UTA's retirement programs, UTA requests the ability to have ongoing conversations on the topic.

Carlton J. Christensen, UTA Board Chair

Carolyn M. Gonot, UTA Executive Director

Attachment A

Summary of UTA and URS Plan Provisions

Summary of Plan Provisions—Utah Transit Authority ("UTA")

Plan	Legacy/New Hire
Description of plans offered	Defined benefit plan plus elective defined contribution plan offered to all eligible employees
Defined Benefit Plan Provisions	
Average Compensation	60 consecutive months that produce highest compensation
Normal Retirement Date (NRD)	Age 65/5 Years of Service, or 37.5 Years of Service
Benefit Formula	2.0% of Average Compensation times Years of Service
Early Retirement Eligibility	55/5
Early Retirement Benefit	Normal benefit reduced 5% per year before NRD
Vested Terminations	5-years
COLA	None
Employee Contribution	None
Defined Contribution Benefit	Match 2/3% of voluntary employee contributions up to 2% of Pay

Summary of Plan Provisions—State of Utah Hybrid Plan

Plan	Legacy	New Hire
Eligibility	Hired prior to July 1, 2011	Hired on or after July 1, 2011
Average Compensation	36 consecutive months that produce highest compensation	60 consecutive months that produce highest compensation
Normal Retirement Date (NRD)	65/4, or 30 years Credited Service	65/4, or 35 years Credited Service
Benefit Formula	2.0% of Average Compensation times Years of Service (YOS)	1.5% of Average Compensation times Years of Service (YOS)
Early Retirement Eligibility	60/20 or 62/10	60/20 or 62/10
Early Retirement Benefit	Normal benefit reduced 3% per year before age 65 and 7% per year before age 60, for <30 YOS	Normal benefit reduced 9% per year before age 65, and 7% per year before age 63, for <35 YOS
Vested Terminations	5-years	4-years
COLA	Indexed to CSI, limited to 4%	Indexed to CSI, limited to 2.5%
Employee Contributions	6% of Pay	Plan costs in excess of 10%
Defined Contribution Plan	Elective plans available	Employer contributes max 10% in DB + DC combined Voluntary employee contributions allowed

Summary of Plan Provisions—State of Utah DC-Only Plan

Plan	Legacy/New Hire
Description of plans offered	Employees not electing the Hybrid Plan are enrolled in the non-elective defined contribution plan.
Non-elective benefit	10% of base compensation
Voluntary benefits	Employee contributions allowed but not matched
Vesting of employer contributions	4 years

THOMPSON COBURN LLP

Attachment B:

Report on Utah Transit Authority Retirement Benefits – Legal Analysis

September 30, 2019

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THOMPSON COBURN LLP

Attachment B

To: Carolyn M. Gonot, Executive Director
Utah Transit Authority

From: Jane Sutter Starke
Trish Winchell

Date: September 30, 2019

Re: Report on Retirement Benefits to Transportation Interim Committee – Legal Analysis

BACKGROUND

Utah Code Ann. § 17B-2a-808.1(4)(a) requires the Utah Transit Authority ("UTA") to present a report to the Legislature's Transportation Interim Committee regarding the UTA's retirement benefits. The report is to include:

(a) The feasibility of becoming a participating employer and having retirement benefits of eligible employees and officials covered in applicable systems and plans administered under Title 49, Utah State Retirement and Insurance Benefit Act;

(b) Any legal or contractual restrictions on any employees that are party to a collectively bargained retirement plan; and

(c) A comparison of retirement plans offered by the UTA and similarly situated public employees, including the costs of each plan and the value of the benefit offered.

This memo provides a legal analysis of the feasibility of the UTA becoming a participating employer in the Utah State Retirement System (the "URS") and providing benefits to its employees through plans administered by the URS, and an analysis of the legal and contractual restrictions on employees that are party to a collective bargaining agreement (CBA). Section I analyzes the relevant plans and the CBA between the UTA and the Amalgamated Transit Union, Local 382 ("Union"). Section II analyzes the possible ways the UTA could transition employees' retirement benefits to the state retirement system. Section III examines legal issues with transition that could arise under state law. Section IV examines issues raised by the transition under applicable labor protections under Section 13(c) of the Federal Transit Act.

A separate report prepared by Aon (the "Aon Report") addresses the financial impact of transitioning UTA employees to the URS and provides the comparison of the retirement plans offered by the UTA and similarly situated public employees.

I. THE PLANS AND THE CBA

The UTA Plan.
The UTA maintains the Utah Transit Authority Employee Retirement Plan and Trust Agreement (the "UTA Plan"), an independent defined benefit pension plan in which both administrative and bargaining unit employees participate. The UTA Plan generally provides for a normal retirement benefit in an annual amount equal to 2% of the participant's average compensation (as defined in the UTA Plan) multiplied by the participant's years of service. The UTA Plan is a governmental plan, exempt from the Employee Retirement Income Security Act of 1974 ("ERISA") and from the funding requirements of the Internal Revenue Code.[1]

The Plan Administrator is the Pension Committee. The Plan provides that the Pension Committee shall consist of 9 members, 7 appointed by the UTA and 2 appointed by the Union.

The Plan provides that the UTA has reserved the right to amend the Plan at any time. The UTA may not, however, make any amendment which affects rights, duties or responsibilities of the Pension Committee without the written consent of the Pension Committee or the affected member of the Pension Committee.

The CBA.
Certain employees of the UTA are represented by the Union. The UTA and the Union are parties to a CBA effective December 11, 2016. The CBA provides that it will continue through December 10, 2019, and from year to year thereafter unless either party gives notice to terminate or modify the CBA not less than 60 days prior to December 10, 2019 or any anniversary thereof.

With respect to pension benefits, the CBA provides in its entirety as follows:

> Eligible employees' pension benefits shall be based upon their respective years of service and their corresponding average annual wages for their highest five consecutive years. The multiplier for each year of service shall be 2%. The maximum benefit available at normal retirement date is 75% of the average annual wages for the employee's highest five consecutive years. Normal retirement date shall mean the date the participant reaches age 65 and completes five years of service in the pension plan or at any age and completed 37.5 years of service in the pension plan. Employees being paid by the Union for Union business shall have that pay count towards their highest five consecutive years calculation. Retirement prior to the normal retirement date will be considered an early retirement and will result in a lower benefit of 5% per year based on the participant's age at the time of retirement, except when a participant completes 37.5 years of service in the pension plan. Employees shall not be allowed to elect an early retirement benefit prior to age 55. UTA and the Union shall each have the same number of representatives on the pension Board of Trustees (not counting members of the UTA Board of Trustees).

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[1] ERISA, Section 3(32) (codified at 29 U.S.C. § 1002(32)) defines a governmental plan as a plan "established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." Internal Revenue Code Section 414(d) (codified at 26 U.S.C. § 414(d)) contains a virtually identical definition.

The CBA does not incorporate the UTA Plan or require that the covered employees participate in the Plan. It merely sets out the benefit formula under which pensions will be calculated and provides for Union representation on the Board of Trustees. The UTA may establish other key terms of the Plan. The CBA prohibits strikes or lockouts during the term of the agreement. The CBA does not contain any dispute resolution procedures applicable to interest disputes. As indicated below, UTA's Section 13(c) protections contain a non-binding fact finding procedure applicable to such disputes.

The Utah State Retirement System.

Title 49 of the Utah Code provides for retirement systems or plans for public employees. There are Tier I systems in which employees who initially entered employment before July 1, 2011 participate, and Tier II systems in which employees hired after July 1, 2011 participate.

After the 2008 economic downturn, the URS lost 22% of its pension assets and the Legislature responded by enacting pension reform. Title 49 of the Utah Code was amended to add the Tier II plans. Employees hired on or after July 1, 2011 choose between two new pension plans: (1) a Defined Contribution Plan (the "Tier 2 DC Plan") or (2) a Hybrid Defined Benefit/Defined Contribution Plan (the "Tier 2 Hybrid Plan"). All participating URS employers were required to begin offering the choice between the Tier 2 DC Plan and the Tier 2 Hybrid Plan to employees who were newly hired on or after July 1, 2011.

An employee electing the Tier 2 DC Plan receives an annual employer contribution of 10% of his or her annual earnings into his or her account. These contributions vest after four years of employment. Employees may also make additional contributions to their accounts on a voluntary basis.

The retirement benefit under the Tier 2 Hybrid Plan is determined by multiplying the employee's years of service by 1.5% of the monthly average earnings of the highest five earnings years. Participants must work for 35 years to qualify for a normal retirement benefit at any age (five years longer than under the Tier 1 DB plan). A cost of living adjustment of up to 2.5% is permitted. Most significantly, if the contribution rate certified by the plan Trustees based on the actuarial valuation remains below 10%, employees are not required to make any additional plan contributions. If the rate exceeds 10%, however, participants in the Tier 2 Hybrid Plan must contribute the excess. If the employer contribution is below 10%, the employer must contribute the difference between 10% and the required contribution rate to the participant's 401(k) plan.

Generally, the Tier 2 system is anticipated to pay lower benefits than the Tier 1 system.

There are six different plans in the Tier 1 system. Eighty-five percent (85%) of the employees in the Tier 1 system participate in the Public Employees Non-Contributory Retirement Plan, a traditional defined benefit plan.[2] Employees hired after July 1, 1986 but before July 1, 2011 are eligible to participate. At normal retirement (age 65 with 4 years of service or any age with 30 years of service), a worker's benefit under this plan is an amount equal to 2% of final average monthly earnings multiplied by the number of years of service. Benefits after retirement are indexed by up to a 4% annual cost of living adjustment.

[2] The other Tier 1 plans are a Public Employees Contributory Retirement Plan (a defined benefit plan for employees hired before July 1, 1986), a Public Safety Retirement System, a Firefighters System, a Governors' and Legislators' Retirement Plan, and a Judges' Retirement System.

The benefits of employees hired prior to July 1, 2011 were unaffected by the pension reform. They continue to participate in the Tier I traditional defined benefit plan and are not eligible for the Tier 2 DC Plan or the Tier 2 Hybrid Plan. The only change made to the Tier 1 plan was to close it to new hires.

II. METHODS OF TRANSITION

This section analyzes the potential methods by which the UTA could become a participating employer and transition benefits of eligible employees to one or more URS plans.

If eligible employees are going have their future benefits covered by the applicable URS plan[3], there are two possible approaches:

- ***Option 1 - New hires only enter in the URS Plan.*** Under this approach, the UTA Plan would be amended to be closed to new hires; after a specified date no new participants would enter the UTA Plan. Title 49 would be amended to make the UTA a participating employer in the URS plan and UTA employees hired after the date specified would choose to enter either the Tier 2 DC Plan or the Tier 2 Hybrid Plan. The UTA employees who were participants in the UTA Plan as of the date specified would continue to participate in the UTA Plan; the UTA Plan presumably would continue to be administered by the UTA, subject to the CBA. Under this option, the changes would affect only new employees hired after the expiration of any existing CBA. This would replicate the approach taken by the Legislature in 2011 when it enacted pension reform transitioning state employees from the Tier 1 defined benefit plans to the Tier 2 DC Plan or the Tier 2 Hybrid Plan. This option is described on page 6 of the Aon Report as "New Hires Only."

- ***Option 2 – All UTA employees move to the URS plan, regardless of hire date; the UTA Plan benefit is frozen in either a "soft freeze" or a "hard freeze."***

  Under this approach, the UTA Plan would be amended to freeze benefits. If the freeze is a "soft freeze," the benefit payable under the plan would continue to increase with future salary growth, but not with years of service. The "soft freeze" is the option described on page 6 of the Aon Report as "All Employees Enter URS." A "hard freeze" would freeze benefits as of a particular date; benefits would not increase with future salary growth. The "hard freeze" is described on page 6 of the Aon Report as "All Employees enter SUR – 'Hard' Freeze UTA Benefit." In either case, Title 49 would be amended so that the UTA would become a participating employer in the URS and UTA employees would choose whether to enter the Tier 2 DC Plan or the Tier 2 Hybrid Plan.

[3] The term "applicable" plan in the statute requiring this report is not clear. We assume that the Legislature would intend that any UTA employees (regardless of date of hire) who become participants in the URS would choose between the Tier 2 DC Plan and the Tier 2 Hybrid Plan for their prospective benefits. These are the only URS plans currently open to new participants. (As noted above, any benefits earned under the UTA Plan would be vested and we assume would not be transferred to the URS system). We assume the Legislature would not intend to move all or some of the UTA employees from the UTA defined benefit plan with its 2% multiplier to the URS defined benefit plan with its 2% multiplier. The legal issues raised are substantially the same regardless of the plan to which the employees move.

In either a "hard freeze" or a "soft freeze" the assets of the UTA Plan continue to be held to pay off the accrued benefit obligations under the terms of the frozen plan. A freeze does not stop contributions to the plan, and does not take away any benefits that have already accrued. With a hard freeze, however, the benefit paid attributable to the years of service as a UTA Plan participant will be less than it otherwise would be because salary increases will be disregarded in applying the plan formula.

As of any date, an individual's accrued benefit under the UTA Plan is his or her normal retirement benefit calculated under the terms of the plan. The benefit is 100% vested after five years of service. The vested accrued benefit cannot be forfeited under the terms of the plan or under state law. UTA Plan, Section 8.04. *See Ellis v. Utah State Retirement Board*, 757 P.2d 882 (Utah Ct. App. 1988), *aff'd* 783 P.2d 540 (Utah 1989) (holding that an employee who has satisfied all conditions precedent to receiving a pension benefit has a vested contractual right to the benefit which cannot be reduced). Accordingly, benefits accrued to the date of the freeze under the UTA Plan will be paid out under that plan. The UTA Plan will continue to exist and presumably continue to be administered by the UTA.[4]

Freezing the plan (Option 2) would affect all UTA employees and would be considerably more disruptive than closing the plan to new hires (Option 1). As is discussed below, freezing the plan (whether the freeze is "soft" or "hard") and transitioning all employees to the URS raises legal issues not raised by closing the plan to new hires and limiting participation in the URS to new hires. The legal issues with freezing the plan are substantially the same whether the freeze is a hard freeze or a soft freeze, although the financial impact is significantly different as is summarized on page 6 of the Aon Report.

III. LEGAL ISSUES WITH TRANSITION – STATE LAW ISSUES[5]

Sources and Scope of the Right to Bargain.
The concerns raised by the right to bargain, of course, affect only represented employees. As noted, the current CBA requires the UTA to maintain a defined benefit plan for the benefit of represented employees, specifies the key terms of the benefit formula and provides for administration by a committee on which the Union has representation.

The Utah Public Transit District Act requires the UTA to bargain with the union representing the employees with respect to wages, salaries, hours, working conditions and welfare, pension and retirement provisions. Utah Code Ann. § 17B-2a-813(2)(c)(i). If impasse is reached in bargaining, the Act does not address how interest disputes are to be resolved. Interest arbitration, which is binding arbitration over the terms of a CBA, is precluded in the public sector by the Utah Constitution. *Salt Lake City v. Int'l Ass'n of Firefighters,* 563 P.2d 786 (Utah 1977).[6] Additionally, the statute precludes employees from striking. Utah Code Ann. § 17B-2a-813(2)(b).

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[4] We note that the administration provision of the plan requires union representation on the Pension Board of Trustees that administers the plan and that the plan also provides that the provision cannot be changed without the consent of the ATU.

[5] We are not licensed to practice law in the State of Utah. The descriptions of state law in this memo have been reviewed by UTA attorneys licensed in Utah.

[6] In a March 17, 1989 Certification issued by the Department of Labor, the Department concluded that binding interest arbitration would violate the Utah Constitution under the rationale set forth in *Salt Lake*

A 1993 13(c) Arrangement contains protections that are used as the basis for certification of Federal Transit Administration (FTA) grants to the UTA.[7] The 1993 13(c) Arrangement provides for a fact-finding process. This is a non-binding interest dispute resolution procedure under which a fact finder makes recommendations for settlement which neither party is obligated to accept. In 2009, the UTA and the ATU reached impasse over the terms of a contract and the UTA implemented its proposal for terms and conditions of employment. *Utah Transit Auth. v Local 382 of the Amalgamated Transit Union,* No. 100907409, at 2 (Utah Dist. Ct. Nov. 10, 2010).[8] An arbitrator ultimately ruled that, under the 13(c) Arrangement, the UTA was precluded from implementing until they had engaged in and completed the non-binding fact-finding procedure set forth in the Arrangement. *Utah Transit Auth. v. Local 382 of the Amalgamated Transit Union,* 289 P.3d 582, 584-85 (Utah 2012). Following the arbitrator's award, the parties entered into a new CBA. *Id.* This mooted the issue of whether the arbitrator or the district court should have been allowed to also decide whether the UTA had bargained in good faith. *Id.* at 585-91. (The district court had decided that allegations regarding bad faith were for the court to resolve.) Based on the Utah Supreme Court's description of events, and what the district court sent to arbitration, the arbitrator simply held that completion of the fact-finding procedure was a predicate to the UTA implementing its final offer. The arbitrator did not find, assuming compliance, that the UTA could not implement its last proposal.

Transition During CBA Term – Possible Challenges.

Under current law, the Legislature has required the UTA to bargain over pensions. The UTA has bargained and entered into a binding agreement requiring it to provide the pension benefits provided under the UTA Plan. The Union could challenge any legislative enactment that would impose conditions inconsistent with a current CBA (such as changing the terms of the pension provided) as an improper impairment of contract[9], and a court could require the UTA to honor its current CBA until it expires.[10] The U.S. Supreme Court has held that a contract may be modified by the state legislature in certain circumstances if it is "reasonable and necessary" to serve an important public purpose. *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977). This, of course, is an intensely factual inquiry and whether a modification is "reasonable and necessary" has been the subject of much litigation.

Transition after Expiration of CBA Term – Possible Challenges.

City v. Int'l Ass'n of Firefighters, supra, and imposed a nonbinding fact finding procedure to resolve UTA's interest disputes. A copy of the certification is Attachment 1 to this memo.

[7] A copy of the 1993 13(c) Arrangement is Attachment 2 to this memo.

[8] A copy of the decision is Attachment 3 to this memo.

[9] Article I, Section 10 of the U.S. Constitution provides that no State shall pass any "Law impairing the Obligation of Contracts." Article I, Section 18 of the Utah Constitution provides: "No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed."

[10] *See Park City Educ. Ass'n v. Bd. of Educ. of Park City Sch. Dist.*, 879 P.2d. 267, 269-71 (Utah Ct. App. 1994) (applying Utah law and concluding that, because State statute gave School District power to enter into a CBA, there was a corresponding obligation to be bound by it during its term while recognizing that School District must retain the right to insist upon different terms in future negotiations).

At the end of the term of the CBA, the UTA would be required under its enabling statute to bargain with the ATU over any changes to pension.[11] Arguably, after good faith bargaining and compliance with the fact-finding procedures set forth in the 13(c) agreement, the UTA could implement a final pension proposal, which (assuming the Legislature has passed the appropriate amendments to the statute mandating the transition) could be participation in the state retirement system under either Option 1 or Option 2 described above. The ATU would likely challenge any legislative requirement that its members participate in the state system, however, arguing that the UTA cannot fulfill its state statutory obligation to bargain in good faith over the pension if the terms are prescribed by a statute that only the Legislature can amend. Litigation could ensue over whether good faith bargaining can occur when the parties are constrained by state legislation forming the backdrop to their pension negotiations.[12] As discussed above, who would decide whether good faith bargaining had occurred is an open question in Utah.

We note that in the public sector employees have also challenged legislative action reducing or freezing their plan benefits prospectively by invoking the state and federal constitutional provisions prohibiting the impairment of contract by legislative action. Such challenges have been brought by both represented and non-represented employees and have been successful in states that have adopted the so-called "California rule." Under the California rule, a public employee has a contractual right to a statutorily created pension that is deemed to vest on the date the employee commences to accrue service under the plan. In states that have adopted the California rule, courts have found that statutes affecting future benefit accruals impair protected contractual rights.

Any litigation challenging legislative action reducing or freezing pension benefits on an impairment of contract theory would have to overcome the following two issues:

- First, Utah courts have not adopted the California rule. Rather, Utah courts have held only that public employees have a contractual vested right to those retirement benefits for which they have satisfied all conditions precedent to receiving. *See, e.g.*, *Hansen v. Pub. Emp. Ret. Sys. Bd. of Admin.*, 246 P.2d 591 (Utah 1952); *Ellis v. Utah State Ret. Bd.*, 757 P.2d 882 (Utah Ct. App. 1988), *aff'd* 783 P.2d 540 (Utah 1989).

- Second, even if a Utah court could be persuaded to reexamine the issue and to conclude that the California rule should apply, the current pension for UTA employees is not created by statute. For union employees, it is created by contract (the CBA) and any right granted is granted only through the end of the contract. There can be no impairment of the CBA after it has expired. Moreover, the UTA has retained the right to amend or terminate the plan.

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[11] An attempt by the Legislature to eliminate the obligation to bargain over pensions would raise significant Section 13(c) issues described in Section IV below.

[12] This issue was litigated in the context of the PEPRA litigation discussed below. *See California v. U.S. Dep't of Labor*, No. 2:13-CV-02069-KJM-DB, 2016 WL 4441221, at *16-18 (E.D. Cal. Aug. 22, 2016). A copy of the decision is Attachment 4 to this memo.

Although litigation under an impairment of contract theory to preclude prospective changes to pension benefits is unlikely to be successful, we note that the ATU has shown a willingness to litigate this issue.[13]

IV. LEGAL ISSUES WITH TRANSITION – SECTION 13(c)

Moving employee participants in UTA's Plan over to the URS plan would likely raise Section 13(c) labor protection issues. The ATU has previously raised two concerns under Section 13(c) in the context of state pension legislation: 1. The loss of pension rights under existing collective bargaining agreements under Section 13(c)(1) (49 U.S.C. §5333(b)(2)(A)); and 2. The loss of the right to collectively bargain over pension issues under Section 13(c)(2) (49 U.S.C. §5333(b)(2)(B)). The following will address both of these issues in the context of this proposed change in the UTA Plan and transition to the URS plan, and will initially provide background on Section 13(c) labor protection.

Section 13(c) Labor Protection.

Fair and equitable labor protections are required by Section 13(c) of the Federal Transit Act (codified at 49 U.S.C. §5333(b)) as a condition to the receipt of grants from the Federal Transit Administration ("FTA"). As a recipient of FTA funds for preventive maintenance and various capital projects and needs, UTA has Section 13(c) obligations contained in two 13(c) protections: (1) a 1993 13(c) Arrangement, referred to *infra*, which is applicable to capital assistance (imposed as a result of a 1993 Department of Labor[14] (DOL) decision); and (2) the 1975 National (or Model) 13(c) Agreement, which is applicable to the receipt of operating assistance grants, including preventive maintenance.

Section 13(c) protections contain various provisions, including those specifically required by the statutory language of Section 13(c) itself. Those include: (1) the preservation of rights, privileges and benefits (including the continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise (which is the preservation of *rights* under existing collective bargaining agreements); (2) the continuation of collective bargaining rights (which is the continuation of the *process* of collective bargaining); (3) the protection of individual employees against a worsening of their positions related to their employment; (4) assurances of employment to employees of acquired public transportation systems; and (5) paid training or retraining programs. 49 U.S.C. § 5333(b)(2)(A)-(F).

In addition, 13(c) protections typically include provisions providing for monetary benefits in the event employees are dismissed or displaced (worsened in employment) as a result of an FTA grant[15], a claims process that includes arbitration for 13(c) claims, an interest dispute resolution mechanism (which in UTA's case is a non-binding fact finding process as previously referred to), and an implementing agreement provision to implement proposed changes in the transit system which may result in employee dismissals or displacements as a result of a FTA grant,

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[13] Concern about litigation challenges under an impairment of contract theory may have been a factor in the decision by the Legislature in 2010 to limit the application of the pension reform legislation to newly hired employees. Newly hired employees could have no impairment claim.

[14] The Department of Labor administers the 13(c) program.

[15] In the event of a successful 13(c) claim, dismissal and displacement benefits are provided for an employee's protective period which is generally the length of employment capped at six years. *See National (Model) Agreement Pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as Amended*, ¶ 14, https://www.dol.gov/olms/regs/compliance/agreement.htm.

among others. Section 13(c) protection applies to both represented and non-represented transit employees, except for high level management employees in a policy making role.

13(c) Certification Process.

Grant applications filed by recipients like UTA are sent by FTA to DOL for 13(c) certification. The certification process is set forth in DOL's 13(c) Guidelines in 29 CFR Part 215. The process provides for the referral of grants to potentially affected unions and the recipient. 29 CFR § 215.3(b). DOL's referral letter contains the proposed 13(c) certification terms, which are typically based on the existing 13(c) protective agreements, and provides an opportunity for the unions and the recipient to object to the proposed 13(c) certification terms within a 15 day period. 29 CFR § 215.3(d)(1). If an objection is filed, DOL then determines whether the objection is sufficient.[16] If an objection is found sufficient, the grant recipient and the union(s) are required to engage in efforts to negotiate alternative protective terms.[17] If the parties fail to reach an agreement, DOL becomes involved in resolving the dispute.

This dispute process can include mediation, legal briefing and determination by DOL. DOL usually issues an "interim" certification during this process, which allows the grant to be certified and released by FTA to the recipient. § 215.3(d)(7). There have been a couple of instances in which DOL has refused to issue an interim certification. For example, DOL refused to certify grants to certain California transit agencies based on concerns raised by the ATU with the State of California's enactment of pension reform legislation, the Public Employees' Pension Reform Act (PEPRA). In refusing to issue an interim certification, DOL stated that there was a substantial possibility that if the parties failed to negotiate a statutorily sufficient resolution to the issues in dispute, it would render the transit agency ineligible for FTA funds. *See* February 5, 2013, Response to Objections in connection with Monterey-Salinas Transit Grant (CA-03-0823). This has been a contentious issue since the 13(c) Guidelines arguably mandate the issuance of an interim certification in stating that DOL "will issue" a certification within five (5) days after the end of the negotiation/discussion period. § 215.3(d)(7). Without an interim certification, FTA grant funds cannot be released during this certification dispute process before DOL.

In the event of legal briefing on a dispute, DOL issues a decision and, as part of the certification of the grant, imposes 13(c) protective terms. These 13(c) protections would then be included as part of the grant agreement with FTA. In the PEPRA dispute referenced above, DOL refused to certify the grants at issue on the basis that PEPRA's changes to pension benefits and bargaining were inconsistent with 13(c)(1) and (2).[18]

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[16] DOL's standards for "sufficiency" are set forth in 29 CFR § 215.3(d)(3).

[17] § 215.3(d)(6).

[18] This decision was successfully challenged in Federal District Court in the State of California under the Administrative Procedure Act. *California v. U.S. Dep't of Labor,* 2016 WL 4441221, 155 F.Supp.3d 1089 (E.D. Cal. 2016), *and* 306 F. Supp. 3d 1180 (E.D. Cal. 2018). In a more recent June 14, 2019 decision by DOL on this matter, DOL reversed its position and rejected the objections of the ATU on the basis of PEPRA and certified grants to various California transit agencies. DOL's decision was based on a reexamination of its earlier determinations in light of the Federal District Court's decisions. DOL found that PEPRA did not preclude bargaining over pensions altogether, some of the changes PEPRA made to defined benefit plans took effect after the expiration of collective bargaining agreements (allowing time for negotiations), and PEPRA did not interfere with the collective bargaining process but allowed negotiations around PEPRA's effects and within its restrictions. *See* June 14, 2019 DOL letter responding to objections to FTA grant Nos. CA-03-0806-04 and CA-90-2117 for Sacramento Regional Transit District

Potential Challenges to a Transition to the URS plan.

Objection to UTA Grants at DOL. The matter involving California's pension reform legislation, PEPRA, is instructive in this proposed transition from the UTA Plan to the URS plan. In the PEPRA dispute, the ATU objected to several grants of California transit agencies at DOL. The ATU's objections were premised on the argument that PEPRA violated 13(c)(1) by eliminating pension rights under existing collective bargaining agreements, and violated 13(c)(2) by eliminating the right to continue to collectively bargain over pension rights. In this context, the ATU could object to UTA grants referred by DOL and make similar arguments. Specifically, the ATU could object on the basis that the transition to the URS plan would deny employees the right to collectively bargain over pension issues since the benefits and terms of the URS plan are determined by state statute and not through a bargaining process, denying employees the right to collectively bargain over pension issues under 13(c)(2). Further, to the extent that changes were made to existing pension rights under the UTA plan that were not provided in the State plan, the ATU could try to challenge the loss of those rights under 13(c)(1) in an objection. The ATU's arguments will depend in large part on the scope and details of any implementing legislation enacted by the Utah Legislature.[19]

Procedurally, DOL would then rule on the sufficiency of the objection. DOL's June 14, 2019 decision in the PEPRA case is a marked departure from DOL's prior denial of certification and decisions. DOL's recent determination concluded it has "broad discretion" in determining whether the requirements of 13(c) are met. In analyzing whether the California pension reform legislation diminished collective bargaining rights and benefits, DOL determined not all changes accomplished through state law preclude certification. In the case of PEPRA, DOL concluded that it did not substantially affect benefits under existing collective bargaining agreements, on the basis that it only addressed one substantive term of employment, namely pensions, and did not preclude bargaining over pensions "altogether." *See* June 14, 2019 decision. In addition, DOL noted that changes to existing plans went into effect after the expiration of a collective bargaining agreement, allowing time and opportunity for negotiations. *Id.* DOL also gave weight to the need of the State to address a problem of economic necessity concerning its budget, noting that PEPRA was not aimed at undermining collective bargaining but alleviating the State's serious financial problem of pension funding. *Id.* at 8. In the case of PEPRA, DOL found that there was a sufficient continuation of rights and preservation of benefits, and the effects of PEPRA were sufficiently limited in scope to allow certification. *Id.* at 9. DOL's inquiry in the event of an objection in this matter will look to the effect and scope of any Utah Legislation in determining whether bargaining is impacted or more broadly eliminated, and whether existing pension rights are substantially impacted or reduced in a meaningful way.

If an objection is found sufficient by DOL, negotiations would be required between UTA and the ATU. Failing agreement, briefing would likely be requested and the dispute would be subject to DOL determination. As mentioned, DOL can issue an interim certification, allowing for the

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and Caltrans on behalf of Monterey-Salinas Transit, among others (June 14, 2019 decision). A copy of the June 14, 2019 letter is Attachment 5 to this memo. The ATU just recently challenged this DOL action in Federal District Court in Washington, D.C. *See Amalgamated Transit Union, Int'l v. U.S. Dep't of Labor*, Civil Action No. 19-cv-2533 (filed August 22, 2019).

[19] If, for example, only new hires were included in the URS plan, it would be arguable as to whether existing pension rights were lost under 13(c)(1) as new hires were not participants in the UTA Plan.

release of FTA funds to UTA, but it could refuse to do so. Final action of DOL, whether it be a legal challenge to a DOL decision on an objection, certification action by DOL, or a refusal by DOL to certify, could be challenged under the Administrative Procedure Act (APA), which provides for judicial review of federal agency action.

13(c) Claims. The ATU could also seek to file 13(c) claims under UTA's 13(c) Arrangement. Under paragraph (5), 13(c) claims can be filed by the Union with UTA. Typically claims seek 13(c) monetary benefits for dismissals or displacements, but the ATU could try to allege a violation of the 13(c) Arrangement in a claim.[20] Unresolved disputes or controversies over the application, interpretation or enforcement of the 13(c) protections, including disputed claims, are subject to an arbitration process under paragraph (8) of the 13(c) Arrangement. Arbitration can be evoked by either party. Under this arbitration process, a binding decision is rendered by a three member board of arbitration. In the event of an adverse award, arbitration decisions can be challenged under state law in limited circumstances. *See* Utah Uniform Arbitration Act, Utah Code Ann. § 78B-11-124, which enables a court to review and vacate (set aside) an award on the basis of partiality, corruption or misconduct by an arbitrator, or an arbitrator exceeded his or her authority, among other bases. Utah's Uniform Arbitration Act also provides a process for confirming awards and for modifying or correcting awards. *See* Utah Code Ann. §§ 78B-11-123 and 125.

State Litigation. If legislation were enacted by the Utah Legislature, the ATU could also attempt to challenge the legislation on the basis that it violated UTA's 13(c) protections perhaps raising the same 13(c)(1) and (2) issues discussed above.[21]

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[20] Note, however, that this claims process in the 13(c) Arrangement appears to be for dismissal and displacement claims. To be successful on such claims, there must be a showing that the adverse impact in employment – the dismissal or "worsening" in employment terms – was caused by or "as a result of" a federal project or grant. Here, in defending claims, it could be argued that the cause would be the enactment of State legislation mandating a transition to the URS plan, not a federal project or grant.

[21] Section 13(c) protections are considered to be contracts to be construed in accordance with state law in state courts. *See Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union,* 457 U.S. 15 (1982).

U.S. Department of Labor

Deputy Under Secretary for
Labor-Management Relations and
Cooperative Programs
Washington, D.C. 20210

MAR 21 1989

Mr. Lou Mraz
Regional Administrator
Urban Mass Transportation
Administration
Region VIII
Federal Office Bldg.
1961 Stout Street
Room 520
Denver, Colorado 80294

Re: UMTA Application
Utah Transit Authority
Purchase 20 Forty-Foot
Transit Coaches and
Related Equipment
(UT-03-0013)

Dear Mr. Mraz:

This is in reply to the request from your office that we review the above captioned application for a grant under the Urban Mass Transportation Act of 1964, as amended.

The Utah Transit Authority (UTA) and the Amalgamated Transit Union Local 382 (ATU) executed an agreement dated April 22, 1974 in connection with a previous grant application. On April 19, 1988 the UTA informed the ATU and the Department of Labor that it intended to negotiate a new Section 13(c) Agreement for application to the pending capital project application. In September 1988 the UTA proposed new protective arrangements; the parties, though, were unable to agree on appropriate arrangements. After mediatory efforts by the Department in December were unsuccessful, the parties were directed, on January 5, 1989, to submit briefs on the areas of disagreement. They were further afforded an opportunity to submit reply briefs on February 13, 1989. In view of the parties contining inability to reach agreement the Department has itself determined the protective arrangements to be imposed for the pending grant application.

New or Amended Agreement

The parties are in dispute over whether the negotiations undertaken between the UTA and ATU should result in a new or an amended Section 13(c) Agreement. The more common approach has been to amend Section 13(c) Agreements. However, either approach is acceptable. The number of issues in dispute lends itself to

ATTACHMENT 1

a consolidated document rather than an amended document. The Department's imposed arrangements, therefore, have been reduced to one document attached hereto as Appendix A. Subheadings in this letter generally refer to the paragraphs in Appendix A.

The ATU asserted that third-party beneficiary language need not be included for the instant certification since "there is no specific evidence that the UTA may attempt to disavow certified arrangements." The Department, however, has included such language in this certification to ensure that the Section 13(c) protective arrangements are enforceable.

Paragraph (1): Duty to Minimize Effects on Employees

We must agree with the UTA that the language of Paragraph (1) of the parties' April 22, 1974, Section 13(c) Agreement, would seem to preclude any action that would adversely affect employees, if taken literally. However, the language UTA has proposed is not adequate by itself given UTA's expressed understanding of the requirements of 13(c). There is a duty to minimize adverse effects on employees under 13(c). The language of the Act itself provides for protection of the interests of employees who may be adversely affected by Federal assistance. The legislative history and 5(2)(f) of the Interstate Commerce Act support the negotiation of protective arrangements prior to the approval of a Federally-assisted project to facilitate consideration of the impact of the project upon employees. The Department has fashioned a provision which combines the first sentence of Section B, Paragraph (1) of the "Section 18" Warranty with the UTA's proposal to arrive at an appropriate provision. See pages 5-6 of the Rural Transportation Employee Protection Guidebook for a discussion of the Department's interpretation of this language.

Paragraph (2)

There is no dispute over the language to be included in this paragraph.

Paragraph (3): Management Rights; Resolution of Grievances Following Contract Expiration

The "management rights" clause proposed by the UTA is not necessary to meet the requirements of Section 13(c). In the absence of an agreement by the parties the Department will not impose such a provision for application to this project. This language is more appropriately a subject for discussions under the parties' collective bargaining agreement.

The parties are also in disagreement over language relating to the resolution of grievances under the collective bargaining agreement following expiration of that agreement. The ATU argues that UTA's provision is contrary to Federal labor policy. The

UTA's proposal included language which provides for arbitration of grievances under expired collective bargaining agreements "as may be required with respect to the arbitration of grievances arising under such agreement". We have added language which states that such a requirement must also be considered "under Federal labor policy" to meet the requirements of Section 13(c). This is consistent with UTA's discussion of the issues yet relies on Federal labor policy to define the exact parameters of the parties' obligation.

Paragraph (4): Protection of Benefits

The history of the 13(c) program clearly supports the principle that protections extend to working conditions and fringe benefits and are not limited to monetary compensation. The Department, therefore, has imposed the provision proposed by the ATU with some minor modifications to permit an arbitrator greater flexibility in fashioning an award. To this end, we have indicated that employees are entitled to "offsetting benefits" rather than "offsetting make-whole benefits."

Paragraphs (5) and (6)

There is no dispute over the language to be included in these paragraphs.

Proposals Regarding Paragraph (7) of the April 22, 1974 Section 13(c) Agreement: First Opportunity for Comparable Employment

The Department has determined that the proposed 13(c) provision providing ATU-represented employees with the first opportunity of employment in any new jobs need not be included in the 13(c) Arrangement for purposes of this Project certification. The Department has referenced or incorporated state statutes in protective arrangements in the past where such statutes were necessary in order to meet the requirements of the Act or where they were agreed to by grant recipients. However, in this situation, the provision of the state statute is not required under Section 13(c). The ATU proposal would incorporate a requirement under State law into the Section 13(c) arrangement. This proposal is beyond the minimum requirements of Section 13(c). The interests of employees under Section 13(c)(3) and (4) are protected by a requirement for priority of reemployment of employees terminated or laid off which is included in Paragraph (6) of Appendix A.

Paragraph (7): Selection Forces; Implementing Agreements

The UTA has proposed that the "selection of forces" language of the April 22, 1974 Agreement be eliminated because it is not legally required by 13(c). The Department, however, believes

that some type of selection of forces language is required to provide employees with the protections to which they are entitled under 5(2)(f) of the Interstate Commerce Act. While the ATU cannot negotiate on behalf of employees of other urban mass transportation employers in the service area of this Project, such employees are, nevertheless, entitled to the UTA's consideration if they are impacted by the Project. Therefore, we have modified the ATU's proposal to substitute language from the Model Agreement which makes this position clear.

The parties are also in dispute over the UTA proposal which provides for factfinding of any interest issues which may arise during the negotiation of implementing agreements. The term "implementing agreement" presupposes that there is authority in an existing Agreement for further development by the parties or for application and interpretation by a neutral arbitrator. Where the implementing agreement does not concern the application of the protective agreement (or imposed arrangement), but instead involves issues related to the making or maintaining of a collective bargaining agreement, those issues are interest issues. Only in the rarest of circumstances should interest issues be raised during discussions over implementing agreements. If interest issues are raised during the course of discussions over implementing agreements, such issues should be referred to factfinding in accordance with paragraph (9). Issues arising in the course of negotiating implementing agreements are to be construed as implementing agreement issues whenever possible. We believe that there is sufficient flexibility under section 5(2)(f) of the Interstate Commerce Act for the Department to conclude that the procedures in Appendix A meet the requirements of the Act even though the parties are precluded under state law from arbitrating interest disputes.

Paragraph (8): Arbitration of 13(c) Claims

The UTA has proposed an arbitration procedure for resolution of disputes over the application, interpretation and enforcement of the terms and conditions of the Section 13(c) Arrangement which is binding and enforceable upon the parties. This procedure, which is a necessary part of the Section 13(c) Arrangement, is essentially the same as that in the parties' 1974 Agreement. The scope of disputes to be resolved under the paragraph, however, has been narrowed substantially. See discussion of Paragraph (9) regarding procedures which would be applicable for interest disputes and Paragraph (3) regarding procedures for resolution of grievances following expiration of a collective bargaining agreement.

Paragraph (9): Factfinding of Interest Disputes

The UTA has provided substantial arguments to justify its position that "there is persuasive evidence that an interest

arbitration provision imposed as part of a 13(c) arrangement, would be void and unenforceable in Utah." (See UTA Reply Brief, February 13, 1989 at page 3.) The Department is convinced that binding interest arbitration would violate the Constitution of the State of Utah under the rationale set forth in the Utah Supreme Court decision in Salt Lake City v. International Association of Firefighters 563 P.2d 786 (Utah) 1977. In order to meet the requirements of 13(c)(2) as discussed in ATU v. Donovan, 767 F.2nd 939, 956 (D.C. Cir. 1985), the Secretary must ensure that an enforceable interest dispute resolution procedure is included for the pending grant. Therefore, the Department of Labor will impose the factfinding procedure set forth in paragraph (9).

The procedure imposed by the Department is mandatory at the request of either party and provides for a full and fair airing of the parties' issues thus ensuring that the parties will give serious consideration to the factfinder's recommendations. The procedure gives equal consideration to the positions of both parties in a bargaining dispute and thereby prevents unilaterial control over mandatory subjects of collective bargaining.

The procedure in Appendix A provides for a geographic restriction on the selection of a neutral which is quite reasonable given similar guidance in Utah State law. It provides for a neutral with experience pertinent to the issues which must be addressed, it also includes appropriate criteria for the consideration of the neutral. We have substituted "stipulations of the parties" for "positions of the parties" under (9)(c)(1) to conform to general practice. Paragraph (9)(c)(3) has been revised to provide for comparison with employers doing comparable work with "consideration to factors peculiar to the community" because of the lack of other urban mass transportation providers in the Utah area.

The status quo provision of Paragraph (9)(f) has been revised to read "the terms and conditions of any expiring collective bargaining agreement between the parties shall remain in place ..." rather than "conditions of emplcyment shall continue ...". The former language is more precise, leaving little room for misinterpretation by the parties.

The UTA's proposed paragraph (g) has not been included by DOL. All the requirements of 13(c) have been met in the arrangements attached at Appendix A for the instant grant application.

Paragraph (10): Duplication of Benefits

The UTA has proposed a "no duplication of benefits" proposal to modify that provision in the parties' 1974 Agreement. The ATU has proffered a counterproposal based on a decision by the Interstate Commerce Commission concerning the proper

interpretation of such language in Appendix C-1. Contrary to the ATU's assertions, the language proposed by the UTA does not require the "complete forfeiture of other existing labor protective conditions"; it requires only "that there shall be no duplication of benefits" (emphasis added). Read in its entirety, the UTA's Paragraph does not result in the elimination of rights or benefits "under any ... protective conditions or arrangements," but, rather, preserves these. The language proposed by UTA is generally accepted throughout the industry and clearly meets the requirements of the Act.

Paragraph (11): Discountinuance of Project Services Language

The ATU has proposed, to be included in a paragraph 11(c), language which provides protections for employees adversely affected "because of a discontinuance of Project services which is as a result of the Project." This proposal was made in response to a UTA proposal, later withdrawn, that employees would not be protected under such circumstances. Clearly employees are intended to be protected under such circumstances and numerous examples of potential adverse affects have been suggested for the UTA's benefit. The ATU's proposal, however, is redundant given the definition of "as a result of the Project" in Paragraph 11(b) of this Arrangement. It need not be included to meet the requirements of the Act.

Paragraph (12): Successor Provision

The UTA has proposed that Paragraph (12) of the parties' April 22, 1974 Section 13(c) Agreement be replaced with a successor clause which only places 13(c) obligations upon a "successor in interest" which undertakes management and operation of the transit system. The successorship obligation envisioned by the transportation authority is clearly more limited than that contemplated in the legislative history of the Act.

Contrary to the UTA's suggestion, DOL does not have an obligation to "either accept language such as that proposed by the Authority or craft a provision of its own." We are not convinced that the existing language would impact upon agents of the transit authority in any manner that was not intended by the Act. For instance, a new contractor undertaking "operation of the transit system" should be bound by the commitments which the UTA made in its 13(c) Agreement. Any other interpretation would have the effect of circumventing the requirements of the Act by passing along Federal assistance but not the corresponding obligations to an alter ego of the transit system.

While there are possible alternative provisions which would also meet requirements of the Act, the provision in the parties' 1974 Agreement is generally well-accepted throughout the industry and need not be revised for this project.

Paragraphs (13), (14), and (15)

The parties have indicated that no changes have been proposed to these paragraphs of the April 22, 1974 Section 13(c) Agreement.

Arrangements To Be Imposed

We do not believe that it is necessary for the parties to execute a formal agreement prior to certification of this project by the Department. However, they are encouraged to do so prior to approval of subsequent UTA grants of assistance. Language in item three below establishes that employees represented by the ATU are intended third-party beneficiaries of the employee protection provisions of the grant contract. In executing the grant contract the Department of Transportation (DOT) and UTA are acknowledging their agreement to the terms therein. The Department of Labor's certification is not merely an opinion of a third party, but a binding prerequisite to approval of Federal Assistance by DOT.

Accordingly, the Department of Labor makes the certification required in the Act with respect to the instant project on condition that:

1. This letter and the terms and conditions of the Arrangement in Appendix A, shall be made applicable to the instant project and made part of the contract of assistance, by reference;

2. The term "project" as used in the Arrangement in Appendix A, shall be deemed to cover and refer to the instant project; and

3. The contract of assistance shall include the following language:

   "The terms and conditions of the aforementioned protective arrangements are intended for the primary and direct benefit of transit employees in the service area of the project. These employees are intended third-party beneficiaries to the employee protective arrangements of the grant contract between the Department of Transportation and the UTA and the parties to the contract have so signified in executing that contract. The employees' representative may assert claims on their behalf."

4. Employees of urban mass transportation carriers in the service area of the project, other than those represented by Amalgamated Transit Union Local 382 shall be afforded substantially the same levels of

protection as are afforded to the employees represented by ATU Local 382 under the attached Arrangement and this certification. Should a dispute arise, after exhausting any available remedies under the 13(c) agreement and absent mutual agreement by the parties to utilize any final and binding procedure for resolution of the dispute, the Secretary of Labor may designate a neutral third party or appoint a member of her staff to serve as arbitrator and render a final and binding determination.

Sincerely,

John R. Stepp

cc: Theodore Munter
Earle Putnam/ATU
G. Kent Woodman/UTA
Gayland Moffat/UTA

U.S.Department of Labor

Office of the American Workplace
Office of Labor-Management Programs
Washington, D.C. 20210

DEC 9 1993

Mr. Louis Mraz
Regional Manager
Federal Transit Administration
Region VIII
Columbine Place
216 16th Street, Suite 650
Denver, Colorado 80202

Re: FTA Applications
Utah Transit Authority
Operating Assistance (CY '93); Land Acquisition for and Construction of Flextrans Maintenance Facility, Purchase Buses, etc.
(UT-90-X021)
Purchase 33 Acres of Real Property for Southern Terminus of UTA Light Rail Project
(UT-03-0020)

Dear Mr. Mraz:

This is in reply to the request from your office that we review the above captioned applications for grants under the Federal Transit Act (the Act).

In connection with a previous grant application, the Department of Labor (Department) determined the Section 13(c) protective arrangements for the Utah Transit Authority (UTA) and the Amalgamated Transit Union (ATU). The determination included "Appendix C" (enclosed), dated September 29, 1993, which provides to the employees represented by the union protections satisfying the requirements of Section 13(c) of the Act.

The ATU continues to object to the application of Appendix C to UTA projects. By letter dated July 2, 1993, the ATU clarified its previous positions on the issues leading to the June 2, 1993 determination. The UTA declined the opportunity to comment on the July 2, 1993 letter from the ATU. The Department has reviewed the ATU's objections and reaffirms that Appendix C is statutorily sufficient.

ATTACHMENT 2

Arrangements to Be Imposed

The language in item three below establishes that employees represented by the ATU are intended third-party beneficiaries of the employee protection provisions of the grant contract. In executing the grant contract, the Department of Transportation (DOT) and the UTA are acknowledging their agreement to the terms therein. The Department of Labor's certification is not merely an opinion of a third party, but a binding prerequisite to approval of Federal Assistance by DOT. The following terms and conditions satisfy the requirements of Section 13(c) of the Act.

Accordingly, the Department of Labor makes the certification required in the Act with respect to the instant projects on condition that:

1. This letter and the terms and conditions of Appendix C dated September 29, 1993, shall be made applicable to the instant projects and made part of the contracts of assistance, by reference;

2. The term "project" as used in the Appendix C dated September 29, 1993, shall be deemed to cover and refer to the instant projects;

3. The contract of assistance for each project shall include the following language, by reference:

   "Nothing in this certification shall preclude the Amalgamated Transit Union from exercising whatever rights it has under Section 32 of the Utah state law;" and

   "The terms and conditions of the aforementioned protective arrangements are intended for the primary and direct benefit of transit employees in the service area of the project. These employees are intended third-party beneficiaries to the employee protective arrangements of the grant contract between the Department of Transportation and the UTA and the parties to the contract have so signified in executing that contract. The employees' representative may assert claims on their behalf."

4. Disputes over the interpretation, application and enforcement of the terms and conditions of the protective arrangements certified by the Department of Labor, which include this letter of certification, shall be resolved in accordance with the provisions in the aforementioned agreements and/or arrangements for the resolution of disputes over the interpretation, application and enforcement of the Section 13(c) agreements and/or arrangements; and

5. Employees of urban mass transportation carriers in the service area of the project, other than those represented by the local union which is a party to, or otherwise referenced in the protective arrangements, shall be afforded substantially the same levels of protection as are afforded to the employees represented by the union under Appendix C dated September 29, 1993 and this certification. Such protections include procedural rights and remedies as well as protections for individual employees affected by the project.

   Should a dispute remain, after exhausting any available remedies under the Section 13(c) arrangements and absent mutual agreement by the parties to utilize any final and binding procedure for resolution of the dispute, the Secretary of Labor may designate a neutral third party or appoint a staff member to serve as arbitrator and render a final and binding determination.

Sincerely,

Charles A. Richards

Charles A. Richards
Deputy Assistant Secretary

cc: Arthur Lopez/FTA/w/enclosure
Jerry Benson/UTA/w/enclosure
Jane Sutter Starke/Eckert, Seamans
Cherin & Mellott/w/enclosure
Earle Putnam/ATU/w/enclosure

Enclosure

September 29, 1993

APPENDIX "C"

Protective Arangement Pursuant to Section 13(c) of the Federal Transit Act.

(1) (a) The Project shall be carried out in full compliance with the protective conditions described herein and in such a manner and upon such terms and conditions as will not adversely affect employees represented by Local 382, Amalgamated Transit Union, AFL-CIO ("Union").

(b) Subparagraph (a) is intended to express the general requirement that the rights and interests of employees represented by the Union be protected from the effects of the Project. Initially, this means that the Utah Transit Authority ("Public Body") in designing and implementing the Project must consider the effects the Project may have on employees represented by the Union and attempt to minimize any adverse effects as a result of the Project. If objectives can be met without adversely effecting such employees as a result of the project, it is expected that adverse effects as a result of the project will be avoided. The duty to minimize adverse effects as a result of the project is not intended to preclude all actions which would adversely affect employees, but to balance such actions in favor of the interests of employees. In the context of particular Project events, this paragraph is to be read in conjunction with other provisions of this Arrangement. It thereby is intended to emphasize the specific statutory requirements that the employees be protected against a worsening of their employment conditions as a result of the Project and receive offsetting benefits to make them "whole" when unavoidable adverse effects occur as a result of the project.

(2) All rights, privileges, and benefits (including pension rights and benefits) of employees represented by the Union (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall

be preserved and continued provided, however, that such rights, privileges and benefits not previously vested may be modified by collective bargaining and agreement of the Public Body or other operator of the transit system and the Union to substitute other rights, privileges and benefits.

(3) The collective bargaining rights of employees represented by the Union including the right to arbitrate or otherwise resolve labor disputes and to maintain checkoff arrangements, as provided by applicable laws, policies and/or existing collective bargaining agreements shall be preserved and continued; provided, however, that this provision shall not be interpreted so as to require the Public Body to retain any such rights which exist by virtue of a collective bargaining agreement after such agreement is no longer in effect, except (a) as may otherwise by required under Federal labor policy with respect to the arbitration of grievances arising under such agreement, or (b) as may be required under applicable law, including Section 13(c) of the Act, or (c) as may be required under paragraph (9) of this Arrangement. The Public body agrees that it will bargain collectively with the Union or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreements with the Union or arrange for such agreements to be entered into, relative to all subjects which are or may be proper subjects of collective bargaining.

(4) Any employee represented by the Union who is laid off or otherwise deprived of employment or placed in a worse position with respect to compensation at any time during his or her employment as a result of the Project, including any program of efficiencies or economies directly or indirectly related thereto, shall be entitled to receive any applicable rights, privileges and benefits as specified in the employee protective arrangements attached hereto and made a part hereof as Exhibit "A"; provided, however, that nothing in Exhibit "A" shall be deemed to supersede or displace any other provisions of this arrangement, and in the event of any conflict or inconsistency between them, the other provisions of this Arrangement shall

control. Any employee represented by the Union who is placed in a worse position with respect to hours, working conditions, fringe benefits, or rights and privileges pertaining thereto at any time during his or her employment as a result of the project shall be made whole. Arbitrators' awards must wholly compensate employees for the harm they suffer, but this does not necessarily or strictly require in all circumstances the restitution of the precise benefit, right or privilege lost or adversely affected as a result of the Project. Reasonable efforts shall first be made to provide restitution of the precise benefit, right or privilege lost or adversely affected as a result of the project. If such efforts are unsuccessful or would be unsuitable, an alternative remedy, awarding either 1) offsetting benefits where such an award would result in a fair and equitable substitute or 2) compensatory damages where the harm has a readily ascertainable economic value and such an alternative remedy is fair and equitable, may be acceptable.

(5) (a) The Public Body shall be financially responsible for the application of these conditions and will make the necessary arrangements so that any employee who is affected as a result of the Project may file a claim with the Public Body within sixty (60) days of the date the employee is terminated or laid off as a result of the Project, or within eighteen (18) months of the date the employee's position with respect to the employee's employment is otherwise worsened as a result of the Project; provided, in the latter case, if the events giving rise to the claim have occurred over an extended period, the 18-month limitation shall be measured from the last such event; provided, further, that no benefits shall be payable for any period prior to six (6) months from the date of the filing of the claim. Unless such a claim is filed with the Public Body within such time limitations, the Public Body shall thereafter be relieved of all liabilities and obligations related to such claim.

(b) In the case of a claim filed under this paragraph, the Public Body will either fully honor the claim, making appropriate payments, or will give notice to the claimant and the Union of the basis for denying or modifying such claim, giving reasons therefor. In the event the Public Body fails to honor such claim, the Union may invoke the following procedures for further joint investigation of the claim by giving notice of its desire to pursue such procedures. Within ten (10) days from the receipt by the Public Body of such notice, the parties shall exchange such factual information as may be available to them relevant to the disposition of the claim and shall jointly take such steps as may be necessary or desirable to obtain from any third parties such additional factual material as may be relevant. As soon as practicable thereafter, the parties shall meet and attempt to agree upon the proper disposition of the claim. If no such agreement is reached, and the Public Body decides to reject the claim, it shall give written notice of its final rejection of the claim, detailing its reasons therefor. In the event the claim is so rejected by the Public Body, the claim may be processed to arbitration as provided by paragraph (8) of this Arrangement. Prior to the arbitration hearing the parties shall exchange a list of intended witnesses. In conjunction with such proceedings, the board of arbitration shall have the power to subpoena witnesses upon the request of any party and to compel the production of documents and other information denied in the pre-arbitration period which is relevant to the disposition of the claim.

(6) (a) During the employee's protective period, as defined in Exhibit "A", any employee who has been laid off or otherwise deprived of employment as a result of the Project shall be granted, if such employee requests in writing, priority of employment or remployment to fill any vacant position on the transit system reasonably comparable to that which the employee held when dismissed for which the employee is, or by training or re-training for a reasonable period can become, qualified; not, however, in contravention of collective bargaining agreements related thereto. In the

event training or re-training is required by such employment or reemployment, the Public Body or other operator of the transit system shall provide or provide for such training or re-training at no cost to the employee, and such employee shall be paid, while training or re-training, the salary or hourly rate provided for in the applicable collective bargaining agreement for such position, plus any displacement allowance to which the employee may be otherwise entitled. If a dismissed employee who has made such request fails, without good cause, within ten (10) days to accept an offer of a position comparable to that held when dismissed, for which the employee is qualified or for which the employee has satisfactorily completed such training, the employee shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this Arrangement.

(b) As between employees who request employment pursuant to this paragraph, the following order where applicable shall prevail in hiring such employees:

(i) Employees in the craft or class of the vacancy shall be given priority over employees without seniority in such craft or class;

(ii) As between employees having seniority in the craft or class of the vacancy, the senior employees, based upon their service in that craft or class, as shown on the appropriate seniority roster, shall prevail over junior employees;

(iii) As between employees not having seniority in the craft or class of the vacancy, the senior employees, based upon their service in the crafts or classes in which they do have seniority, as shown on the appropriate seniority rosters, shall prevail over junior employees.

(7) (a) In the event the Public Body contemplates any change in the organization or operation of its system which may result in the dismissal or displacement of employees, or rearrangement of the working forces represented by the union, as a result of the Project, the Public Body shall

do so only in accordance with the provisions of subparagraph (b) hereof. Provided, however, that changes which are not a result of the project, but which grow out of the normal exercise of seniority rights occasioned by seasonal or other normal schedule changes and regular picking procedures under the applicable collective bargaining agreement, shall not be considered within the purview of this paragraph.

(b) The Public Body shall give the Union at least sixty (60) days written notice of each proposed change which may result in the dismissal or displacement of such employees or rearrangement of the working forces as a result of the Project, by sending certified mail notice to the Union. Such notice shall contain a full and adequate statement of the proposed changes, including an estimate of the number of employees of each classification affected by intended changes and the number and classifications of any jobs in the Public Body's employment available to be filled by such affected employees. At the request of either the Public Body or the Union, negotiations for the purpose of reaching an agreement with respect to the application of the terms and conditions of this Arrangement shall commence immediately. These negotiations shall include determining the selection of forces from among the urban mass transportation employees who may be affected as a result of the Project, to establish which such employees shall be offered employment with the Public Body for which they are qualified or can be trained; not, however, in contravention of collective bargaining agreements relating thereto, and any assignment of employees represented by the Union made necessary by the intended changes shall be made on the basis of an agreement between the Public body and the Union. If no agreement is reached within twenty (20) days from the commencement of negotiations, either party may submit it to arbitration in accordance with procedures contained in paragraph (8) hereof. The Authority of the arbitrator shall be limited to the determination of the dispute regarding the application of the terms and conditions of this Arrangement to the intended change. In any such arbitration, the terms of this Arrangement

are to be interpreted and applied in favor of providing employee protections and benefits no less than those established pursuant to Section 5(2)(f) of the Interstate Commerce Act, currently codified at 49 U.S.C. 11347.

(8) (a) Any labor dispute or controversy between the Public Body and any employee represented by the Union or between the Public Body and the Union, regarding the application, interpretation, or enforcement of this Arrangement, which cannot be settled by the parties within thirty (30) days after the dispute or controversy first arises, may be submitted at the written request of either the Public Body or the Union to a board of arbitration to be selected as hereinafter provided.

(b) The Public Body and the Union shall each, within five (5) days after a request under subparagraph (a), select one member of the arbitration board and the two members thus chosen shall select a third member who shall serve as chairman. If either party fails to select its member within the prescribed time limit, the highest officer of the Union, on the one hand, or of the Public Body on the other, or their nominees, as case may be, shall be deemed to be the selected member, and the board of arbitration shall then function and its decision shall have the same force and effect as though the parties had selected their members. Should the two members be unable to agree upon the appointment of the neutral member within ten (10) days, either may request the American Arbitration Association to furnish a list of (5) persons from which the neutral member shall be selected. The two members selected by the parties shall, within seven (7) days after the receipt of such list, determine by lot the order of elimination, and thereafter each shall, in that order, alternately eliminate one name until only one name remains. The remaining person on the list shall be the neutral member.

(c) The board of arbitration shall render its decision within forty-five (45) days after the date of the close of the hearing. The decision shall be by majority vote of the arbitration board and shall be final, binding and conclusive.

(d) The board of arbitration shall have no authority to add to, delete from, or change the terms of this Arrangement. The fees and expenses of the neutral member, as well as any other joint expenses incidental to the arbitration, shall be borne equally by the parties, and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by the Project, it shall be the employee's obligation to identify the Project and specify the pertinent facts relied upon. It shall then be the burden of the Public Body to prove that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon the employee even if other factors may also have affected the employee.

(9) (a) Any labor dispute between the Public Body and the Union regarding the making or maintaining of a collective bargaining agreement, or the wages, hours, working conditions, or other terms to be included in such an agreement, which cannot be settled by the parties within sixty (60) days after the dispute first arises may be submitted at the written request of either such party to fact finding in accordance with this paragraph.

(b) Upon a written request for fact finding, the Public Body and the Union shall meet and attempt to agree on an acceptable neutral fact finder. If the parties are unable to agree on a neutral fact finder within ten (10) days after the request for fact finding, either party may request the Federal Mediation and Conciliation Service to furnish a list of five (5) persons from which the neutral fact finder shall be selected. The request shall specify a preference for neutral fact finders experienced in matters of transportation and public sector interest disputes, and having a place of business in one of the following States: Colorado, Idaho, Montana, Utah or Wyoming. The parties shall, within seven (7) days after receipt of such list, determine by lot the order of elimination, and thereafter each

shall, in that order, alternatively eliminate one name until only one name remains. The remaining person on the list shall be the neutral fact finder.

(c) In connection with a factfinding proceeding under this paragraph, the Public Body and the Union shall exchange such factual information as may be available to them, reasonable in nature and scope, and relevant to the issues presented. The parties agree that no such relevant information shall be withheld. In conjunction with such proceedings, the neutral factfinder shall have the power to compel the production of documents and other information denied in the pre-factfinding period which is relevant to the disposition of the issues, and to adjust the time frames for this factfinding procedure to allow for the receipt and review of such information.

(d) In making findings of fact and recommendations for the resolution of the matters in dispute the neutral fact finder shall take into consideration the following factors:

(1) The stipulations of the parties;

(2) The financial conditions of the transit system, the ability of the Public Body to administer and finance the existing system, and the interest and welfare of the public;

(3) A comparison of the wages, hours, and terms and conditions of employment of the Public Body's employees with those of other public and private employees doing comparable work giving consideration to factors peculiar to the community or area and the job classification involved;

(4) The overall compensation presently received by the Public Body's employees, including wages, hours, and terms and conditions of employment, and all medical, insurance, pension, and fringe benefits received;

(5) Collective bargaining agreements between the parties; and

(6) Such other factors not confined to those noted above which are normally and traditionally taken into consideration in determination of issues submitted to mutually agreed upon dispute settlement procedures in public service or private employment.

(e) Each party shall within five (5) days of the selection of the neutral fact finder submit to the other party and the neutral fact finder a listing of unresolved issues and its position on the identified issues. The neutral fact finder shall hold hearings and receive oral or written testimony as appropriate. Except as provided in subsection (c), the neutral fact finder shall issue findings of fact and recommendations for resolution of the issues in dispute within forty-five (45) days after the submission of the listing of issues to the neutral fact finder. Except as provided in subsection (f), the recommendations of the fact finder shall be advisory only and shall not be binding on either party.

(f) Each party shall notify the neutral fact finder and the other party to the dispute whether it accepts the recommendations, in whole or in part, within fifteen (15) days of the issuance of such recommendations. If neither party rejects the recommendations for resolution of the issues in dispute, such recommendations shall be deemed to be a final resolution of the matters in dispute. If a party does reject such recommendations, it shall include in its notification its specific reasons for rejection in writing. Within two (2) days after the receipt of a rejection by either party, the neutral fact finder shall release for publication in the local media his or her findings of fact, recommendations for settlement, the positions of the parties, and the reasons of the parties for rejection of the fact finder's recommendations.

(g) The terms and conditions of any expiring collective bargaining agreement between the parties shall remain in place following expiration of such agreement, unless otherwise mutually agreed in writing by the parties, until the conclusion of the fact finding proceedings. The time limitations included in

this paragraph may be extended by mutual written agreement of the parties. The fees and expenses of the neutral fact finder, as well as any other joint expenses incidental to the fact finding, shall be borne equally by the parties, and all other expenses shall be paid by the party incurring them.

(10) Nothing in this Arrangement shall be construed as depriving any employee of any rights or benefits which such employee may have under any existing job security or other protective conditions or arrangements by collective bargaining agreement or law where applicable; provided that there shall be no duplication or pyramiding of benefits to any employees, and, provided further, that any benefit under this Arrangement, shall be construed to include the conditions, responsibilities, and obligations accompanying such benefit. This paragraph is intended to be construed consistent with the Hodgson Affidavit in Congress of Railway Unions v. Hodgson, 326 F.Supp. 68 (D.D.C. 1971), and the Federal court's interpretation of the concept of "pyramiding" in New York Dock Railway v. U.S., 609 F.2d 83, 100-101 (2d Cir. 1979).

(11)(a) The term "Project", as used in this Arrangement shall not be limited to the particular facility, service, or operation assisted by Federal funds, but shall include any changes, whether organizational, operational, technological, or otherwise, which are a result of the assistance provided.

(b) The phrase "as a result of the Project", as used in this Arrangement, shall include events occuring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto; provided, however, that volume rises and falls of business, or changes in volume and character of employment brought about by causes other than the Project (including any economies or efficiencies unrelated to the Project) are not within the purview of this Arrangement.

(c) Except as otherwise provided in paragraph (6)(a) of Exhibit "A", the term "days", as used in this Arrangement, shall mean calendar days.

(12) This Arrangement shall be binding upon the successors and assigns of the parties hereto, and no provisions, terms or obligations herein contained shall be affected, modified, altered, or changed in any respect whatsoever by reason of the arrangements made by or for the Public Body to manage or operate the system. Any person, enterprise, body, or agency, whether publicly or privately owned, which shall undertake the management or operation of the transit system shall agree to be bound by the terms of this Arrangement and accept the responsibility for full performance of these conditions.

(13) The employees represented by the Union shall continue to receive coverage under Social Security, Workmen's Compensation, unemployment compensation, and the like. In no event shall these benefits be worsened as a result of the Project.

(14) In the event any provision of this Arrangement is held to be invalid or otherwise unenforceable under the Federal, State or local law, the remaining provisions of this Arrangement shall not be affected and the invalid or unenforceable provisions shall be re-negotiated for purpose of adequate replacement under Section 13(c) of the Act. If such negotiation shall be result in mutually satisfactory agreement, either party may invoke the jurisdiction of the Secretary of Labor to determine substitute fair and equitable employee protective arrangements for application only to the particular Project, which shall be incorporated in this Arrangement only as applied to that Project, and any other appropriate action, remedy, or relief.

(15) If this Project is approved for assistance under the Act, the foregoing terms and conditions shall be made part of the contract of assistance between the Federal Government and the applicant for Federal funds, provided, however, that these arrangements shall not merge into the contract of assistance, but shall be independently binding and enforceable

by and upon the parties, in accordance with its terms; nor shall the collective bargaining agreement merge into this Arrangement, but each shall be independently binding and enforceable by and upon the parties, in accordance with its terms.

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

UTAH TRANSIT AUTHORITY, a Utah public transit district, Plaintiff, v. LOCAL 382 OF THE AMALGAMATED TRANSIT UNION, Defendant.	**AMENDED RULING ON DEFENDANTS' MOTION TO COMPEL ARBITRATION AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** Civil No. 100907409 Judge L. A. Dever

This matter came on for hearing on cross motions. The plaintiff was represented by Scott A. Hagen, D. Zachary Wiseman and Liesel B. Stevens. The defendant was represented by Joseph E. Hatch and Arthur F. Sandack. After considering the memoranda of the parties and the arguments presented, the Court rules as follows, after noting that the following facts are not in dispute and are contained in the memoranda of both parties:

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1. Plaintiff Utah Transit Authority ("UTA") is a Utah Public Transit District with operations in several Utah counties along the Wasatch Front with its headquarters in Salt Lake County.

2. Defendant Local 382 of the Amalgamated Transit Union ("Union") is an unincorporated association with its principal office in Salt Lake County.

3. The Union is the recognized exclusive representative for purposes of collective bargaining of certain UTA employees that are described in a series of collective bargaining agreements ("CBA") between UTA and the Union.

4. The most recent CBA expired on December 10, 2009, but was extended by agreement of the parties to December 21, 2009.

5. The parties began negotiations for a successor agreement in August of 2009. The parties met approximately fourteen times during this period.

6. After December 21, 2009, UTA declared that an impasse had occurred and discontinued negotiations.

7. Based on the declaration of impasse, UTA implemented changes to the employees' terms and conditions of employment and informed the Union of these actions.

8. In addition to a CBA, the Union and UTA were and are subject to an arrangement pursuant to Section 13(c) of the Urban Mass Transit Act of 1964 (Section 13(c) Arrangement), which requires, in general, that public transit agencies that receive federal funds make "protective arrangements" for the benefit of employees.

9. The 13(c) Arrangement governing UTA and its employees is enforceable in State Court and is governed by state law.

10. Pursuant to the Section 13(c) Arrangement, if fact-finding is invoked by either party the terms of the expired CBA remain in effect until fact-finding is completed.

11. Neither side has invoked fact finding.

12. The parties do not agree on the application of Section 13(c). The Union contends that Paragraph 8 of the Arrangement is akin to a general arbitration obligation. The parties agree that the arbitration obligation is limited to the "application, interpretation, or enforcement" of the Section 13(c) Arrangement, but they disagree as to the limitations imposed by that language.

13. The parties have agreed to arbitrate the issue of the application of whether Section 13(c) Arrangement, specifically ¶ (9)(g) of the Arrangement prohibited UTA from modifying the terms and conditions of employment on December 21, 2009.

ISSUES

Is Arbitration mandated by the Section 13(c) Arrangement?

The Section 13(c) Arrangement does require arbitration. However, the arbitration requirement only applies to the application, interpretation, or enforcement of the Section 13(c) Arrangement. The Union cites to the recent case of *Amalgamated Transit Union, Local 192, AFL-CIO vs. Alameda-Contra Costa Transit District,* Case No. RG10522627, of the Superior Court for the County of Alameda, for the proposition that a Section 13(c) Arrangement requires arbitration. Although that case has substantial similarity in facts to the instant case, the Superior Court was asked to issue a Preliminary Injunction to maintain the status quo pending arbitration. That arbitration had previously been ordered by the Court. Those are not the facts of this case.

Does this Court have Jurisdiction to Address the Actions of UTA?

Utah Code 17B-2a-813 provides that the District Court is empowered to decide whether or not UTA violated Utah labor laws, failed to bargain in good faith or is subject to an arbitration obligation under a CBA. The Federal provisions contained in the Section 13(c) Arrangement have been clearly determined not to supersede state law but are tools to protect the collective bargaining rights of the workers. *See Jackson Transit Auth. v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982).

CONCLUSION

The Plaintiff in its Motion for Partial Summary Judgment is not asking whether UTA violated Utah law in implementing changed terms and conditions. The answer to this requires deciding factual issues: whether there was bargaining in good faith, whether the impasse concept was properly invoked and whether the invoking of fact-finding is still viable.

Plaintiff's Motion for Partial Summary Judgment is on the issue of who has jurisdiction to determine if UTA violated Utah Law. This Court concludes that it is Judicial System that has that authority, not a third party arbitrator.

This stands as the Final Order of the Court.

DATED this 9 day of November, 2010.

BY THE COURT:

L. A. Dever
District Judge

Approved as to form:

Joseph E. Hatch, Esq.
Attorney for the Union

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, *et al.*, Defendants.	No. 2:13-cv-02069-KJM-DB ORDER

In 2012, California passed a law that substantially reformed the pension system for public employees, the California Public Employees Pension Reform Act (PEPRA). Soon after PEPRA was passed, two California transit agencies subject to PEPRA submitted applications for federal funding under the Urban Mass Transportation Act of 1964 (UMTA). UMTA requires that before the federal government can approve a grant, the U.S. Department of Labor (DOL) must provide a specific certification: that arrangements between the transit employers applying for funds and their employees include provisions necessary for the preservation of certain employee rights and for the continuation of the employees' collective bargaining rights, among other things.

The DOL denied the two transit agencies' requests because, as DOL determined, PEPRA allowed for neither preservation of the transit employees' pension rights nor a continuation of their collective bargaining rights over pensions. The two transit agencies successfully challenged the DOL's decisions under the Administrative Procedure Act (APA) in this court in 2013, and the matter was remanded to the DOL for reconsideration. The DOL issued

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new decisions in 2015, again denying certification. Again the transit agencies sought relief in this court. The DOL moved to dismiss or for summary judgment, and the transit agencies likewise sought summary judgment in response. Those motions are now pending. A union of the transit agencies' employees, the Amalgamated Transit Union (ATU), filed an *amicus curiae* brief in support of the DOL's decisions.

The court held a hearing on those motions on May 13, 2016. Kathleen Kraft and Stephen Higgins appeared for the plaintiffs, Sacramento Regional Transit District (SacRT) and Monterey Salinas Transit (MST). Ryan Parker and Susan Ullman appeared for the DOL. Benjamin Lunch, who represents ATU, observed the hearing. The DOL's motion is denied in part, the transit agencies' motion is granted in part, the plaintiffs are granted leave to amend their supplemental complaint, and the parties are both allowed short supplemental briefs as explained below.

I. BACKGROUND

A. The Urban Mass Transportation Act of 1964

Congress enacted UMTA to further the United States' interest in "the development and revitalization of public transportation systems." 49 U.S.C. § 5301(a). Among other purposes, UMTA is meant to provide federal funding for public transportation and "promote the development of the public transportation workforce." *Id.* § 5301(b)(1)–(8). UMTA prompted a nationwide shift away from private to public operation of mass transportation systems. *See Jackson Transit Auth. v. Amalgamated Transit Union*, 457 U.S. 15, 17 (1982); *Kramer v. New Castle Area Transit Auth.*, 677 F.2d 308, 310 (3d Cir. 1982).

UMTA allows state and local transportation agencies to obtain federal grants. Transportation agencies can obtain these grants only with a certification from the DOL. Section 13(c) of UMTA, 49 U.S.C. § 5333(b), specifies what this certification entails: "[T]he interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable." *Id.* § 5333(b)(1). These arrangements "shall include provisions that may be necessary for," among other things, (1) "the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise," and (2) "the continuation of collective bargaining rights." *Id.* § 5333(b)(2)(A)–(B). The first requirement, "preservation," is commonly cited as section 13(c)(1) of UMTA, and the

second requirement, "continuation," is commonly referred to as section 13(c)(2) of the same law.

B. The California Public Employees' Pension Reform Act (PEPRA)

As summarized in this court's previous orders, in 2012, the Governor of California signed PEPRA into law. *California v. U.S. Dep't of Labor* (Remand Order), 76 F. Supp. 3d 1125, 1130 (E.D. Cal. 2014); *California v. U.S. Dep't of Labor* (Enforcement Order), ___ F. Supp. 3d ___, 2016 WL 98746, at *1–2 (E.D. Cal. Jan. 8, 2016). As elected officials often do, the Governor issued a press release describing PEPRA as a "sweeping reform" that limited pension benefits for state employees, increased the retirement age, required state employees to pay for half of their pension costs, and stopped abusive pension practices. Office of Gov. Edmund G. Brown, Jr., Press Release (Aug. 28, 2012).[1]

This court, of course, looks to PEPRA's relevant sections, which provide that employees hired after January 1, 2013 are "new" employees and must pay half of the costs of their defined benefit retirement plans: "Equal sharing of normal costs between public employers and public employees shall be the standard." Cal. Gov't Code § 7522.30(a). Employees hired before January 1, 2013 are "classic" employees and may also be required to pay the same fifty percent share after good-faith collective bargaining. *Id.* § 20516.5(c). PEPRA sets January 1, 2018 as the effective deadline for collective bargaining on this contribution requirement. *See id.* Beginning on that date, a public employer "may require that members pay fifty percent of the normal cost of benefits." *Id.* § 20516(b), (c).

PEPRA also makes changes to the way retirement benefits are calculated, both for new and classic employees. If a public employee's retirement benefits are calculated as a percentage of his or her pre-retirement compensation, PEPRA sets specific limits on the amount of the employee's compensation that can be used in that calculation: Public employees may no longer purchase "nonqualified service credit" or "airtime."[2] Cal. Gov't Code § 7522.46. For new employees,

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[1] At the time this order was filed, this press release was available at https://www.gov.ca.gov/news.php?id=17694.

[2] PEPRA defines these phrases by reference to the U.S. Internal Revenue Code. *See* Cal. Gov't Code § 7522.46(a) (citing 26 U.S.C. § 415(n)(3)(C)). Generally speaking, "nonqualified service time" or "airtime" is made up of time credits an employee may purchase to increase his or her retirement benefits. These credits add fictitious years to the true number of years the employee worked before retirement. *See* 26 U.S.C. § 415(n). The additional years are significant because retirement benefits are often calculated by multiplying a percentage of the employee's pre-retirement

PEPRA defines a percentage-based formula for the calculation of retirement benefits; benefits are calculated using a multiplier that increases with the employee's age at retirement, from one percent at the earliest retirement age, fifty-two, to a maximum of two-and-one-half percent at age sixty-seven. *See id.* § 7522.20(a). Previously, the earliest retirement age was fifty, and the multiplier reached its maximum value at age sixty-three. 2013 Administrative Record (AR) 1321. PEPRA also prevents "pension spiking"—pre-retirement, short-term increases in an employee's wages to inflate pension benefits—by calculating benefits for new employees based on the employee's highest average annual salary in the three years leading up to retirement. Cal. Gov't Code § 7522.32. For new employees, the final level of compensation that may be taken into account excludes unused vacation time, ad hoc payments and bonuses, and other amounts. *Id.* § 7522.34(c).

C. The Plaintiff Transit Agencies

SacRT is a special regional mass transit district based in Sacramento. Remand Order, 76 F. Supp. 3d at 1129. It operates dozens of bus routes, thousands of bus stops, almost forty miles of light rail track, fifty light rail stations, more than thirty bus-to-light-rail transfer stations, and eighteen park-and-ride lots. *Id.* at 1130. It relies heavily on federal funding. *Id.* at 1130–31.

Many of SacRT's approximately one thousand employees are represented by the ATU. *Id.* 1129–30. SacRT alleges it has authority under California statute to establish an independent retirement system for its employees. *Id.* Through collective bargaining with the ATU, SacRT established a pension plan for its unionized employees.[3] *Id.* The plan is a defined benefit plan, meaning SacRT pays a fixed benefit to retirees under a formula: a retiring employee's benefits are calculated as a percentage of his or her pay multiplied by the number of years he or she worked for SacRT, known as the number of years "in service." *See* 2013 AR 407–27. SacRT funds these benefits entirely; employees do not contribute to the plan fund. *See* 2013 AR 402, 416. A member of the retirement plan is eligible for retirement if he or she has worked ten years or more at age fifty-five or if he or she has completed twenty-five years of service, regardless of age. 2013 AR 413. Benefits for employees who retire at age fifty-five with twenty-five years of service are calculated using a two percent multiplier, and benefits for employ-

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compensation by the number of years that employee worked. If an employee can artificially add years to her tenure, she can add to her retirement benefits.

[3] The SacRT and MST plan provisions described here are those the DOL reviewed on submission of the plaintiffs' funding application.

ees who retire at age sixty or later with thirty or more years' service are calculated using a two-and-one-half percent multiplier. *Id.* Cash received in lieu of unused vacation time, ad hoc payments, or shift differentials, and other amounts may be used in calculating benefits. 2013 AR 410. SacRT and ATU have negotiated over this benefit scheme in the past. 2013 AR 213.

MST is the consolidated transportation services agency for Monterey County, California. Remand Order, 76 F. Supp. 3d at 1133. Some of MST's employees are represented by the ATU. *Id.* For employees hired before June 30, 2011, MST agreed to fully fund pension contributions for its defined benefits plan. *See* 2013 AR 802–10, 24. Employees hired after June 30, 2011 pay half of the contributions. *See* 2013 AR 824. Under this plan, fifty-five is the normal age of retirement, and employees receive retirement benefits equal to the product of their final compensation, a percentage multiplier, and the number of years of their service. 2013 AR 793–94, 824, 829–31. The MST plan also allows employees to purchase airtime and allows bonuses, overtime, and other amounts to be included in the calculation of retirement benefits. *See* 2013 AR 794. The amount of compensation used in this calculation is the highest twelve-month average compensation. *Id.*

D. SacRT's and MST's Grant Applications, 2013 Complaint and Remand Order

This case concerns four applications for federal funding. The first was submitted by SacRT in November 2012, which, as noted above, required the DOL's certification under UMTA section 13(c). ATU objected and argued that the DOL should not certify the grant, citing PEPRA provisions that raise minimum retirement ages, define formulas for calculating pensions, and require new employees to contribute half the cost of their retirement plan. 2013 AR 211–15. Among other legal authorities, ATU cited *Amalgamated Transit Union v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985), which it interpreted to hold that the DOL must not certify arrangements under UMTA section 13(c) "where workers previously enjoyed collective bargaining rights but those rights were subsequently diminished or eliminated altogether by state law." 2013 AR 214. SacRT disagreed with ATU's description of PEPRA and distinguished PEPRA from the state law at issue in *Donovan*. 2013 AR 699–702. The DOL ordered ATU and SacRT to negotiate in an effort to find a resolution on their own, but those negotiations were unsuccessful. In April 2013, the DOL declined to issue an interim certification, and in September 2013, the DOL issued its final decision, which denied certification in light of PEPRA. 2013 AR 120–36.

The remaining three funding applications were submitted by the California Department of Transportation on MST's behalf in September 2013, and by MST on its own behalf in December 2012 and January 2013. ATU objected to all three applications and argued PEPRA precluded certification under UMTA section 13(c). Despite negotiations, ATU and MST were unable to resolve their dispute. They submitted briefing to the DOL, and in September 2013, the DOL issued its final decision. As in SacRT's case, the DOL declined to certify MST's arrangements, citing PEPRA. 2013 AR 190–207.

SacRT and MST filed a complaint in this court in October 2013. They argued that the DOL had acted arbitrarily and without authority in violation of the APA; that it had prejudged their applications, also in violation of the APA; and that the DOL's decisions imposed unconstitutional conditions on the award of federal funds. ECF No. 1. In December 2014, this court issued an order dismissing the transit agencies' constitutional claims, denying the DOL's motion to dismiss the other claims, granting the plaintiffs' motion for summary judgment on the APA claims, and remanding the matter to the DOL for further proceedings. Remand Order, 76 F. Supp. 3d at 1148. The court identified five aspects of the DOL's decision that violated the APA.

First, the DOL had relied on *Donovan*, *supra*, 767 F. 2d 939, without accounting for factual differences between that case and this one. *See* Remand Order, 76 F. Supp. 3d at 1142–43. Specifically, in *Donovan*, the circuit court reversed the certification of an agreement that did not permit collective bargaining on several subjects previously subject to bargaining. 767 F.2d at 941, 943. PEPRA, by contrast, does not eliminate collective bargaining rights or grant SacRT and MST unilateral authority; rather, it changes the parameters within which collective bargaining may proceed. *See* Remand Order, 76 F. Supp. 3d at 1142–43.

Second, the DOL had overlooked the fact that under federal labor policy, "[b]oth employers and employees come to the bargaining table with rights under state law that form a backdrop for their negotiations." *Id.* at 1143 (quoting *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987)) (alteration in original). Pension reform may be part of this "backdrop," because no provision of federal labor policy "expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining." *Id.* (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504–05 (1978) (plurality opinion)).

Third, "by finding that PEPRA prevents collective bargaining over pensions, [the DOL] essentially determined that a pension is necessarily a defined benefit plan . . . ." *Id.* But "nothing in PEPRA prevents bargaining over defined contribution plans, which are another form of pension." *Id.* The DOL had therefore written a substantive term into the parties' agreement, which it had no authority to do. *Id.*

Fourth, the DOL had not considered "the realities of public sector bargaining." *Id.* Bargaining in the public sector differs from bargaining in the private sector. For example, a private employer may send a single representative to the bargaining table, with the authority to make a binding agreement, whereas a public employer may not be able to make concessions or change policy so simply. In short, "[i]n the public sector, agreement at the bargaining table may be only an intermediate, not a final, step in the decisionmaking process." *Id.* at 1143–44 (quoting *Robinson v. State of New Jersey*, 741 F.2d 598, 607 (3d Cir. 1984)).

Fifth, to conclude that PEPRA did not preserve existing collective bargaining rights of employees hired after January 1, 2013, the DOL relied on *Wood v. National Basketball Association*, 602 F. Supp. 525, 529 (S.D.N.Y. 1984), and similar cases, but it did not consider whether factual differences between those cases and this one undermined their persuasive effect. *See id.* at 1144–45. In this case, unlike those on which the DOL relied, "neither 'new' employees nor the employers are pursuing individual agreements or are seeking some advantage outside the [collective bargaining agreement], but rather are constrained by PEPRA as a backdrop to their employment relationship." *Id.* at 1145. On a related note, the DOL essentially redefined "bargaining unit" when it found that future employees who had not yet been hired were covered by a collective bargaining agreement. *Id.*

E. DOL's 2015 Denial Letters

The DOL initially noticed an appeal of this court's 2014 remand order, but later dismissed that appeal voluntarily over the plaintiffs' objections. *See* Not. Appeal, ECF No. 83; Order Dismissing Appeal, ECF No. 86. On August 13, 2015, the DOL issued its decisions on remand, concluding as it did before that the plaintiffs' grant applications could not be certified under section 13(c). *See* SacRT Decision, ECF No. 88-4; MST Decision, ECF No. 88-5. It reached this conclusion on two independent grounds: (1) as applied by SacRT and MST, "PEPRA prevents the 'continuation of collective bargaining' as that phrase is used in section 13(c)(2)"; and (2) as applied by SacRT and MST, "PEPRA prevents 'the preservation of rights, privileges, and benefits (including continuation

of pension rights and benefits) under existing collective bargaining agreements,' contrary to section 13(c)(1)." SacRT Decision at 8; MST Decision at 8.

With respect to section 13(c)(2), because the DOL could not accept this court's reading of *Donovan*, it instead interpreted the language and legislative history of section 13(c) without reference to *Donovan*. *See* SacRT Decision at 7–11; MST Decision at 7–11. It also consulted several mid-twentieth-century judicial decisions interpreting the National Labor Relations Act (NLRA) to understand the likely contemporary meaning of "collective bargaining" in the pension context. SacRT Decision at 11–13; MST Decision at 11–13. Together, this analysis led the DOL to conclude that Congress meant to prevent the "lessening" or "worsening" of collective bargaining rights, even if collective bargaining rights were not completely eliminated. The NLRA decisions it consulted confirmed this understanding, and the DOL summarized its determination that "as a general rule, section 13(c) certification is unavailable to a transit agency that unilaterally sets or changes the terms of pensions covering employees in a collective bargaining unit." SacRT Decision at 13; MST Decision at 13.

The DOL also considered whether PEPRA is the "kind of state law that can remove issues from the collective bargaining obligation established by section 13(c)." SacRT Decision at 13; MST Decision at 13. It contrasted PEPRA with state laws that Congress had not meant to preempt when it passed the NLRA. These state laws, it found, were beneficial to employees on balance: they established minimum labor standards or ensured adequate mental health treatment, for example. SacRT Decision at 13–14; MST Decision at 13–14. In contrast, PEPRA more closely resembled the types of state laws that Congress had meant to preempt, including state laws that superficially served a benign purpose but actually overrode collectively bargained agreements. *See* SacRT Decision at 14–17; MST Decision at 14–16.

The DOL then considered the realities of collective bargaining in the public sector. SacRT Decision at 17–18; MST Decision at 17–18. It found that SacRT was required by state law to bargain collectively, and that SacRT could bargain without the need for legislative ratification. SacRT Decision at 17. Similarly, MST was not required to obtain legislative ratification of its pension policies. MST Decision at 17. The DOL also found that although public transit authorities come to the bargaining table under the watchful eye of a state-policy chaperone, Congress had long understood similar policy concerns. It had decided to allow states a choice: provide for the continuation of collective bargaining rights, regardless of state policy, or forego federal funding. SacRT Decision at

17–18; MST Decision at 17–18. The DOL noted that Congress had allowed states to forbid public transportation strikes and decide on a form of dispute resolution other than binding arbitration, which it understood to indicate that Congress had already addressed the issue of conflicting state policy. SacRT Decision at 17–18; MST Decision at 17–18. As for budget constraints, the DOL wrote, "The solution is for parties with collective bargaining obligations to bargain within budget constraints, not for an employer to use budget constraints as a reason for unilaterally removing a subject from bargaining." SacRT Decision at 18; MST Decision at 17. The DOL therefore found that the realities of public-sector bargaining did not allow it to certify SacRT's or MST's arrangements.

F. Enforcement Order and Supplemental Complaint

Following the DOL's 2015 decisions, SacRT and MST returned to this court and argued that the DOL had not complied with the court's 2014 order. They asked the court to enforce that order and allow them to file a supplemental complaint.

The court granted the motion to enforce in part. *See generally* Enforcement Order, 2016 WL 98746. First, the court concluded that because the DOL had not relied on *Donovan* at all, its decision was not inconsistent with the Remand Order, where the court found the DOL had previously relied on *Donovan* reflexively. *Id.* at *4. Second, the court found that because the DOL's decisions on remand had considered whether PEPRA formed a permissible state-law backdrop, those decisions were not inconsistent with the Remand Order. *Id.* Third, because DOL no longer arbitrarily equated pensions and defined benefit plans, its decisions were not inconsistent with the Remand Order. *Id.* at *5. Similarly, on remand the DOL had addressed the realities of collective bargaining in the public sector, so the court found its decisions were not inconsistent with the Remand Order in this way. *Id.* But because the DOL rejected this court's conclusions with respect to whether "new" employees, who had not yet been hired, were protected by existing collective bargaining agreements, the agencies' motion was granted and the inconsistent portions of the DOL's SacRT decision on remand were vacated. *Id.* at *5. As a matter of remedies, the court did not remand the case again because the inconsistent portions were presented as alternative grounds for the DOL's decisions. *Id.*

Instead, the transit agencies' were allowed to file a supplemental complaint. *Id.* at *6–7. In their supplemental complaint, SacRT and MST allege the DOL's 2015 decisions on remand violated the APA by interpreting sections 13(c)(1) and (2) of the UMTA arbitrarily, capriciously, and in excess of the

DOL's authority. In their first claim, the agencies argue the DOL "erroneously concluded that 'lessening or diminution of collective bargaining rights, even when they are not entirely eliminated, violates section 13(c).'" Suppl. Compl. ¶¶ 89–90, ECF No. 88-2. They argue the DOL's analysis was "one-sided" and "incomplete," "ignored both the historical context for the requirement to continue collective bargaining rights," "misapplied judicial precedent under the National Labor Relations Act," reached conclusions that contradicted this court's previous order, "persisted in its position that 'pension rights' mean only 'defined benefit pension rights,'" and "rendered its decision without adequately distinguishing prior, inconsistent Department interpretations and application of Section 13(c)." *Id.* ¶¶ 92–96.

In the plaintiffs' second claim, they argue the DOL erroneously "found that new employees have pension rights under existing collective bargaining agreements that predate their employment." *Id.* ¶ 106. They argue the DOL arbitrarily "decreed that any state-law change to the terms of a collective bargaining agreement violates Section 13(c)(1) on the ground that such an agreement is applicable to new employees." *Id.* ¶ 107.

The DOL moved to dismiss the supplemental complaint, and in the alternative, requested summary judgment that its 2015 decisions did not violate the APA. Def.'s Br., ECF No. 99-1. The plaintiffs filed a cross-motion for summary judgment and opposition, Pls.' Br., ECF No. 104-1, and the parties each filed responsive briefing, Def.'s Resp., ECF No. 107; Pls.' Resp., ECF No. 110. With the court's permission, the ATU also filed an *amicus curiae* brief in support of the DOL's motion, ATU Br., ECF No. 106, and the plaintiffs filed a response, Pls.' Resp. ATU, ECF No. 111.

II. THE LAW OF THIS CASE

The parties both ask this court to revisit conclusions in the Remand and Enforcement Orders that are adverse to their current positions. The court therefore clarifies what role those orders play here.

When a court makes a decision in a final order, for example by granting summary judgment, and the decision is express or necessarily implied, the court must generally avoid revisiting that decision later on in the same case. *See United States v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014). This is one aspect of the "law of the case" doctrine. *Id.* It is a rule of "judicial intervention designed to aid in the efficient operation of court affairs." *Id.*

The law of the case doctrine does not bar a district court from reconsidering its own non-final rulings in the same case. *Peralta v. Dillard*, 744 F.3d 1076, 1088 (9th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 946 (2015). For example, the court may reconsider a prior order in which it denied summary judgment, *id.* at 1088–89, or granted a preliminary injunction, *see Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013). A district court also has discretion to depart from the law of the case if the first decision was clearly erroneous, if the law, evidence, or other circumstances changed in the meantime, or if applying the law of the case would work a manifest injustice. *See, e.g.*, *Gallagher v. San Diego Unified Port Dist.*, 14 F. Supp. 3d 1380, 1389 (S.D. Cal. 2014) (citing *United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998)).

On a similar note, the Ninth Circuit and Supreme Court recognize a district court's inherent authority to reconsider non-final, or interlocutory decisions: "As long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *City of Los Angeles v. Santa Monica BayKeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (citation omitted). This is also the practical effect of Federal Rule of Civil Procedure 54(b), which authorizes a district court to revise "any order or other decision . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." That said, as a general rule, district courts do not revisit their interlocutory decisions when the law and evidence are unchanged, when no clear error has occurred, and when no manifest injustice would result. *See, e.g.*, *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 649 F. Supp. 2d 1063, 1069–70 (E.D. Cal. 2009). In this way, a district court's decision to depart from the law of the case or to reconsider an interlocutory order will often rest on similar reasoning. *Cf. Jadwin v. Cty. of Kern*, No. 07-0026, 2010 WL 1267264, at *9 (E.D. Cal. Mar. 31, 2010) (district courts look to similar standards when deciding whether to reconsider under Rule 54(b) and whether to grant a motion under Rules 59(e) or 60(b)).

In this case, the Remand Order was a final order: it dismissed claims, granted summary judgment, and remanded the matter to the DOL, and judgment was entered on the same day it was filed. ECF No. 82. The court therefore considers its decisions in that order to be the law of this case. Moreover, the DOL appealed the Remand Order, but voluntarily dismissed its appeal. Although the question ultimately is one for an appellate tribunal to decide, this likely prevents further appellate review of the merits of that appeal. *See United States*

v. Arevalo, 408 F.3d 1233, 1236 (9th Cir. 2005) (quoting *Barrow v. Falck*, 977 F.2d 1100, 1103 (7th Cir. 1992)). The DOL may not now relitigate the merits of the Remand Order.

The Enforcement Order, by contrast, did not finally adjudicate any claims, but addressed a motion based on the previously filed final order and allowed the case to continue by way of a supplemental complaint. The Enforcement Order was therefore an intermediate-stage order that this court may reconsider or modify, even in the absence of any intervening evidentiary or legal developments.

Rather than dividing the parties' arguments and this court's previous findings more granularly into final and non-final categories here, the court addresses its previous decisions as they arise in context below.

III. LEGAL STANDARD

When, as here, a plaintiff challenges a federal agency's actions under the APA, the district court assumes an appellate role, and the entire case presents a question of law. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). The court does not identify disputed issues of material fact, as it would in a typical summary judgment proceeding. *Occidental Eng'g Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 769 (9th Cir. 1985); *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1256 (E.D. Cal. 2010). Rather, the reviewing court's function "is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g*, 753 F.2d at 769; *see also Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) ("Because this is a record review case, we may direct that summary judgment be granted to either party based upon our review of the administrative record.").

The court now turns to the plaintiffs' first claim, under section 13(c)(2), which concerns "the continuation of collective bargaining rights." As summarized above, the DOL concluded on remand that SacRT and MST have implemented PEPRA in a way that prevents the continuation of their employees' collective bargaining rights. SacRT and MST argue the DOL's decisions both misinterpreted the UMTA and were arbitrary and capricious.

IV. THE CONTINUATION OF COLLECTIVE BARGAINING RIGHTS

A. Statutory Interpretation—is the UMTA Unambiguous?

This case concerns foremost the DOL's interpretation of the UMTA. When a district court is asked to review an agency's interpretation of a statute, the court must first check whether the statute's language itself answers the questions in the case, provided that the agency did not act unconstitutionally or outside the authority Congress allotted to it. *United States v. Mead Corp.*, 533 U.S. 218, 227–28 & n.6 (2001); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). "[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 842–43, and agencies must always "operate within the bounds of reasonable interpretation," *Util. Air Regulatory Grp. v. Envt'l Prot. Agency*, ___ U.S. ___, 134 S. Ct. 2427, 2442 (2014) (citation and quotation marks omitted). The judicial branch is the final authority on statutory interpretation, *Chevron*, 467 U.S. at 843 n.9; that is, an agency receives no consideration or deference from federal courts when it incorrectly interprets unambiguous law.

The court must therefore first decide whether "the continuation of collective bargaining rights" has an unambiguous meaning. *Id.* at 842–43. Each party argues the other's interpretation is simply incorrect. This itself suggests the phrase is ambiguous, which the court concludes it is, as explained below.

A statute's words are always the place to begin. *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, ___ U.S. ___, 132 S. Ct. 1670, 1680 (2012); *Jackson Transit*, 457 U.S. at 23. Unless Congress says otherwise, those words have the same meanings as usual. *Roberts v. Sea-Land Servs., Inc.*, ___ U.S. ___, 132 S. Ct. 1350, 1356 (2012). Context also matters, both "the specific context in which that language is used and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). One interpretation of a word or phrase might lead to a result that clashes with the rest of the law. *Util. Air*, 134 S. Ct. at 2442. Context might even overwhelm the most grammatically correct understanding of a single word. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69–70 (1994).

Here, section 13(c) provides, in relevant part,

> (1) As a condition of financial assistance . . . the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. . . .
>
> (2) Arrangements under this subsection shall include provisions that may be necessary for—

> (A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
>
> (B) the continuation of collective bargaining rights;
>
> (C) the protection of individual employees against a worsening of their positions related to employment;
>
> (D) assurances of employment to employees of acquired public transportation systems;
>
> (E) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and
>
> (F) paid training or retraining programs.

49 U.S.C. § 5333(b)(1)–(2).

SacRT and MST believe the phrase "the continuation of collective bargaining rights" means the opposite of "the end of collective bargaining rights." By contrast, the DOL concluded on remand and argues now that the phrase means the opposite of the "diminution" or "lessening" of collective bargaining rights. Neither interpretation is obviously correct. Consider, for example, the D.C. Circuit's interpretation of the phrase in the mid-1980s. The *Donovan* court understood "the continuation of collective bargaining rights" to mean "[m]aintaining the status quo" or "substantially preserving collective bargaining rights that had been established by federal labor policy." 767 F.2d at 948. This suggests the DOL's interpretation is reasonable: the status quo is not maintained and a right is not "preserved" if it diminishes. But only two years after *Donovan* was decided, two different panels of the same court found "the ordinary meaning of the term 'continuation' . . . would seem to be 'without interruption.'" *United Transp. Union, AFL-CIO v. Brock*, 815 F.2d 1562, 1564 (D.C. Cir. 1987) (quoting *Amalgamated Transit Union v. Brock*, 809 F.2d 909, 916 (D.C. Cir. 1987)).[4] This suggests SacRT and MST have it right. *Donovan* therefore does not provide a dispositive definition of "continuation."

These conflicting readings fit the many synonyms and antonyms of "continuation" suggested by a variety of new and old reference guides. *See, e.g., Webster's New World Dictionary of the American Language* 319 (college ed. 1962) (defining "continuation" as "a keeping up or going on without interruption; prolonged and unbroken existence or maintenance"); *Roget's Int'l Thesaurus* 32–34, 68 (3rd

[4] Although *United Transportation Union v. Brock* and *Amalgamated Transit Union v. Brock* were before different panels, both opinions were written by the same judge.

ed. 1962) (synonyms of "continuation" include extension, maintenance, sustenance, and persistence; antonyms include cessation, close, discontinuance, end, ending, and abandonment); Merriam-Webster's Online Dictionary (defining "continuation" as "the act or fact of continuing in or the prolongation of a state or activity"; suggesting "abidance, ceaselessness, continuance, continuity, continuousness, durability, duration, endurance, persistence, subsistence" as synonyms and "cessation, close, discontinuance, discontinuity, end, ending, expiration, finish, stoppage, surcease, termination" as antonyms);[5] Oxford English Online Dictionaries (defining "continuation as "[t]he action of carrying something on over a period of time or the process of being carried on" or "[t]he state of remaining in a particular position or condition"; suggesting "carrying on, continuance, extension, prolongation, protraction, perpetuation" as synonyms and "end" as an antonym);[6] American Heritage Online Dictionary (defining "continuation" as "[t]he act or fact of going on or persisting" and "[t]he state of continuing in the same condition, capacity, or place").[7]

On remand, the DOL relied on the 1962 Webster's New World Dictionary's definition, quoted first in the previous paragraph, presumably because UMTA was passed soon after it was published. *See* SacRT Decision at 9; MST Decision at 8–9. That definition demonstrates the ambiguity of "continuation" in section 13(c)(2): "keeping up or going on" suggests a right would not diminish, whereas "without interruption" and "unbroken" suggests a right will not be extinguished for any period of time.

The Supreme Court recently interpreted a similar word, "continued," to mean "carried on or kept up without cessation," "extended in space without interruption or breach of connection," or "stretching out in time or space esp. without interruption," *Adoptive Couple v. Baby Girl*, ___ U.S. ___, 133 S. Ct. 2552, 2560 (2013) (citations, quotation marks, and alterations omitted). The Court suggested the verb "continue" meant "[t]o go on with a particular action or in a particular condition; persist," "[t]o remain in the same state, capacity, or place," or "go on with an action that is preexisting." *Id.* (citations, quotation marks, and alterations omitted). Thus, under 25 U.S.C. § 1912(f),[8] a provision of the Indian

[5] http://www.merriam-webster.com/dictionary/continuation

[6] http://www.oxforddictionaries.com/us/definition/american_english/continuation; http://www.oxforddictionaries.com/us/definition/american_english-thesaurus/continuation

[7] https://ahdictionary.com/word/search.html?q=continuation

[8] That section provides, "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond

Child Welfare Act of 1978, the words "continued custody" meant that custody had existed both before and after a particular point in time. This discussion suggests the plaintiffs' definition may be just as correct as the DOL's: although "continued" can mean "to remain in the same state," in *Adoptive Couple*, it meant "without cessation," and as the Court eventually concluded, in the relevant statutory context, it meant essentially "existing both before and after." *See* 133 S. Ct. at 2560–61.

Section 13(c) itself also appears to offer a synonym for "continuation" when it lists "the preservation of rights, privileges, and benefits" and then clarifies parenthetically that this phrase includes the "continuation of pension rights and benefits." 48 U.S.C. § 5333(b)(2)(A). But "preserve," like "continue," could plausibly mean both to "[m]aintain . . . in its original or existing state," as in preserving records, or to "[m]aintain or keep alive," as in preserving a memory. *See* Oxford Online American English Dictionary.[9] Again, either definition of "preservation," like "continuation," is reasonably supported by the text of section 13(c).

The context of section 13(c)(2) also shows "continuation" could mean both the opposite of "end" and "diminution." Section 13(c) requires protections for employees affected by federal assistance. It tasks the Secretary of Labor with a review of the relevant "arrangements" to ensure they are "fair and equitable." 59 U.S.C. § 5333(b)(1). Congress required these arrangements to include whatever provisions were necessary to guarantee "the preservation of rights, privileges, and benefits . . . under existing collective bargaining agreements"; "the continuation of collective bargaining rights"; "the protection of individual employees against a worsening of their positions related to employment"; and "assurances of employment to employees of acquired public transportation systems," among other things. *Id.* § 5333(b)(2). In this context, "continuation" could reasonably mean either "staying the same" or "not ceasing." The court reached this same conclusion in its previous order when it rejected the plaintiffs' argument that "certification should be withheld only when statutory changes completely preclude collective bargaining." Remand Order, 76 F. Supp. 3d at 1142.

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a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

[9] These definitions and examples are those provided by the American English version of the Oxford Online English Dictionary, available at the time this order issued at http://www.oxforddictionaries.com/us/definition/american_english/preserve.

This ambiguity would not have arisen had Congress instead required arrangements necessary to avoid the "diminution" or "termination" of collective bargaining rights. Congress did use the word "worsening" in another provision of section 13(c): "Arrangements under this subsection shall include provisions that may be necessary for— . . . the protection of individual employees against a worsening of their positions related to employment." 49 U.S.C. § 5333(b)(2)(C). This more specific word choice may suggest Congress had something other than a "worsening" in mind when it referred to "the continuation" of collective bargaining rights. That is, if Congress had intended to prevent more than just the termination of collective bargaining, it could have written, "Arrangements under this subsection shall include provisions that may be necessary for— . . . the protection against a worsening of employees' collective bargaining rights." And a "worsening" would have encompassed a termination just as well as a diminution.

By using the word "continuation" in section 13(c)(2), Congress could have meant to prevent the end of collective bargaining between the employees and employers of mass transportation systems in the United States. Congress could also have meant to prevent state and local governments from chipping away at the collective bargaining rights of their mass transportation employees. In sum, SacRT's and MST's interpretation is plausible; so is the DOL's. The statute is ambiguous.

B. Deference to the DOL's Interpretations—In General

If a statute's words are ambiguous, the court must decide whether the agency's interpretation is a permissible one. *Chevron*, 467 U.S. at 843–44. For this reason, courts must often also decide what leeway or deference to allow an agency's decisions.

In some instances, Congress delegates interpretive authority to an agency. *See id.* If that is the case, a federal court does not "simply impose its own construction of the statute," but must adopt the agency's interpretation, which is in fact binding "unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead*, 533 U.S. at 227. This approach is known as *Chevron* deference. *See id.*; *Chevron*, 467 U.S. at 842–43. An agency is entitled to permissive judicial review under *Chevron* only if it appears both that "Congress delegated authority to the agency generally to make rules carrying the force of law" and that the interpretation in question "was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–27. Applying these rules, the Ninth Circuit considers the binding power of an agency's decisions on third par-

ties—their precedential value—to be "*the* essential factor in determining whether *Chevron* deference is appropriate." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc) (emphasis in original) (citation and quotation marks omitted).

If an agency's decisions are not allowed the deference defined in *Chevron*, the agency's reasoning is often persuasive nonetheless. *Mead*, 533 U.S. at 227. The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* (quoting *Chevron*, 467 U.S. at 844). The deference allowed to an agency depends on a number of commonsense considerations: How thorough and careful is the agency's reasoning? Is the agency's decision consistent with its earlier and later pronouncements? Is its reasoning valid? Does the decision concern a subject matter within the agency's technical expertise? *See id.* at 228. These considerations may lead a court to view a decision with anything from great respect to indifference. *Id.* This less-permissive and widely varying level of deference is usually referred to in shorthand as *Skidmore* deference, after *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

This court decided in the Remand Order that the DOL's interpretations in the 2013 letters were not entitled to *Chevron* deference. Now, as before, in issuing the 2015 letters,"[r]ather than conducting an essentially discretionary review of whether any arrangement could be fair and equitable in light of PEPRA or relying on any administrative expertise, DOL relied on case law and federal labor policy, as filtered through a number of NLRA cases, to reject the applications at issue." Remand Order, 76 F. Supp. 3d at 1137. These circumstances support the conclusion Congress did not mean to delegate interpretive authority to the DOL, which means *Chevron* does not apply. *See also id.* ("The [*Donovan*] court rejected DOL's certification only after undertaking its own examination and interpretation of Section 13(c) and specifying how DOL should interpret such agreements. *Donovan* thus supports plaintiffs' claim that de novo review is appropriate." (citing 767 F.2d at 940)). Moreover, this is the law of the case.

The DOL argues, however, its most recent decisions are nonetheless entitled to *Chevron* deference because circumstances have changed. It argues its 2015 decisions were issued under authority granted to the DOL by Congress and have the force of law. DOL Br. at 7. The court disagrees. The DOL indeed acted within its authority by applying the mandatory factors of section 13(c), but Congress did not "delegate[] authority to [the DOL] generally to make rules carrying the force of law," *Mead*, 533 U.S. at 226–27; *see also* Guidelines, Section 5333(b),

Federal Transit Law, 60 Fed. Reg. 62,964-01 ("There is no statutory authority to issue regulations under section 5333(b).").

DOL's decisions also are not precedential. The DOL's argument to this end relies on three facts: (1) California recognized the predictive power of the DOL's decisions here by making exceptions from PEPRA for more employees than those affected by this case; (2) the plaintiffs' briefing in this case compares the Department's current decisions and its previous decisions; and (3) the Department considered its own previous decisions on remand. DOL Br. at 7–8. If these facts were enough to prove an agency's decisions are precedential, then almost any agency decision would be entitled to *Chevron* deference, because arbitrarily inconsistent pronouncements are always subject to reversal under § 706(2)(A). *See, e.g.*, *Westar Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) ("A fundamental norm of administrative procedure requires an agency to treat like cases alike. If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases."); *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 162 (D.D.C. 2011) (same). The DOL's decisions here are better understood as unpublished, case-by-case determinations without significant legal force; they are not precedent. As before, and as necessary, the court applies *Skidmore* deference to the DOL's conclusions. *See* Remand Order, 76 F. Supp. 3d at 1137.

C. Three General Concerns with the DOL's Decisions

As summarized above, when an agency has interpreted an ambiguous statutory term, the court must decide whether the agency's interpretation is a permissible one. Here, because the deferential rules of *Chevron* do not apply, the court allows the DOL's interpretation of "continuation" the weight commensurate with the level of care, consistency, formality, expertness, and general persuasiveness of its reasoning, under *Skidmore* and similar cases. *Mead*, 533 U.S. at 228; *Skidmore*, 323 U.S. at 140. Before weighing the DOL's 2015 decisions in detail, the court notes three larger trends in those decisions that counsel skepticism.

First, the DOL purposefully ignored directly relevant authority: the *Donovan* case. As explained in this court's Remand Order, *Donovan* is one of very few judicial interpretations of section 13(c). *See* Remand Decision, 76 F. Supp. 3d at 1139 (citing *In re NJ Transit Bus Operations, Inc.*, 125 N.J. 41, 65 (1991)). Its importance is borne out in the record of this case. *See* 2013 AR 214 (ATU interprets *Donovan* in its objection to SacRT's application); 2013 AR 699–702 (SacRT

argues *Donovan* does not control the DOL's decision); 2013 AR 127–30 (DOL's original decision discussing *Donovan*); Remand Order, 76 F. Supp. 3d at 1139–43 (discussing *Donovan* and the parties' interpretation of it). The DOL once described *Donovan* as "exhaustive" and "controlling." 2013 AR 130.

A few additional details illustrate the court's concern. In the Remand Order, after devoting several paragraphs to the Georgia statute at issue in *Donovan* and the D.C. Circuit's reasoning, this court could agree with neither the plaintiffs' nor the DOL's reading of UMTA:

> Plaintiffs read too much into *Donovan* to argue that it means 13(c) certification should be withheld only when statutory changes completely preclude collective bargaining. But defendants also read too much into the case when they say it controls the interpretation of Section 13(c) in this case.

Id. at 1142. Here, in contrast to the situation before the *Donovan* court, PEPRA does not give an employer unilateral control over collective bargaining; it makes larger-scale changes to state pension law. *Id.* at 1142–43. In the Remand Order, the court found the DOL had not appreciated this difference and remanded the matter. But on remand, rather than considering *Donovan* and this court's interpretation of it, the only judicial decisions wading into the intersection of general state law and section 13(c), the Secretary's designee thought it better to avoid *Donovan* altogether for the time being, even as it purported to preserve its ability to invoke its prior interpretation:

> I continue respectfully to disagree with the district court's assessment of my September 4, 2013 determination as arbitrary and capricious, including my reliance on *Donovan*. For purposes of any potential further judicial review, I hereby clarify that the Department adheres to the analysis set forth in my earlier certification decision, and that the Department preserves its rights to rely on that earlier reasoning and analysis as an independent basis for denying certification.
>
> For purposes of remand, however, this Analysis is intended to explain why the factors and issues identified by the district court do not support certification of this grant under Section 13(c). . . .
>
> . . . The court also did not preclude the Department from relying on either section 13(c)(1) or section 13(c)(2) if the Department again decided against certification. . . .
>
> . . . [I]n light of the district court's remand decision, I hereby set out an analysis of sections 13(c)(1) and (2) that does not rely on *Donovan* . . . .

SacRT Decision at 7–8; *see also* MST Decision at 7–8.

Reasonable readers may certainly disagree about the meaning of section 13(c) and what the *Donovan* court would have done with this case. But if the DOL truly believes that the parties' dispute may be resolved "as a matter of pure statutory construction" because "[t]he language of the UMTA is unambiguous and leaves no doubt as to Congress's intent," DOL Resp. at 3, then its current decision to avoid reliance on *Donovan* on remand is questionable. "The judiciary," which encompasses the D.C. Circuit in its *Donovan* decision, "is the final authority on issues of statutory construction . . . ." *Chevron*, 467 U.S. at 843 n.9. An agency may not simply disregard a federal court's interpretation of an unambiguous statute. *Id.*

At the same time, as explained above, the phrase "continuation of collective bargaining rights" is unclear. The DOL's decision to disregard relevant judicial authority in charting a new course is therefore not necessarily "arbitrary and capricious" gainsaying. Nor is the DOL's decision on remand facially inconsistent with the Remand Order, as this court pointed out in its Enforcement Order, as the DOL did not press forward with reflexive reliance on *Donovan*. But its decision to abandon an authority it once found controlling, without attempting to wrestle with this court's decision, undercuts its credibility. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (an agency's inconsistency detracts from the weight its conclusions are due); *Skidmore*, 323 U.S. at 140 (the persuasiveness of an agency's determination depends on its evident thoroughness); *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002) (evidence suggestive of prejudgment "diminishes the deference" owed an agency's decisions).

Second, the DOL reached the same conclusions on remand in 2015 as it did originally in 2013. Federal courts have long recognized that an agency may become so committed to a decision that it resists genuine reconsideration on remand. *Food Mktg. Inst. v. Interstate Commerce Comm'n*, 587 F.2d 1285, 1290 (D.C. Cir. 1978); *accord, e.g., Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 899 (D.C. Cir. 2006); *Competitive Enter. Inst. v. Nat'l Hwy. Traffic Safety Admin.*, 45 F.3d 481, 484 (D.C. Cir. 1995). Similarly, the Supreme Court has "viewed critically" an agency's "post hoc rationalization." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "The agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result." *Food Mktg. Inst.*, 587 F.2d at 1290. "A reviewing court . . . will accord a somewhat greater degree of scrutiny to an order that arrives at substantially the same conclusion as an order previously remanded by the same court." *Greyhound Corp. v. Interstate Commerce Comm'n*, 668 F.2d 1354, 1358 (D.C. Cir. 1981).

Third, the DOL's 2015 decisions focus primarily on interpretations of statutes and federal judicial decisions rather than the technical specifics of this case. "[C]ourts, rather than agencies, have expertise in interpreting case law." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 320 (2d Cir. 2005) (citing *New York New York, LLC v. Nat'l Labor Relations Bd.*, 313 F.3d 585, 590 (D.C. Cir. 2002), and *University of Great Falls v. Nat'l Labor Relations Bd.*, 278 F.3d 1335, 1341 (D.C. Cir. 2002)). In the 2015 decisions, the DOL has not drawn significantly on its subject-matter expertise, previous decisions, or thorough factual research. For example, its decisions do not grapple with the differing challenges public and private employers face, an area it presumably would have expertise to evaluate, and an area the court asked it to consider on remand. It did not explain how its experience reviewing protective arrangements shows how PEPRA shifts the balance of power between union negotiators and transit agencies. It did not illustrate the impact of PEPRA's specific requirements. It did discuss the differences between defined benefit and defined contribution plans, but only generally, rather than investigating the details of the plans in this case. Given the marked shift in the pension landscape since UMTA was passed, the DOL must be in a position to clarify the stakes more consistently with its agency role. *Cf. LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 255 (2008) (noting "[d]efined contribution plans dominate the retirement plan scene today," whereas in the 1970s and 1980s, "the [defined benefit] plan was the norm" (citation omitted; alterations in original)). In sum, the DOL attempted to develop rather than apply the law.

Nevertheless, some aspects of the DOL's 2015 decisions do show thoroughness and attention to detail. The DOL's conclusions are supported extensively by citations to legal authority and UMTA's legislative history, and the DOL relied on nontrivial, lengthy, and detailed analyses. *See, e.g.*, SacRT Decision at 13–22; MST Decision at 13–21. Although the DOL found that the considerations this court identified in the Remand Order did not lead it to a different conclusion, it explained why.

The court therefore reviews the DOL's reasoning with caution, but without prejudging the outcome.

D. Whether the DOL's Interpretation of Section 13(c)(2) Stands

As summarized above, section 13(c)(2) is ambiguous, and neither the plaintiffs' nor the DOL's motion can be granted on the basis of statutory construction alone. The court must therefore scrutinize the DOL's more detailed reasoning and decide whether its application of section 13(c)(2) is sufficiently persuasive, despite the three general concerns identified above, such that its mo-

tion may be granted. The DOL's findings are organized into four parts: (1) a discussion of legislative history; (2) a review of federal appellate decisions published near the time of section 13(c)'s enactment; (3) a discussion of collective bargaining in the public sector; and (4) an analysis of federal judicial decisions discussing how state and federal labor law interact under the National Labor Relations Act (NLRA). As explained in the next four subsections, the DOL's motion cannot be granted on the basis of these conclusions.

1. Legislative History

Ambiguities in statutes may often be resolved by referring to their legislative histories. *See N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 773 (9th Cir. 2011). As the *Donovan* court and the DOL both found, when section 13(c) was written in the early 1960s, at least some legislators understood "[t]he question of policy" to be, in the words of Senator Wayne Morse, section 13(c)'s sponsor, whether the federal government should "make available to cities, States and local governmental units Federal money to be used to strengthen their mass transit system when the use of that money would result in lessening the collective bargaining rights of existing unions?" *Donovan*, 767 F.2d at 946–47 (quoting 109 Cong. Rec. 5671–72 (1963)) (alteration omitted). The *Donovan* court believed Senator Morse "could not have been clearer about the purpose of" section 13(c). *Id.* Senator Morse's words indeed suggest concern that workers' bargaining rights might diminish.

Section 13(c)'s historical context could also support this conclusion. The UMTA was enacted "to foster the development and revitalization of public transportation systems." 49 U.S.C. § 5301(a). Its purposes included promoting "the development of the public transportation workforce." *Id.* § 5301(b)(8). Congress wanted to support mass transportation with federal funds, but worried that public ownership of mass transportation agencies would threaten rights private employees had won. *Jackson Transit*, 457 U.S. at 17, 23–24. "To prevent federal funds from being used to destroy the collective-bargaining rights of organized workers, Congress included § 13(c) in the Act." *Id.* at 17. "Congress intended that § 13(c) would be an important tool to protect the collective-bargaining rights of transit workers, by ensuring that state law preserved their rights before federal aid could be used to convert private companies into public entities." *Id.* at 27–28. Because a right may discontinue both by degree and abruptly, this context suggests Congress expected collective bargaining rights would neither diminish gradually nor vanish immediately.

On the other hand, the legislative history also includes hints that Congress was not concerned with small changes over time, but with a sudden end to

collective bargaining in the mass transportation industry. In April 1963, the Senate considered a draft of section 13(c), which provided that the Secretary of Labor would ensure workers were protected by arrangements that included, "without being limited to, such provisions as may be necessary for . . . (2) the encouragement of the continuation of collective bargaining rights." 2016 AR 618 (reproducing 109 Cong. Rec. 5415 (1963)). A Senator asked whether this language "would mean that the city or the public body taking over [a] shaky transit system would have to continue the collective bargaining agreement." 2016 AR 619 (reproducing 109 Cong. Rec. 5,416). The answer was "Yes." *Id.* The same Senator then explained his understanding that the Labor Secretary had recommended different language, "prevention of the curtailment of collective bargaining rights," which had not been adopted. *Id.* "Obviously the committee did not go that far on that subject," he said. *Id.* The answering Senator agreed: the Senate committee had "wisely" declined the Labor Secretary's suggestion, although he noted the language "without being limited to" may serve a similar purpose. *Id.* Nevertheless, the language "without being limited to" also escaped the final version of section 13(c).

This exchange counterbalances Senator Morse's statement, excerpted above. It suggests that at least some senators understood the Secretary of Labor would not be permitted to withhold certification of an arrangement simply because it allowed the "curtailment" of collective bargaining rights. The word "curtailment" communicates an intent to avoid diminutions more obviously than the phrase "necessary for . . . the continuation." *See, e.g.*, Oxford American Dictionary Online (defining "curtailment" as "[t]he action or fact of reducing or restricting something").[10] Had Congress's intent been to prevent even modest changes, as the DOL contends, Senators would not have summarily rejected the word "curtailment."

SacRT and MST also cite the hearing testimony of a labor representative regarding UMTA's provisions. *See* S.6 and S. 917, Bills to Authorize the Housing and Home Finance Agency to Provide Additional Assistance for the Development of Mass Transportation Systems, and for Other Purposes: Hearing Before the Subcomm. on Banking and the Currency, 88th Cong. 319 (Mar. 8, 1963) (Testimony of Andrew J. Biemiller, Director, Dep't of Legislation, AFL-CIO), ECF No. 21-2. This representative explained to Senators his worry that "not only the right to strike but the right to bargain [could] go down the drain" if mass

[10] At the time this order issued, the definition above was accessible at http://www.oxforddictionaries.com/us/definition/american_english/curtailment.

transportation were managed publicly. *See id.* He agreed with a Senator who asked whether transportation workers worried that "all that been gained from collective bargaining and, indeed, collective bargaining will be lost." *Id.* at 320. "[I]t is also conceivable that pension rights, and so on, that have been won, could be wiped out," he explained. *Id.* The labor representative's words—"going down the drain," "lost," and "wiped out"—communicate a fear not of gradual change, but of a complete end. *See also* Pls.' Br. at 13 (citing additional, similar elements of the legislative history). This concern fits the historical context: a general shift away from the private, unionized operation of mass transportation to public, non-union operation. Again this suggests Congress was concerned primarily with the complete termination of collective bargaining, not its curtailment or diminution.

A review of this legislative history shows the DOL on remand relied on legislative history and historical context only to the extent that the history and context supported its conclusions. It did not address the elements of UMTA's legislative history and context that weighed in favor of SacRT's and MST's interpretations. It did not explain why it decided not to rely on that information or why it found SacRT's and MST's citations unpersuasive. The absence of this discussion undermines the persuasiveness of the DOL's decisions and illustrates a long-recognized difficulty in any analysis of legislative history. When a court or agency relies on legislative history, especially the statements of individual Senators and witnesses at hearings, it must somehow forge one alloyed opinion from many minds. The interpreter of legislative history must "act according to the impression [it] think[s] this history should have made" on the many legislators. *United States v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring). Needless to say, this can be a "weird endeavor." *Id.* It also risks undue reliance on the statement of a single legislator whose understanding does not fit that of the whole Congress. *See, e.g.*, *Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 506 U.S. 153, 166 (1993); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

In short, the DOL's analysis of the legislative history is not persuasive. At the same time, neither is the plaintiffs'. If UMTA's legislative history shows anything, it is that Congress did not craft section 13(c)(2) with a future law like PEPRA in mind, but rather out of concern attached to the general shift away from private toward public operation of mass transportation services. Moreover, the parties' citations suggest no uniform understanding of the phrase "continuation of collective bargaining rights" among the legislators who wrote it. The word "continuation" may very well have been a classic legislative compromise.

In this situation, the best reading of section 13(c)(2) is an unsatisfying generalization: "the continuation of collective bargaining rights" means that collective bargaining rights will not cease, and they will not diminish to the point that the bargaining relationship substantially clashes with federal policy on collective bargaining. This interpretation marries the notion that "continuation" may reasonably mean both "not end" and "not diminish," as highlighted in the sections above, with the context and history of UMTA's passage. This history and context shows Congress was concerned that the hard-fought bargaining rights of private transit workers would no longer be protected by federal law. As summarized above, it was motivated primarily by larger-scale restrictions on collective bargaining rights, changes proportionate to the national collapse of the private mass transit industry, changes that would be easy to see when overlaid with the fundamentals of federal labor policy. The DOL's motion cannot be granted on the basis of its interpretation of section 13(c)'s legislative history.

2. Contemporary Decisions Interpreting the NLRA

The DOL confirmed its impression of UMTA's legislative history by reviewing several mid-twentieth-century federal appellate decisions interpreting the NLRA. It found that as commonly understood in this context, an employer's "obligation to bargain over pensions was not restricted to changes that completely eliminated or replaced an existing pension or other employee benefit plan." SacRT Decision at 11–12; MST Decision at 11–12. Its analysis on remand does not support this conclusion, and its motion cannot be granted on the basis of this reasoning.

The parties agree, as does this court, that "[s]ection 13(c) evinces no congressional intent to upset the decision in the [NLRA] to permit state law to govern the relationships between local governmental entities and the unions representing their employees." *Jackson Transit*, 457 U.S. at 23–24. All agree as well that Congress imposed no federal definition of "collective bargaining rights" on the states when it passed section 13(c). *Donovan*, 767 F.2d at 949. Nothing suggests Congress intended to invent a new definition of "collective bargaining" for the sole purpose of the UMTA. "Instead, Congress used the phrase generically, incorporating within the statute the commonly understood meaning of 'collective bargaining.'" *Id.* Therefore, the *Donovan* court concluded, Congress intended the following definition, as far as it goes: "good faith negotiations, to a point of impasse, if necessary, over wages, hours and other terms and conditions of employment." *Id.* (emphasis omitted). The parties do not suggest this view is incorrect, and this court sees no reason to disagree with it.

The *Donovan* court's definition of "collective bargaining" resembles the definition in section 8(d) of the NLRA, 29 U.S.C. § 158(d): "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." It also resembles the definition embodied by California law. *See, e.g.*, Cal. Gov't Code § 3512 ("It is the purpose of [the Ralph C. Dills Act, Government Code sections 3512–3523.5,] to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public employee organizations."). In light of the consistency of these definitions, the DOL's decision to consult federal decisions interpreting section 8(d) of the NLRA was not unreasonable. Its interpretations of these sections, however, is. Some additional background information is necessary to explain why.

Federal courts interpreting the NLRA have understood employee pensions to be a mandatory subject of collective bargaining under that statute. *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 159 (1971); *Pac. Coast Ass'n of Pulp & Paper Mfrs. v. Nat'l Labor Relations Bd.*, 304 F.2d 760, 761 (9th Cir. 1962). Many federal decisions rely on the Seventh Circuit's thorough discussion in *Inland Steel Company v. National Labor Relations Board*, where the court reasoned that pension benefits are "conditions of employment." *See, e.g.*, *Allied Chem.*, 404 U.S. at 159 n.1 (citing, *inter alia*, *Inland Steel Co. v. Nat'l Labor Relations Bd.*, 170 F.2d 247, 255 (7th Cir. 1948), *cert. denied on this issue*, 336 U.S. 960 (1949), *aff'd on other grounds sub nom. Am. Commc'ns Ass'n, C.I.O., v. Douds*, 339 U.S. 382 (1950)); *Pac. Coast*, 304 F.2d at 761 (same). On a similar note, compulsory retirement ages are a mandatory subject of collective bargaining under the NLRA. *See, e.g.*, *Fibreboard Paper Prods. Corp. v. Nat'l Labor Relations Bd.*, 379 U.S. 203, 222 & n.10 (1964) (citing *Inland Steel*, 170 F.2d 247).

This much is uncontroversial. So is the general rule that under the NLRA, an employer must not act unilaterally in areas of mandatory bargaining. Even minimal unilateral changes to terms and conditions of employment may violate the NLRA. *See, e.g.*, *Leeds & Northrup Co. v. Nat'l Labor Relations Bd.*, 391 F.2d 874, 876 (3d Cir. 1968) ("[t]he only change made was to reduce the employees' share of company profits in excess of a level which it had attained only twice in its history[,]" but this change nonetheless violated the NLRA).

Citing these rules, the DOL's decisions on remand relied on the following premises: (1) The definition of "collective bargaining" in section 13(c) is a term of art, and Congress meant to use the established meaning when it enacted section 13(c); (2) one way to learn the established meaning of "collective bargaining" at the time UMTA was enacted is to consider the meaning of that term under the NLRA; (3) under the NLRA, employers must bargain collectively about pensions and retirement ages; (4) if an employer makes unilateral changes to pension plans and retirement ages, it violates the NLRA; and (5) even minimal unilateral changes violate the NLRA. *See* SacRT Decision at 11–13; MST Decision at 11–13.

From these premises the DOL concluded (a) Congress intended, by using the phrase "collective bargaining," to require good faith negotiation over every change a state makes to pension plans or retirement provisions, however minimal; (b) if a state law makes minimal, unilateral changes to public pension and retirement provisions, there has been no "continuation of collective bargaining rights" under section 13(c)(2); and (c) because PEPRA made unilateral changes to the law governing public pensions and retirement ages, SacRT's and MSTs grants cannot be certified.

These conclusions do not necessarily follow from the DOL's premises. First, section 13(c)(2) "substantially preserv[es]"—not completely preserves—"collective bargaining rights that had been established by federal labor policy," *Donovan*, 767 F.2d at 948. Congress understood "federal labor policy would dictate the substantive meaning"—not the total meaning—"of collective bargaining for purposes of section 13(c)." *Id.* at 950. "Congress did not intend to subject local government employers to the precise strictures of the NLRA." *Id.* at 949. Nor did it "impose[] upon the states the precise definition of 'collective bargaining' established by the NLRA." *Id.* The federal elements of "collective bargaining" are necessary to prevent section 13(c)(2) from becoming a "meaningless tautology"; that is, "if state law defines the 'collective bargaining rights' that must be continued under the federal statute, then a public transit authority's labor relations always will be in compliance with section 13(c), because by definition a state transit authority will be in conformity with state law." *Id.* at 948. But wholesale adoption of federal labor law also is not necessary to avoid this nonsensical result.

The DOL's decisions cite this caveat, *see* SacRT Decision at 13; MST Decision at 13, but do not persuasively consider its effect. The DOL's reasoning reads the totality of mid-twentieth-century federal decisional law into the words

"collective bargaining rights." This was not Congress's intent in passing UMTA. If Congress had intended for the Labor Secretary to approve federal funding only when a state's collective bargaining laws would not have violated the NLRA if adopted by a private employer, Congress could have cited section 8(d) of that Act. Instead, Congress referred only generally to "collective bargaining rights."

Similarly, as the plaintiffs point out, some states do not require NLRA-level collective bargaining between transit employees and public mass transit agencies, yet the DOL has not denied certification under section 13(c) to those states. *See* Pls.' Br. at 14 (citing Mo. Ann. Stat. § 105.520; Kan. Stat. Ann. § 75-4321).

Second, the DOL did not explain why the decisions it cited would apply just as well in the public-employment context. The NLRA does not apply to state and local employers. *See Jackson Transit*, 457 U.S. at 23 (citing 29 U.S.C. § 152(2)). A similar concern motivated this court's previous order, and thus flagged the issue for the DOL's consideration. *See* Remand Order, 76 F. Supp. 3d at 1143 ("[T]here is nothing in federal labor policy which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining." (citation and quotation marks omitted)).

Third, this court previously concluded that California did not give local agencies, including SacRT and MST, unilateral control over pensions. *Id.* PEPRA does not allow "one party control over collective bargaining but rather made across-the-board changes in public employee pension law." *Id.* That is the law of this case, as discussed above. The DOL's decision on remand impliedly assumes this conclusion was incorrect.[11]

For these reasons the DOL's post-remand discussion of NLRA cases contemporary to UMTA's passage is unpersuasive. As discussed above, those cases can reasonably be interpreted to suggest Congress understood the words "collective bargaining rights" to encompass bargaining over pensions and retirement ages. *See, e.g.*, *Allied Chem.*, 404 U.S. at 159 & n.1. These cases are also strong evidence that if a state forbade its transit agencies from bargaining over "wages,

[11] The court did not consider this contradiction in its enforcement order. *See* Enforcement Order at *4 ("The DOL considered the text of UMTA section 13(c) and that statute's legislative history, then concluded the plaintiffs' application of PEPRA did not preserve employees' rights or provide for the continuation of collective bargaining. This analysis was not inconsistent with the court's order as it pertained to *Donovan*." (citations omitted)). Because the DOL's current motion is largely denied, however, the court declines to reconsider its conclusions in the Enforcement Order.

hours [or] other terms and conditions of employment," as in *Donovan*, 767 F.2d at 943, Congress would have intended the Secretary to deny certification. But these decisions do not show that any unilateral action by a state, however modest, precludes certification under section 13(c)(2). They do not fit this case because PEPRA does not grant SacRT and MST unilateral authority over pension rights. The DOL's motion cannot be granted on this basis.

3. Collective Bargaining in the Public Sector

This court's previous order also remanded the matter for the DOL to consider the realities of bargaining in the public sector. On remand, the DOL acknowledged (1) that in some cases, "modifications to state pension plans must be ratified by the state legislature," SacRT Decision at 17; MST Decision at 17; and (2) that generally, "in the public sector, terms and conditions of employment are public decisions shaped by political processes and realities outside the direct control of a particular public sector employer and must operate within legislatively imposed budget constraints and be consistent with the legislature's policy direction." *Id.* It did not explain further, except to say both public and private employers face budgetary shortfalls and must negotiate around them. *See* SacRT Decision at 17–18; MST Decision at 17–18.

The DOL considered the differences between private and public employers only superficially. SacRT and MST have not claimed they were frustrated by an inability to obtain ratification from the California legislature. Nor was that the purpose of this court's previous citation of *Robinson v. State of New Jersey*, *supra*, 741 F.2d at 607–08. *See* Remand Order, 76 F. Supp. 3d at 1143–44. In *Robinson*, the Third Circuit referred broadly to "approval by other public authorities" and the difficulty unions face advancing "the collective interests of their members in a number of arenas." 741 F.2d at 607. The *Robinson* court quoted a paragraph from a law review article explaining that it "may not be legally possible or politically sensible" for a public employer to "send someone to the bargaining table with authority to make a binding agreement." *Id.* at 608 (quoting Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. Cin. L. Rev. 669, 670–71 (1975)). Public employers must consider taxes, legislative policies, constitutional requirements, civil service principles, municipal codes, and other concerns in addition to the ordinary concerns of private employment, like budgets or competitors' practices. *See id.*

The court recognizes the Remand Order could likely have spelled out these concerns with greater precision. *See* 76 F. Supp. 3d at 1143–44 (referring to legislative ratification, among other difficulties in public bargaining). For this

reason the court does not reconsider its previous conclusion that the DOL's decisions on remand were consistent with the Remand Order. *See* Enforcement Order at *5. But the DOL's perfunctory discussion in the 2015 letters does not exhibit the care or insight one might expect from an agency with significant subject-matter expertise. The DOL says little if anything of the many rocks and hard places between which SacRT and MST must navigate: they must bargain with the ATU, comply with California law, and preserve and continue the rights of their employees under UMTA; they face a statutory and regulatory framework and a local legal environment foreign to private employers; local and regional constituencies vie for recognition over the prerogatives of state law; both public accountability and market forces hang over their heads; and ultimately it is the local legislative body that decides whether to approve a collective bargaining agreement. *See* Pls.' Br. at 28–30. The DOL's motion cannot be granted on this basis; rather, its reasoning on remand supports the plaintiffs' argument that the DOL's conclusions were foreordained.

4. State-Law Backdrops

This court's previous order noted that "[b]oth employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations," Remand Order, 76 F. Supp. 3d at 1143 (quoting *Fort Halifax*, 482 U.S. at 21). On remand, the DOL considered whether PEPRA was only a part of this backdrop and found it was not. SacRT Decision at 13–17; MST Decision at 13–16. The DOL summarized its conclusion: "PEPRA is not a law setting background minimum labor standards that is permissible under federal labor policy. Instead, it more closely resembles the laws that are inconsistent with federal labor policy because they intrude on collective bargaining." SacRT Decision at 14; MST Decision at 14. This summary, if read literally, implies the DOL also concluded that only state laws setting minimum labor standards are permissible under federal labor policy.

As an initial matter, the plaintiffs' briefing improperly dismisses the DOL's reasoning as an attempt to attribute preemptive effect to section 13(c). The DOL did not deny certification under a misunderstanding that PEPRA was preempted by federal law. Rather, it considered the effect of the Supreme Court's decisions in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), and *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724 (1985), along with several other cases involving potential federal-state conflicts, as this court's previous order advised. *See* Remand Order,

76 F. Supp. 3d at 1143. The court therefore does not address the plaintiffs' preemption-related arguments.

The question posed in this court's previous order was whether PEPRA is part of the larger California legal system that would underlie every collective bargaining effort, as was true of the pension legislation in *Malone*, the severance-pay law in *Fort Halifax*, the insurance statute in *Metropolitan Life*, or other laws summarized in *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 136–37 & nn.2–3 (1976). As the Supreme Court has explained, "federal rules designed to restore the equality of bargaining power" are compatible with state laws that "impose[] minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with [the] general goals" of federal labor policy under the NLRA. *Metro. Life Ins.*, 471 U.S. at 754–55. In theory, if a private analog to PEPRA would be preempted by the NLRA, then the DOL's decision not to certify the plaintiffs' grants could be upheld. But this is not the case, as explained below.

a. Federal Labor Policy Defined

The court begins with the Supreme Court's definition of federal labor policy in the context of the NLRA:

> [F]ederal labor policy . . . is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. . . . Congress was not concerned with the substantive terms upon which the parties agreed. The purposes of [federal labor laws] are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves.

Teamsters v. Oliver, 358 U.S. 283, 295 (1959). This definition and the other decisions cited below suggest several questions to help decide whether a state law substantially clashes with federal labor policy.

b. Identification of Clashes Created by State Law

(i) Does the state law concern state interests "deeply rooted in local feeling and responsibility," and are those interests "a merely peripheral concern" of federal policy? *Machinists*, 427 U.S. at 136–37. The *Machinists* Court explained, "the federal law governing labor relations does not withdraw from the States power to regulate where the activity regulated is a merely peripheral concern of [federal labor policy]." *Id.* at 137 (citation, quotation marks, and alterations omit-

ted). The policing of violence is a matter for the states, for example. *Id.* at 136. But states may not subvert federal policy with laws that are facially indifferent to that policy. For example, in *Oliver*, the Supreme Court prevented a state from enforcing an otherwise neutral bar on price fixing because in practical effect, the law's enforcement destroyed a contract provision won by hard-fought collective bargaining. *See* 358 U.S. at 293–97.

(ii) Is the state law generally applicable? Broad statutes of general applicability are more likely to survive preemption than narrow statutes that apply only to a state's own employees or specifically to collective bargaining. *Compare, e.g., Metro. Ins. Co.*, 471 U.S. at 755 ("Minimum state labor standards affect union and nonunion employees equally . . . ."), *with, e.g., Hull v. Dutton*, 935 F.2d 1194, 1198 (11th Cir. 1991) ("[The Alabama statute in question] applies only to its own employees and not to its citizens generally. The statute is an expression of the state's power as an employer to regulate relations with its own employees, rather than the state's authority to regulate in the interest of the health, welfare, and mores of its citizens.").[12] Generally applicable statutes are often consistent with federal policy because they do not primarily regulate the relationship between employees, the union, and the employer. *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 533 (1978) (plurality opinion). But even generally applicable laws may clash with federal policy and so be preempted. *Id.* (citing *Farmer v. United Bhd. of Carpenters and Joiners of Am., Local 25*, 430 U.S. 290, 300 (1977)). The price-fixing law at issue in *Oliver* is again an example. *See, e.g.*, 358 U.S. at 297 ("Clearly it is immaterial that the conflict is between federal labor law and the application of what the State characterizes as an antitrust law.").

(iii) Does the law protect workers' interests, for example, by establishing minimum labor standards? Laws that protect workers' rights and interests are more likely to comport with federal labor policy. In *Metropolitan Life*, the Supreme Court found a Massachusetts law was not preempted because that law pursued a healthcare goal unrelated to the purposes of the NLRA. *See* 471 U.S. at 758. The Court wrote, "Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety." *Id.* at 756; *see also id.* ("It would turn [federal] policy . . . on its head to . . . penalize[] workers who have chosen to

[12] The plaintiffs argue unpersuasively that *Hull* is not relevant here. *See* Pls.' Br. at 19–20 & n. 29. The *Hull* court interpreted the Railway Labor Act (RLA). The RLA, like the NLRA, outlines the dimensions of federal labor policy and is relevant.

join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.").

Similarly, in *Malone*, the Supreme Court considered a Minnesota law providing that when an employer closes its business, "all employees with 10 or more years of service would receive whatever pension benefits had accrued to them, regardless of whether their rights to those benefits had vested within the terms of the [retirement] Plan." 435 U.S. at 501–02. A plurality of four justices[13] concluded "there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining." *Id.* at 504–05.[14] And in *Fort Halifax*, the Supreme Court upheld a Maine law that required any employer that closed a plant with one hundred or more employees to provide each worker a specific severance payment. 482 U.S. at 5.

At the same time, state laws are not necessarily inconsistent with federal labor policy when they cut against employees' best interests. As explained by the Eleventh Circuit, a state law may be inconsistent with federal labor policy "despite the irony" that the inconsistent law benefits the employees rather than the employer. *Hull*, 935 F.2d at 1197. Congress determined that "the collective bargaining process is best promoted if negotiated agreements are shielded from any unilateral changes by [an employer]. Thus, as the bitter so often goes with the sweet, this prohibition must readily be enforced . . . ." *Id.*; *accord, e.g.*, *Leeds*, 391 F.2d at 877 ("The [NLRA] not only protects the employees from the direct economic effect of the employer's unilateral action, but also forbids the bypassing of the collective bargaining agent, for this would undermine the union's authority by disregarding its status as the representative of the employees."); *see also Oliver*, 358 U.S. at 295 (federal labor policy encourages collective bargaining and is not concerned with the substantive terms of the parties' agreements). In other words,

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[13] Two justices did not participate, and three dissented.

[14] After reaching this preliminary conclusion, the Court considered in detail the legislative history of the Welfare and Pension Plans Disclosure Act (WPPDA) and concluded that Congress could not have intended to preempt the Minnesota statute by passing the NLRA. *See id.* at 505–15. The WPPDA has since been replaced by the Employee Retirement Income Security Act of 1974 (ERISA). *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). Unlike ERISA, which preempts state regulation, the WPPDA anticipated state action. *See id.* Nevertheless, government plans are exempt from ERISA, *Standard Oil Co. of Cal. v. Agsalud*, 633 F.2d 760, 764 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981) (Mem.), so its passage would seem to have no effect on the Supreme Court's decision in *Malone*, to the extent that decision applies to a state employer's plan.

although it may be true that state laws protecting workers' interests are more likely to be consistent with federal policy, it does not follow that laws serving another purpose are more probably inconsistent with federal policy, as long as collective bargaining rights are preserved.

(iv) Does the state law essentially dictate the substantive result of collective bargaining? A state law is often preempted if it does. *See Chamber of Commerce v. Bragdon*, 64 F.3d 497, 501 (9th Cir. 1995) (citing *Barnes v. Stone Container Corp.*, 942 F.2d 689, 693 (9th Cir. 1991), and *Bechtel Constr. v. United Bhd. of Carpenters*, 812 F.2d 1220, 1226 (9th Cir. 1987)). In other words, even unintentional or coincidental state interference with collective bargaining is preempted when the state law "impos[es] a contract term on the parties and thus alter[s] incentives to negotiate." *Barnes*, 942 F.2d at 693.

(v) Does the law otherwise clash with the federal goal of encouraging "the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations"? *Oliver*, 358 U.S. at 295. Federal labor policy does not condone a state's "meddling at the heart of the employer-employee relationship." *Barnes*, 942 F.2d at 693. Nevertheless, a state law is not necessarily contrary to federal labor policy even if it entirely removes an issue from the bargaining table. If this were true, nearly every state law tangential to employment would be preempted, from minimum wage laws (no bargaining over lower hourly wages, e.g., in return for pay in kind) to health and safety standards (no bargaining around regulations burdensome to both employees and employers, but beneficial to the public).

In summary, federal decisions considering the preemption of state laws may help trace the boundaries of federal labor policy, and federal labor policy is the standard against which arrangements are measured under section 13(c)(2). A variety of state laws may be consistent with federal labor policy and provide a backdrop to collective bargaining under section 13(c)(2), while at the same time some laws are not part of this backdrop.

c. Analysis

The questions identified above help divide consistent from the inconsistent state laws. When those questions are asked of PEPRA, this court finds no substantial inconsistency with federal labor policy:

(i) Deeply rooted state interests: On the one hand, PEPRA does not concern the most traditional of California's police powers, such as the general health, safety, and wellbeing of California citizens. It is not analogous to the "pe-

ripheral" state laws identified by the Supreme Court. *See, e.g.*, *Machinists*, 427 U.S. at 136–37 & nn.2–3; *accord, e.g.*, *N.Y. Tel.*, 440 U.S. at 532–33 (upholding an unemployment benefits law that involved merely "the distribution of benefits to certain members of the public"); *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53 (1966) (upholding a civil remedy for libel despite its labor-law implications). PEPRA does reflect an overarching concern with a broad and traditional state interest: the budget. Governor Brown's announcement signals PEPRA was meant to save "billions of taxpayer dollars," rein in costs, and ensure that California's public retirement system remained viable. None of the parties has cited authority to suggest California targeted the process of collective bargaining or the relationships between unions and public employers specifically. This question resolves in favor of neither the plaintiffs' nor the DOL's position.

(ii) General Applicability: PEPRA applies only to employees of the state and its statutory agencies. This limited scope, on the one hand, makes PEPRA comparable to the unilateral decision of a private employer. Under federal labor policy, private employers must not make unilateral changes to wages and conditions of employment. Nevertheless, SacRT and MST are not themselves guilty of unilateral mischief, and they are the entities, not the State of California, who would be the beneficiaries of the federal grants at issue here. SacRT's and MST's relationships with ATU, not California's, are at issue here. As discussed below, the DOL unreasonably dismissed SacRT's and MST's arguments that they and other agencies have been able to bargain around PEPRA's effects. This question too resolves in equipoise and helps neither the DOL's nor the plaintiffs' case.

(iii) Protection of workers' interests: In general, PEPRA's changes increase the share of pension costs borne by employees and are intended to alleviate California's financial burdens as employer. But as discussed above, only the most general trend in favor of state laws that benefit employees is discernable in federal appellate decisions. *Compare, e.g.*, *Metro. Life Ins.*, 471 U.S. 724 (minimum insurance policy protections), *and Fort Halifax*, 482 U.S. 1 (severance pay guaranties), *with, e.g.*, *Oliver*, 358 U.S. 283 (elimination of price guaranties favorable to employees), *and Machinists*, 427 U.S. 132 (withholding of economic remedies from employees). It is not clear from these cases that a state law conflicts with federal policy simply because its substantive result may tend to favor employers' interests. *See, e.g.*, *Hull*, 935 F.2d at 1197. And here, local transit agencies' ability to negotiate about pension benefits and employees' ability to propose offsets is not cut off. This answer does not support the DOL's motion.

(iv) Dictating the substantive results of bargaining: PEPRA does not dictate the results of collective bargaining. It does impose specific, prospective limitations on defined benefits plans. But as the plaintiffs point out, they and the Bay Area Rapid Transit District (BART) have continued collective bargaining over other complementary pension strategies in the wake of PEPRA's enactment. *See* Pls.' Br. at 23–24. The record before the court supports the conclusion that PEPRA leaves local agencies free to negotiate around its effects and within PEPRA's restrictions. *See id.*; *see also* BART Amicus Curiae Br. 4–7, ECF No. 26-1. Federal NLRA decisions recognize an employer's obligation to bargain with employee unions about the effects of management's decisions. *See First Nat'l Maint. Corp. v. Nat'l Labor Relations Bd.*, 452 U.S. 666, 681 (1981) ("There is no dispute that the union must be given a significant opportunity to bargain about . . . matters of job security as part of the effects bargaining mandated by § 8(a)(5) [of the NLRA])."). For example, in *NLRB v. Royal Plating and Polishing Co.*, 350 F.2d 191 (3d Cir. 1965), a decision the Supreme Court cited with approval in *First National Maintenance*, the Third Circuit held that the NLRA does not prohibit a failing business from deciding unilaterally to relocate or close, provided that first it notifies the union and allows it "an opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision." *Id.* at 196. That is, federal law allows private employers to follow the dictates of economic necessity, so long as they bargain over the effects of management's decisions. *See id.* at 196–97. The answer to this question therefore favors the plaintiffs.

(v) Clash with goal of encouraging collective negotiation: Finally, although ATU, SacRT, and MST dispute how extensively PEPRA limits their ability to bargain over pension plans and retirement ages, no one suggests the change works to expand the parameters of collective bargaining with respect to defined benefit plans at least. For example, it is undisputed that in the future, local agencies cannot both comply with PEPRA and fund defined benefits plans with certain characteristics. This favors the DOL's motion.

In summary, of these five questions, one favors the plaintiffs, one favors the DOL, and three are neutral or uncertain. It cannot be said that PEPRA substantially conflicts with federal labor policy such that its private analog would be preempted under the NLRA.

For an example of a state law that does conflict with federal policy, consider the Georgia statute at issue in *Donovan*:

> [I]n April 1982, the Georgia legislature . . . pass[ed] Act 1506, which amended [a previous enactment] so as to limit [the Metropolitan At-

> lanta Rapid Transit Authority's (MARTA's)] authority to bargain collectively with ATU. Specifically, Act 1506 prohibited MARTA from bargaining over five subjects that are at issue here: the assignment of employees, discharge and termination of employees for cause, subcontracting of work, fringe benefits for part-time employees, and assignment and calculation of overtime. It also changed the procedures to be followed for interest arbitration such that, where the parties could not agree on wages, the matter could be submitted to arbitration only upon the consent of both parties.

767 F.2d at 942–43. Each of the five questions listed above shows how Act 1506 conflicted with federal labor policy: (i) it concerned the relationship between employees and MARTA directly, rather than traditional state interests; (ii) it was not generally applicable, but specifically prohibited MARTA from negotiating with the ATU about five topics; (iii) it did not protect workers' interests; (iv) it dictated the result of collective bargaining by forbidding collective bargaining altogether in a number of respects; and (v) in sum, it was "obvious" to the D.C. Circuit "that several of these provisions [were] completely antithetical to the concept of collective bargaining embodied in section 13(c)." *Id.* at 952–53. The DOL's analysis of state-law backdrops does not allow the court to grant its motion.

E. Arbitrary Process

As noted above, the plaintiffs independently challenge the DOL's process as arbitrary and capricious in violation of the APA. The path an agency takes to arrive at a decision is subject to review just as well as the decision itself. The APA "establishes a scheme of reasoned decisionmaking." *Allentown Mack Sales & Serv., Inc. v. Nat'l Labor Relations Bd.*, 522 U.S. 359, 374 (1998) (citation and quotation marks omitted). This court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. 706(2). "Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce." *Allentown*, 522 U.S. at 374; *accord CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) ("'[A]rbitrary and capricious' review under the APA focuses on the reasonableness of an agency's decision-making processes."). An agency's process was arbitrary if it relied on facts Congress never intended it to, ignored an important aspect of the problem, explained its decision in a way that does not fit the evidence before it, or if its decision is "so implausible that it could not be ascribed to a difference in view or

the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

An agency's obligations to use a rational process and to interpret statutes correctly are distinct. *See, e.g.*, *CHW W. Bay*, 246 F.3d at 1223. In other words, an agency might interpret a statute correctly and the court defer to its interpretation, but the agency still could apply that interpretation arbitrarily in violation of the APA. Or the agency might use a perfectly rational process but interpret a law incorrectly.

Here, SacRT and MST claim (1) the DOL confused the requirements of sections 13(c)(1) and (c)(2) by focusing on the substance of their collective bargaining agreements rather than the parties' ability to bargain; and (2) the DOL reached an arbitrarily different result in this case than it did in a comparable case from Massachusetts.

1. Confusion Between Sections 13(c)(1) and (c)(2)

Sections 13(c)(1) and (c)(2) impose different requirements on a transit agency's arrangements with its employees. Section 13(c)(1) prevents certification if a transit agency's arrangements do not include provisions necessary for "the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise." 49 U.S.C. § 5333(b)(2)(A). Section 13(c)(2) is concerned with another kind of right, "collective bargaining rights." *Id.* § 5333(b)(2)(B).

SacRT and MST argue that PEPRA applies restrictions to only one type of pension plan, defined benefits plans, and does not restrict their ability to bargain with the ATU about defined contribution plans. For this reason they claim the DOL arbitrarily and incorrectly considered the subject of collective bargaining agreements (the topic of section 13(c)(1)) rather than the plaintiffs' ability to bargain under section 13(c)(2). On remand, the DOL was not persuaded by this argument. It found that defined contribution plans shift the risk of market downturns from the employer to the employees and retirees and are in practice no more than a mandatory savings account. For this reason, the DOL explained, it could not certify the plaintiffs' applications. PEPRA may allow bargaining over a less desirable form of pension plan, but the parties had traditionally bargained over defined benefits plans. Therefore, in the DOL's view, PERPA removed an important topic from the bargaining table and did not allow a continuation of collective bargaining rights.

The DOL did not give much weight to the possibility that ATU, SacRT, and MST could find ways to increase pay, bonuses, or other benefits to compensate employees for the increased risks they shouldered in a defined contribution plan, or to offset contributions to a defined benefits plan. This is one of the plaintiffs' greatest frustrations: they argue the DOL refuses to recognize their ability to collectively bargain around PEPRA's restrictions. *See* Pls.' Br. at 23 (explaining the point by citation to *First National Maintenance Corp.*, *supra*, 452 U.S. at 681–82, discussing effects bargaining). The Secretary's designee explained his reasoning regarding SacRT:

> PEPRA's effect on collective bargaining rights is much less now than when I issued my September 4, 2013 decision. Nevertheless, the developments are insufficient for me to certify that protective arrangements exist for the continuation of collective bargaining rights. SacRTD states that it will not "fully" apply PEPRA until the current collective bargaining agreement expires or is amended. The term "fully" suggests that SacRTD may partially implement PEPRA. . . .
>
> SacRTD is therefore in a different position than transit agencies that could provide assurances either directly or through the state Attorney General that state laws restricting collective bargaining would not result in a diminution of collective bargaining rights or failure to preserve terms of an existing collective bargaining agreement. [Citing the DOL's decisions in other cases] In those cases, the transit agencies committed to complying with section 13(c)'s requirements and not applying a state law that the Department viewed as potentially precluding such compliance. SacRTD has not made that commitment and asserts a right to apply PEPRA.

SacRT Decision at 18–19. And as for MST, the DOL explained, "It is immaterial that Monterey Salinas and ATU negotiated a new collective bargaining agreement effective October 1, 2013 because the agreement was bargained within the parameters established by PEPRA." MST Decision at 18 (citation and quotation marks omitted).

In other words, because SacRT was unable to promise it would not be subject to PEPRA's restrictions, given that PEPRA is state law, and because MST's post-PEPRA bargaining was affected by PEPRA, the DOL denied certification. Similarly, BART's experience was unpersuasive to the DOL in this respect:

> The BART unions reportedly bargained over pensions within the constraints of PEPRA while PEPRA was in effect. Such bargaining does not provide for the continuation of collective bargaining rights required by section 13(c)(2) because the continuation of collective bargaining rights means, as discussed above, that a transit agency

> generally cannot change pension terms during the term of or after the expiration of a collective bargaining agreement without bargaining to impasse. In some instances, a union may waive its right to bargain. Whether or not the unions in BART waived their right to bargain over PEPRA, the unilateral changes required by PEPRA prevent the continuation of unions' right to bargain over the changes. Moreover, the BART unions eventually reached an agreement that did not comply with PEPRA after California passed legislation suspending PEPRA's applicability to employees protected by section 13(c).

SacRT Decision at 19–20 (citations omitted); *accord* MST Decision at 19. That is, "the results of bargaining [were] different when PEPRA [was] in effect than when it [was] not in effect," which "confirms the impact that PEPRA has on collective bargaining." *Id.*

In summary, the DOL's reasoning appears to be that because SacRT, MST, and BART could only bargain within the confines of PEPRA's limitations on defined benefits plans, PEPRA did not allow a continuation of collective bargaining over pensions. It was concerned about what SacRT and MST might do in the future if they received certification. Bargaining results before PEPRA were "different" than bargaining results after PEPRA.

But the DOL did not explore how the bargaining process was different in practice. It explained only in general that bargaining "diminished." It remains unclear what practical impact the DOL believed PEPRA's restrictions had on the bargaining process itself, rather than the result of that process. If PEPRA shifted power from ATU to SacRT and MST, for example, how exactly did it do that? What negotiation disadvantages did ATU confront because of PEPRA? Did ATU begin from a position of weakness in pension negotiations? How was ATU unable, if it was unable, to demand concessions in return for the transit agencies' inability to bargain about certain aspects of defined benefits plans? Does experience in other cases show this is true? PEPRA's practical effect on bargaining is a subject the DOL could have persuasively developed and framed with its expertise. Starkly, it did not.

It cannot be that bargaining discontinued simply because the results of the bargaining process were "different." As the DOL recognizes, section 13(c)(2) protects collective bargaining rights, not bargaining results. *See* SacRT Decision at 9; MST Decision at 9. The DOL does not address why SacRT, MST, and ATU could not make up for PEPRA's restrictions on defined benefits plans with negotiations over offsets for required contributions to those plans, more generous defined contribution plans, healthcare benefits, insurance packages, wages, bo-

nuses, and any number of other benefits. The DOL focused instead only on why defined contribution plans are substantively inferior to defined benefits plans and what changes SacRT and MST might make in the future, rather than on their current agreements. This cursory analysis shows it was concerned by the likely substantive results of bargaining, not with the continuation of collective bargaining rights. Its decision not to certify was arbitrary.

2. Inconsistency with a Previous Decision

The plaintiffs' second argument focuses on a 2009 change to the health benefits of Massachusetts transit employees and the DOL's 2011 certification of federal grants to the Massachusetts Bay Transit Authority (MBTA). In 2009, Massachusetts passed a law transferring the MBTA's group insurance plan to a state insurance commission. *MBTA v. Local 589, ATU, AFL-CIO, CLC*, No. 13-3409, 32 Mass. L. Rep. 82, 2013 WL 7863572, at *1 (Mass. Super. Ct. Dec. 19, 2013) (citing 2009 Mass. Acts Ch. 25 § 140). Previously, insurance coverage had been determined by collective bargaining, but under the new law, collective bargaining was prohibited. *See id.*; 2009 Mass. Acts Ch. 25 § 140.[15]

The ATU and other unions representing MBTA employees objected, and the DOL found in June 2011 that the Massachusetts law "appear[ed] to have removed mandatory and/or traditional subjects of collective bargaining from the consideration of the parties and may prevent the MBTA from continuing the collective bargaining rights," as required by section 13(c)(2). 2013 AR 1556–59. MBTA saw its federal funding was in jeopardy and asked the state legislature for an exemption. *MBTA*, 2013 WL 7863572, at *2. The MBTA and ATU began negotiations to establish a healthcare plan to supplement the coverage offered under the state commission. The MBTA assured the DOL it would be able to collectively bargain with the unions over this supplemental plan. *See* Letter from Richard Davey, Sec'y, Mass. Dep't of Transp., to John Lund, Deputy Assistant Sec'y, Off. Labor-Mgmt. Standards, U.S. Dep't of Labor (Sept. 2, 2011), ECF No. 18-30.[16] In reliance on these developments, the DOL certified MBTA's

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[15] The statute was specific on this point: "Upon transfer . . . [beneficiaries] shall receive group insurance benefits determined exclusively by the commission, the coverage shall not be subject to collective bargaining, and no other reimbursements or other contractual obligations shall be paid by the [MBTA] for health care benefits not provided through the group insurance commission." 2009 Mass. Acts Ch. 25 § 140.

[16] The court previously granted the plaintiffs' request to supplement the administrative record with this document. *See* Order Apr. 24, 2014, at 17, ECF No. 41.

grant. Letter from Ann Comer, Chief, Div. of Statutory Programs, U.S. Dep't of Labor, to Marybeth Mello, Reg. Admin., Fed. Transp. Admin. (Sept. 9, 2011), ECF No. 18-30.[17]

The Massachusetts Legislature later formalized this exception in an amendment to the statutory provisions cited above. *See MBTA*, 2013 WL 78663572, at *2 (citing 2011 Mass. Acts Ch. 189).[18] This amendment also provided that any negotiated supplemental coverage should not duplicate the benefits and coverages offered by the state insurance commission. 2011 Mass. Acts Ch. 189.

At the time the DOL certified the MBTA grant, the MBTA and unions had not completed negotiations over a supplemental health plan. *See* Comer Letter, *supra*; MBTA, 2013 WL 7863572, at *2. They did not in fact reach a negotiated solution, but came to a bargaining impasse and submitted the matter to interest arbitration. *Id.* The arbitrator made a decision in August 2013, which the Massachusetts Superior Court confirmed over the MBTA's objections in December 2013. *Id.*

In this case, during the first, pre-remand proceedings before the DOL, SacRT cited the Massachusetts law and the DOL's certification and argued that PEPRA presented an analogous situation. *See* 2013 AR 131. The DOL disagreed:

> The Massachusetts Act did not place hard caps on health care benefits or impose restrictions on negotiated supplemental plans. The language of the Act specifically provided an exemption for all current collective bargaining agreements, preserving employees' existing rights and benefits. As a result, after extensive negotiations, MBTA and the union (ATU) were able to agree to a health welfare trust plan that provided benefits and coverage supplementary to those provided by the mandated [state commission] coverage. In sum, contrary to the situation here, the Massachusetts Act fully preserved rights and benefits under existing collective bargaining agreements, and the parties were able to negotiate a supplemental health plan, thus continuing collective bargaining rights.

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[17] *See supra* note 16.

[18] The amendment provided in part as follows: "Nothing in [section 140] shall restrict the authority of the [MBTA] to bargain collectively . . . over the establishment of a Health and Welfare Trust Plan or to pay the cost, in whole or in part, as determined by collective bargaining, of any supplementary benefits or coverages provided under such a trust plan."

Id. SacRT raised this argument again during its initial challenge in this court to the DOL's decision, but this court did not reach it. *See* Remand Order, 76 F. Supp. 3d at 1144.

On remand, the parties revisited the MBTA case, and the Secretary's designee again found the analogy unpersuasive:

> As I explained in my September 4, 2013 decision, PEPRA . . . differs from a Massachusetts law that transferred group health insurance coverage from a transit agency to an insurance commission because the Massachusetts law placed no hard caps on health care benefits and no restrictions on negotiating supplemental plans. AR 131. PEPRA puts hard caps on defined benefit plans and restricts parties' ability to negotiate supplemental defined benefit plans, even if such plans do no more than supplement (such as by establishing a guarantee of minimum benefit) a defined contribution retirement plan such as those envisioned by PEPRA.

SacRT Decision at 20–21; MST Decision at 20.

Here, the plaintiffs ask the court to find that the DOL's decisions are arbitrarily inconsistent with its decisions in the MBTA case. As noted above, under the APA, administrative agencies must "treat like cases alike" and explain inconsistencies. *Westar Energy*, 473 F.3d at 1241. SacRT's and MST's motion cannot be granted on this basis.

Both in 2013 and 2015 the DOL explained its belief that the Massachusetts law differed from PEPRA because it allowed the MBTA and its unions to continue negotiations over health insurance coverage and imposed no "hard caps" on the substance of their agreements. Although SacRT and MST are correct that under PEPRA they may negotiate a defined contribution plan with the ATU, PEPRA prohibits the adoption of a defined benefit plan with characteristics outside its boundaries. *See* Cal. Gov't Code § 7522.02(e). The plaintiffs have not drawn the court's attention to a PEPRA provision or part of the administrative record showing the DOL understood that law erroneously as imposing a kind of "hard cap" on defined benefit retirement plans. Rather, it seems a result analogous to that adopted by the Massachusetts Legislature in the MBTA case has been achieved: the California legislature created an exemption that could limit PEPRA's reach in response to the DOL's and this court's decisions. *See id.* § 7522.02(a)(3); *see also supra* notes 15, 18.

The court does agree with the plaintiffs that the DOL wrote incorrectly in 2013 that the MBTA and its unions had successfully negotiated a supplemental health plan in 2011. Nevertheless, the DOL's 2015 decisions do not rely on this

misunderstanding. Nor would a correction have much effect, if any: "collective bargaining rights" means negotiation in good faith to impasse, if necessary, which describes what the MBTA and its unions did. *See MBTA*, 2013 WL 7863572, at *2.

F. Conclusion—Section 13(c)(2)

The DOL's decisions on remand cannot be upheld on the basis of its interpretation of section 13(c)'s language or legislative history. The same is true of the DOL's review of federal appellate decisions contemporary to UMTA's passage, its consideration of the differences between public and private bargaining, and its review of what state laws may form a permissible backdrop to collective bargaining. At most the authorities on which DOL relies show that section 13(c)(2) prevents certification if a state passes laws that substantially clash with federal labor policy. It is not possible to conclude on this record that PEPRA substantially clashes with federal labor policy.

In addition, the DOL's decisions to deny certification under section 13(c)(2) cannot be upheld because the DOL focused on the results of collective bargaining under PEPRA rather than on whether protective arrangements ensured a continuation of the process through which collective bargaining rights are exercised. Similarly, the DOL unjustifiably rejected evidence that California transit agencies had bargained over pensions notwithstanding PEPRA's limitations on defined benefits plans. By contrast, the DOL's analysis of a previous case in Massachusetts was not arbitrary or capricious and cannot support the plaintiffs' motion.

For these reasons, to the extent the DOL's decisions on remand rejected certification under section 13(c)(2), it acted arbitrarily, and its decisions must be set aside under 5 U.S.C. § 706(2)(A). But because the DOL also denied certification under section 13(c)(1), the plaintiffs cannot obtain relief unless they also prevail on their second claim, which concerns that section. The court now turns to it.

V. THE PRESERVATION OF RIGHTS, PRIVILEGES AND BENEFITS

A. SacRT

In the Remand Order, this court found the DOL had exceeded its authority by redefining the scope of a collective bargaining agreement to protect the rights of future employees. *See* 76 F. Supp. 3d at 1145. The DOL believed this conclusion was erroneous, but rather than requesting reconsideration or a modi-

fication of the judgment, for example under Federal Rule of Civil Procedure 59(e) or 60(b), and instead of obtaining relief from the Ninth Circuit Court of Appeals, the DOL dismissed its appeal voluntarily and again denied certification to SacRT for the same reason. *See* SacRT Decision at 21. Therefore, in the Enforcement Order, the court set aside the DOL's decision to deny certification to SacRT on the basis of section 13(c)(1). *See* Enforcement Order at *5.

This court has no desire to persist in any error it committed. It may well be that SacRT's collective bargaining agreement offers some protections to future employees. *See, e.g.*, 2013 AR 372 ("All new employees [i.e., new hires] shall be on probation for a period of 180 days (six months) from the completion of training."). But the court cannot bless the DOL's strategy here. For this reason the court declines to reconsider its order setting aside the DOL's decision to deny certification to SacRT under section 13(c)(1).

As to SacRT, the plaintiffs' motion is granted, and the DOL's motion is denied.

B. MST

MST's application presents three additional problems.

First, the DOL's decision on remand denied certification to MST because it found the pension rights of neither new nor classic employees were preserved. *See* MST Decision at 20–21. But the plaintiffs' supplemental complaint challenges only the DOL's discussion of new employees' rights. *See* Suppl. Compl. ¶¶ 100–10, ECF No. 88-2. The parties disagree whether the supplemental complaint can nevertheless be read to imply a challenge to both new and classic employees. If it cannot, MST asks for leave to amend its supplemental complaint, and the DOL argues an amendment should not be allowed.

Second, the DOL argues its decision may be upheld on a straightforward reading of section 13(c)(2). *See* DOL Br. at 15; DOL Resp. at 16. However, its current briefing relies on a reading of two phrases it did not present to the parties in issuing the 2015 letters. MST argues the DOL has attempted to justify its decision after the fact by relying on this new material and asks the court to disregard it.

Third is the substance of the DOL's decision on remand. As noted above, it found that MST had not adopted protective arrangements to preserve the rights of its new and classic employees. MST argues the DOL has not identified any specific right that was not preserved. The next three subsections address these issues.

1. Amendment to the Supplemental Complaint

Federal Rule of Civil Procedure 15 governs amendments to the pleadings. The policy of Rule 15 heavily favors amendments that allow a case to be decided on its merits. *See, e.g.*, *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987); *see also* Fed. R. Civ. P. 15(b)(1) (allowing amendment even in trial, "when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits"). Leave to amend may be denied if the amendment is sought in bad faith, if it would prove an exercise in futility, or if it would cause undue delay, among similar reasons, *see, e.g.*, *Cafasso, U.S.* ex rel. *v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011), but the focus of Rule 15 is what prejudice the opposing party will suffer as a result, *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

Here, the plaintiffs' supplemental complaint does not clearly allege any claim about classic employees' rights under section 13(c)(1). It focuses on new employees and employees who have not yet been hired. *See* Suppl. Compl. ¶¶ 100–10. Nevertheless, the parties have devoted several pages of their existing briefing to classic employees. *See* DOL Br. at 15–20; Pls.' Br. at 36–38; DOL Resp. at 18–21; Pls.' Resp. at 7–10. The DOL has not described what specific prejudice it would suffer if MST is allowed leave to amend. The court therefore grants MST's request to amend its complaint to allege a claim based on the DOL's denial of certification under section 13(c)(1) with respect to classic employees. To alleviate any prejudice this amendment may cause, the court allows both parties to file short supplemental briefs, as detailed in the conclusion of this order.

2. Statutory Interpretation and Post-Hoc Rationalizations

In the DOL's current briefing, it argues that its decisions may be upheld because section 13(c) protects the rights of all employees "affected by the assistance" and because section 13(c)(1) addresses the preservation of rights under collective bargaining agreements "or otherwise." *See* DOL Br. at 17–18; DOL Resp. at 21–25. The DOL did not rest its decision to deny certification on these provisions on remand. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50.

The DOL argues in response that its citations to these phrases can support its current motion because this court must interpret the entirety of section 13(c). The court agrees that all of section 13(c) is relevant, but disagrees that the parties' motions may be resolved on the basis of unambiguous statutory language, as explained in the next section. The DOL's new arguments cannot support its motion.

3. The Rights of Future Employees

As discussed above, when a federal court is asked to review an administrative agency's interpretation of a statute, the first question is that law's plain meaning. Both the court and the agency are bound by Congress's plain expressions of intent. *Chevron*, 467 U.S. at 842–43. When ambiguities arise, the agency's interpretation is allowed binding deference under *Chevron* if that appears to have been Congress's intent. *See Mead*, 533 U.S. at 227–28. Otherwise, the agency's decisions receive lesser deference under *Skidmore*. *See id.*

Here the DOL argues section 13(c)(1) unambiguously supports its position. *See* DOL Br. at 15; DOL Resp. at 16. MST does not define its position so clearly, but its citations of legislative history suggest it is less certain of the statute's unambiguity. *See* Pls.' Br. at 31–32. The court begins again with the statute itself:

> (1) As a condition of financial assistance . . . the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. . . .
>
> (2) Arrangements under this subsection shall include provisions that may be necessary for—
>
> > (A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise . . . .

49 U.S.C. § 5333(b)(1)–(2). Like section 13(c)(2), this section requires some reading between the lines.

For one, "preservation" and continuation" also appear in section 13(c)(1). In its decisions on remand, the DOL defined "preservation" by referring to the verb "preserve," which it defined as "to keep from harm, damage, danger, evil; protect; save." SacRT Decision at 8 (quoting *Webster's New World Dictionary of the American Language* 1153 (college ed. 1962)); MST Decision at 8 (same). It also wrote that "preservation of rights" means "an employer cannot change rights." SacRT Decision at 9; MST Decision at 9. In light of the ambiguous meaning of "continuation," described above, the court cannot agree that any

"change" prevents a preservation or continuation of rights. Nothing about section 13(c) suggests Congress meant to use "continuation" differently in sections 13(c)(1) and (c)(2). In both sections its context and apparent purpose are similar: the status of rights during a shift to publicly operated mass transit. *Cf. Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (the same word used in different parts of the same law is presumed to have the same meaning unless (1) it has "several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing" and (2) the context of its use shows a "variation in the connection in which the words are used" (citation and quotation marks omitted)).

Second, the meaning of the word "existing" is not immediately obvious on the face of section 13(c)(1). At one level the ambiguity is easily addressed. The DOL understood the "existing collective bargaining agreement" to refer to the agreement in force at the time a transit agency applies for federal funds. The plaintiffs do not challenge this definition, and the court finds it is a reasonable reading. Congress could not have meant to preserve only those rights "existing" at the time UMTA was passed, for example. Otherwise the employees of transit agencies created after UMTA's passage would have no "existing" rights to preserve, considering the absence of a sunset provision from section 13(c). *See Donovan*, 767 F.2d at 957 (Ginsburg, J., concurring).

Section 13(c)(1) however requires an additional inference with respect to "existing collective bargaining agreements." At face value, it refers to all "rights, privileges, and benefits . . . under existing collective bargaining agreements," regardless of the expiration of an existing agreement, regardless of renegotiations down the road, and regardless of inevitable employee turnover. That is, section 13(c)(1) could be read to refer to all rights defined in an existing agreement and require a preservation of those rights in all future agreements for all employees, past, present, and future. The plaintiffs, the DOL, and the ATU do not adopt this position, and rightly so. It seems unlikely Congress meant to freeze in place the substantive rights, privileges, and benefits negotiated at the time of each employer's first application for federal funding. Rather, the plaintiffs and the DOL infer different limitations from section 13(c)(1)'s context and history.

The DOL understands section 13(c)(1) to encompass the rights guaranteed to both (a) employees who have already been hired and (b) unknown prospective employees who may be eligible for protection under the same agreement in the future, if they are hired. *See, e.g.*, MST Decision at 20 ("[I]t is axiomatic that when an established bargaining unit expressly encompasses employees in a

specific classification, new employees hired into that classification [i.e., new hires] are included in the suit." (quoting *In re Airway Cleaners, LLC*, 362 NLRB No. 87 (Apr. 15, 2015))). In other words, the DOL interprets section 13(c)(1) to require the unchanging preservation of all rights, privileges, and benefits during the agreement's term. In contrast, the plaintiffs argue, "Congress intended section 13(c)(1) to protect the 'hard earned' pension benefits of already-hired and already-retired transit employees who risked loss of benefits and years of service in the switch from private to public employment." Pls.' Br. at 31. They acknowledge that prospective employees may have 13(c)(1) rights under a bargaining agreement, but "submit that the particular substantive rights protected by 13(c)(1) *cannot* encompass rights and benefits to which the new employee would have no claim under state law." Pls.' Resp. at 10 (emphasis in original).

These competing interpretations each have strengths and weaknesses. For example, the plaintiffs have the benefit of the most poignant dangers identified in section 13(c)'s legislative history. Among other citations, they refer to legislators' disapproval of a transit agency that refused to accept the pension obligations of a private transit company's retired employees. Pls.' Br. at 31–32. In response, the DOL argues that Congress meant for federal funding to encourage transit agencies to hire more employees. DOL Resp. at 23. It points out that Congress probably did not mean for new hires to be exempted from the protections required by section 13(c)(1). *See id.* at 23–24.

Had the DOL supported its current legal arguments with citations to specific rights, privileges, and benefits for MST's employees and then identified which PEPRA provisions eliminated MST's ability to make arrangements that protected those rights, this order might have resolved differently. Instead, on remand the DOL found (1) that this court misperceived the definition of a collective bargaining unit under MST's collective bargaining agreement; (2) that MST's bargaining agreement applied to "new employees," as defined in PEPRA; and (3) that PEPRA changed the way benefits are calculated under defined benefits plans. *See* MST Decision at 20–21.

The DOL did not explain why PEPRA prevented MST from negotiating its way around PEPRA's limitations such that past, present, and future employees' rights would be preserved, even if only in an alternative form. Section 13(c)(1) cannot be interpreted to prohibit every "change" to a collective bargaining agreement, even changes without any meaningful effect. The DOL did not explain why it made no difference that MST did not even have "new employees" covered by the existing agreement, who would be affected by PEPRA. *See* 2013

AR 912 ("Pension benefits under [MST's collective bargaining agreement] will not be affected by PEPRA as MST has no 'new' employees. MST has not hired any [such employee] and shall not hire any such employee [before the expiration of the collective bargaining agreement]."). To the extent the DOL's decision rests on its conclusion that PEPRA is an impermissible state-law backdrop, the court cannot uphold its reasoning, as discussed above and in the Remand Order.

The DOL's decision on remand leaves too many basic questions unanswered to be persuasive, or accorded deference. This court cannot fill in the blanks on the DOL's behalf. *See Crickon v. Thomas*, 579 F.3d 978, 982 (9th Cir. 2009) (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). Neither can its attorneys after the fact. *See Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010).

As for MST's "new employees," the DOL's motion is denied, and the plaintiffs' motion is granted.

VI. CONCLUSION

The parties' cross motions are **granted in part and denied in part:**

(1) With respect to SacRT, the DOL's motion is denied, and the plaintiffs' motion is granted.

(2) With respect to MST's "new employees," the DOL's motion is denied, and the plaintiffs' motion is granted.

(3) This order does not resolve the pending motions to the extent they concern MST's "classic employees"; nevertheless, with respect to these employees, the DOL's motion cannot be granted on the basis of its analysis of section 13(c)(2). Its motion is denied in that respect.

The court grants plaintiffs' request to amend the supplemental complaint to allege a claim based on the DOL's denial of certification under section 13(c)(1) with regard to MST's classic employees. An amended supplemental complaint shall be filed **within seven days**. The parties' current motions will be construed to apply to that amended supplemental pleading. To alleviate any prejudice this amendment may cause the DOL, it is granted leave to file a five-page supplemental brief in support of its motion. MST is likewise allowed a five-page supplement. Both parties' supplemental briefs shall be filed **within fourteen days** of the date this order is filed.

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The court does not at this point reach the question of any appropriate remedy.

IT IS SO ORDERED.

DATED: August 19, 2016.

UNITED STATES DISTRICT JUDGE

U.S. Department of Labor

Office of Labor-Management Standards
Washington, D.C. 20210

June 14, 2019

Robert Molofsky, General Counsel
Amalgamated Transit Union
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Silver Spring, MD 20903
Email: 13c@atu.org

Re: RESPONSE TO OBJECTIONS TO EMPLOYEE PROTECTION TERMS
FOR PENDING FTA GRANT APPLICATIONS
CA-03-0806-04 and CA-90-Z117
Sacramento Regional Transit District and Caltrans *on behalf of* Monterey-Salinas Transit; and
Alameda-Contra Costa Transit District, CA-2017-017-01 and CA-2019-011;
Golden Gate Bridge, Highway and Transportation District, CA-2019-041;
Los Angeles County Metropolitan Transportation Authority, CA-2018-012-01 and CA-2018-093-01;
Riverside Transit Agency, CA-2019-048;
San Francisco Bay Area Rapid Transit District, CA-2019-029;
San Joaquin Regional Transit District, CA-2019-034;
San Mateo County Transit District, CA-2017-104-01;
Santa Clara Valley Transportation Authority, CA-2018-081-01 and CA-2019-047

Dear Mr. Molofsky:

This is in response to your November 29, 2018 letter, in which Amalgamated Transit Union (ATU) Local 1225 and Local 256 registered certain objections to the Proposed Terms for Employee Protection Certification contained in the Department of Labor's (Department) referral letters of November 16, 2018 for CA-03-0806-04 and CA-90-Z117. This letter also responds to ATU's objections to the other above captioned grant applications. Pursuant to Department Guidelines (29 CFR Part 215), all of the objections were timely received.

With regard to grants CA-03-0806-04 and CA-90-Z117, ATU asserted that the Department's sole rationale for proposing to certify the current grant is to comply with the decisions of the U.S. District Court for the Eastern District of California. *See California v. U.S. Dep't of Labor*, 306 F. Supp. 3d 1180 (E.D. Cal. 2018) (final decision). ATU in turn objected to the Department's proposed certification on the basis that it would be premature and improper to certify the grant in order to comply with the district court's decisions given that an appeal is still pending before the United States Court of Appeals for the Ninth Circuit. ATU noted that while the Department moved to voluntarily dismiss the appeal, ATU moved to intervene for the purpose of taking over the Department's appeal.

ATTACHMENT 5

After ATU submitted its objection, the Ninth Circuit denied ATU's motion to intervene and dismissed the appeal. ATU's objection regarding the pendency of the appeal is therefore moot. As such, the Department determines in accordance with the Guidelines at 29 C.F.R. § 251.3 that ATU's objection to CA-03-0806-04 and CA-90-Z117 is not sufficient.

Regarding the remaining grants, ATU objects to the Department's proposed certification due to PEPRA's (California Public Employees' Pension Reform Act (PEPRA), Cal. Gov't § 7522 et seq.,) effect on transit employees' collective bargaining rights.

In light of the district court's decisions, the Department has reexamined its earlier determinations denying certification pursuant to section 13(c) of the Urban Mass Transportation Act (UMTA), now codified at 49 U.S.C. § 5333(b) (hereinafter "section 13(c)"), to these grants because of the PEPRA's impact on transit employees. Based on that reexamination, the Department has concluded that PEPRA does not present a bar to certification under section 13(c).

Background and Procedural History

The facts were set out in the Department's previous correspondence issued on September 4, 2013, September 30, 2013, and August 13, 2015. As such, only a brief summary of the relevant facts and subsequent procedural history is provided here.

The Sacramento Regional Transit District (SacRTD) and the California Department of Transportation (Caltrans) on behalf of Monterey-Salinas Public Transit System Joint Powers Agency d/b/a Monterey-Salinas Transit (MST) first submitted the grants at issue to the Federal Transit Administration in 2012. The Federal Transit Administration forwarded the grants to the Department with a request for certification pursuant to section 13(c), which requires that the Department certify that "fair and equitable" arrangements are in place to protect the interests of affected employees before state and local transportation agencies can receive federal mass transit funding assistance. *See* 49 U.S.C. § 5333(b). Those arrangements "shall include provisions that may be necessary for," *inter alia*, "the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise," and "the continuation of collective bargaining rights." 49 U.S.C. § 5333(b)(2)(A), (B).

The Department initially denied certification to SacRTD's application on September 4, 2013 and to MST's application on September 30, 2013, on the basis that PEPRA precluded certification. PEPRA, enacted in 2012, reformed California's public employee pension system and applies to most California public employees, including transit employees affected by these grants. Among other requirements, PEPRA mandates that public employees hired after 2013: contribute at least 50% of the cost of their pension benefits; establish minimum time-in-service requirements; caps the pension benefits they can receive; and prescribes the calculation of their pension benefits at retirement. PEPRA also changes some aspects of pensions for public employees hired before 2013, including ending employees' ability to purchase service credit for non-working time ("airtime"). SacRTD and MST transit employees had collective bargaining agreements in place in 2013 that provided defined benefit pension plans with more employee-favorable terms than

those permitted by PEPRA. The Department determined that PEPRA's unilateral changes to pension benefits without bargaining were inconsistent with section 13(c)(1)'s mandate to preserve pension benefits under existing collective bargaining agreements and section 13(c)(2)'s mandate to ensure continuation of collective bargaining rights.

The transit agencies sought review of the Department's determination in federal district court. In a December 30, 2014 decision, the court held that the Department's determinations were arbitrary and capricious. *California v. U.S. Dep't of Labor*, 76 F. Supp. 3d 1125 (E.D. Cal. 2014). Among the reasons the court provided was that the Department erred in "reflexively" relying on *Amalgamated Transit Union v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985), in light of the factual differences between that case and the circumstances here, which involved "a state's system-wide changes in some aspects of public employment." 76 F. Supp. 3d at 1143. Additionally, the court found that the Department's conclusion that PEPRA prevented collective bargaining over pensions was erroneously premised on an assumption that a pension must necessarily be a defined benefit rather than a defined contribution plan. *Id.* at 1143. The court further stated that the Department was arbitrary and capricious in, *inter alia*, "fail[ing] to consider the realities of public sector bargaining," and in determining that not yet hired employees had rights under collective bargaining agreements. *Id.* at 1144-45. The court remanded the matter to the Department for further proceedings consistent with its decision. *Id.* at 1148.

On August 13, 2015, the Department issued new final determinations denying section 13(c) certifications. The Department explained its interpretation that the lessening or diminution of collective bargaining rights as accomplished by PEPRA violates section 13(c), drawing support from the statute's text, legislative history, and case law establishing that the commonly understood meaning of collective bargaining precludes unilateral changes to mandatory subjects of collective bargaining. The Department also explained its disagreement that the factors and issues identified by the court supported certification of the grants. The transit agencies challenged the new final determinations, and the district court ruled that they were arbitrary and capricious. *California v. U.S. Dep't of Labor*, 306 F. Supp. 3d 1180 (E.D. Cal. 2018) (hereinafter 2018 Decision); *California v. U.S. Dep't of Labor*, No. 2:13-CV-02069-KJM-DB, 2016 WL 4441221 (E.D. Cal. Aug. 22, 2016) (hereinafter 2016 Decision). The court found that the statutory text and legislative history of section 13(c) were ambiguous as to whether section 13(c)(2)'s provision requiring "the continuation of collective bargaining rights" protected those rights from a diminishing or lessening that fell short of elimination. 2016 Decision, 2016 WL 4441221, at *9-12, 15-17. The court noted, however, that the history of the statute suggested that the provision was "motivated primarily by larger-scale restrictions on collective bargaining rights." *Id.* at *17. The court also determined the Department erred in relying on case law establishing that even minimal unilateral changes by an employer could violate the statute because Congress' intent was not to apply all National Labor Relations Act (NLRA) law to states through the UMTA. *Id.* at *19-20. The court determined that PEPRA was a permissible state law "backdrop" for collective bargaining because it did not substantially interfere with federal labor policy. *Id.* at *21-26. The court also determined the Department erred in failing to explain why the transit authority's ability to negotiate for other types of benefits did not make up for any change made by PEPRA. *Id.* at *27-28.

The district court also ruled that the Department had been arbitrary or capricious in concluding that there were not adequate arrangements in place to preserve the pension rights of MST employees hired before 2013 ("classic employees"). 2018 Decision, 306 F. Supp. 3d 1180. The court reasoned that section 13(c)(1)'s obligation to preserve rights and benefits was intended "to prohibit only those changes that harm or diminish bargained-for rights" in a manner that is not trivial. *Id.* at 1186-87. The court determined that PEPRA's change to classic employees' airtime rights "was not sufficiently meaningful to trigger § 13(c)(1)." *Id.* at 1189. The court enjoined the Department from relying on PEPRA to deny California's application of funding for MST or SacRTD under section 13(c)(1) or (2). *Id.* at 1190. The Department initially appealed the court's decisions, but on November 5, 2018, moved voluntarily to dismiss the appeal. On December 19, 2018, the Ninth Circuit denied ATU's motion to intervene and dismissed the appeal.

Pursuant to its Procedural Guidelines, 29 C.F.R. § 215, the Department refers grant applications and proposed protective arrangements and terms and conditions to: the recipient and any subrecipient of the funding, and any unions representing employees of the recipient(s), its contractors, and/or other service area providers. Following these guidelines, on November 16, 2018, the Department re-referred the grant applications at issue in the litigation on the basis of the previously certified protective arrangements.

Once a grant application is referred to the parties, the parties have fifteen days to inform the Department of any objection to the recommended terms. For the Department to find an objection sufficient, it must "raise" material issues that "may require alternative employee protections," or "concern changes in legal or factual circumstances that may materially affect the rights or interests of employees." 29 C.F.R. § 215.3(d)(3). If no party objects or the Department does not find the objection sufficient, the Department certifies the proposed terms. The Department then provides FTA with a certification specifying the protective arrangements and terms and conditions to be made applicable to the federal assistance. 29 C.F.R. § 215.3(d)(5). After reviewing the above listed objections, the Department concludes that no sufficient objections have been raised.

Analysis

Analysis of sections 13(c)(1) and (2)

After the district court's decisions, the Department independently reexamined the scope of its authority under section 13(c) and the best way to provide fair and equitable employee protective arrangements. The Department now concludes that Section 13(c) grants the Secretary broad discretion in determining whether there are adequate "employee protective arrangements." 49 U.S.C. § 5333(b). The protective arrangements required as a condition of financial assistance are those that "the Secretary concludes are fair and equitable." *Id.* (emphasis added). The plain terms of the statute make clear the deference to be afforded to the Secretary's judgment of what provisions are fair between an employer and employees. *See Kendler v. Wirtz*, 388 F.2d 381, 384 (3d Cir. 1968) ("It is for the reasonable accommodation of unavoidably conflicting interests . . . that the Congress has seen fit to make the judgment of the Secretary of Labor as to what is fair and equitable controlling."); *cf. City of Los Angeles v. U.S. Dep't of Commerce*, 307 F.3d 859,

870-71 (9th Cir. 2002) (holding that statute providing that the Secretary of Commerce "shall, if he considers it feasible," use statistical sampling, vests "meaningful discretion" on the Secretary to set a standard for feasibility and to determine whether the standard has been met); *Connecticut Dep't of Children & Youth Servs. v. Department of Health & Human Servs.*, 9 F.3d 981, 985-86 (D.C. Cir. 1993) (statute requiring that specified procedures and programs must be implemented to the "satisfaction of the Secretary" constituted an "extraordinary grant of discretion" to the Secretary, subject to reversal only for an "egregious claim"); *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1224-25 (D.C. Cir. 1993) (statute empowering Secretary to provide "such other exceptions and adjustments * * * as the Secretary deems appropriate" grants "broad delegation of discretion" subject to "quite narrow" judicial review).

The statutes provides that the Secretary must conclude that each of the five[1] different varieties of protective provisions that must be included among the § 13(c) arrangements are fair and equitable. But the Secretary still retains broad discretion in evaluating fairness and equity vis-à-vis each of the five objectives. *Kendler v. Wirtz*, 388 F.2d 381, 383 (3d Cir. 1968). Section 13(c) directs that the "[a]rrangements . . . shall include provisions that may be necessary" to meet these five objectives. 49 U.S.C. § 5333(b)(2) (emphasis added). The use of the permissive term "may be necessary" underscores the breadth of the Secretary's discretion under section 13(c) to determine what provisions are needed to satisfy the five requirements. *See Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 767 F.2d 939, 944 n.7 (D.C. Cir. 1985) (differentiating requirement that the Secretary determine all five objectives are satisfied prior to certification from Secretary's discretion to determine "whether or not a specific provision within a labor agreement satisfies one of section 13(c)'s express objectives").

In this case, the Secretary must determine whether arrangements satisfy section 13(c)'s objectives of "preservation of . . . benefits . . . under existing collective bargaining agreements" and "continuation of collective bargaining rights." 49 U.S.C. § 5333(b)(2)(A)&(B). As the district court correctly recognized, the terms "continuation" and "preservation" could be construed strictly to mean that no changes can be made to employees' collective bargaining rights, or more leniently to mean that the rights must only be substantially continued or preserved. *See* 2016 Decision, 2016 WL 4441221, at *10-12; *see also Random House Webster's Unabridged Dictionary* 440 (2d ed. 2001) ("continuation" means "something that continues some preceding thing by being of the same kind or having a similar content"). The statutory text permits either interpretation.

Although courts and the Department have looked to the legislative history of section 13(c), that history does not fully resolve the ambiguity in the meaning of "continuation" and "preservation." As the Department explained in its earlier determinations, Senator Wayne Morse, section 13(c)'s sponsor, indicated that the provision was designed to avoid a "lessening" or "worsening" of rights, suggesting Congress could have been concerned about any diminishment of rights. *See* 109 Cong. Rec. 5671-72 (1963). Senator Morse's reference to "lessening" or "worsening" may be considered in context as opposition to a committee bill's mere encouragement of the continuation of collective bargaining rights, however. In that context, he could have been using

[1] As previously codified, section 13(c) enumerated five subsections. *See* 49 U.S.C. § 1609(c) (1988). In 1994, the text of the statute as codified was revised to separate the fourth assurance into two separate lettered paragraphs, which is how it remains today. *See* 49 U.S.C. § 5333(b)(2)(d) and (e) (1994).

the terms at a high level of generality to oppose the "lessening" or "worsening" that would result if states were only encouraged to continue collective bargaining rights, *i.e.*, a system in which collective bargaining rights would not be entirely eliminated but preserved only partially and to varying degrees in different states. The legislative history does not show that legislators had a settled conception that any lessening in rights in a particular collective bargaining relationship, no matter how minor, would necessarily fail to preserve rights under an existing collective bargaining agreement or discontinue the right to bargain collectively.

The purpose and context of the statute, however, do suggest that an appropriate interpretation is that the statute does not preclude certification in all circumstances where there may be diminishments in collective bargaining rights and benefits. Section 13(c)'s purpose was to allow the Secretary to accommodate states' unique circumstances while ensuring fairness and equity and the "legislative history stress[es] the need for flexibility and discretion." *Local Div. 589, Amalgamated Transit Union, AFL-CIO, CLC v. Mass.*, 666 F.2d 618, 634 (1st Cir. 1981). It would be contrary to this flexible design to conclude that any change in state law over the years that affects bargaining rights or benefits of its public sector employees means the Secretary would lose any discretion in determining whether the requirements of the statute are met.

It is also revealing that section 13(c)'s purpose was not to "subject local government employers to the precise strictures of the NLRA." *Donovan*, 767 F.2d at 949; *see also Jackson*, 457 U.S. at 28 ("Congress designed § 13(c) . . . to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law."). During debate, Senator Morse assured Senator Goldwater that section 13(c) did not disturb the NLRA's exemption of state and local governments from its requirements. *See* 109 Cong. Rec. 5674 (1963). Senator Morse also clarified that workers would not retain the right to strike after becoming employed by a state that forbade strikes by public employees. *See id.* at 5672. Despite the loss of this economic weapon, Congress did not explicitly require workers be given some other right to compensate for the loss. *See Donovan*, 767 F.2d at 953-55. In fact, the *Donovan* court suggested that it may be proper under 13(c) to allow wage disputes, which are universally acknowledged to lie at the heart of collective bargaining, *id.* at 950-51, to be resolved through "good faith" collective bargaining supported, if necessary, by non-binding mandatory, meaningful fact-finding. This indicates that Congress did not intend that the Department apply with rigidity the requirements of the NLRA when interpreting section 13(c) requirements and recognized that the transition from private workers protected by the NLRA to public employees exempt from it would necessarily entail a loss of some collective bargaining rights, including the right to bargain over a no-strike clause. Consequently, it is reasonable not to apply with rigidity to section 13(c) arrangements the rule that private employers may violate the NLRA by making "[e]ven minimal unilateral changes to terms and conditions of employment." *See* 2016 Decision, 2016 WL 4441221, at *19. Rather, section 13(c)'s purpose and context suggest that not all changes to bargaining rights and benefits accomplished through state law preclude certification.

This more lenient interpretation of the meaning of "continuation" and "preservation" provisions in section 13(c) is not inconsistent with the relevant case law. It follows the California district court's decisions. *See* 2018 Decision, 306 F. Supp. 3d at 1187 (explaining section 13(c) protects affected employees against "meaningful negative changes to rights and benefits conferred by their then-existing collective-bargaining agreements"). It also does not conflict with the D.C.

Circuit's opinion in *Donovan*. The D.C. Circuit explained Senator Morse's reference to "[m]aintaining the status quo" as usually meaning "*substantially* preserving collective bargaining rights that had been established by federal labor policy." *Donovan*, 767 F.2d at 948 (emphasis added). The D.C. Circuit therefore recognized that section 13(c) did not require the absolute preservation of all collective bargaining rights.

This interpretation is also consistent with case law recognizing that the Department's role is to ensure the arrangements are fair and equitable as opposed to ensuring the perpetuity of certain benefits or rights. Under section 13(c), the Department must certify as of the time of a pending grant application that the "protective arrangements" are "fair and equitable" under the five objectives, and, if the state were to change its law "'contrary to the policy of 13(c)'" and "'halt the flow of funds or take other appropriate action.'" *Donovan*, 767 F.2d at 948 n.9 (quoting *Local Div. 589*, 666 F.2d at 634). Only a change that is "basically unfair or inequitable" would be problematic since "Congress's general intent to secure fair arrangements does not require the implementation of any *particular* set of detailed provisions." *Local Div. 589*, 666 F.2d at 634 (emphasis added). These courts recognized that Congress granted the Department discretion to determine whether the agreement is fair and equitable, but section 13(c) does not require the Department to go beyond that role.

Application of section 13(c) in this case

The discussion above shows that section 13(c) does not compel the results the Department reached in 2013 and 2015. Instead, it shows that key statutory terms can be interpreted in different ways and that the Secretary has broad discretion to determine which fair and equitable arrangements may be necessary for "preservation of . . . benefits . . . under existing collective bargaining agreements" and "continuation of collective bargaining rights." 49 U.S.C. § 5333(b)(2)(A)&(B). As explained below, there are several reasons why the Department now determines that such arrangements exist despite PEPRA's impact on affected employees.

While PEPRA does make significant reforms to California's public employee pension system, the reforms do not substantially affect transit employees' benefits under existing collective bargaining agreements. PEPRA addresses only one substantive term of employment (pensions). PEPRA imposes few, if any, restrictions on other subjects of collective bargaining. Moreover, PEPRA does not preclude bargaining over pensions altogether, but rather caps defined benefit plans and their eligibility criteria prospectively while allowing bargaining over defined contribution plans. As attorneys representing California noted, "PEPRA does not stand as an obstacle to substantive bargaining over participation in, and contributions to, defined contribution qualified retirement plans such as a 401(k) or 457(b) plan, or other forms of deferred compensation as the parties may bargain." AR 001323. "In fact, nothing in PEPRA prohibits the negotiation of an actuarially equivalent retirement benefit to that which may have been allowable through a defined benefit pension prior to PEPRA." *Id.* Additionally, since some of PEPRA's changes to defined benefit plans only go into effect after the expiration of a collective bargaining agreement in effect on January 1, 2013, *see* Cal. Gov. Code § 7522.30(f), the law allowed time and opportunity for such negotiations. Therefore, the Department concludes that, despite PEPRA, the section 13(c) arrangements meet section 13(c)(2)'s standard

of "preservation of . . . benefits . . . under existing collective bargaining agreements." 49 U.S.C. § 5333(b)(2)(A).

PEPRA also does not impermissibly impair collective bargaining rights in violation of section 13(c)(2)'s standard of "continuation of collective bargaining rights." PEPRA does not interfere with the collective bargaining process. It leaves agencies and employees "free to negotiate around [PEPRA's] effects and within [its] restrictions." *See* 2016 Decision, 2016 WL 4441221, at *25. In fact, as the court noted, transit agencies and employees "have continued collective bargaining over other complementary pension strategies in the wake of PEPRA's enactment." *Id.* Such a determination is consistent with Congress' implicit acknowledgement that collective bargaining rights remain even if state law takes away an employee right without replacing it with an equivalent benefit. *See Donovan*, 767 F.2d at 953-55 (explaining that Congress recognized transition from private to public would result in the loss of the right to strike, but did not necessarily require employees be provided with some equivalent economic weapon).

Moreover, the Department concludes that the section 13(c) arrangements are "fair and equitable" despite PEPRA's requirements. As the court noted, even the NLRA "allows private employers to follow the dictates of economic necessity, so long as they bargain over the effects of management's decisions." 2016 Decision, 2016 WL 4441221, at *25. Section 13(c) therefore allows California some latitude to address a problem of economic necessity concerning its budget, especially given that the legislative history indicates that Congress did not intend the provision to result in a strict application of NLRA precedent and intended more flexible dealings with states. *See id.* at *24; *see also Local Div. 589*, 666 F.2d at 639 (explaining "[t]he state's 'paramount authority . . . extends to economic needs as well,'" and "the importance of allowing states to legislate freely on social and economic matters of importance to their citizens, modifying the law to meet changing needs and conditions" (quoting *Veix v. Sixth Ward Ass'n*, 310 U.S. 32, 39 (1940)).

In this instance, PEPRA was not aimed at undermining this collective bargaining system but at alleviating the state's serious financial problem of pension funding. The Department considers both PEPRA's unique purpose and its limited effect in deciding to certify the grants at issue. Since PEPRA's effect is limited to one area of collective bargaining, and that area remains open for bargaining over significant aspects of pensions, PEPRA does not prevent the parties from meeting their statutory minimum and the employee protective arrangements appear fair and equitable. Thus, the Department determines that PEPRA does not preclude certification of the grants at issue.

The Department recognizes the ATU's desire to defend the Department's 2013 and 2015 determinations not to certify the grants at issue based on PEPRA. The Department does not consider that position a sufficient reason to deny certification. Since the 2013 and 2015 determinations, the Department has changed its position in a number of ways. First, as the district court concluded, the Department previously improperly treated *Donovan* as controlling even though the law at issue in *Donovan* was materially different from PEPRA. The law in *Donovan* applied to one transit authority, was aimed at collective bargaining, and removed five subjects from the collective bargaining process. *Donovan*, 767 F.2d at 942-43. In contrast, PEPRA is a state-wide law applicable to public employees generally and is not directed to the

process of collective bargaining but rather addresses the substantive terms of employment in one respect (pensions), an area where states traditionally have latitude, and, as discussed above, it does not preclude bargaining over pensions altogether. In light of the district court's decision, and on reexamination of *Donovan*, the Department concludes that its earlier determinations should not have treated *Donovan* as controlling.

Second, the Department's earlier determinations gave insufficient consideration to terms in section 13(c), discussed above, that give discretion to the Department to interpret section 13(c)'s requirements. Third, the earlier determinations adopted definitions of statutory terms such as "continuation" and "preservation" that were not compelled by the statutory language or legislative history. As explained above and in the district court's decisions, section 13(c) grants the Secretary broad discretion to determine whether arrangements continue bargaining rights and preserve benefits even if a state law has made certain changes impacting collective bargaining rights and benefits of transit employees. *See* 2016 Decision, 2016 WL 4441221, at *20; 2018 Decision, 306 F. Supp. 3d at 1187. Fourth, the 2015 determination focused on NLRA precedents concerning the duty to bargain and preemption without sufficient consideration of UMTA's purpose and context, which indicate that the Department should not apply section 13(c) in a manner that reflexively incorporates NLRA precedent to a public sector setting.

Finally, the Department's earlier determinations gave too little weight to what the district court termed the realities of public sector collective bargaining. The district court's decisions and the statutory purpose and context of section 13(c) indicate that Congress intended the Department to exercise flexibility when accommodating state's public sector collective bargaining. The provisional purpose of Congress in enacting section 13(c) – to cushion the impact on transit employees of a change from private to public sector employment – is relevant in interpreting the scope of section 13(c)'s protections. The Department considered that purpose in more carefully examining the changes made by PEPRA to determine if there is still a sufficient continuation of rights and preservation of benefits. The Department determines that PEPRA's effects are sufficiently limited in scope and purpose so as to allow the Department to conclude the arrangements continue to exist that meet section 13(c)'s requirements for the continuation of collective bargaining rights and the preservation of rights, including continuation of pension rights and benefits under existing collective bargaining agreements.

Sincerely,

Arthur F. Rosenfeld, Director
Office of Labor-Management Standards

cc: See certifications

Attachment C

Utah Transit Authority

Benchmarking and Retirement Plan Review

September 30, 2019

AON
Empower Results®

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Executive Summary

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Empower Results®

Actuarial Certification

This report documents the results of a pension study with actuarial values as of January 1, 2019 of the Utah Transit Authority Employee Retirement Plan ("the Plan") as requested by The Utah Transit Authority ("UTA"). The information provided in this report is intended strictly for documenting values related to estimate current and future actuarially determined contributions for the plan.

Determinations for purposes other than the ones described above may be significantly different from the results in this report. Thus, the use of this report for purposes other than those expressed here may not be appropriate.

This study has been conducted in accordance with generally accepted actuarial principles and practices, including the applicable Actuarial Standards of Practice as issued by the Actuarial Standards Board. The funding results are based on our understanding of the amounts typically prepared by UTA's actuary to fund the plan.

Future actuarial measurements may differ significantly from the current measurements presented in this report due (but not limited to) to such factors as the following:

- Plan experience differing from that anticipated by the economic or demographic assumptions;
- Changes in actuarial methods or in economic or demographic assumptions;
- Increases or decreases expected as part of the natural operation of the methodology used for these measurements (such as the end of an amortization period); and
- Changes in plan provisions or applicable law.

Due to the limited scope of this report, we have not included an analysis of the potential range of such future measurements except as noted in the report.

Funded status measurements shown in this report are determined based on various measures of plan assets and liabilities. For funding purposes, plan assets are measured based on the asset valuation method described in this report. Plan liabilities are measured based on the interest rates and other assumptions summarized in the assumptions section of this report.

These funded status measurements may not be appropriate for assessing the sufficiency of plan assets to cover the estimated cost of settling the plan's benefit obligations, and funded status measurements for plan sponsor may not be appropriate for assessing the need for or the amount of future contributions.

In conducting the study, we have relied on personnel information as provided UTA and Milliman, the Plan's actuary, as of the January 1, 2019 valuation date, plan provisions as administered by UTA, and Plan assets documented by Milliman as of January 1, 2019. While we cannot verify

the accuracy of all the UTA and Milliman supplied information, the supplied information was reviewed for consistency and reasonableness. As a result of this review, we have no reason to doubt the substantial accuracy or completeness of the information and believe that it has produced appropriate results.

The actuarial assumptions and methods used in this study are described in this report. The UTA Pension Committee has selected most of the baseline economic and demographic assumptions used in the report. Aon has reviewed these assumptions and selected additional assumptions for purposes of this study. Aon provided guidance with respect to these additional assumptions, and it is our belief that the assumptions represent reasonable expectations of anticipated plan experience. The undersigned are familiar with the near-term and long-term aspects of pension valuations and collectively meet the Qualification Standards of the American Academy of Actuaries necessary to render the actuarial opinions contained herein. The information provided in this report is dependent upon various factors as documented throughout this report, which may be subject to change. Each section of this report is considered to be an integral part of the actuarial opinions.

To our knowledge, no colleague of Aon providing services to UTA has any material direct or indirect financial interest in UTA. Thus, we believe there is no relationship existing that might affect our capacity to prepare and certify this actuarial report for UTA.

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September 2019

Background and Purpose

Aon was notified in late-May that it was selected as the winning firm for Utah Transit Authority ("UTA") RFP Number 19-03026 and entered into a contract on June 18, 2019 with two key objectives:

- Benchmark retirement plan benefits provided by UTA against peers in which it competes for talent, including the state and five transit authorities.
- Conduct feasibility study of moving UTA employees into the Utah State Retirement Systems ("URS") retirement program.

This document summarizes our methodology, findings, and conclusions and is intended for the exclusive use of UTA. This report does not consider any legal implications of either changes to the UTA plan or transitions to other plans. Legal aspects of transitions are covered under a separate document "Report on Retirement Benefit" which Aon has not reviewed.

We have projected UTA's liabilities, assets and contributions under various assumptions and methods. Projections, by their nature, are not a guarantee of future results. They are intended to serve as estimates of future financial outcomes that are based on assumptions about future experience and the information available at the time of modeling.

The projections shown assume specific investment return, mortality, turnover, disability, and retirement assumptions are met. Actual results may differ due to such variables as demographic experience, the economy, stock market performance, and the regulatory environment. As such, we have provided sensitivity analysis for the key assumptions.

A complete description of the assumptions and methods used for this analysis are included in the Appendices.

The calculations included in this presentation were completed under the supervision of:

- Eric Atwater, FSA, EA
- David Kuhn, FSA, EA
- Deep Mandal, FSA, EA, CFA

The team was supported with the assistance of Ben Bedont, ASA, and Pooja Gattu.

Key Conclusions

Our detailed analysis is summarized in the main report following this Executive Summary. A summary of our findings is as follows:

- **Feasibility of Moving to the URS Tier 2 Plan:** There are differences between the UTA and URS retirement programs that will have impacts to UTA and its employees. However, many of these impacts are offsetting, which would limit the overall impacts to employee benefit amounts and cost to UTA.
  - Overall costs are expected to be slightly higher in the long-term under the URS plans than the UTA plans if assumptions are met.
  - Current UTA employees are expected to be minimally impacted with a move to the URS Hybrid Plan, unless a "hard freeze" of current UTA benefits occurs at transition.
  - An average new hire is expected to have about 4% less retirement income under the URS Hybrid Plan and 26% less under the URS Defined Contribution ("DC") Plan at age 65 than under the UTA plans.
  - A hard freeze is uncommon in the public-sector space and is primarily only used if the plan sponsor is moving to a defined contribution-only approach.
  - Regarding legal analysis around the method of transition, please see page six of the "Report on Retirement Benefit," a separate document.

- **Financial**: We looked at the current actuarial values for the UTA defined benefit plan ("DB") and projected future contributions required to fund the plans on an ongoing basis. Conclusions are:
  - The current UTA DB Plan assumptions are reasonable. We recommended two updates of the assumption for this study, updates to inflation and mortality, and prepared 20-year forecasts of the current UTA plans' costs with those new assumptions.
  - The key driver of costs for the UTA DB Plan (which is most of the overall retirement cost) is the current goal of fully funding the plan by 2034. This is still true even if UTA moves to the URS plans going forward or if near-term economic disruptions occur, positive or negative.

- **Benchmarking:** We compared the UTA plans against 5 other transit organizations (the "peers").
  - UTA's retirement benefits are at the upper end of the competitive range as compared to the peer group.
  - Some peers have changed either plan structures (moved to DC) and/or lowered benefits in the defined benefit plan for recent hires (i.e., over the last 5-10 years). Therefore, UTA's benefits for new hires are higher than its peers.
  - TriMet, DART, and RTD are clustered together, while UTA, San Diego, and Sacramento provide higher overall retirement benefits.

We have not included postretirement medical or life benefits as part of this study. We have summarized available information on the retiree medical benefits for the peer group on page 62.

We will discuss key highlights in the next sections. More detailed analysis is found in the main body of the report.

Feasibility of Moving to State Pension Plans (URS Tier 2)

The Utah Retirement Systems ("URS") offers employees two retirement options under its Tier 2 Program where the per-employee cost is set at 10%:

- A Hybrid Plan: The Hybrid Plan is composed of a Defined Benefit ("DB") and Defined Contribution ("DC") Plan, with a contribution up to 10% funding the DB plan first and any remaining contributions going toward the DC plan.

- Defined Contribution Only plan: the employee would receive an annual 10% contribution from UTA into the DC plan.

Under either URS plan, the employee may make elective contributions to their DC account. Again, the employer is contributing only 10% of payroll for either option.

Currently, the URS DB plan costs about 8.7% of pay and employees receive about 1.3% of pay contribution to the URS DC plan (using information from the most recently available actuarial valuation report, with the URS DB costs expected to trend to over 9.0% in the coming year based on a recent URS release). If the URS DB plan costs exceed 10% of payroll in a particular year, then employees are required to make up the shortfall and are not provided with a URS DC plan contribution.

If UTA were to switch employees to the URS Tier 2 Plan, then it would be slightly more costly compared with its current retirement plan over the long-term, as the URS contribution of 10.0% is slightly more than UTA's retirement plan contribution of about 9.1% of pay for future benefits (overall costs for UTA are larger when you factor in the funding of prior benefits, which are ignored for purposes of comparing the two plans on a go-forward basis). This assumes all actuarial and economic assumptions are met or if investment returns are better than assumed. Near-term costs of moving to the URS Plans depend on the method of transitioning plans.

Based on our specific scenarios, we do not project that any UTA employees participating in the Hybrid Plan will incur additional contributions over the next 20 years unless negative events occur further out in the projection timeframe, or assumptions are modified that increase the ongoing costs of the plan. Note that the URS Plan assumes a 2.5% inflation rate in its most recent actuarial valuation available (January 1, 2018) which is the maximum rate the plan provides for inflation in a given year. This assumption is higher than what we assumed in our analysis in this report (which is 2.1%).

UTA's paying down of past liabilities (i.e., benefits earned prior to our assumed URS Plan transition date of January 1, 2021) is the largest driver of costs over the next 15 years and dominates the impacts of any design changes.

In the case of a severe downturn or "recession", the URS Hybrid Plan would cost less than the UTA Plan since the impact of the significantly lower investment returns on the URS plan assets would be passed to the participating UTA employees. Our analysis assumes that additional costs or savings due to adverse or beneficial experience related to UTA plan benefits earned prior to adopting the URS benefits would be assumed by UTA and not shared with UTA employees.

Financial Impacts of Moving to URS

The table below compares the impact, in today's dollars, of entering URS plans under various approaches for current employees assuming all assumptions are met:

- UTA's costs are about $5.2 million less over the next 20 years, in today's dollars, if only new hires are put into URS Plan. However, beyond the time-period of our forecast, the move to the URS Plan will eventually be more expensive when all legacy UTA employees are replaced and the average cost per employee is 10% of payroll. This short-term savings is from our expectation that more expensive UTA DB plan (older employees with shorter career service who cost more than 10% of payroll) are expected to be replaced faster than the average employee who costs less than 10%. As can be seen in the chart below, the savings is cumulatively at $5.2 million after 10 years and is still only at $5.2 million after 20 years.
- The only way UTA saves more significant amounts over the near-term is by entering existing employees into URS plans by means of a "hard freeze" of the accrued benefit under UTA's current plan (i.e., benefit frozen as of the transition date and not increased for future salary growth). Under a "hard freeze", UTA would save about $17.0 million in today's dollars. As mentioned previously, hard freezes are not common in public sector retirement plans and are primarily used to transition to a defined contribution-only approach.

Option	Description	Cost/(Savings)[1] (in millions)		
		2023	Intermediate (0 – 10 years)	Long term (0 – 20 years)
New Hires Only	▪ Current Employees remain in UTA plan ▪ Hires after January 1, 2021 participate in URS	($0.8)	($5.2)	($5.2)[2]
All Employees Enter URS – "Soft" Freeze UTA Benefit	▪ Current Employees start participating in URS with UTA plan benefit increasing with future salary growth only ("soft freeze") ▪ Hires after January 1, 2021 participate in URS	$0.8	$5.9	$8.0
All Employees Enter URS - "Hard" Freeze UTA Benefit	▪ Current Employees start participating in URS with UTA plan benefit frozen as of January 1, 2021 ("hard freeze") ▪ Hires after January 1, 2021 participate in URS	($1.2)	($9.8)	($16.8)

[1] Measured based on reduction in cash contributions; Immediate impact savings based on reduction in ADC. Value in today's dollars (i.e., present value) based on 4.5% cost of capital.

[2] The transition to the URS Plan will eventually becomes a net cost to UTA in the out years when all legacy UTA employees have been replaced and the full cost is 10% of payroll.

If a transition occurred, we would expect that employees would be allowed to make a one-time election to join either the URS Hybrid or DC Only plan; at the transition date for UTA employees, and at hire for future UTA employees. For purposes of this analysis, we assumed all employees choose the Hybrid. Due to the fixed 10% cost for URS plans, we expect this assumption to have no or little impact on the analysis.

For the legal analysis regarding method of transition, see page six of the "Report on Retirement Benefit," a separate document.

Employee Impacts of Moving to URS Plans

We were requested to analyze the differences provided by the UTA and URS retirement plans based on different job classifications at UTA. The impact by job classifications varies slightly, but overall employees would experience roughly similar retirement income under URS Hybrid Plan and less under URS DC Only Plan if all assumptions are met. Key aspects to note:

- Though the URS Hybrid Plan has a lower multiplier (1.5% vs 2.0% for UTA), it has an automatic cost-of-living-adjustment (COLA) that makes the benefit significantly more valuable than a level annuity. See example of this impact in the main body of the report.

- Under the "Recession" scenarios, employees would be better off under UTA's plan since the URS Hybrid would require higher employee contributions.

- Based on our review of the URS actuarial report, URS assumes the maximum COLA (2.5%) will be paid and reflects that in the determination of the defined benefit cost (which reduces the defined contribution amount paid to the employee). If less than 2.5% inflation is realized, the employee will have received less than the full 10% per year value due to the pricing of the cost of living provision.

- The UTA plan has earlier retirement ages available (age 55) and provides subsidized early retirement reductions (25% at age 60 vs. approximately 37% for URS). However, URS allows full retirement after 35 years of service versus 37.5 years for UTA's Plan.

For the average current employee (age 48 with 10 years of service), UTA's retirement plan delivers about 3% more retirement income replacement than the URS Hybrid Plan and about 15% more retirement income replacement than the URS DC-Only plan at 65 for the same job classification under various scenarios.

A replacement ratio measures the amount of pre-retirement income replaced by retirement benefits, adjusted for inflation. It typically includes sources of retirement income from Social Security, Defined Benefit, Defined Contribution and Personal Savings. It allows an apples-to-apples comparison of DB and DC plans and provides a measure of the standard of living one can expect to maintain in retirement.

For this study, we are only showing the benefits applicable to amounts paid for by the employers. This shifts the focus to employer comparability and provides less information on employee retirement income adequacy, which would employee sources. Employees have the opportunity to make their own contributions in the plans we reviewed, such as an elective contribution to a 401(k) plan or a 457 plan (or in some cases the employees are required to contribute to a defined benefit plan). We have not shown the value of the employee-paid benefits in this study, although it is understood that employees have a responsibility to contribute voluntarily to accumulate the necessary funds to reach their retirement goals.

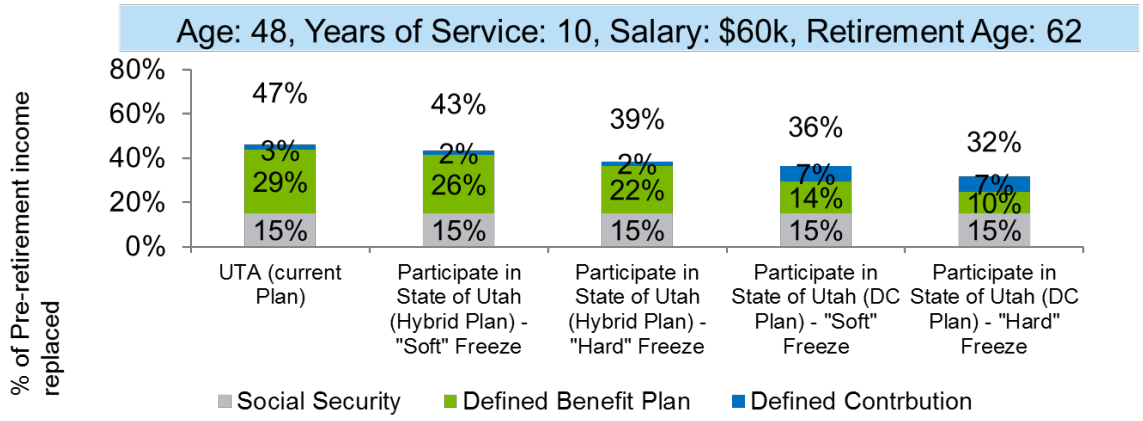
Note that the Social Security amounts shown are for the employer-paid portion of the benefit (50% of the full value). Also, we have calculated the Social Security benefit based on an average UTA employee's compensation. Therefore, our Social Security amounts shown in our charts would overstate the value provided to higher-paid employees, especially for those earning above the Social Security wage base ($132,900 in 2019).

See the main report for a more detailed description of replacement ratios.

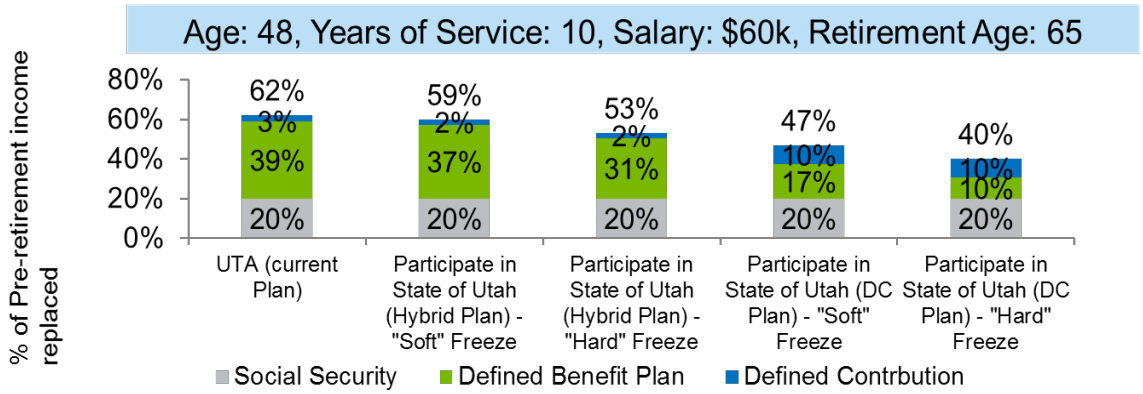
Employee Impact (Existing Hire)

The following exhibits compare the pre-retirement income replaced by employer-paid benefit assuming the average employee is transferred to the Utah Retirement Systems ("URS") under various scenarios.

We have prepared exhibits for retirement at age 62 and age 65.



Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.



Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

The UTA retirement plan delivers about 4% more retirement income replacement at age 62 and 3% more at 65 than the URS Hybrid plan (under the “Soft” freeze) and about 11% more retirement income replacement at age 62 and 15% more at age 65 than the URS DC plan (under the “Soft” freeze) for the same job classification under various scenarios.

If the UTA accrued benefit is frozen, then the replacement ratios are about 4% less for the average employee at age 62 and 6% to 7% at age 65.

Based on the current economic environment, we are showing that the URS DC-only Plan (and in fact any DC focused plan) are not delivering the same potential income replacement as defined benefit plans. This is for two reasons:

- Our assumptions reflect that the average employee will likely not achieve the same long-term investment performance as defined benefit plan investments (5.5% for the employee and 7.0% for defined benefit plans in our assumptions).
- The cost to buy an annuity for a retiring employee to achieve similar longevity protection provided by a defined benefit plan annuity in the current economic environment is very expensive (represented by a 2.6% interest rate embedded in the pricing of the annuity product).

Please see *Feasibility of State Plan* section for comparisons of various positions at different retirement ages and Appendices for assumptions and methods used to develop replacement ratios.

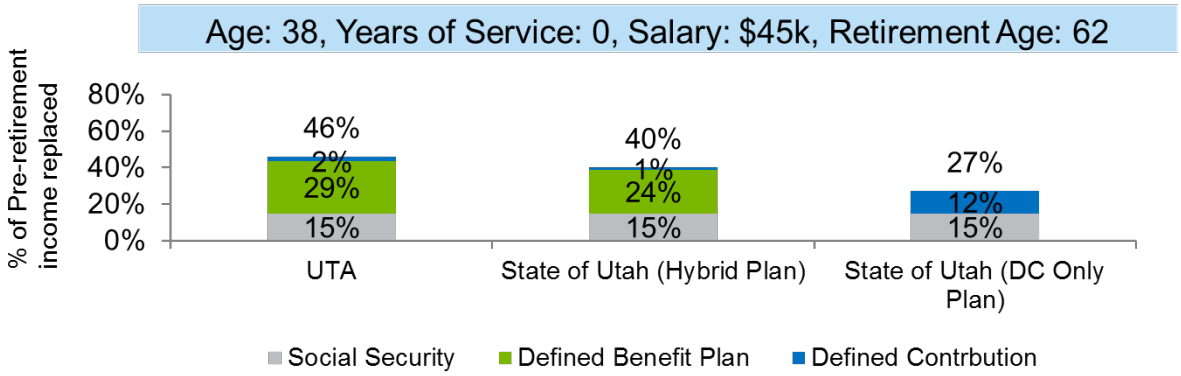
Employee Impact (New Hire)

Similar to the prior examples, we also compare the pre-retirement income replaced by UTA’s plan with that of the URS plan for the average new hire who works a full career until age 62 or age 65 retirement.

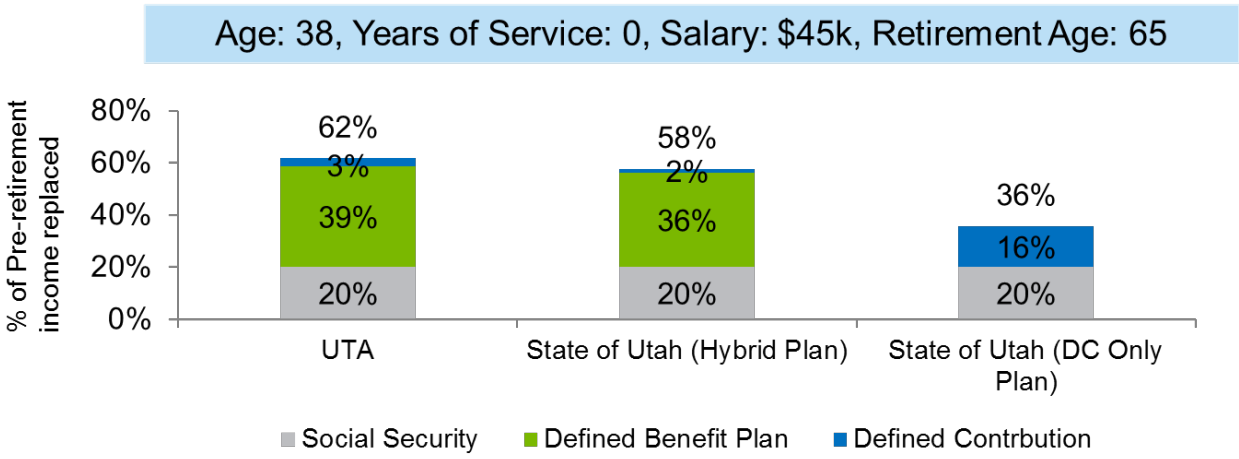
- The UTA plans deliver about 6% more retirement income replacement at age 62 and 4% more at age 65 than the URS Hybrid plan and about 19% more retirement income

replacement at age 62 and 26% at age 65 than the URS DC plan for the same job classification.

- With no blending of URS and UTA benefit features for new hires, the new employee comes a little below the prior “soft” freeze UTA legacy employee.



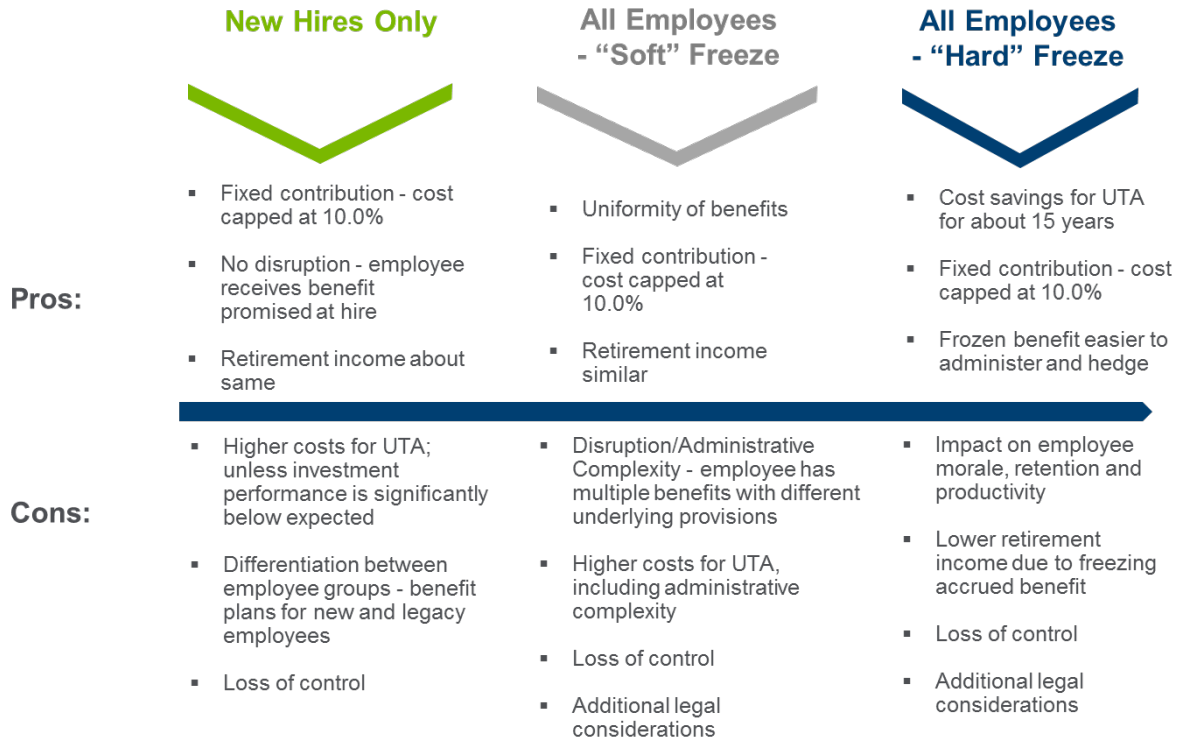
Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.



Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

Please see *Feasibility of State Plan* section for comparisons of various positions at different retirement ages and *Appendices* for assumptions and methods used to develop replacement ratios.

There are many considerations in moving to the URS plans. The following exhibit provides a high-level summary of some key advantages and disadvantages:



Financial Analysis of UTA Retirement Plans

Aon collected census and financial data directly from the plan's actuary, Milliman, and performed its own independent analysis for this study. We conducted a full replication of the January 1, 2019 results and were able to match to within 1%.

Based on our high-level review, the assumptions in the January 1, 2019 valuation were reasonable based on our knowledge of the plan. Aon developed a set of "modeling" assumptions to be used in its forecast. The only difference between the "modeling" and valuation assumptions is the use of the latest Society of Actuaries Public Sector mortality table, with mortality improvement scale MP-2018. We also lowered the underlying inflation assumption to 2.1% but did not change any other assumption influenced by inflation (e.g., we kept the long-term salary increase at 3.4%).

The impact of the mortality change increased the liability about 1.6% and the Actuarially Determined Contribution ("ADC") about 2% as of January 1, 2019.

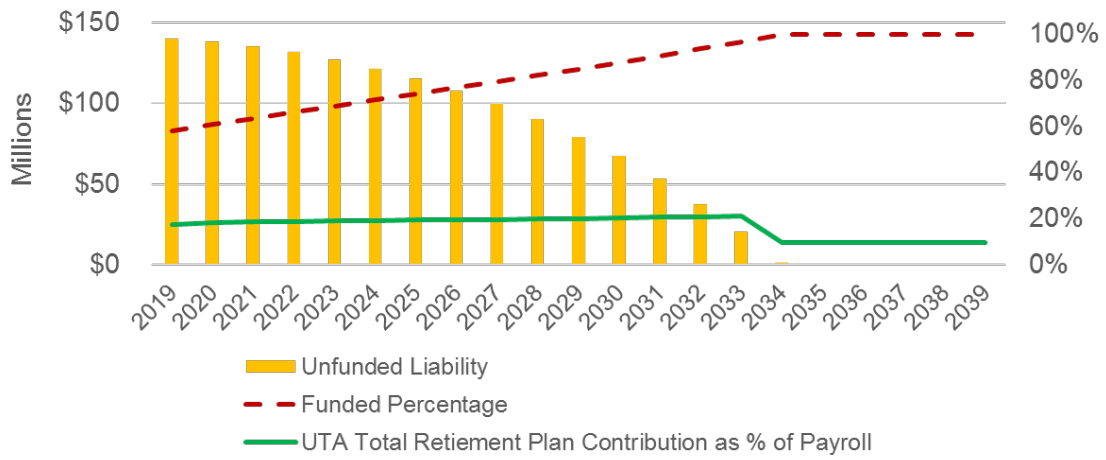
UTA's funding policy is to be fully funded by January 1, 2034 (i.e., 15-year closed) using an increasing (i.e. level-percent-of-payroll) amortization method. Thus, any deviations from expected will result in higher or lower future contributions over the 15-year period.

The UTA Defined Benefit ("DB") plan is expected to cost about 16% - 20% of payroll for 15 years while the unfunded liability is paid down. The DB cost for new hires and future accruals is about 8% of total payroll (note the Milliman report will show this amount based on an adjusted payroll) and will be UTA's cost in 15 years if all assumptions are met.

The UTA Defined Contribution ("DC") plan, which is a match on a Section 457 plan deferral, costs UTA about 1.1% of covered payroll. **Thus, UTA's aggregate cost for the DB and DC plan is slightly under 10% of payroll per year in 15 years if all assumptions are met.**

The following exhibit shows the Actuarially Determined Contribution ("ADC") and projected funded status if all assumptions are met.

- The impact of investment returns that are 100 basis points lower than expected, or about 6.0% per annum, results in contributions that are about 2.0% of payroll per year higher over the next 20 years. Conversely, if investment returns are 100 basis points higher than assumed, contributions would be about 2.0% of payroll per year less.
- The 457 Plan match is approximately an additional 1.1% of payroll included in these annual retirement costs.



See Financial Modeling section of the main report for additional scenarios and sensitivity of various assumptions.

Benchmarking of UTA against other Transit Organizations

We compared the retirement benefits provided by UTA against the following peers:

- TriMet (Portland, Oregon)
- Dallas Area Rapid Transit ("DART" - Dallas, Texas)
- Regional Transit District ("RTD" - Denver, Colorado)
- San Diego, California
- Sacramento, California

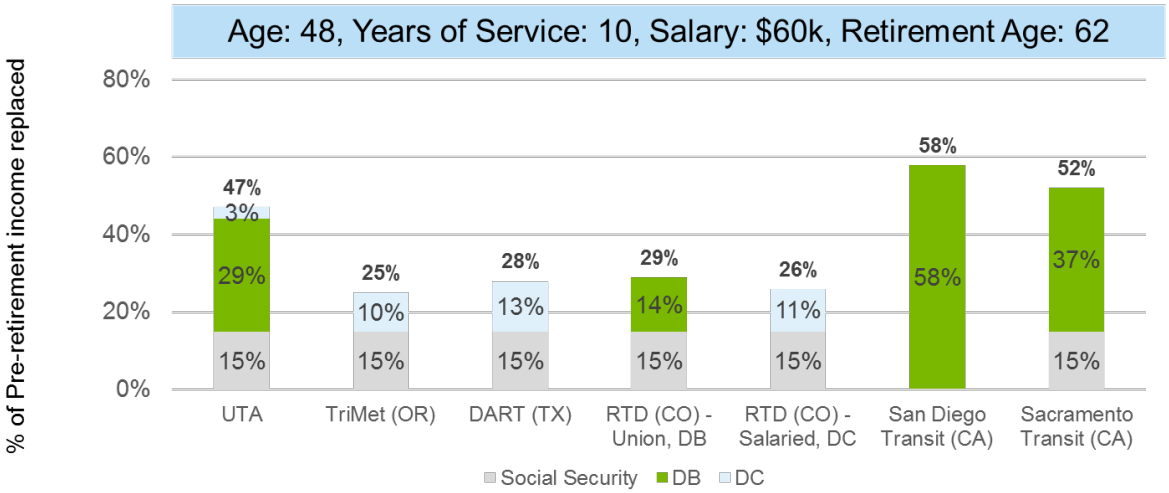
We utilized retirement income replacement ratios ("replacement ratios") of employer-paid for benefits, as described earlier, to compare competitiveness of retirement benefits offered.

UTA's retirement benefits are at the **upper end of the competitive range** with its transit peers. Due to changes in retirement programs for several of the peers, we have separated our analysis between new hires and "legacy" employees (i.e., employees with over 10+ years of service). The retirement benefits that UTA provides to "legacy" employees ranks near the top, slightly trailing only Sacramento and San Diego. The rest of the peers all provide similar retirement income but significantly less than the top three.

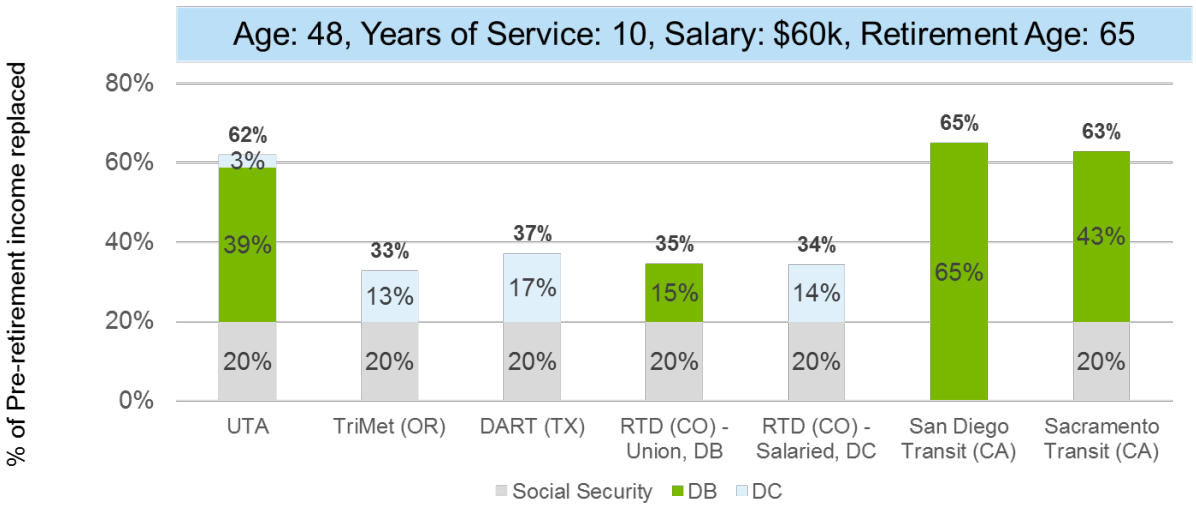
Most of the peers have lowered retirement benefits for new hires, while UTA has not. Thus, UTA's retirement benefits for new hires are the highest compared to its peers.

Given the variety of factors (assumptions, funding policy and governance) that go into developing the annual cost and funded status, we do not see these factors as a measure of competitiveness. However, we have provided financial information in this section for illustrative purposes.

The following exhibits compare the pre-retirement income replaced by the entity's employer-paid portion of the retirement plans for the average employee currently employed with UTA at age 62 or age 65 retirement. The UTA retirement plan is at the upper end of competitive range with its peers for "legacy" employees at all retirement ages.

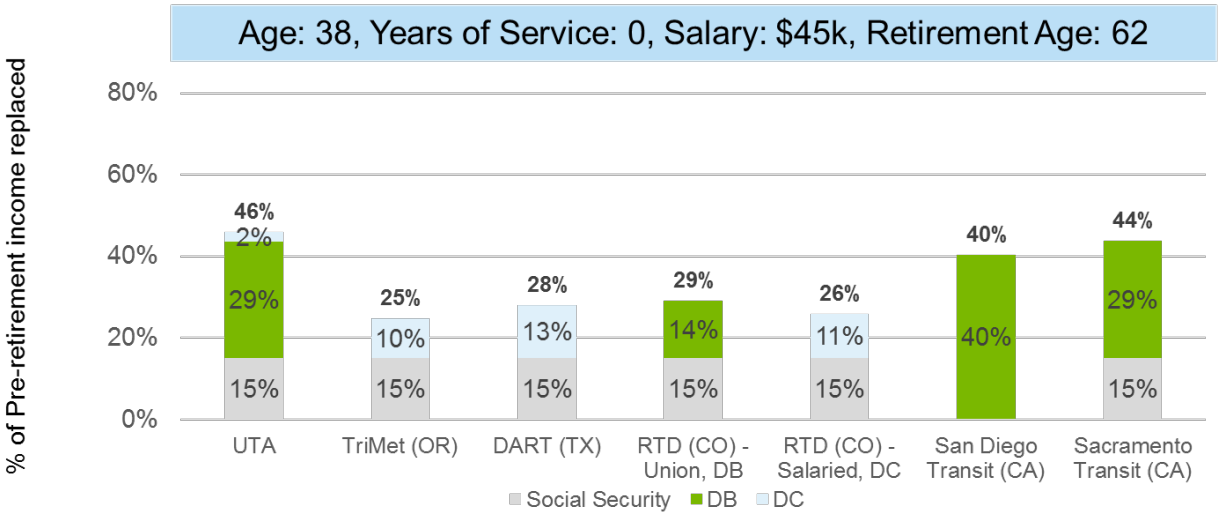


Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.



Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

The following exhibits compare the pre-retirement income replaced by the entity's employer-paid portion of the retirement plans for the average new hire who works a full career until age 62 or age 65 retirement. The UTA's retirement plan provides the most retirement income with its peers for newer (i.e., 2009 and thereafter) hired employees at all retirement ages.



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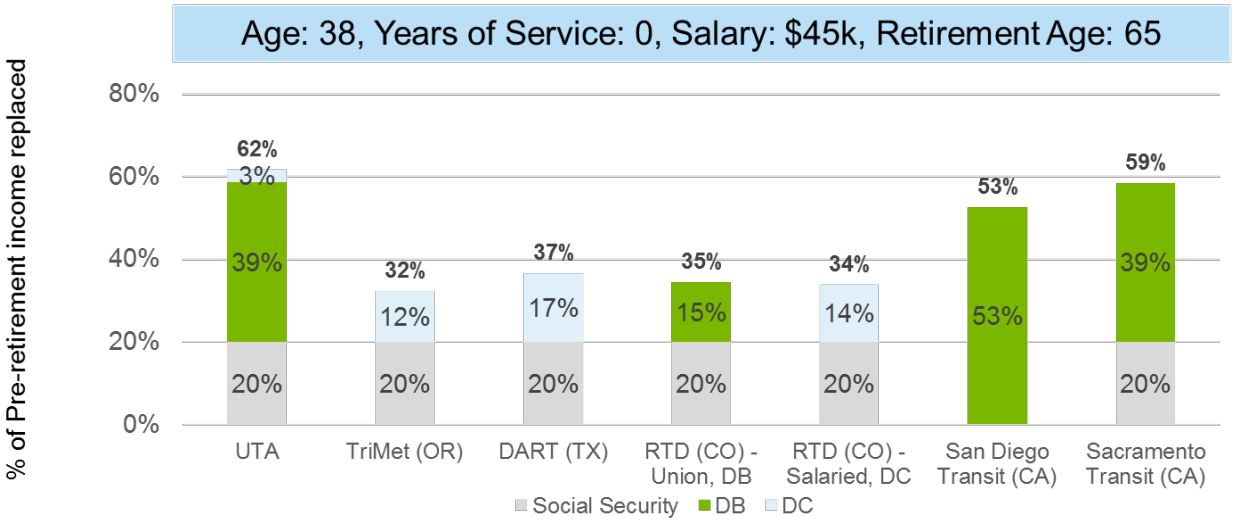


Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

Please see Benchmarking section for additional comparisons and Appendices for assumptions and methods used to develop replacement ratios

We have also reviewed the overall retirement related financial information from each of the comparator plans from the recently available Comprehensive Annual Financial Reports ("CAFRs"). The following table summarizes key financial information related to the retirement plan for UTA's peers that offer DB plans. We consider the information illustrative and do not consider it to be a true measure of competitiveness given the various practices in governance, funding policy and assumptions. However, UTA's cost and unfunded liabilities are lower than most of its peers.

Please note that amounts are from the most recent CAFRs and may not reflect the most current information shown in the 2019 actuarial valuation reports.

	Total Payroll	Actuarial Accrued Liability	Market Value of Assets	Unfunded Liability		Funded Percentage	Discount Rate	Effective Amortization Period	Actuarially Determined Contribution ("ADC")	
				Amount	as % of Payroll				Amount	as % of Payroll
UTA	$132.5	$310.0	$204.5	$105.5	80%	66.0%	7.00%	15	$18.9	14.3%
TriMet (OR)	$182.8									
DART (TX)	$249.9									
RTD (CO)	$135.6	$463.8	$222.7	$241.1	178%	48.0%	7.00%	30	$21.1	15.6%
San Diego Transit (CA)	$27.0	$300.3	$166.2	$125.4	464%	55.4%	7.00%	15	$15.9	59%
Sacramento Transit (CA)	$31.6	$177.9	$133.2	$44.7	141.5%	74.9%	7.25%	15	$7.9	25%

Since some plans only provide defined contribution plans, we have also provided a summary of the defined benefit plus defined contribution plan amounts.

		Defined Benefit Actuarially Determined Contribution ("ADC")		Defined Contribution		Total	
	Total Payroll	Amount	as % of Payroll	Amount	as % of Payroll	Amount	as % of Payroll
UTA	$132.5	$18.9	14.3%	$1.6	1.2%	$20.5	15.5%
TriMet (OR)	$182.8			$7.5	4.1%	$7.5	4.1%
DART (TX)	$249.9			$22.8	9.1%	$22.8	9.1%
RTD (CO)	$135.6	$21.1	15.6%	$4.2	3.1%	$25.3	18.7%
San Diego Transit (CA)	$27.0	$15.9	59%			$15.9	59%
Sacramento Transit (CA)	$31.6	$7.9	25%			$7.9	25%

Main Report

- Section I: Feasibility of State Plan
  - Financial Impact
  - Impact of Various Job Classifications

- Section II: Financial Modeling
  - Methodology
  - Forecast

- Section III: Benchmarking
  - Methodology
  - Retirement Income Comparison

- Appendices
  - Assumptions and Methods
  - Detailed Peer Plan Provisions
  - Retirement Income Comparisons to State Plans for Individual Job Classifications

Section I: Feasibility of State Plan

Methodology—Overview

- We collected and reviewed retirement plan information on the State of Utah Retirement Systems ("URS")
  - Benefit provisions as described in the January 1, 2018 valuation report for the Tier 2 Hybrid and summary information regarding the Tier 2 defined contribution plan
  - Three options were assumed to transition to the URS Plans at January 1, 2021:
    - **Close Plan to New Hires ("New Hires Only" enter URS):** UTA provisions continue for those employees hired prior to January 1, 2021. All new hires after January 1, 2021 earn URS Tier 2 benefits (DB or DC)
    - **Enter URS - Soft-Freeze**: UTA benefits freeze benefit service effective January 1, 2021, although benefit continues to be indexed with pay increases, all UTA employees earn URS Tier 2 benefits thereafter (DB or DC) on future service
    - **Enter URS - Hard Freeze UTA benefit**: UTA benefits freeze effective January 1, 2021; all UTA employees earn URS Tier 2 benefits thereafter (DB or DC) on future service
    - For legal considerations around the method of transition, please see page six of the "Report on Retirement Benefit," a separate document.
- For this analysis, note the following pricing considerations:
  - We have allowed for continued service accruals for early retirement eligibility on the UTA benefits while covered by the URS provisions. This may be optional and should be considered in any final design decisions (subject to the opinion of the reviewing attorneys).
  - For price comparisons, we have maintained the UTA funding policy of reaching 100% funded status as of January 1, 2034 for the UTA-related benefits earned prior to 2021.
  - The URS 10% employer cost cap does **not** apply to liabilities earned under the UTA Plan prior to 2021 and related costs are charged directly to UTA. Only go-forward URS benefit-related liabilities are subject to the 10% cap.
  - Additional design approaches could grandfather subgroups of the current UTA population (e.g., those who are age 55 and have 10 years of service) in the UTA provisions and move the remaining employees into the URS provisions
- See *Appendices* for detailed assumptions and methods.

Design Comparison of Key Provisions

UTA Provisions

DB

- 2%/year of service x final average 5 pay
- Retirement at 65 or 37.5 years of service
- Early retirement at age 55 with 5 years of service
  - Subsidized benefits for early retirement
- Lump sum options
- No employee required contribution

DC

- Match 2/3rd of employee deferral, max 2% of compensation

URS Provisions (Tier 2)

Hybrid (Choice 1)

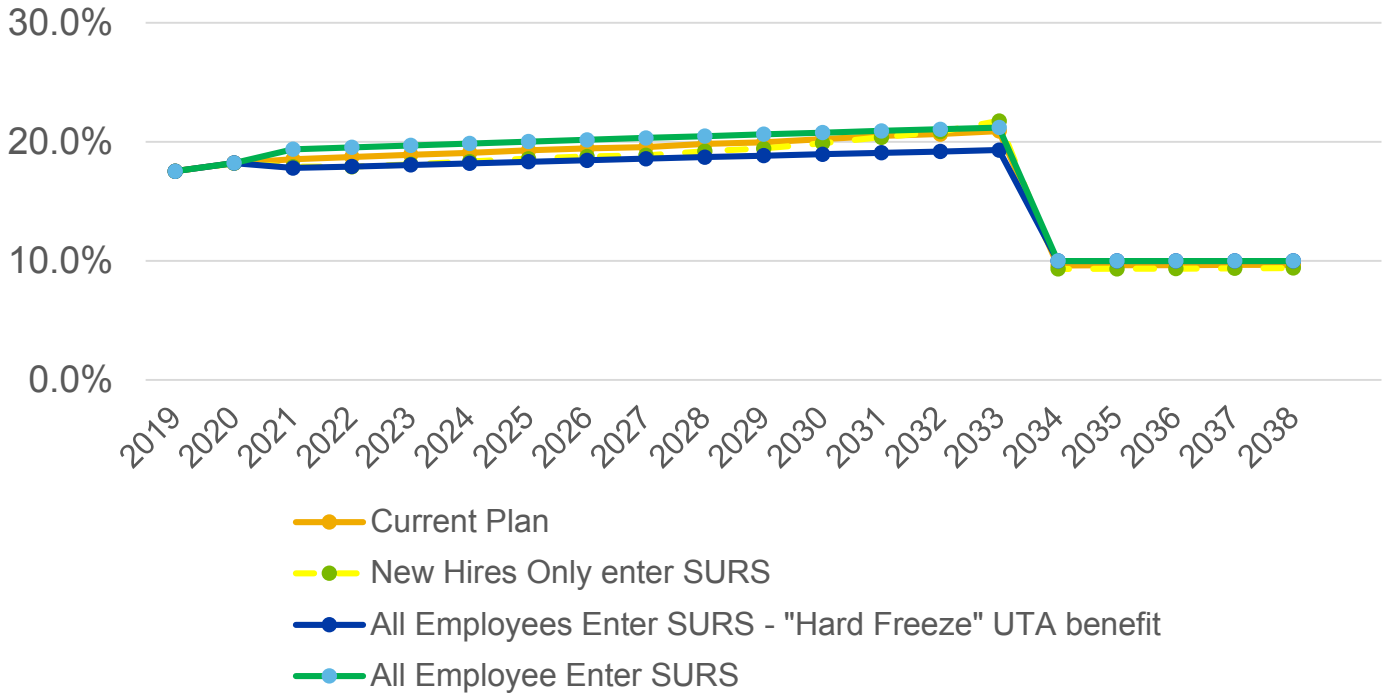
- DB: 1.5%/year of service x final average 5 pay
- DB: Retirement at 65 or 35 years of service
- DB: Early retirement at age 60 with 20 years of service or age 62 with 10 years of service
  - Actuarial equivalent benefits for early retirement
- DB: Cost of living up to 2.5% on initial retiree benefit
- DB: Required employee contribution if actuarial cost is over 10%
- DC: Residual contribution if actuarial cost is below 10% (currently about 1%)

DC Only (Choice 2)

- 10% employer contribution

Contribution Impact—Entering State Plan

- The following shows the impact on the Actuarially Determined Contribution (“ADC”) if UTA were to enter the Utah Retirement Systems (“URS) under the baseline assumptions:
  - Hard freeze shows the most immediate savings while the soft freeze is the most expense.
  - Costs fall to long term cost in 2034 when prior UTA benefits are fully funded
  - Long-term costs approach 10%/year in the URS transition options in the out years.
  - See *Appendices* for complete assumptions and methods



Note: Costs include any defined contribution plan costs

Assumption Considerations to Reflect State Plan Transition

There are several key differences between the URS and UTA pension plans. Certain assumptions were made regarding behavior for employees with a frozen UTA benefit. These behaviors will also be impacted by any final design options for the transition into the URS plan.

Feature	Description	Pricing Assumption
Lump Sum	▪ UTA allows lump sum option ▪ URS does not have a lump sum option	While a lump sum on the frozen benefit may be preserved, we assume that a partial lump sum is not elected and only annuity options are chosen prospectively
Retirement Eligibility	▪ UTA provides subsidized benefits prior to age 65, as early as age 55 ▪ For URS, with less than 35 years of service, retirement cannot start until at least age 60	While two benefit commencement dates could be possible with the frozen UTA and URS service-related benefits, we assumed benefits will not be commenced until eligibility requirements under both plans are met. We adjusted the retirement assumption to reflect this inability to retire at certain ages
Cost of Living Increase	▪ URS provides an annual cost of living increase on the retirement benefit ▪ UTA does not provide cost of living increase	Only the benefit related to URS service will receive a cost of living increase
Disability Benefit	▪ URS provides special disability benefits if member is covered by LTD benefit protection contract	We have assumed UTA members will not be covered by a LTD benefit protection contract.

Other Cost Considerations

- Costs are based on data and assets as of January 1, 2019
- Assets have recovered significantly year-to-date after the 4th quarter downturn in 2018
  - Cost levels in this report could be reduced if asset performance is maintained through year-end
- URS Hybrid Plan has a fixed level of annual employer contributions of 10%
  - Employer contributes annual cost plus an amortization of the unfunded liability to defined benefit program. If amount is less than 10% of payroll, then a contribution of the difference is paid to the employee's defined contribution account
    - For example, the preliminary Tier 2 DB Rate for Fiscal Year 2020-2021 is 9.11%, leaving 0.89% to be contributed to the DC plan
  - If annual contribution rate is greater than 10%, then the employee will pay the amount over 10%. Therefore, long-term investment and demographic risks are borne by the employee
  - We have assumed the liabilities at 2021 and future gains and losses on these pre-2021 service related amounts would be charged directly to UTA via an amortization until 2034
    - i.e., these costs would not impact the 10% cap
    - Gains and losses on URS-service related liabilities are amortized in a 20-year open amortization, which does impact the 10% cap
- For our scenarios, we have also assumed all employees elect the Hybrid program

Pros and Cons of Entering State Plan

	New Hires Only	All Employees - "Soft" Freeze	All Employees - "Hard" Freeze
Pros:	▪ Fixed contribution - cost capped at 10.0% ▪ No disruption - employee receives benefit promised at hire ▪ Retirement income about same	▪ Uniformity of benefits ▪ Fixed contribution - cost capped at 10.0% ▪ Retirement income similar	▪ Cost savings for UTA for about 15 years ▪ Fixed contribution - cost capped at 10.0% ▪ Frozen benefit easier to administer and hedge
Cons:	▪ Higher costs for UTA; unless investment performance is significantly below expected ▪ Differentiation between employee groups - benefit plans for new and legacy employees ▪ Loss of control	▪ Disruption/Administrative Complexity - employee has multiple benefits with different underlying provisions ▪ Higher costs for UTA, including administrative complexity ▪ Loss of control ▪ Additional legal considerations	▪ Impact on employee morale, retention and productivity ▪ Lower retirement income due to freezing accrued benefit ▪ Loss of control ▪ Additional legal considerations

Job Position Benchmarking

- The following slides demonstrate how various individuals in different job categories and career progressions would be impacted by moving from the UTA retirement plans to the URS Tier 2 Plans
- Data was selected from the January 1, 2019 valuation data and represent average employees from within that job category and the selected age/years of service level (see next page)
- The following benefits are compared at retirement ages 60, 62, and 65 (and the employee is assumed to continue employment from today until the retirement date):
  - UTA Plan and 457 ongoing
  - Transition to the URS Tier 2 Hybrid Plan under the soft freeze approach effective 2021
  - Transition to the URS Tier 2 Defined Contribution program effective 2021
  - The hard freeze scenario is not shown on the chart but commentary on the amount of additional replacement ratio reduction is provided on each slide
- Replacement ratios are showing the benefits applicable to amounts paid by the employers. We have not shown the value of the employee-paid benefits in this study, although it is understood that employees have a responsibility to contribute at least voluntarily to accumulate the necessary funds to reach their retirement goals.
- Replacement ratios of are adjusted for inflation. I.e., the value from a plan that does not provide cost of living increases on the retirement benefit is reduced to reflect that its replacement value is not protected from inflation increases
- Social Security amounts shown in our charts are overstated for higher-paid employees, especially for those earning above the Social Security wage base ($132,900 in 2019).
- See *Appendices* for detailed assumptions and methods.

Methodology—Replacement Ratios

- **What is a replacement ratio?**
  - The ratio of annual retirement income to the final year of pay
  - Adjusted to keep pace with inflation; DB plans without a cost-of-living-adjustment ("COLA") will see a lower replacement ratio than multiplier times years of service

- **Sources of retirement income included in replacement ratios**
  - Social Security benefits
  - Employer contributes 6.2%;
    - Includes automatic cost-of-living-adjustment ("COLA");
    - Replaces about 15% of pay at Age 62; increases to about 20% at Age 65 retirement
  - Employer-provided benefits
    - Defined benefit pension
      - Employer portion: remainder of accrued benefit
    - Defined contribution
      - Employer portion: benefit attributed to match or automatic contributions

- **Benefits earned from employee-paid benefits are not shown in this study**

Job Position Profiles

- We calculated retirement income provided under the UTA and URS plans for the following job classifications. The average age and service shown for each classification is based on the census data provided by the plan's actuary as of January 1, 2019

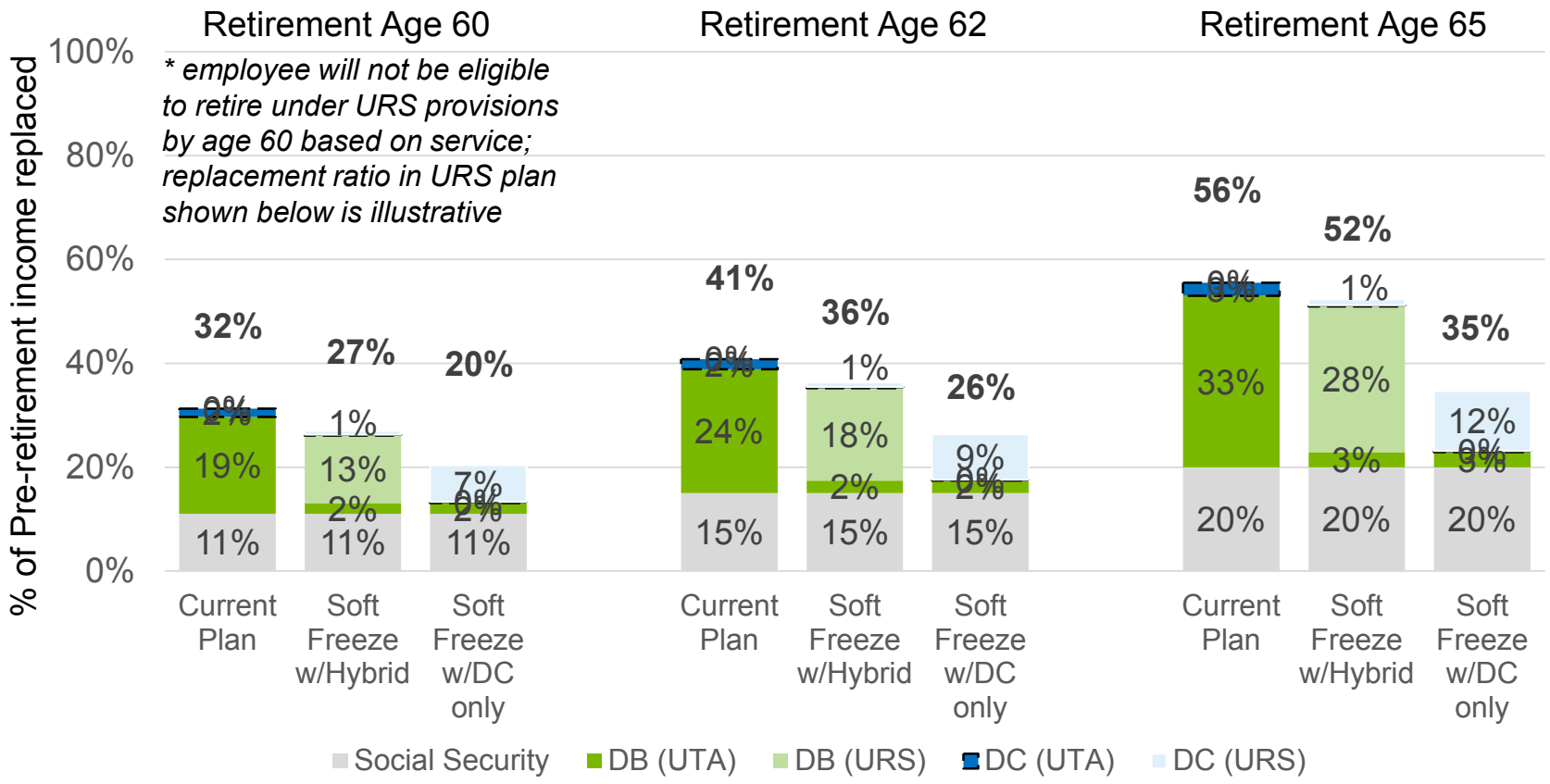
Age/Service/Salary				
Position	**New Hire**	**Early Career**	**MidCareer**	**Late Career**
Bus/Train Operator	42 / 0 / $39,000	28 / 2 / $41,000	43 / 11 / $55,000	58 / 22 / $55,000
Office Staff	39 / 0 / $56,000	33 / 3 / $57,000	43 / 12 / $67,000	57 / 22 / $75,000
Technicians/Mechanics	36 / 0 / $51,000	28 / 2 / $52,000	43 / 17 / $65,000	57 / 21 / $80,000
Cleaners/Security/Transit Police	39 / 0 / $38,000	22 / 1 / $34,000	48 / 17 / $64,000	58 / 29 / $58,000
Management	43 / 0 / $102,000	39 / 7 / $90,000	48 / 11 / $123,000	53 / 21 / $136,000

Feasibility of State Plan—Employee Impact Summary

- Current UTA Plan and the soft freeze with transition to the URS Hybrid Plan will provide about the a comparable level of retirement income at age 65 in most cases, across all job classifications
- Current UTA Plan generally provides equal or better retirement income than URS options at all retirements used in this study
  - UTA currently provides subsidized early retirement reductions prior to age 65
- Both the current plan and the soft freeze/URS Hybrid Plan combination provide better retirement income than the soft freeze/URS DC Plan combination across all job classifications
  - This is the impact of the low interest rate environment on the private annuity marketplace. Very expensive to buy annuity protection
  - The DB plan can invest over the long-term to achieve higher return on its assets than an typical individual
- Hard freeze option with transition to URS provides less retirement income compared to the soft freeze option, and the reduction in retirement income is more for late career hires and at higher retirement ages
  - An employee with a final average pay benefit formula can accrue significant value through salary increases during the years just prior to retirement. The hard freeze cuts off the increases on the UTA benefit.
  - Hard freezes are primarily only used to transition to a defined contribution-only approach and are not as commonly used in public sector plan transitions
- See *Appendices* for the individual replacement ratio charts by job classification

Feasibility of State Plan—Employee Impact
(Bus/Train Operators–883)

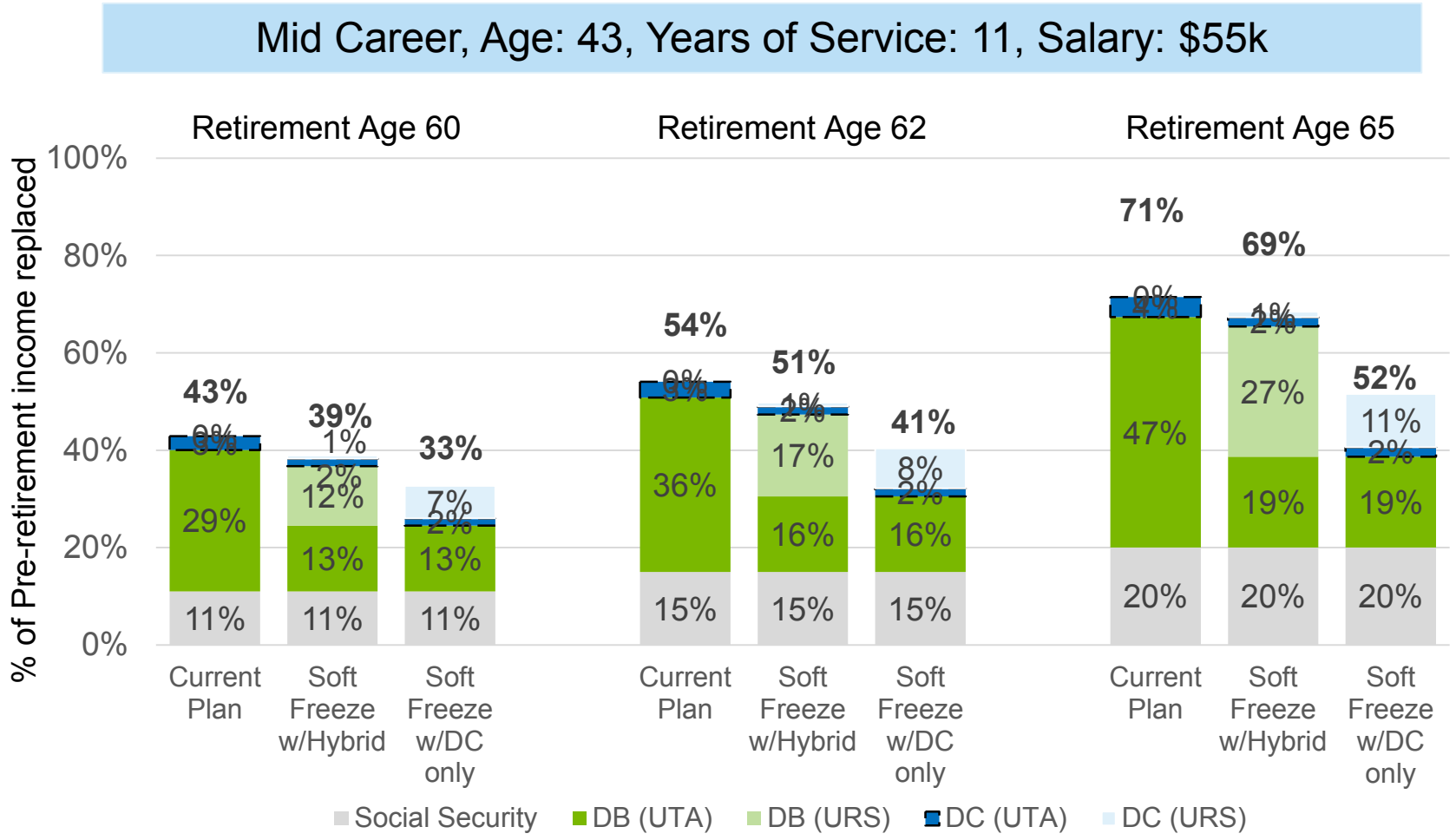
Average New Hire, Age: 42, Years of Service: 0, Salary: $39k



Hard freeze will replace 1 – 1.5% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

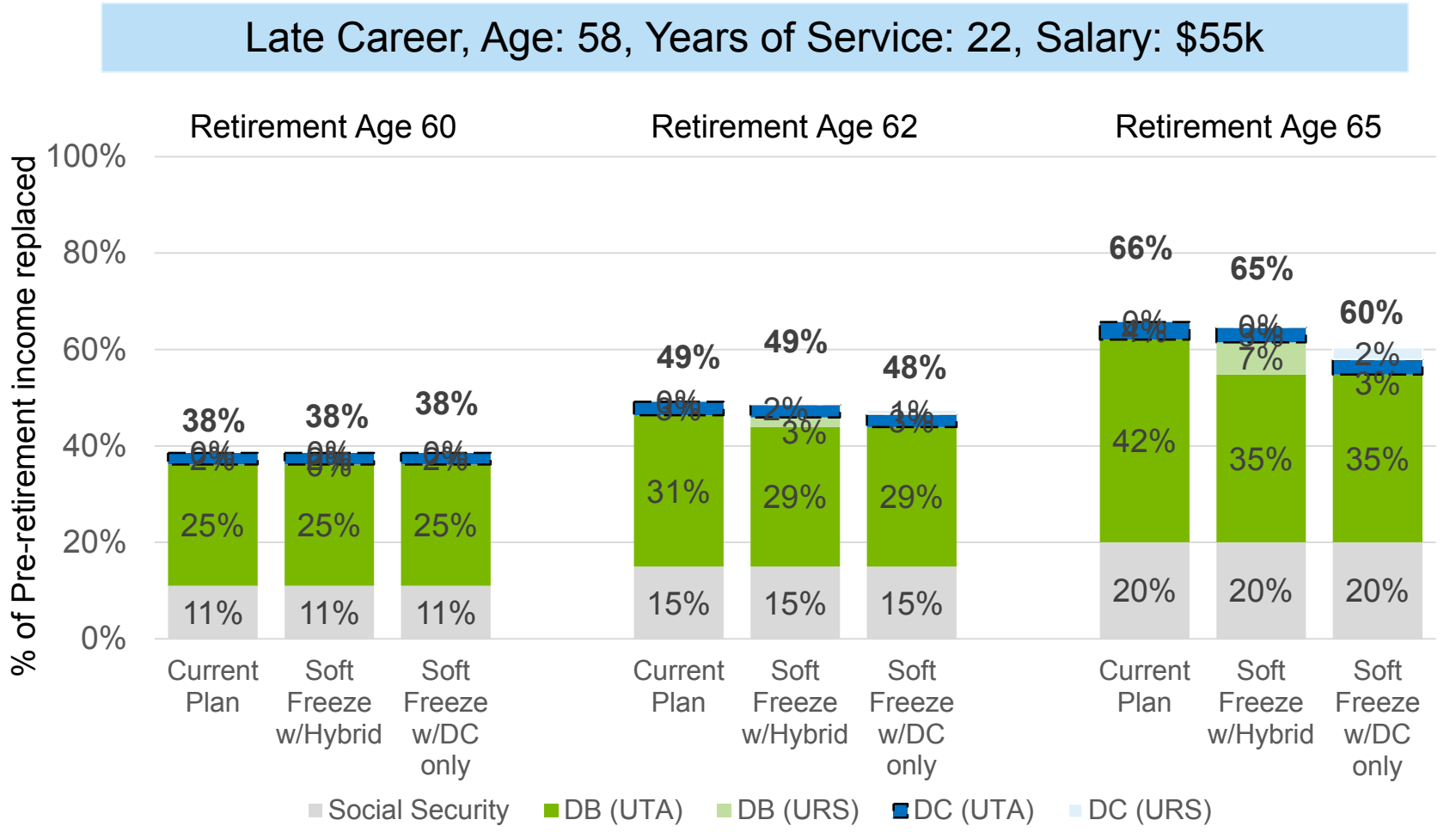
Feasibility of State Plan—Employee Impact
(Bus/Train Operators–883)



Hard freeze will replace 5.3 – 9.1% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

Feasibility of State Plan—Employee Impact
(Bus/Train Operators–883)

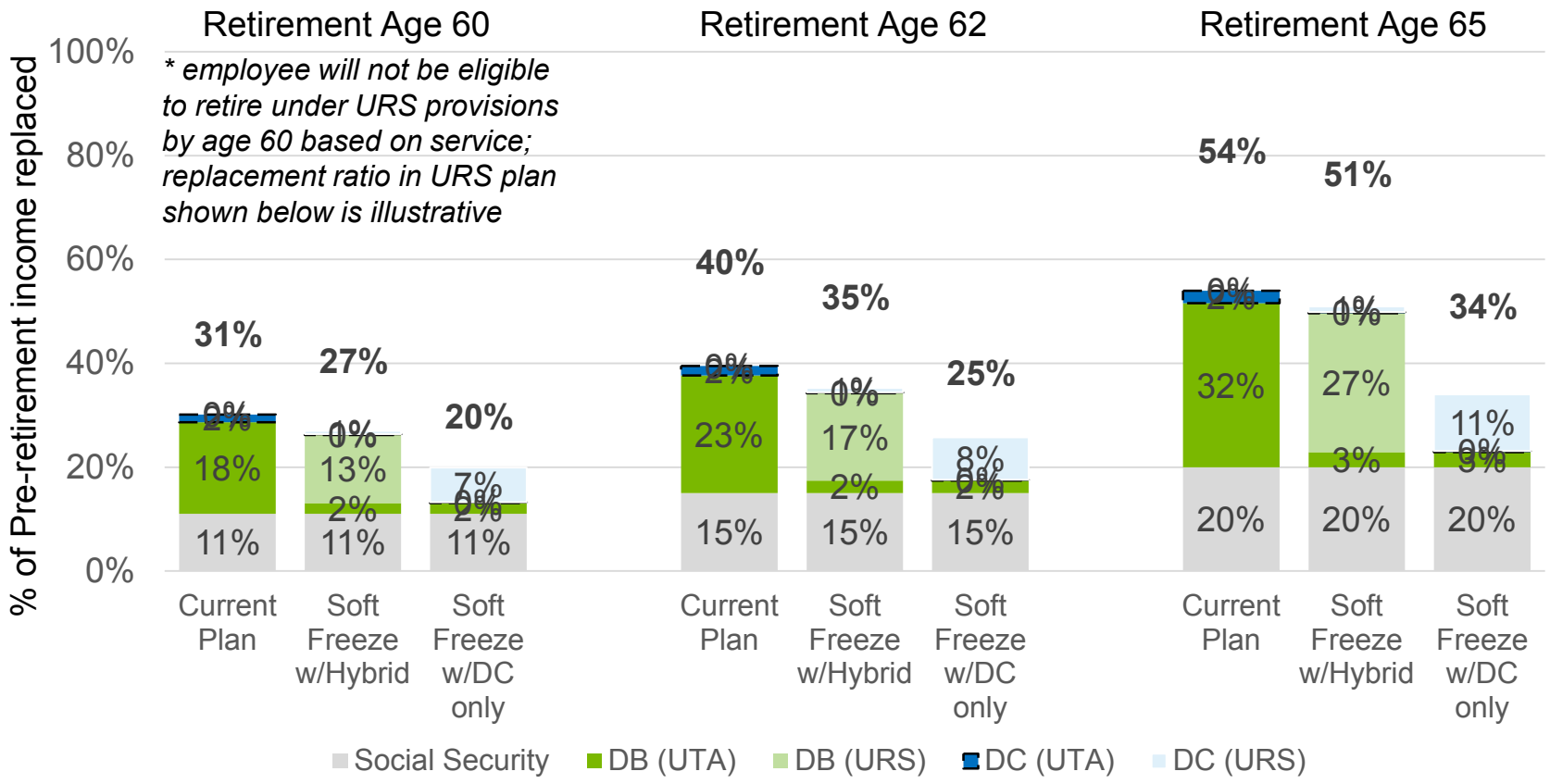


Hard freeze will replace 0 – 5.4% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

Feasibility of State Plan—Employee Impact
(Managers, Executives–96)

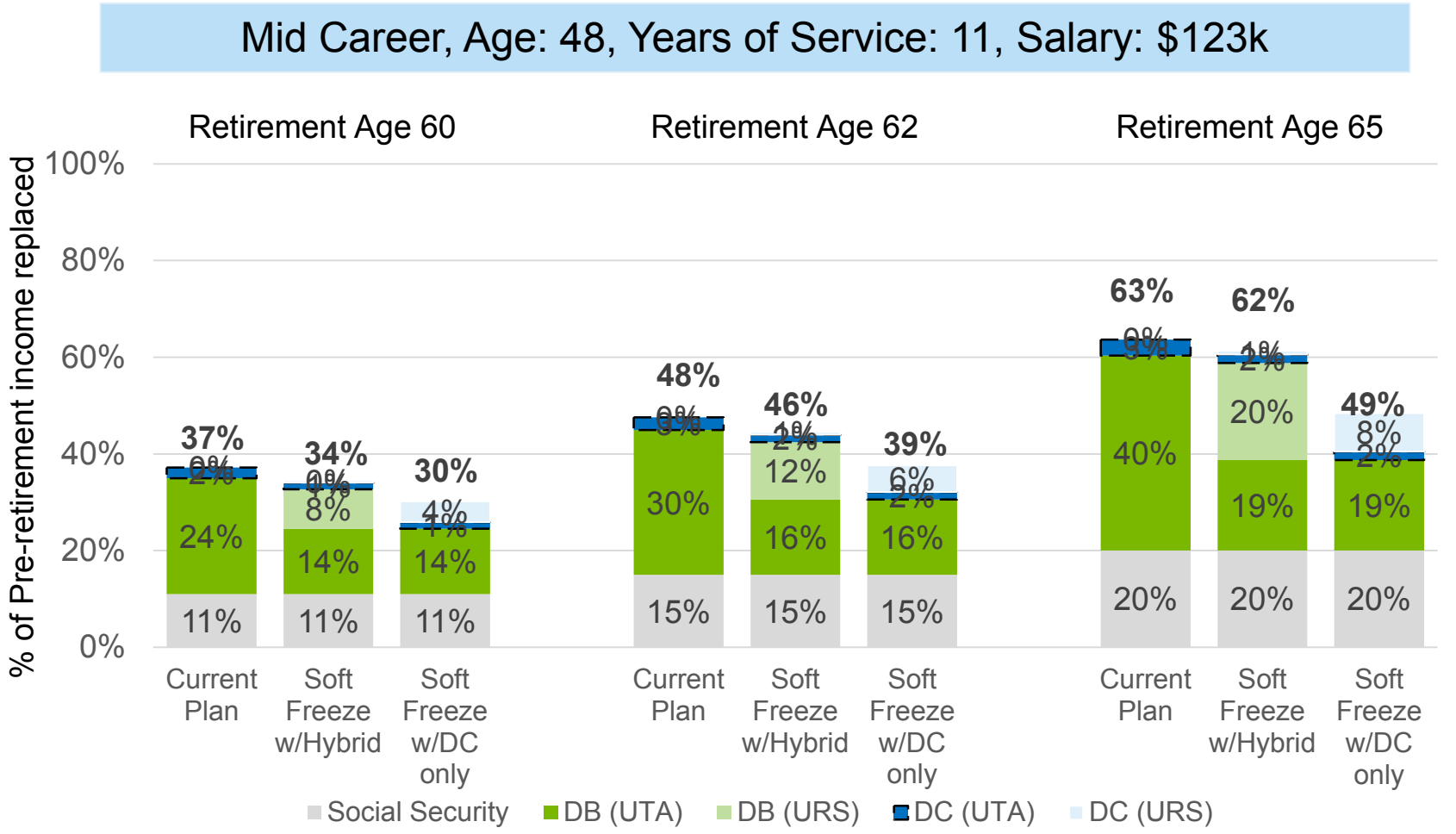
Average New Hire, Age: 43, Years of Service: 0, Salary: $102k



Hard freeze will replace 0.8 – 1.4% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

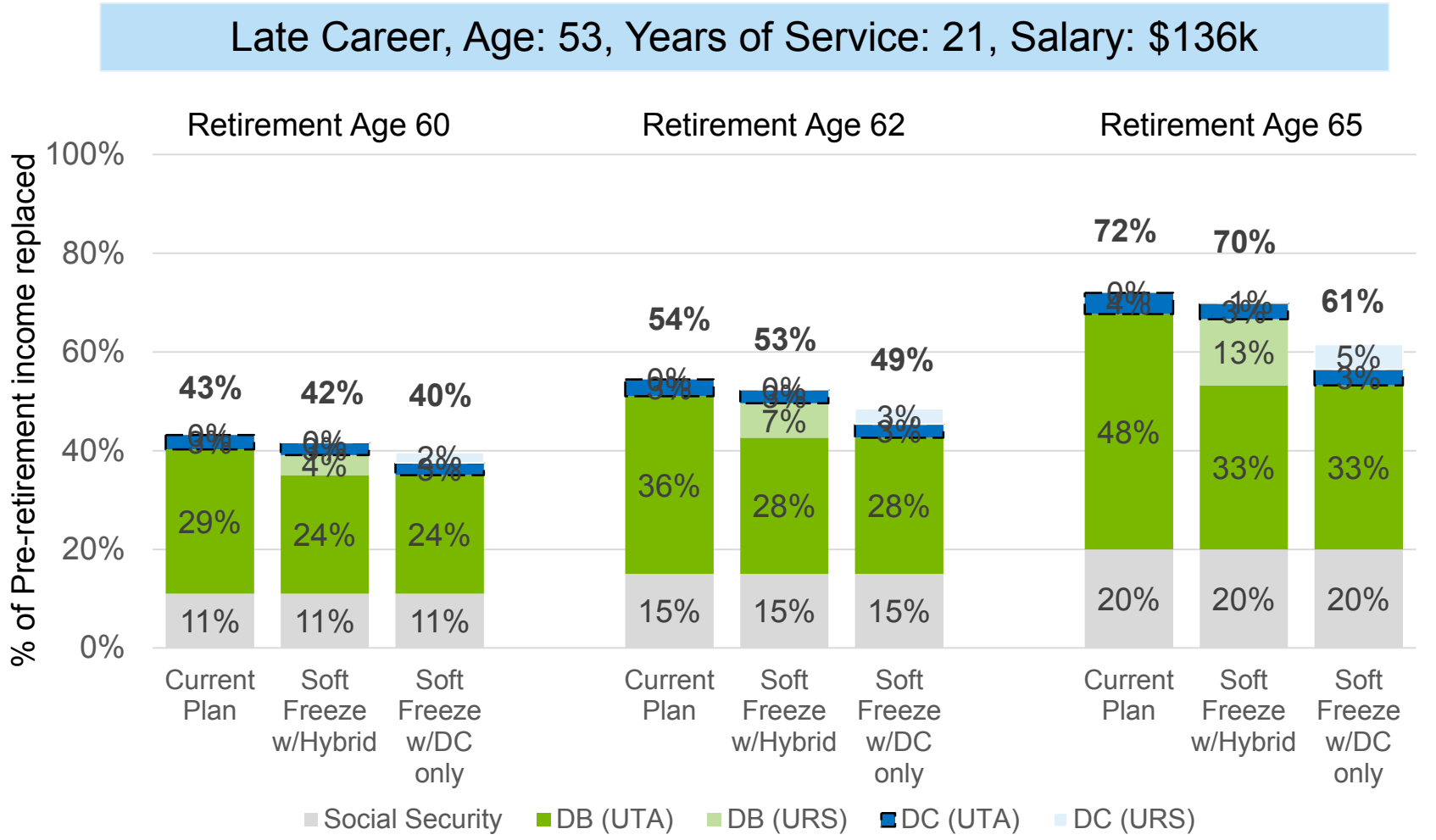
Feasibility of State Plan—Employee Impact
(Managers, Executives–96)



Hard freeze will replace 3.8 – 7.4% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

Feasibility of State Plan—Employee Impact
(Managers, Executives–96)



Hard freeze will replace 3.7 – 9.5% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

Key Findings—Feasibility of State Plan

Design Variations

- URS has a lower accrual rate (1.5% vs 2.0%) but has COLA
- UTA has less restrictive early retirement – URS restricted to 35 years or after age 60 (UTA requires age 55)

Impact on Average Employee

- Retirement income about same under URS Hybrid as UTA's plan, but URS DC plan provides less retirement income
- If UTA accrued benefit frozen, employees' replacement ratios about 10% less and entering URS provides less retirement income

Impact on New Hires

- UTA plan provides more retirement income than URS at earlier retirement ages; about the same as URS Hybrid at age 65

Financial Impact

- UTA cost for future accruals less than URS cost if all assumptions met
- URS caps employer cost at 10%. Thus URS plan provides cost containment and results in some savings in certain scenarios

Section II: Financial Modeling

Methodology—Overview

- We collected census and financial information as of January 1, 2019 directly from the plan's actuary (Milliman) and performed an independent, high-level review of assumptions, methods and liabilities.
  - We performed a full replication of results as of January 1, 2019 and was able to match the current actuary's results to within 1% based on the assumptions and methods used in the valuation.
  - We also reviewed the assumptions and suggested changes, or a set of "modeling" assumptions, to be used in the long-term forecast.
- We projected liabilities, contributions and funded status under the following scenarios:
  1) Baseline – 7.0% annual investment return; 2019 valuation assumptions except using PUBG-10 mortality with MP-2018 mortality improvement scale
  2) Blue Skies – same as baseline except using varying returns over the 10 years starting in 2021 in that average 10.4% annual investment return (and correlated inflation)
  3) Black Skies ("Recession") – same as baseline except using varying returns over the10 years starting in 2021 that average -5.6% annual investment return (and correlated inflation)
  4) High Inflation – same as baseline except using varying returns over the10 years starting in 2021 that averages 3.9% annual investment return and 4.4% in annual inflation
- Financial scenarios are not intended as an expectation of a likely event, but are used to test the limits of the plan's costs under a possible scenario, although extreme.
- We have also modeled the feasibility transition approaches under the various scenarios.
- See *Appendices* for detailed assumptions and methods.

Actuarial Assumptions Review

Assumption	January 1, 2019 Valuation	Comments
Expected Rate of Return	7.0% net of investment expenses	▪ 6.6% median based on Aon's Q3 2019 capital market assumption with our recommended inflation ▪ Average expected rate of return assumption is 7.25% according to 2019 NCPERS Public Retirement Systems Study ▪ Deemed reasonable for modeling purposes
Rates of Salary Increase	3.4%/year except 5.4% over the first 5 years of employment	Reviewed and deemed reasonable for modeling purposes
Inflation	2.3%	2.1% based on Aon's Q3 2019 capital market assumption Recommend 2.1% inflation
Mortality	Preretirement: RP-2014 Blue Collar Employees Table with scale MP-2014 Postretirement: RP-2014 Blue Collar Healthily Annuitant with scale MP-2014	Recommend latest public sector mortality table (PUBG-10 Employee and Healthy Annuitant) with scale MP-2018 Increases liability about 1.6%
Retirement Rate	Rates based on years and service eligibility for normal retirement; rates begin at age 55 and go to age 70	Reviewed and deemed reasonable for modeling purposes; Review of age of terminated vested retirements recommended Adjusted to limit commencement to reflect URS later commencement requirements. URS rates are applied to new hires without legacy UTA benefits

Actuarial Assumptions Review

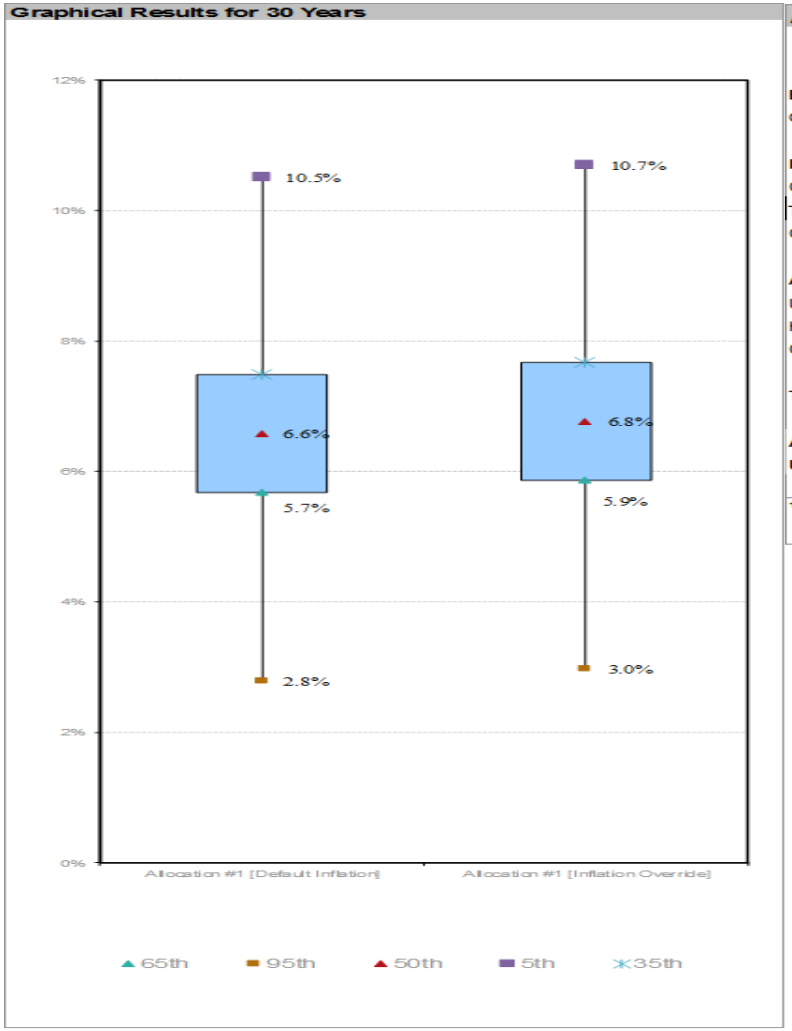
Assumption	January 1, 2019 Valuation	Comments
Rates of Separation from Active Membership	20% in first year, 15% in 2nd year, then 15% for years under age 30 and 6% for years over age 30	Reviewed and deemed reasonable for modeling purposes
Rates of Disability	None	Benefit is not significantly different than actuarial equivalent of accrued benefit

The following are the key differences in assumptions between the valuation and our projections:

- ❑ Mortality: Moving to the most recently available public sector tables
- ❑ Adjusted retirement rates and benefit payments when moving to URS programs to reflect differences in designs

Expected Rate of Return

- The following shows expected return on assets of UTA's plan based on our capital market assumptions:



Asset Allocation

	Expected Nominal Return[1]	Expected Risk (Volatility)	Allocation #1
Equity			
Global Equity (Developed & Emerging)	7.6%	19.0%	63.00%
Fixed Income			
Cash (Govt)	2.3%	2.0%	1.00%
TIPS	3.0%	4.5%	1.00%
Core U.S. Fixed Income (Market Duration)	3.1%	5.0%	22.00%
Alternative Investments			
U.S. REITs	6.1%	19.0%	1.00%
Hedge Funds - Direct (Median Manager)	5.4%	10.0%	10.00%
Commodities	4.7%	17.0%	2.00%
Total Portfolio			100.00%
Aon Hewitt View	2.10%		
UTA Current Assumption	2.30%		

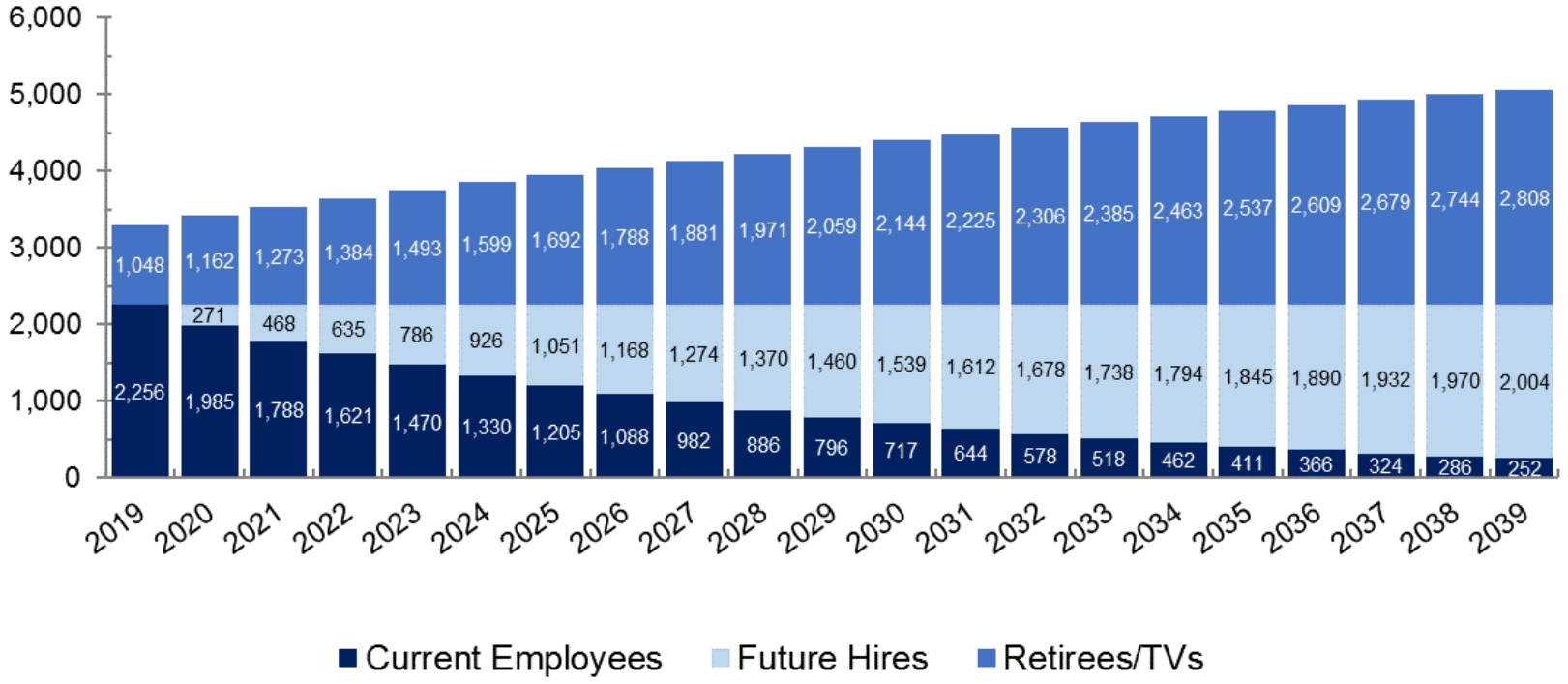
[1] All Expected Returns are geometric (compounded); Nominal Return = (1 + Real Return) x (1 + Inflation) -1

- Expected rate of return ranges between 35th and 65th percentile (the blue shaded box). 50th percentile is represented by the triangles.
- Based on Aon 2019 Q3 capital market assumptions reflecting a 30-year time horizon
- Excludes any adjustment for active management premium or administrative expenses
- Asset allocation as of December 31, 2018
- 7.0% return is a reasonable expected return over the long-term

Projected Headcount

The following shows UTA's headcount in the pension plan over the next 20 years for current employees, future hires, and current and future retirees (in payment and waiting to commence payment) assuming all assumptions are met and the current active headcount is maintained:

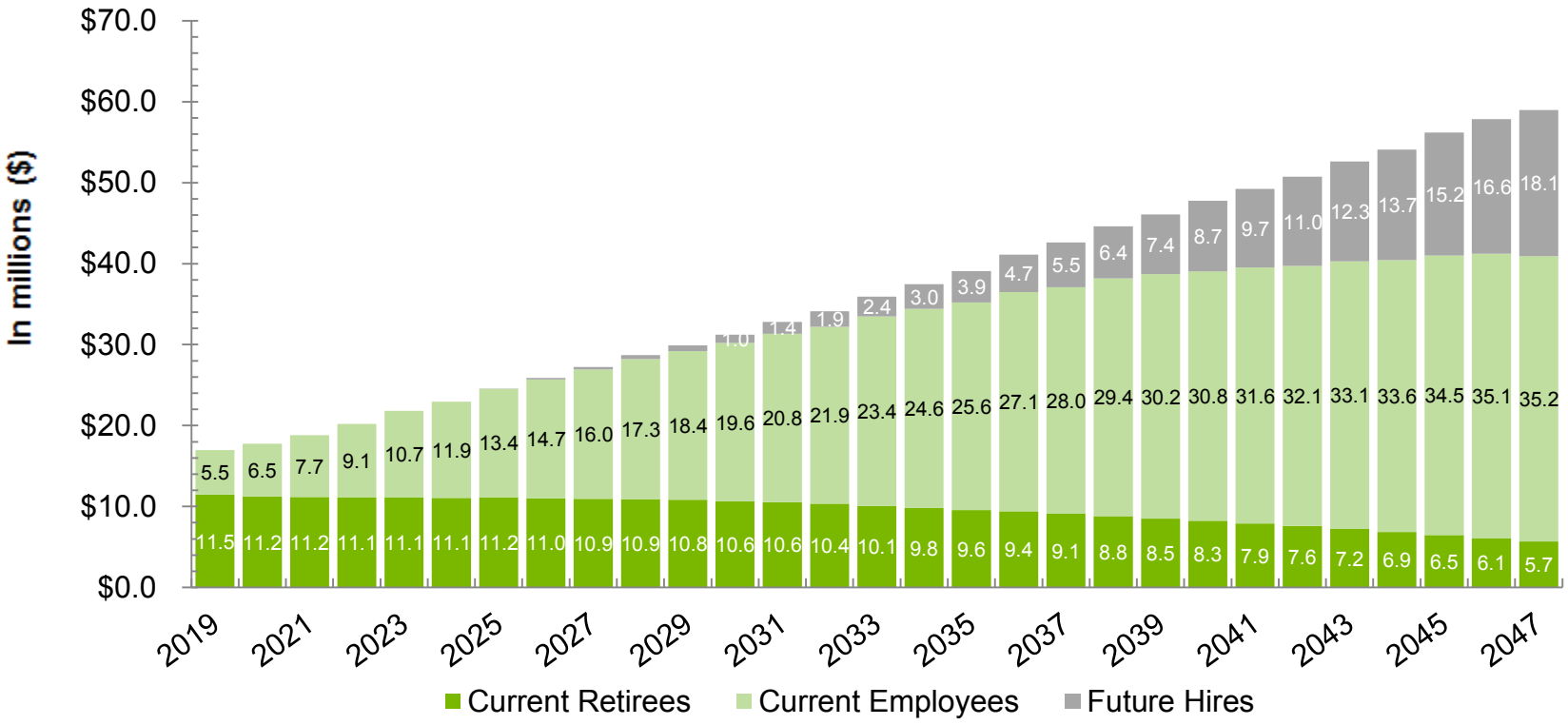
- Current employees will be about 20% of the working population in 15 years.
- Based on current assumptions, the plan expects about 40-50 participants per year to leave the UTA DB Plan due to receipt of lump sum payout of their benefit.



Projected Benefit Payments

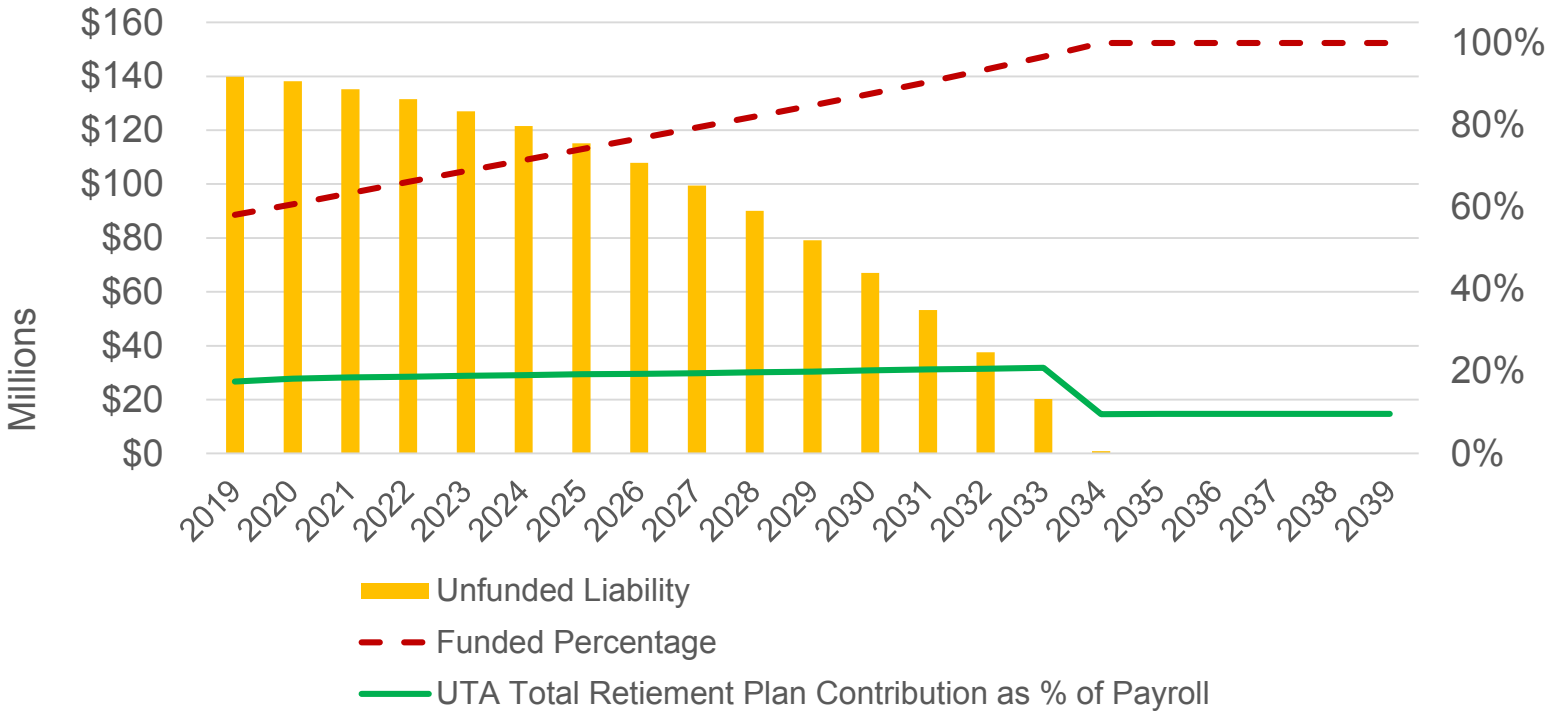
The following shows the projected cash flows under the current plan assuming all assumptions are met:

- Current retirees and former employees will be collecting payments for over 60+ years
- About $3 - $4 million is projected to paid out annually as lump sum payments to retiring and terminating actives and former employees



Projected Contribution and Funded Status—Baseline

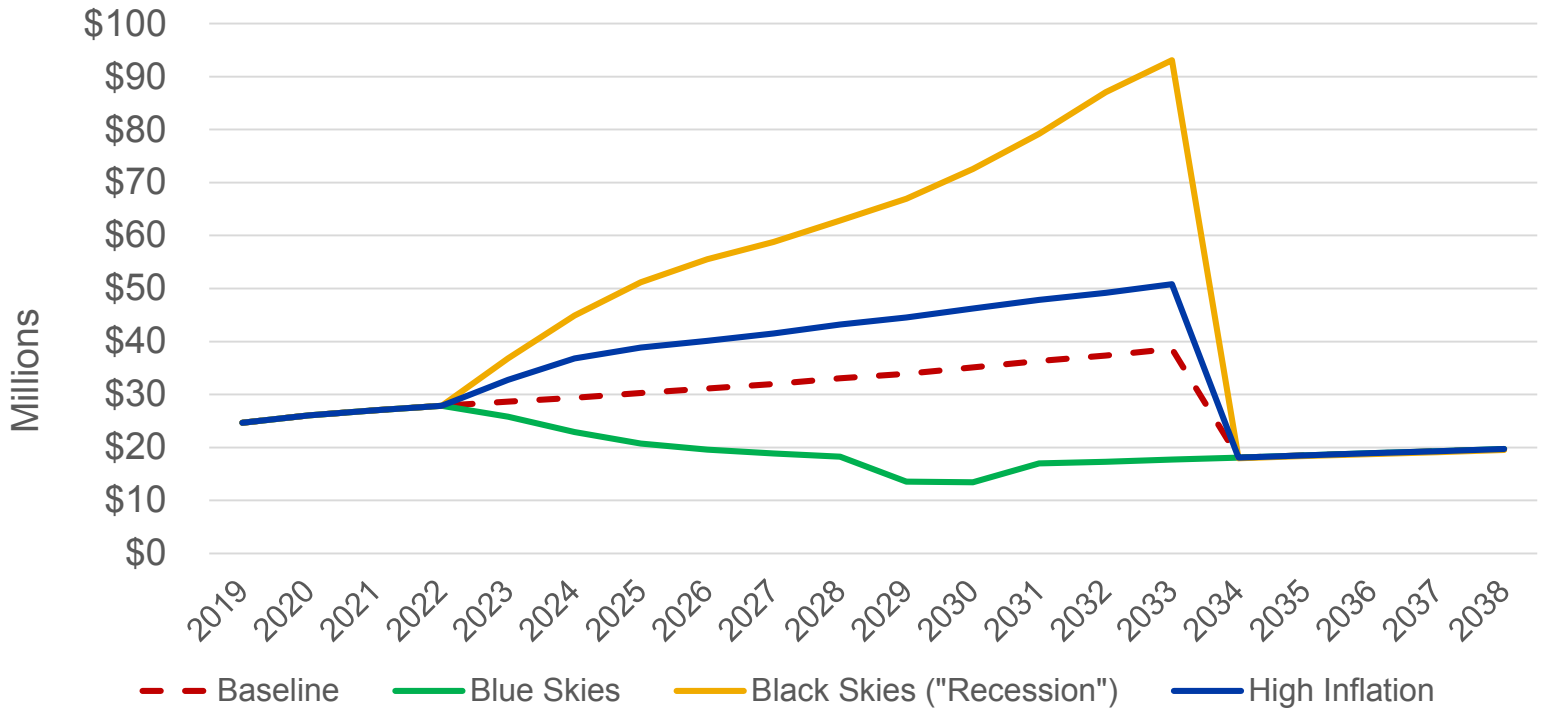
- The following shows the Actuarially Determined Contribution ("ADC") and projected funded status if all assumptions are met.
  - The impact of investment returns that are 100 basis lower than expected, or about 6.00% per annum, results in contributions that are about 2% of payroll/year higher over the next 20 years . Conversely, if investment returns are 100 basis points higher than assumed, contributions would be about 2% of payroll/year less. The impacts are larger as your near 2034 as there is less time to pay for any new unfunded amount



Note: the 457 plan match is approximately an additional 1.1% of payroll, which are included in these plan contributions as a % of payroll

Projected Contribution—Alternative Scenarios

- The following compares the total retirement plan contribution under various scenarios:
  - All unfunded liabilities are expected to be funded by January 1, 2034 (current funding goal)
  - Amounts include expected defined contribution match of 1.1% of pay/year
  - The high inflation scenario also contains below average investment returns but not as low as the "Recession" scenarios



Projected Contribution—Alternative Scenarios (continued)

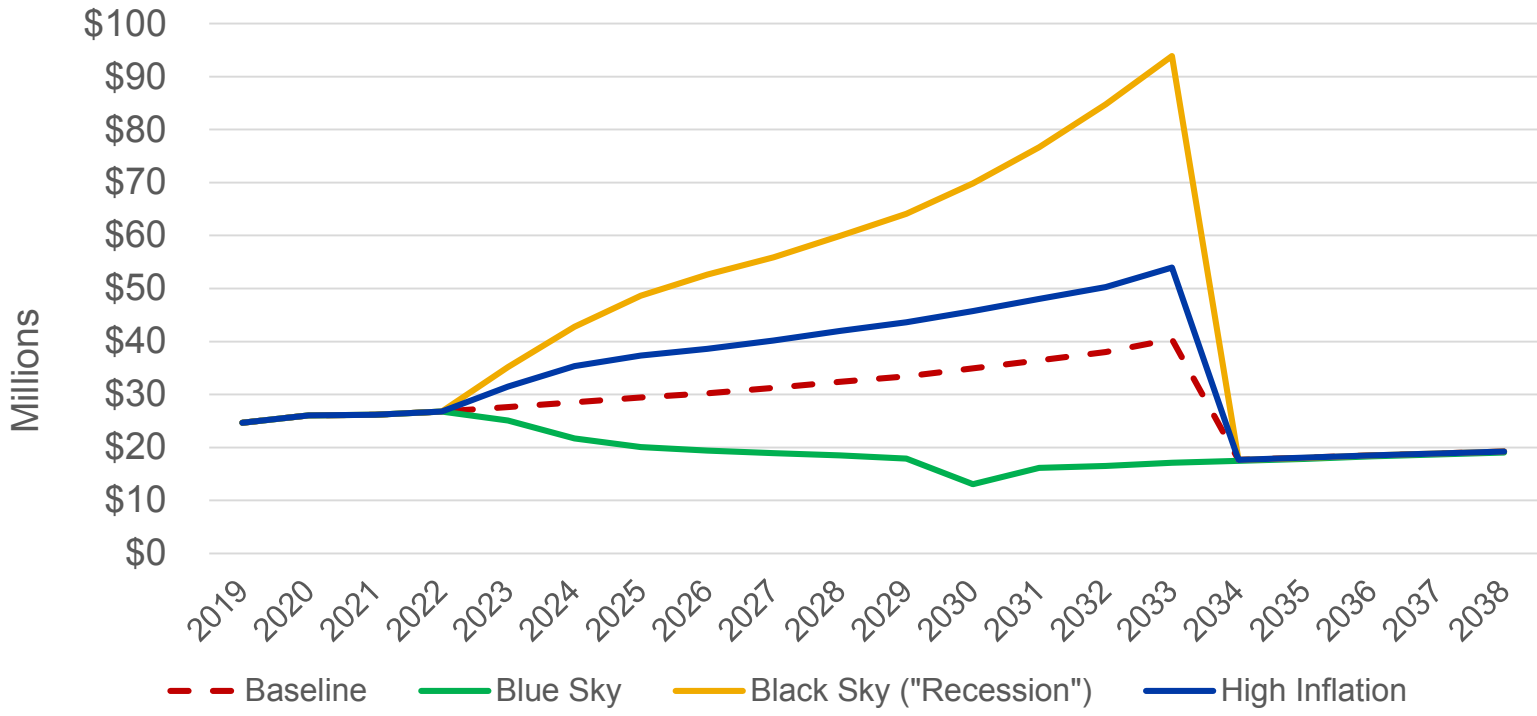
- The table below compares the impact on the Actuarially Determined Contribution ("ADC"), in today's dollars, under various economic conditions (events occur beginning in 2021):

Option	Description	Cost/(Savings)[1] (in millions) 2023	Intermediate (0 – 10 years)	Long term (0 – 20 years)
Blue Skies	▪ Baseline assumed for 2019 and 2020 ▪ World economy grows ahead of consensus expectations, while inflation remains subdued ▪ **Average annual investment return of 8.79% over 10 years; 7.96% over 20 years**	($2.3)	($34.4)	($88.3)
Black Skies (Recession)	▪ Baseline assumed for 2019 and 2020 ▪ Deep recession followed by a longer period of stagnant growth ▪ **Average annual investment return of (6.21)% over 10 years;(-0.15)% over 20 years**	$6.6	$88.2	$209.6
High Inflation	▪ Baseline assumed for 2019 and 2020 ▪ World economy grows moderately faster than expected but at the expense of much higher inflation ▪ Average annual investment return of 2.52% over 10 years; 4.74% over 20 years ▪ **Average annual inflation of 3.62% over 10 years; 3.04% over 20 years**	$3.3	$34.7	$67.1

[1] Measured based on reduction in cash contributions; Immediate impact savings based on reduction in ADEC. Value in today's dollars (i.e., present value) based on 4.5% cost of capital. Note that contributions timing reflects one year lag.

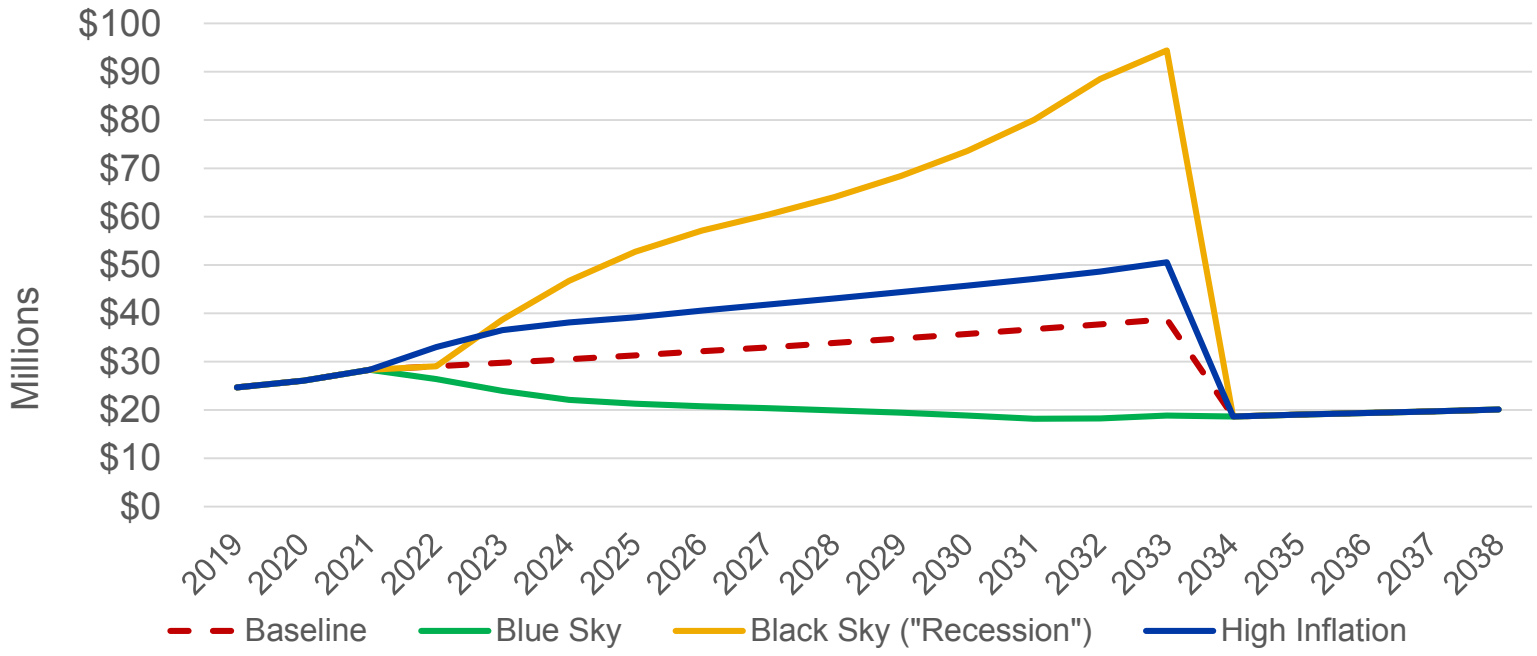
Projected Contributions—Alternative Scenarios (New Hires Only)

- The following compares the Actuarially Determined Contribution ("ADC") under various scenarios if UTA were to enter URS:
  - All hires prior to January 1, 2021 remain in UTA plan. All post 2020 hires enter URS plan
  - Pre-2021 liabilities, which are not subject to the 10% cost containment, drive the variability of costs over the next 15 years, regardless of design
  - Defined contribution costs are included



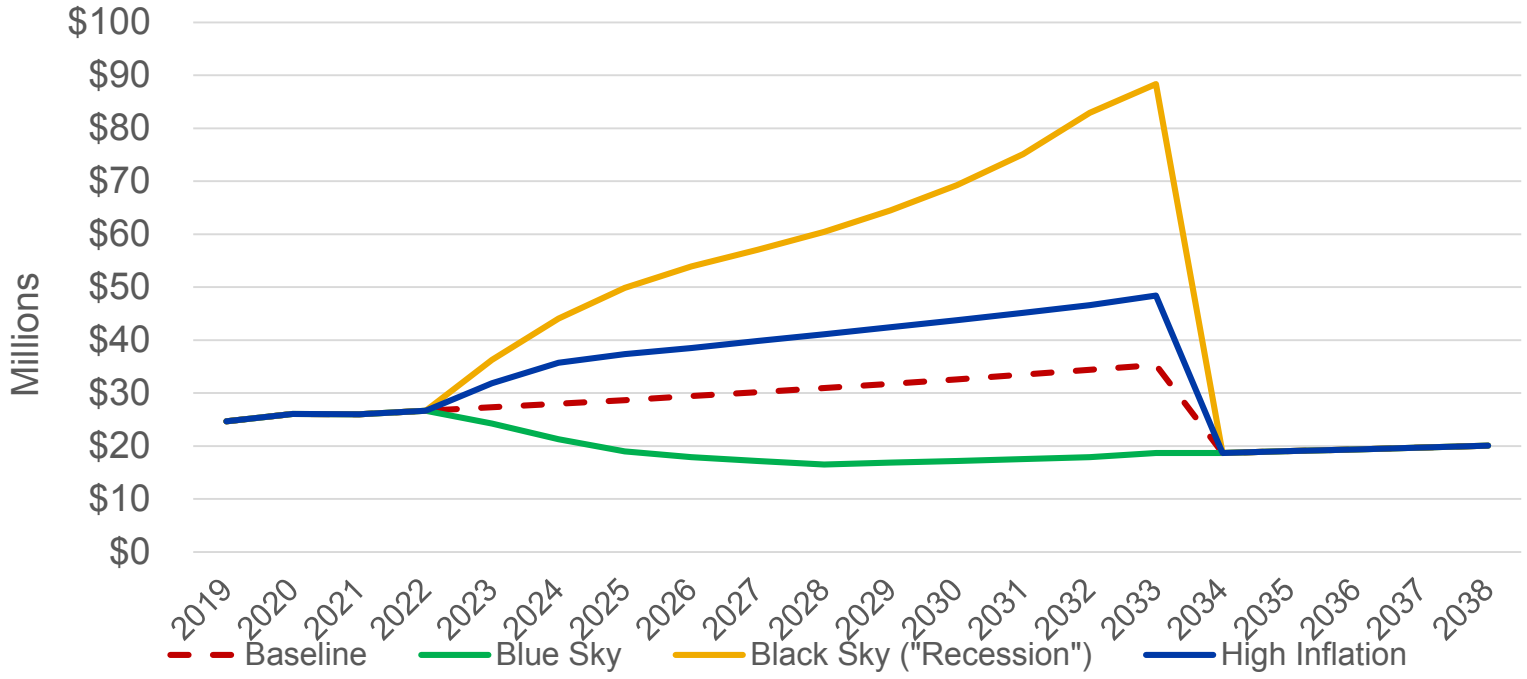
Projected Contributions—Alternative Scenarios (Enter State - Soft Freeze)

- The following compares the Actuarially Determined Contribution ("ADC") under various scenarios if UTA were to enter URS:
  - All employees move to URS plan effective January 1, 2021; pre-2021 benefits receive salary indexing
  - Pre-2021 liabilities, which are not subject to the 10% cost containment, drive the variability of costs over the next 15 years, regardless of design
  - Defined contribution costs are included



Projected Contributions—Alternative Scenarios (Enter State - Hard Freeze)

- The following compares the Actuarially Determined Contribution (“ADC”) under various scenarios if UTA were to enter URS:
  - All employees move to URS plan effective January 1, 2021; pre-2021 benefits based on compensation and service as of January, 2021 ("frozen”)
  - Pre-2021 liabilities, which are not subject to the 10% cost containment, drive the variability of costs over the next 15 years, regardless of design
  - Defined contribution costs are included



Key Findings—Financial Modeling

- Annual increase in benefits of 8.5% to 9.5% of payroll
- Goal of fully funding plan by January 1, 2034 adds additional costs of 8% to 10% per year. Updated mortality tables reflected in the above numbers.

- Match on employee deferrals up to 2% of payroll
- Based on actual usage, costs are about 1.1% of payroll each year
- Costs increase with payroll and would be minimally impacted in various economic scenarios

- Plan's return is intended to maximize long-term return on fund. Volatility of return seeking assets will impact year to year funding requirements
- Amortizations of unfunded liability are made over decreasing time period, so costs will be more volatile as plan nears full funding goal at 2034
- No cost of living increases on retiree benefits so inflation has minimal impact on costs (unless salaries spike during an inflation run)

Section III: Benchmarking

Methodology—Overview

- We collected retirement plan information for peers based on publicly available information and contacted each peer to verify their plan provisions to ensure accuracy.
- Peers include: TriMet (Portland, Oregon); Dallas Area Rapid Transit ("DART" - Dallas, Texas); Regional Transit District ("RTD" - Denver, Colorado), San Diego, California and Sacramento, California.
- We utilized retirement income replacement ratios ("replacement ratio") to compare competitiveness of retirement benefits offered.
  - A replacement ratio measures the amount of pre-retirement income replaced by retirement benefits, adjusted for inflation. It includes sources of retirement income from Social Security, Defined Benefit, Defined Contribution and Personal Savings.
  - It allows an apples-to-apples comparison of Defined Benefit and Defined Contribution ("DC") Plans and also provides a measure of the standard of living one can expect to maintain in retirement.
- Given the variety of factors (assumptions, funding policy and governance) that go into developing the annual cost and funded status, we do not see it as a measure of competitiveness. However, we have provided financial information in the Benchmarking section for illustrative purposes.
- **Note that all replacement ratios in this presentation reflect only the employer provided amounts**
- Retiree medical and life benefits were not considered as part of this study
- See *Appendices* for detailed assumptions and methods.

Peer Comparison—Key "Legacy" Employees Plan Provisions

- **The following table summarizes key retirement plan provisions for UTA's peers for the average, or "legacy", employee.**
  - See Appendices for detailed summary of plan provisions

Entity	"Legacy" Employees				
	DB Multiplier and/or DC contribution	Cost-of-Living-Adjustment ("COLA")	Early Retirement Age ("ERA")	Normal Retirement Age ("NRA")	Employee Contributions
UTA	2.0% DB plan + match up to 2.0% DC	--	55	65/37.5YOS	--
TriMet (OR)	8.0% DC	--	--	--	--
DART (TX)	7.7% Fixed + max 3.0% match DC	--	--	--	--
RTD (CO) – Union, DB	1.0% DB	--	50&20YOS	65/ 60&10YOS	3.0%
RTD (CO) – Salaried, DC	7.0% - 9.0% DC	--	--	--	--
San Diego Transit (CA)	2.0% - 2.7% DB	2.0%	50	67	8.0%
Sacramento Transit (CA)	2.0% - 2.5% DB	--	55/25YOS	60	--
State of Utah	2.0% DB + DC or 10% DC	2.1%	60&25YOS	65/30YOS	--

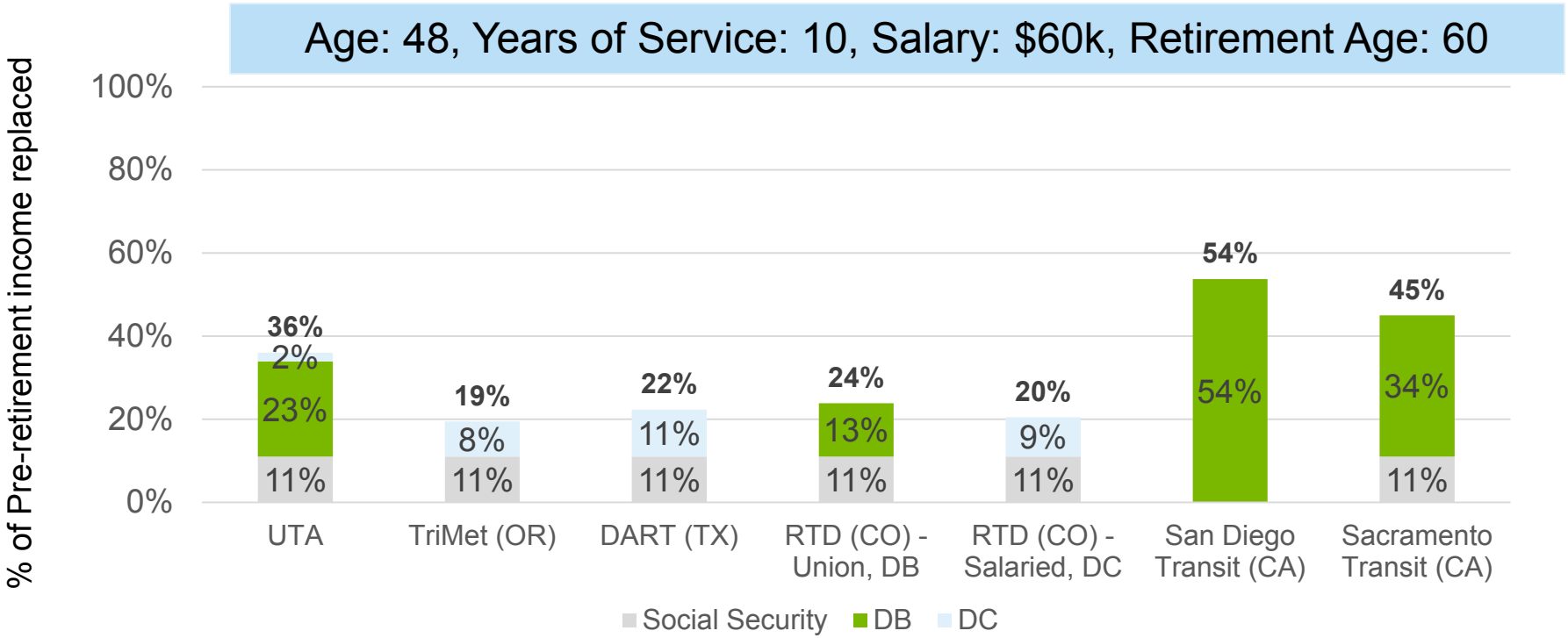
Peer Comparison—Key New Hire Plan Provisions

- **The following table summarizes key retirement plan provisions for UTA's peers for new hires**
  - See Appendices for detailed summary of plan provisions

Entity	New Hires				
	DB Multiplier and/or DC contribution	Cost-of-Living-Adjustment ("COLA")	Early Retirement Age ("ERA")	Normal Retirement Age ("NRA")	Employee Contributions
UTA	2.00%DB + match up to 2.00% DC	--	55	65/37.5YOS	--
TriMet (OR)	8.0% DC	--	--	--	--
DART (TX)	7.7% Fixed + max 3.0% match DC	--	--	--	--
RTD (CO) – Union, DB	1.0% DB	--	50&20YOS	65/ 60&10YOS	3.0%
RTD (CO) – Salaried, DC	7.0% - 9.0% DC	--	--	--	--
San Diego Transit (CA)	1.0% - 2.5% DB	2.0%	52	67	6.25%
Sacramento Transit (CA)	1.0% - 2.5% DB	--	52	67	5.75%
State of Utah	1.5% DB + DC or 10% DC Only	2.1%	60	65/ 35YOS	Excess of cost > 10%

Replacement Ratio Comparison—"Legacy" Employee, Age 60 Retirement

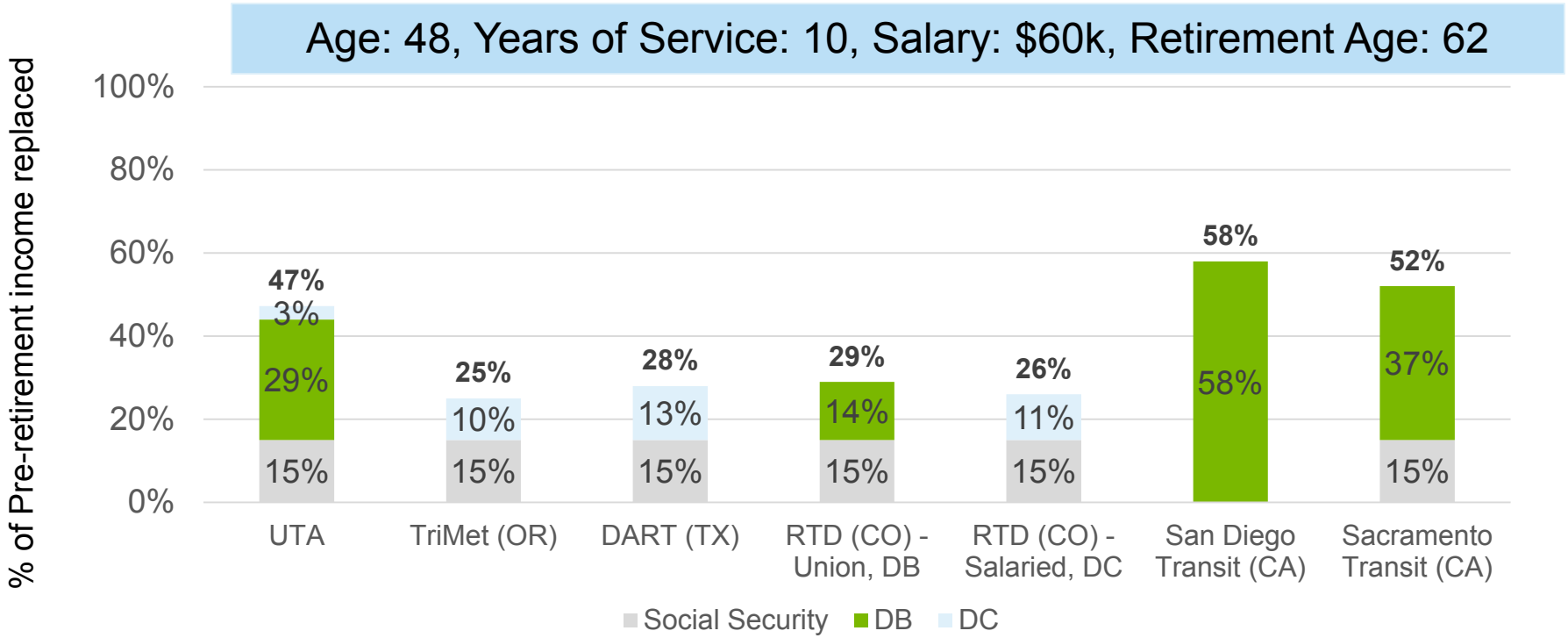
- The following compares the pre-retirement income replaced by the entity's retirement plans for the average employee at age 60 retirement.
  - UTA's retirement benefits are competitive with its peers for retirement at age 60 primarily due to no DB employee contributions. Note that Social Security is shown for illustrative purposes but not available until age 62.
  - UTA provides the third highest retirement income, trailing only San Diego and Sacramento.



Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the employer portion of the expected Social Security amount (50% of the full amount).

Replacement Ratio Comparison—"Legacy" Employee, Age 62 Retirement

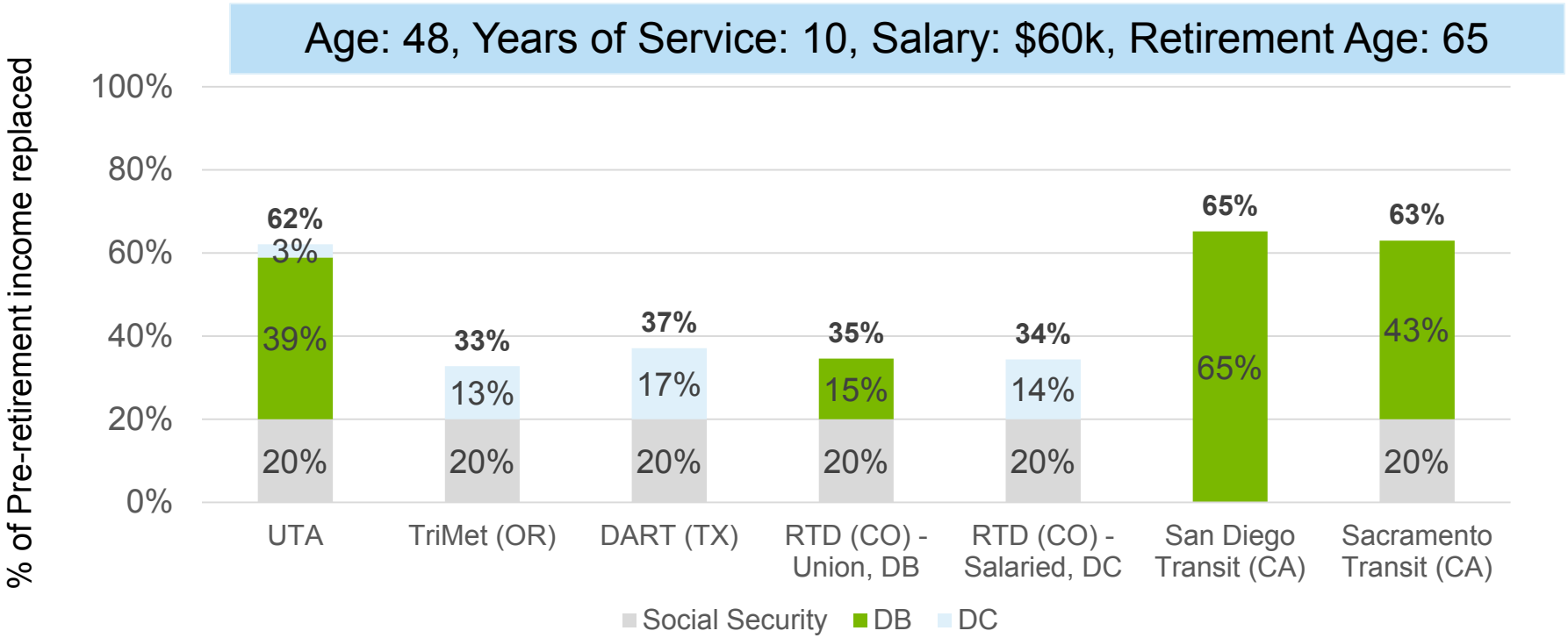
- The following compares the pre-retirement income replaced by the entity's retirement plans for the average employee at age 62 retirement.
  - UTA's retirement benefits are competitive with its peers for retirement at age 62 primarily due to combined DB and DC programs and no DB employee contributions
  - UTA provides about 32% of an employee's retirement income, compared to its peers providing an average of about 24%



Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the employer portion of the expected Social Security amount (50% of the full amount).

Replacement Ratio Comparison—"Legacy" Employee, Age 65 Retirement

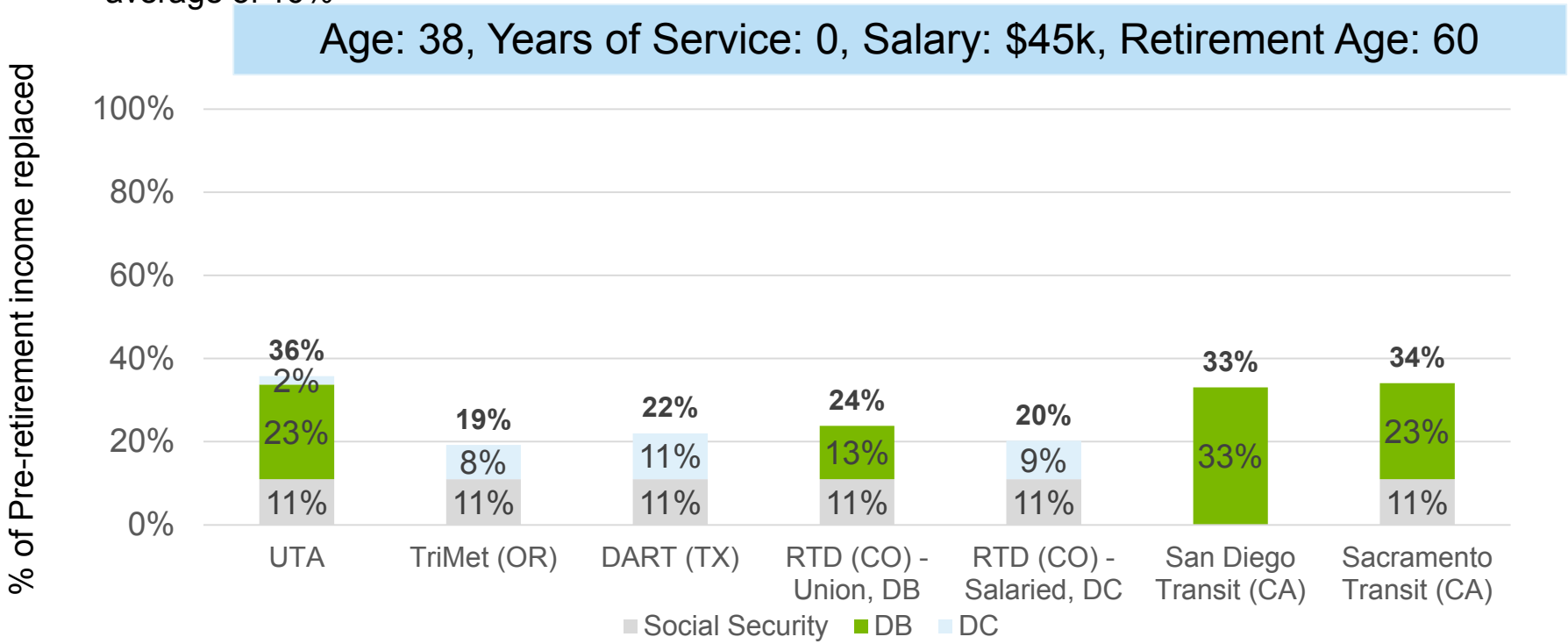
- The following compares the pre-retirement income replaced by the entity's retirement plans for the average employee at age 65 retirement.
  - UTA's retirement benefits are competitive with its peers for retirement at age 65 primarily due to combined DB and DC programs and no DB employee contributions
  - UTA provides about 42% of an employee's retirement income, compared to its peers providing an average of 28%



Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the employer portion of the expected Social Security amount (50% of the full amount).

Replacement Ratio Comparison—New Hire, Age 60 Retirement

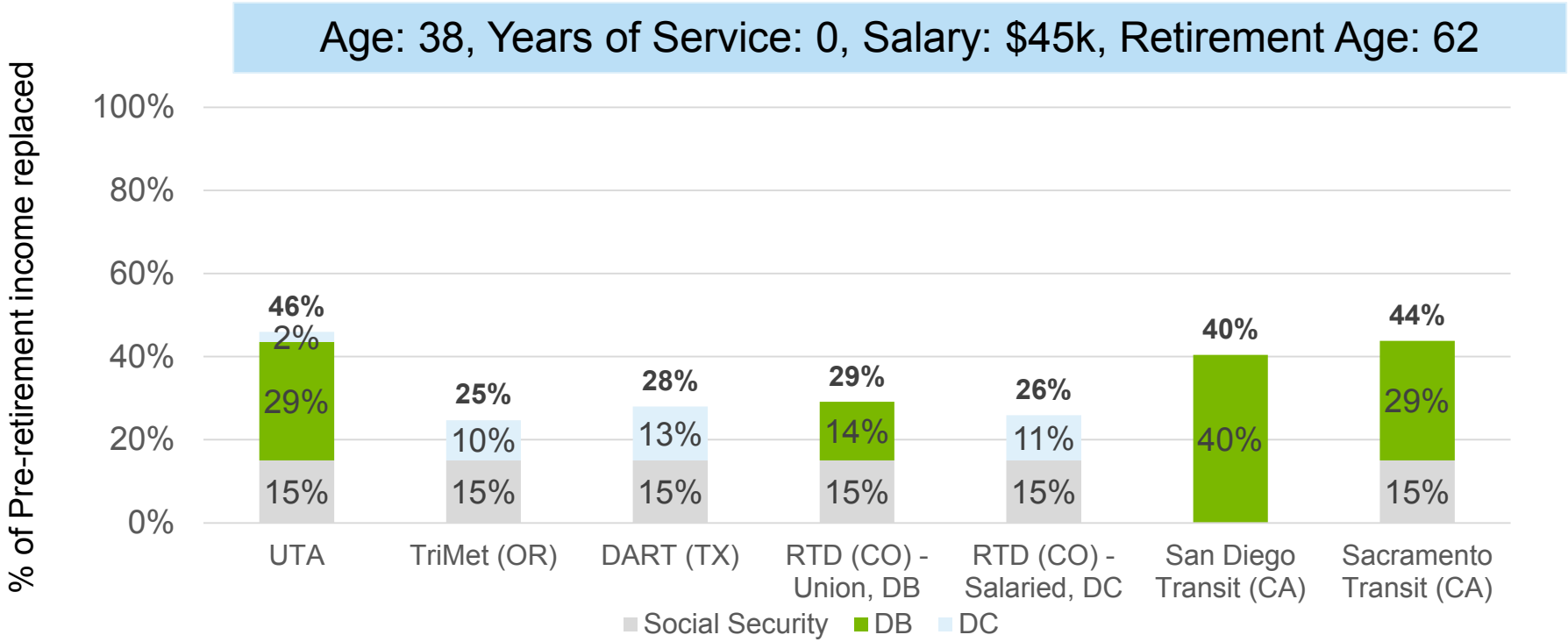
- The following compares the pre-retirement income replaced by the entity's retirement plans for new hires at age 60 retirement.
  - UTA's retirement benefits are competitive with its peers for retirement at age 60 primarily due to combined DB and DC programs, favorable multiplier, and no DB employee contributions
  - Note that Social Security is shown for illustrative purposes but not available until age 62.
  - UTA provides about 25% of an employee's retirement income, compared to its peers providing an average of 16%



Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the employer portion of the expected Social Security amount (50% of the full amount).

Replacement Ratio Comparison—New Hire, Age 62 Retirement

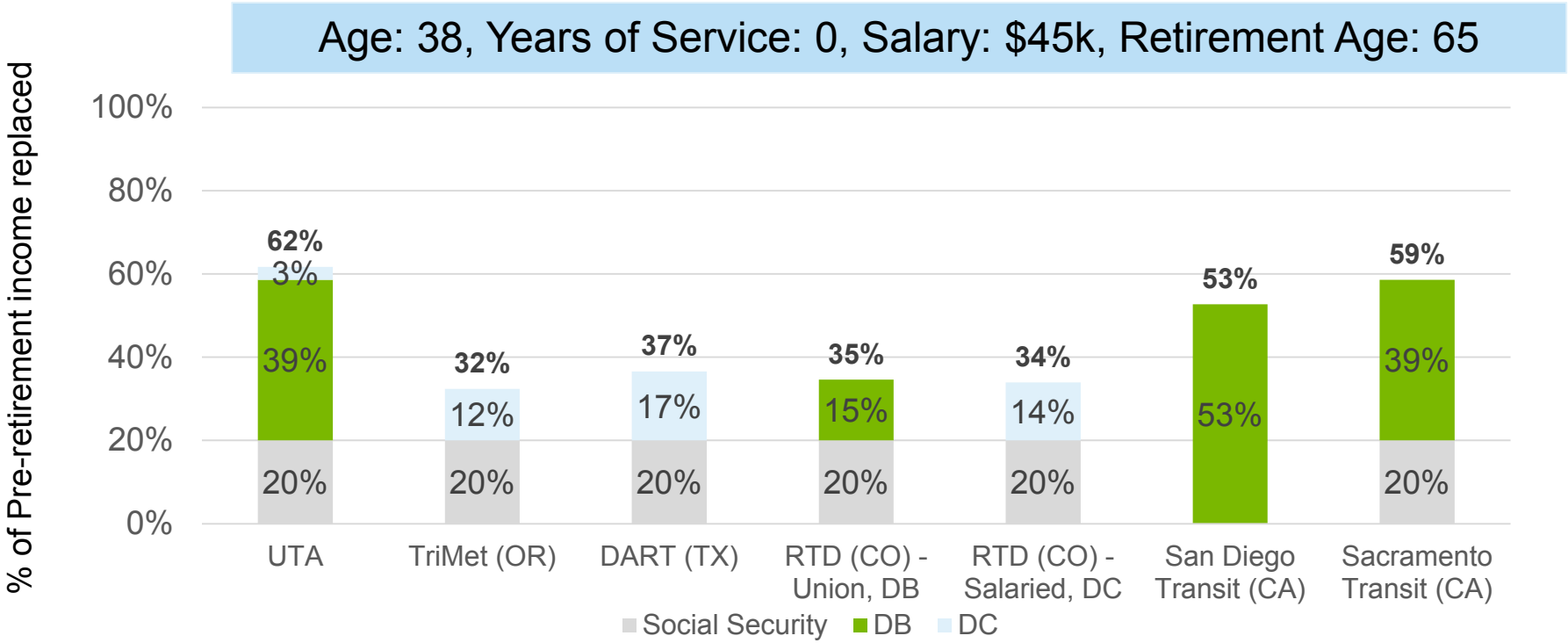
- The following compares the pre-retirement income replaced by the entity's retirement plans for new hires at age 62 retirement.
  - UTA's retirement benefits are competitive with its peers for retirement at age 62 primarily due to combined DB and DC programs and no DB employee contributions
  - UTA provides about 31% of an employee's retirement income, compared to its peers providing an average of 20%



Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the employer portion of the expected Social Security amount (50% of the full amount).

Replacement Ratio Comparison—New Hire, Age 65 Retirement

- The following compares the pre-retirement income replaced by the entity's retirement plans for new hires at age 65 retirement.
  - UTA's retirement benefits are competitive with its peers for retirement at age 65 primarily due to combined DB and DC programs and no DB employee contributions
  - UTA provides about 42% of an employee's retirement income, compared to its peers providing an average of 25%

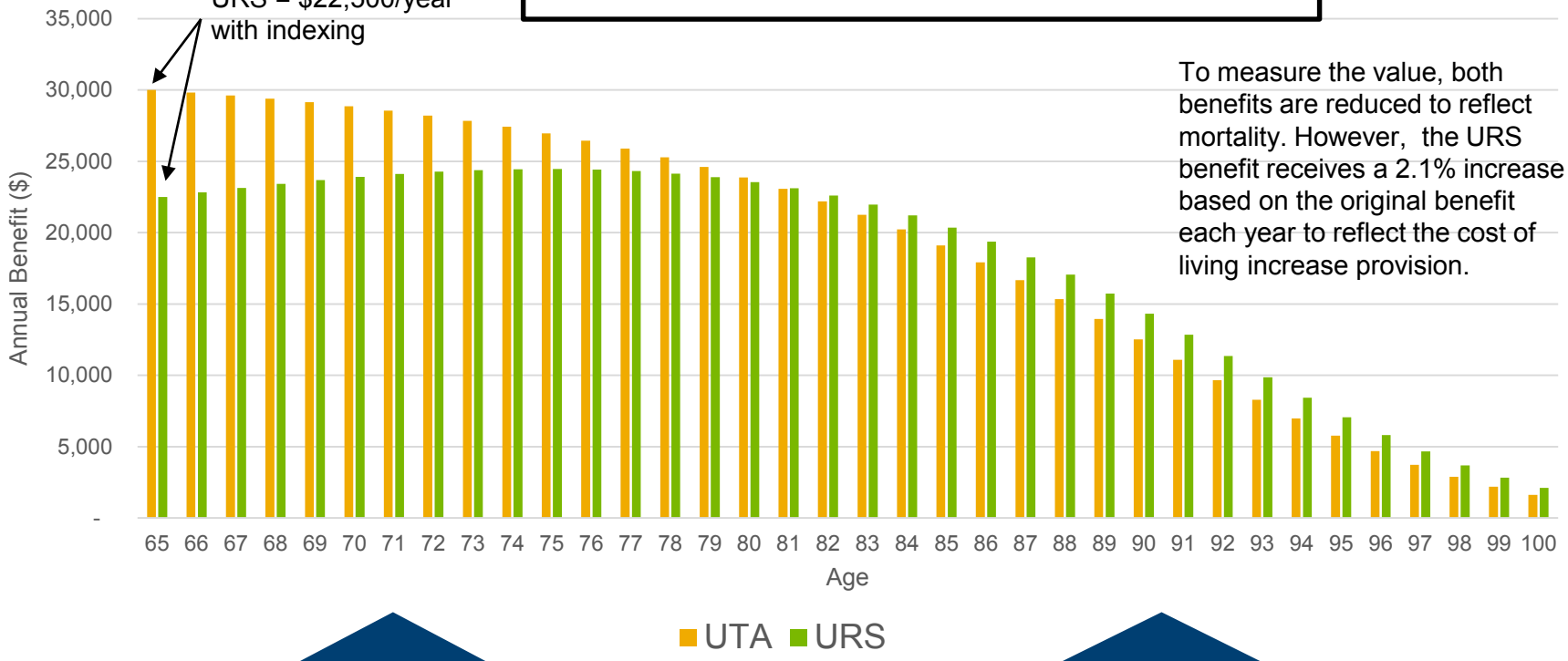


Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the employer portion of the expected Social Security amount (50% of the full amount).

Impact of Cost of Living Indexing on Benefit Value - Example

Employee with 25 years of service retiring at age 65 with $60,000 as her final average earnings

At age 65, benefit is
UTA = $30,000/year
URS = $22,500/year
with indexing



To measure the value, both benefits are reduced to reflect mortality. However, the URS benefit receives a 2.1% increase based on the original benefit each year to reflect the cost of living increase provision.

The URS benefit is 75% of the UTA benefit at age 65

Reflecting the indexing and discounting at 2.6% interest, the URS benefit is 91.9% of the UTA benefit

Peer Comparison—Sensitivity

- **The following table summarizes impact on retirement income of key assumption changes:**
  - **DC investment return**
    1% lower return will reduce retirement income by about 10% for the UTA plan. For DC only plans such as TriMet and DART, the reduction in retirement income would be 15% or higher.
  - **Annuity conversion interest rate**
    1% lower interest rate will reduce retirement income by about 10% for the UTA plan. Since all DB and DC plans are annuitized for retirement income, impact expected to be similar for the other plans.
  - **Annuity conversion mortality table**
    Switching to the SOA mortality table for corporate plans will increase retirement income by about 5% for the UTA plan. Impact expected to be similar for the other plans.
  - **Inflation**
    1% lower inflation will increase the relative retirement income by about 15% for the UTA plan. Impact expected to be similar for the peers without COLA. For the peers with COLA, impact expected to be smaller.

Comparison of Retiree Medical Benefits

Entity	Retiree Medical Coverage Legacy//New Hire	Description of Benefit	ER Obligation
UTA	No Specific Plan	A Retiree Medical Account funded with personal time during employment and unpaid sick and personal time at retirement if employee has five years of service at retirement.	No
TriMet (OR)	Yes/Yes	Nonunion employees with 10 years of service are eligible for continuation of pre-retirement medical coverage until Medicare eligible age. Retiree contributes 100% premium.	No
DART (TX)	Yes/Yes	Medical and Life plans offered, eligible at age 60 & 10 years of service. Retiree contributions determined annually, however, DART paid 100% of costs in 2018.	Yes
RTD (CO) – Union, DB	No/No		No
RTD (CO) – Salaried, DC	No/No		No
San Diego Transit (CA)	Yes/Yes	Private healthcare exchange subsidized by HRA, contributions ranging from $100-$1000/month based on service	Yes
Sacramento Transit (CA)	Yes/Yes	Medical, Life, and dental plans offered, district pays 90-92% of cost.	Yes
State of Utah	Yes/Yes	PEHP Medicare Supplement Plans that cover 50%, 75% or 100% of cost after Medicare	Yes

Peer Comparison—Financial (Defined Benefit)

- **The following table summarizes key financial information from recent CAFRs related to the retirement plan for UTA's peers that offer DB plans.**
  - We consider the information illustrative and do not consider it to be a true measure of competitiveness given the various practices in governance, funding policy and assumptions
  - However, UTA's cost and unfunded liabilities are lower than most of its peers.

	Total Payroll	Actuarial Accrued Liability	Market Value of Assets	Unfunded Liability		Funded Percentage	Discount Rate	Effective Amortization Period	Actuarially Determined Contribution ("ADC")	
				Amount	as % of Payroll				Amount	as % of Payroll
UTA	$132.5	$310.0	$204.5	$105.5	80%	66.0%	7.00%	15	$18.9	14.3%
TriMet (OR)	$182.8									
DART (TX)	$249.9									
RTD (CO)	$135.6	$463.8	$222.7	$241.1	178%	48.0%	7.00%	30	$21.1	15.6%
San Diego Transit (CA)	$27.0	$300.3	$166.2	$125.4	464%	55.4%	7.00%	15	$15.9	59%
Sacramento Transit (CA)	$31.6	$177.9	$133.2	$44.7	141.5%	74.9%	7.25%	15	$7.9	25%

Peer Comparison—Financial (Total)

- **The following table summarizes key financial information related to the retirement plan for UTA's peers that offer DB plans.**
  - We consider the information illustrative and do not consider it to be a true measure of competitiveness given the various practices in governance, funding policy and assumptions

		Defined Benefit Actuarially Determined Contribution ("ADC")		Defined Contribution		Total	
	Total Payroll	Amount	as % of Payroll	Amount	as % of Payroll	Amount	as % of Payroll
UTA	$132.5	$18.9	14.3%	$1.6	1.2%	$20.5	15.5%
TriMet (OR)	$182.8			$7.5	4.1%	$7.5	4.1%
DART (TX)	$249.9			$22.8	9.1%	$22.8	9.1%
RTD (CO)	$135.6	$21.1	15.6%	$4.2	3.1%	$25.3	18.7%
San Diego Transit (CA)	$27.0	$15.9	59%			$15.9	59%
Sacramento Transit (CA)	$31.6	$7.9	25%			$7.9	25%

Key Findings—Benchmarking

Plan Features that make plan competitive

- DB and DC combined offering make program highly competitive (only one in peer group to offer combination for both legacy and new hires)
- No employee contributions for DB plans (only one in peer group)
- Like UTA, not many peers are offering COLA

Retirement Benefits at upper end of competitive range

- Retirement Benefits at the upper end of competitive range for both legacy employees and new hires with transit peers
- Some peers offer significantly lower retirement benefits to new hires compared to legacy

Appendices

Appendices—Assumptions and Methods

Valuation Date	▪ January 1, 2019 initially; January 1st each year thereafter
Census Data	▪ As of January 1, 2019, projected forward assuming all demographic assumptions met.
New Entrants	▪ New entrants are assumed to replace current active participants who leave such that the active headcount remains level. The new entrant profile is based on recent hires.
Demographic Assumptions	▪ Same as specified in actuarial report for fiscal year ending June 30, 2019 (issued September 2016) except mortality; using most recent mortality tables released by Society of Actuaries for public sector employees (PUbG-10) with the MP-2018 mortality improvement scale. New hires in the URS Plan without legacy UTA benefits use the retirement rates used in the January 1, 2018 valuation of the URS Plan.
Discount Rate:	▪ 7.00% discount rate, which is within the 35th and 65th percentiles based on plan's target asset allocation and Aon's capital market assumptions.
Investment Return (Defined Benefit Plan):	▪ 7.00% net investment return (unless specified); net of investment expenses only.
Salary Growth:	▪ 5.4% for first 5 years, then 3.4% thereafter
Assumed Payroll Growth:	▪ 3.4% (for actuarially determined contributions)
Inflation:	▪ 2.10%
Administrative Expenses:	▪ $440,000 annually; increasing with inflation; UTA paid $440,000i n 2018 or about 23 bps and $324k in 2017 or about 31 bps

Appendices—Assumptions and Methods (continued)

Assets	▪ $194.5 million in trust as of January 1, 2019, projected forward assuming $215.3 million in trust as of December 31, 2019
Funding Method	▪ Entry Age Normal; unless specified.
Funding Policy	▪ Actuarially Determined Contribution (“ADC”) based on 15-year, level-percentage-of-pay, closed amortization funding policy. URS Hybrid Plan is based on 20-year, level percentage of pay, open amortization funding policy
Asset Method	▪ Market Value of Assets
Blue Skies	▪ Baseline for 2019 and 2020, and 2031 to 2039 ▪ For 10 years starting 2021 – Annual Returns: 17.95%, 16.80%, 12.70%, 9.35%, 8.55%, 8.15%, 8.00%, 7.85%, 7.75%, 7.60% – Annual Inflation: 2.40%, 2.60%, 2.85%, 2.75%, 2.60%, 2.55%, 2.50%, 2.45%, 2.40%, 2.35%
Black Skies (Recession)	▪ Baseline for 2019 and 2020, and 2031 to 2039 ▪ For 10 years starting 2021 – Annual Returns:-24.95%, -21.80%, -14.05%, -4.20%, 1.70%, 2.05%, 2.25%, 2.75%, 3.25%, 3.75% – Annual Inflation: -1.85%, -1.65%, -0.70%, 0.05%, 0.25%, 0.50%, 0.65%, 080%, 1.00%,1.15%
High Inflation	▪ Baseline for 2019 and 2020, and 2031 to 2039 ▪ For 10 years starting 2021 – Annual Returns: -9.20%, -3.45%, 5.30%, 6.95%, 6.35%, 6.75%, 6.90%, 7.00%, 7.05%, 7.05%, 7.60% – Annual Inflation: 3.10%, 3.85%, 4.85%, 5.15%, 5.20%, 5.05%, 4.75%, 4.40%, 4.10%, 3.80%

Appendices—Assumptions and Methods (continued)

Investment Return (Defined Contribution Plan):	▪ 5.50% net investment return (unless specified), net of administrative and investment expenses
Defined Contribution Plan Beginning Balance:	▪ Varies by Plan – employees assumed to contribute to DC plan and/or Personal Savings after meeting mandatory DB contribution requirements (if any)
Annuity Conversion Rate (for DC balances):	▪ 2.60%; based on current annuity provider rates as of 8/23/2019
Annuity Conversion Mortality (for DC balances):	▪ SOA PubG-10 Tables
Employee Contributions:	▪ 6.00% total employee contributions to retirement plans assumed;

Summary of Plan Provisions—Utah Transit Authority ("UTA")

Plan	Legacy/New Hire
Description of plans offered	Defined benefit plan plus elective defined contribution plan offered to all eligible employees
Defined Benefit Plan Provisions	
Average Compensation	60 consecutive months that produce highest compensation
Normal Retirement Date (NRD)	Age 65/5 Years of Service, or 37.5 Years of Service
Benefit Formula	2.0% of Average Compensation times Years of Service
Early Retirement Eligibility	55/5
Early Retirement Benefit	Normal benefit reduced 5% per year before NRD
Vested Terminations	5-years
COLA	None
Employee Contribution	None
Defined Contribution Benefit	Match 2/3% of voluntary employee contributions up to 2% of Pay

Summary of Plan Provisions—Tri-County Metropolitan Transportation District of Oregon (“TriMet”)

Plan	Legacy/New Hire
Description of plans offered	All eligible employees are enrolled in non-elective defined contribution plan; elective defined contribution plan without employer match is also available.
Non-elective benefit	8% of base compensation

Summary of Plan Provisions—Dallas Area Rapid Transit ("DART")

Plan	Legacy/New Hire
Description of plans offered	All eligible employees are enrolled in non-elective defined contribution plan; elective defined contributions plan with employer match is also available.
Non-Elective Benefit	7.7% of payroll period compensation
Elective Benefit	Match 50% of employee contribution up to 3.0% of payroll period compensation

Summary of Plan Provisions—Regional Transportation District-Denver ("RTD")

Plan	Legacy/New Hire
Description of plans offered	Bargained: Defined benefit plan NonBargained: nonelective defined contribution plan All participants: elective 457b defined contribution plan with no employer match
Defined Benefit Plan Provisions (Bargained Only)	
Average Compensation	Highest 5 of all service years
Normal Retirement Date (NRD)	65, or 10 years Credited Service
Benefit Formula	1.0% of Average Compensation times Years of Service
Early Retirement Eligibility	50/20
Early Retirement Benefit	Normal benefit reduced 4% per year before NRD
Vested Terminations	5-years
COLA	None
Employee Contribution	3% of Pay
Defined Contribution Plan (Non-bargained Only)	7-9% of compensation, set annually by the Board

Summary of Plan Provisions—San Diego Metropolitan Transit System ("MTS")

Plan	Legacy	New Hire
Eligibility	Hired prior to January 1, 2013	Hired on or after January 1, 2013
Average Compensation	Final Year Compensation	36 consecutive months that produce highest compensation
Retirement Age	50-55	52-67
Benefit Formula	2.0% of Average Compensation at age 50, to 2.7% at age 55, times Years of Service	1.0% of Average Compensation at age 52, to 2.5% at age 67, times Years of Service
Early Retirement Benefit	N/A	N/A
Vested Terminations	5-years	5-years
COLA	2%	2%
Employee Contribution	Determined annually	Half of Normal Cost, per PEPRA

Summary of Plan Provisions—Sacramento Regional Transit District ("SacRt")

Plan	Legacy	New Hire
Eligibility	Hired prior to January 1, 2015	Hired on or after January 1, 2015
Average Compensation	48 consecutive months that produce highest compensation	48 consecutive months that produce highest compensation
Retirement Age	55/25YOS – 60/30YOS	52-67
Benefit Formula	2.0% of Average Compensation at age/svc 55/25, to 2.5% at age/svc 60/30, times Years of Service	1.0% of Average Compensation at age 52, to 2.5% at age 67, times Years of Service
Early Retirement Benefit	N/A	N/A
Vested Terminations	5-years	5-years
COLA	None	None
Employee Contributions	Determined annually by the Retirement Boards of Directors	Half of Normal Cost, per PEPRA

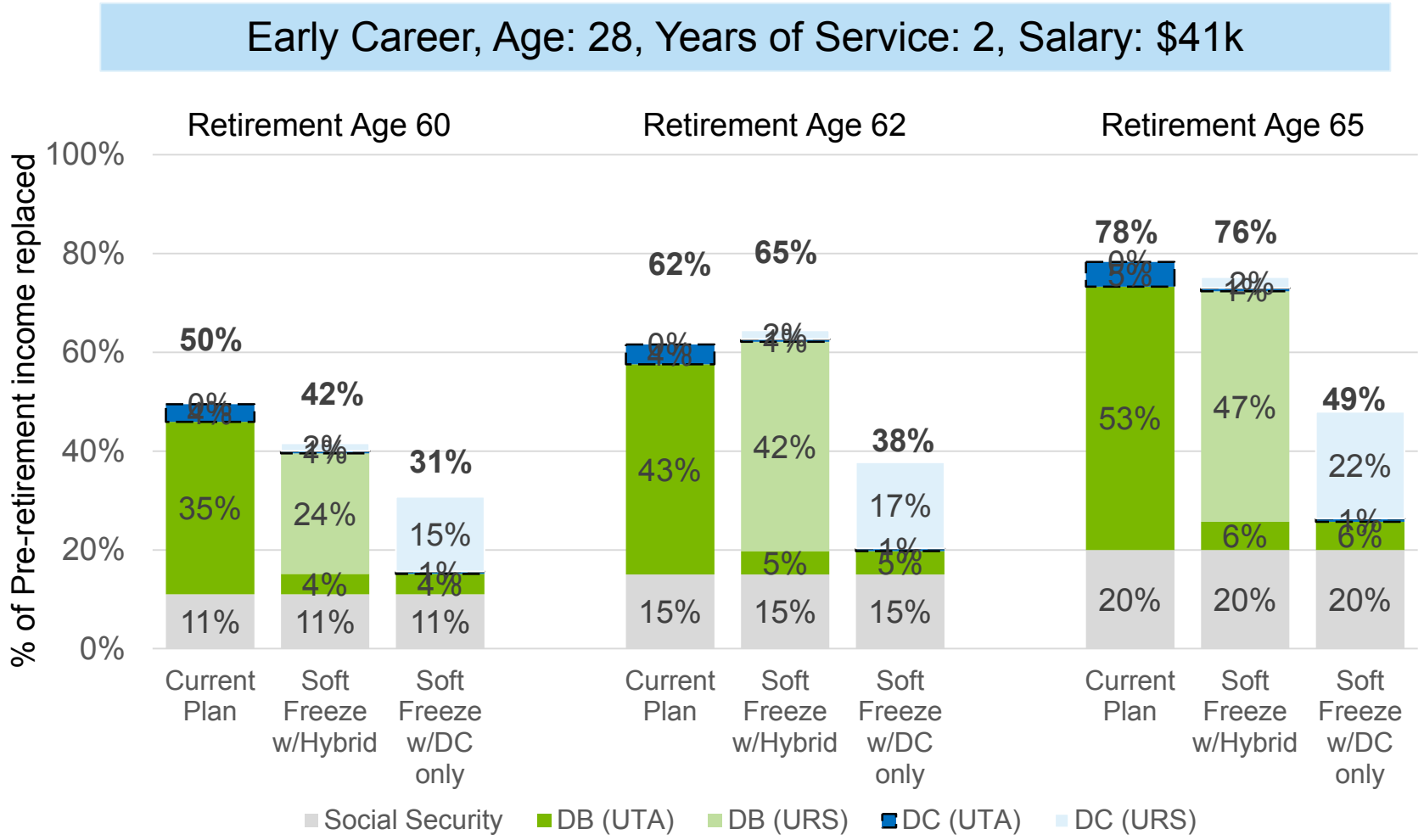
Summary of Plan Provisions—State of Utah Hybrid Plan

Plan	Legacy	New Hire
Eligibility	Hired prior to July 1, 2011	Hired on or after July 1, 2011
Average Compensation	36 consecutive months that produce highest compensation	60 consecutive months that produce highest compensation
Normal Retirement Date (NRD)	65/4, or 30 years Credited Service	65/4, or 35 years Credited Service
Benefit Formula	2.0% of Average Compensation times Years of Service (YOS)	1.5% of Average Compensation times Years of Service (YOS)
Early Retirement Eligibility	60/20 or 62/10	60/20 or 62/10
Early Retirement Benefit	Normal benefit reduced 3% per year before age 65 and 7% per year before age 60, for <30 YOS	Normal benefit reduced 9% per year before age 65, and 7% per year before age 63, for <35 YOS
Vested Terminations	5-years	4-years
COLA	Indexed to CSI, limited to 4%	Indexed to CSI, limited to 2.5%
Employee Contributions	6% of Pay	Plan costs in excess of 10%
Defined Contribution Plan	Elective plans available	Employer contributes max 10% in DB + DC combined Voluntary employee contributions allowed

Summary of Plan Provisions—State of Utah DC-Only Plan

Plan	Legacy/New Hire
Description of plans offered	Employees not electing the Hybrid Plan are enrolled in the non-elective defined contribution plan.
Non-elective benefit	10% of base compensation
Voluntary benefits	Employee contributions allowed but not matched
Vesting of employer contributions	4 years

Feasibility of State Plan—Employee Impact
(Bus/Train Operators–883)

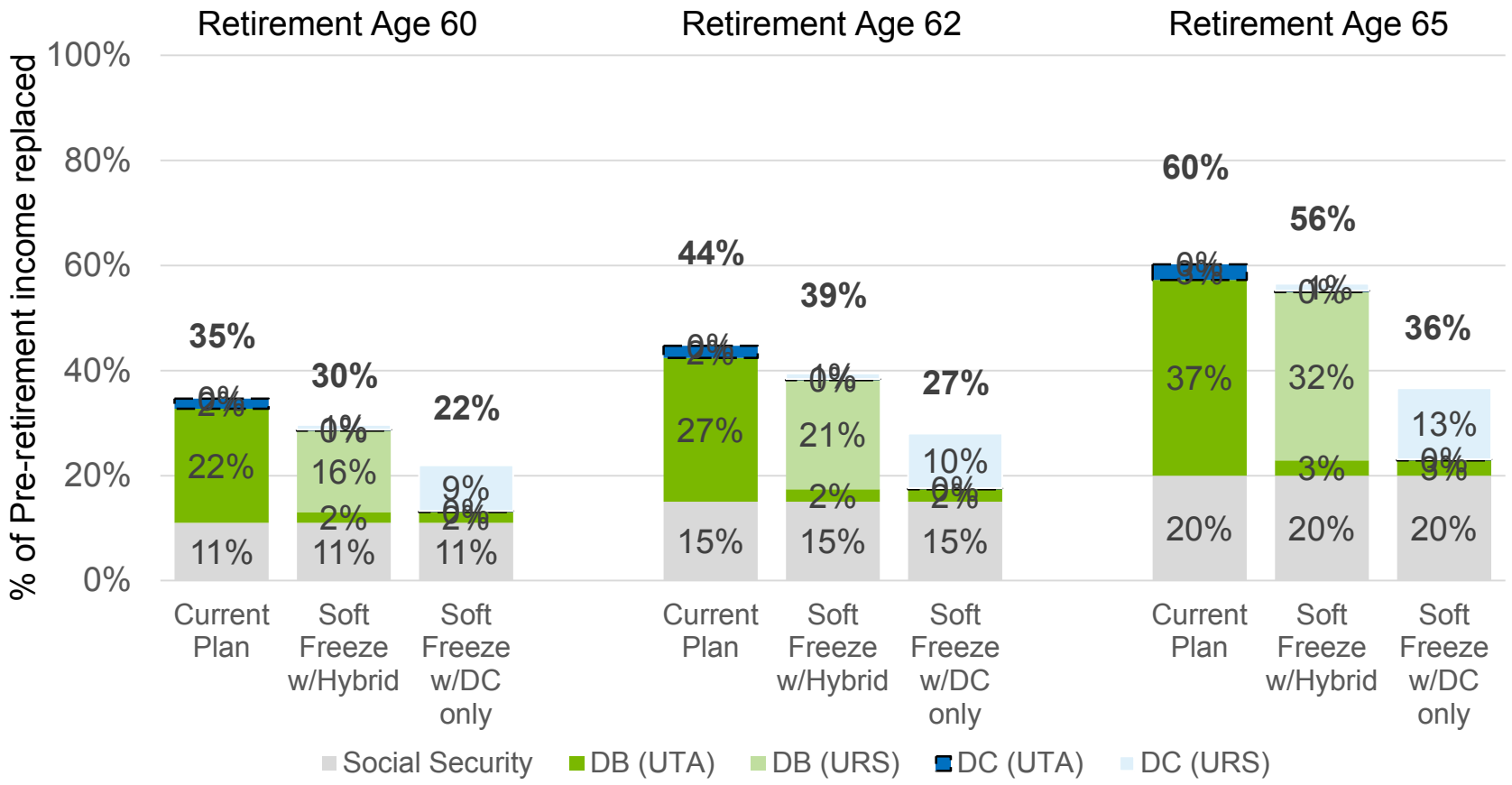


Hard freeze will replace 2.6 - 4% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

Feasibility of State Plan—Employee Impact
(Clerical, Customer Service, Engineers, Accountants, Admin, Supervisors, IT–509)

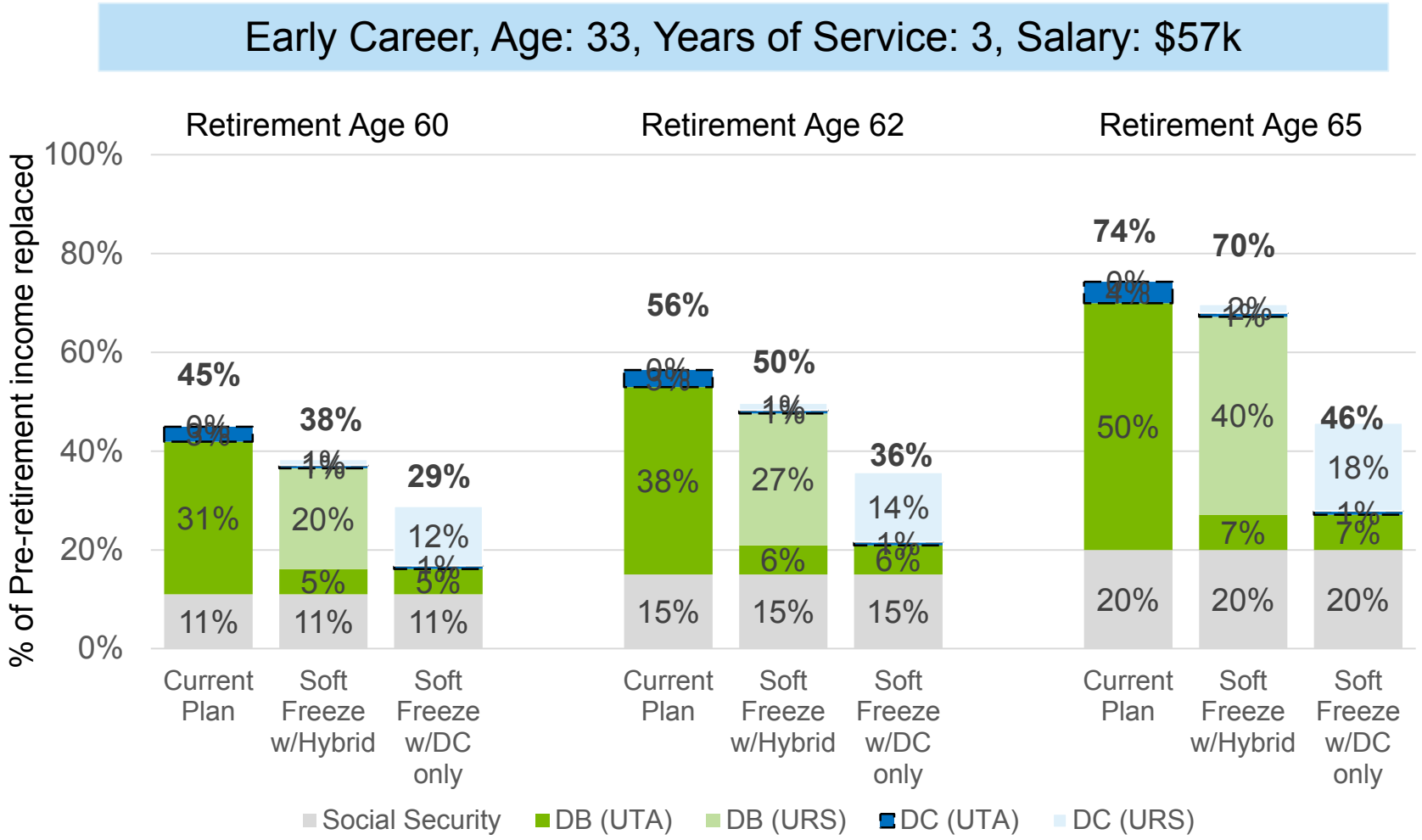
Average New Hire, Age: 39, Years of Service: 0, Salary: $56k



Hard freeze will replace 1 – 1.6% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

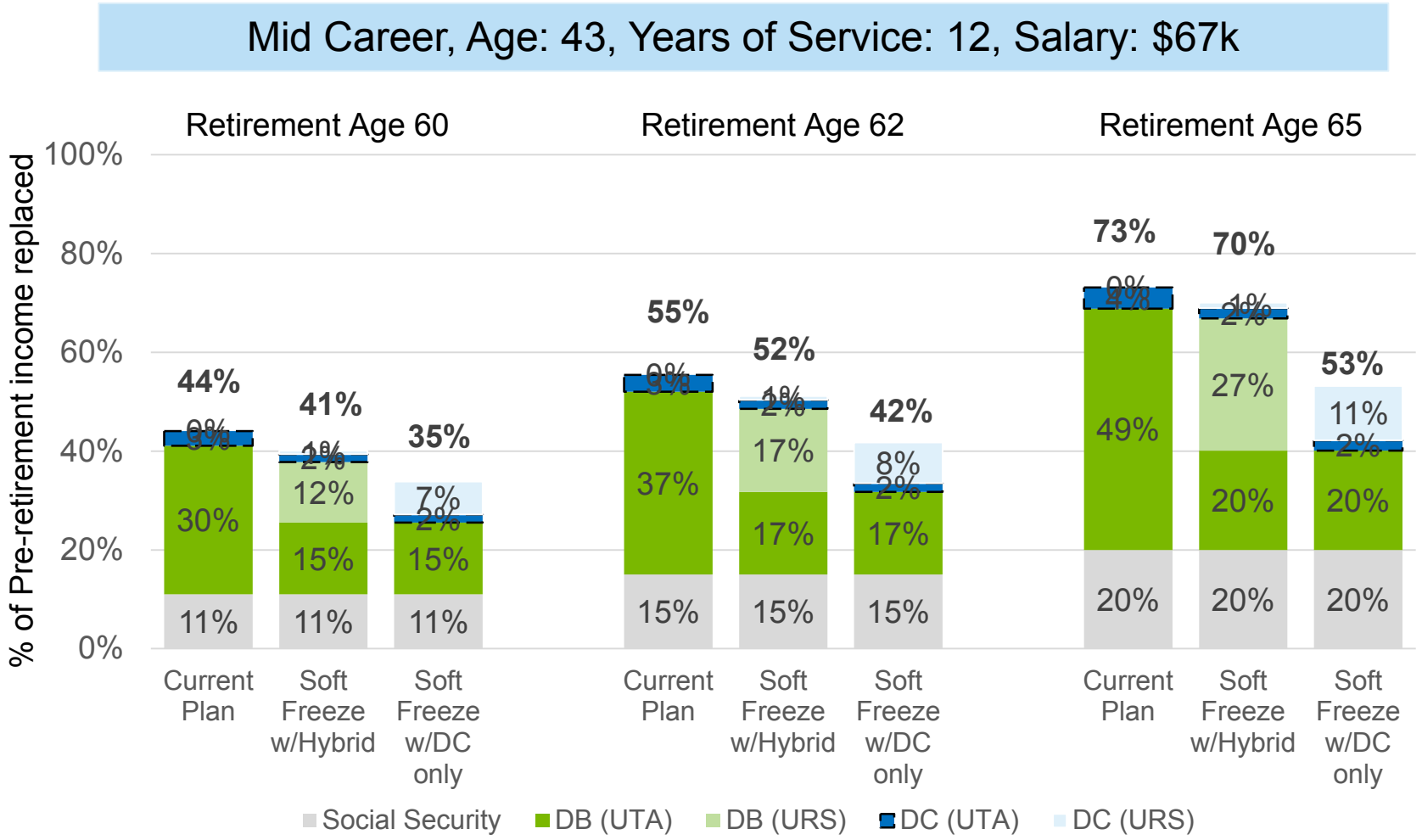
Feasibility of State Plan—Employee Impact
(Clerical, Customer Service, Engineers, Accountants, Admin, Supervisors, IT–509)



Hard freeze will replace 2.9 – 4.5% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid

Feasibility of State Plan—Employee Impact
(Clerical, Customer Service, Engineers, Accountants, Admin, Supervisors, IT–509)

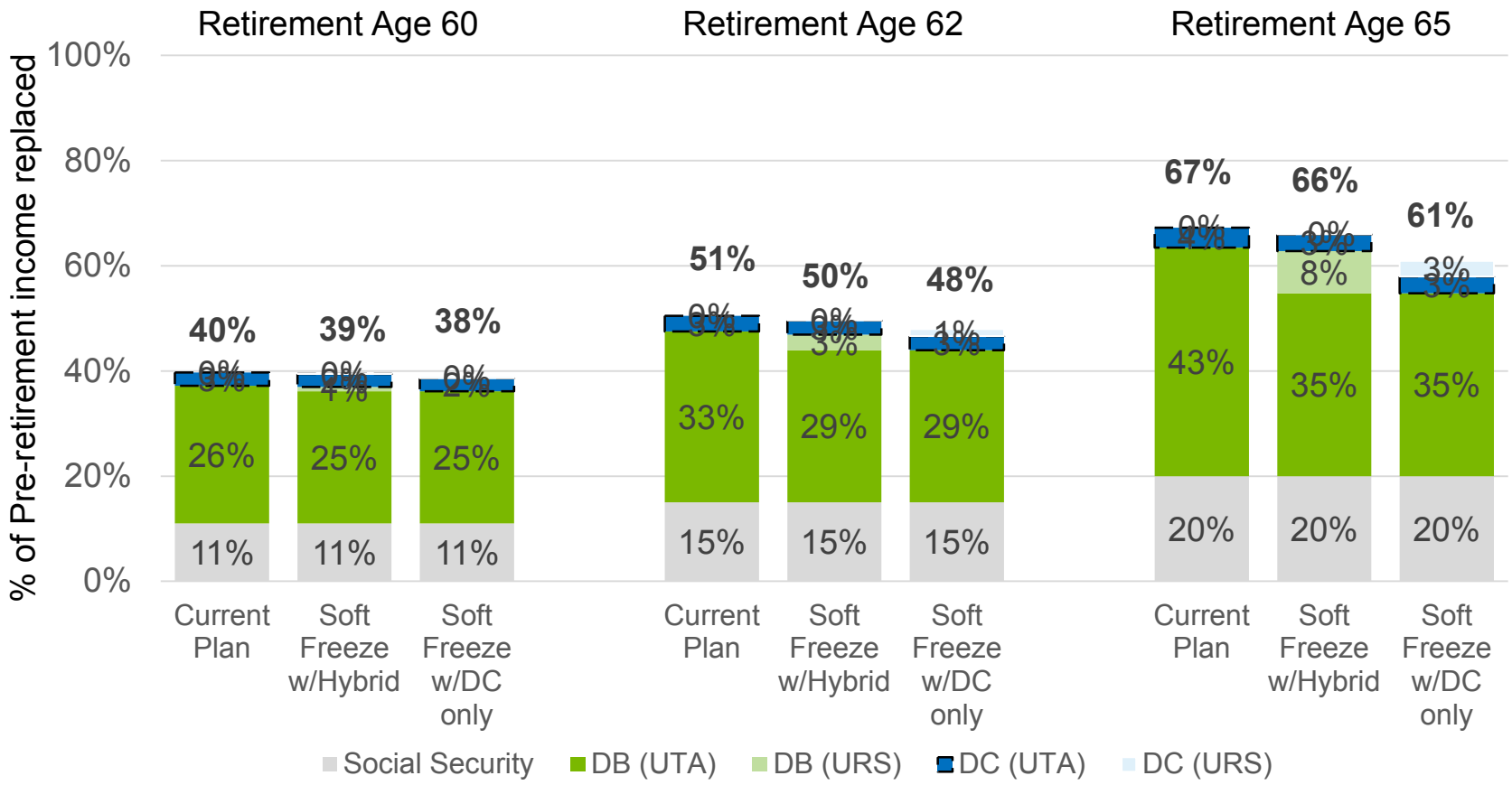


Hard freeze will replace 5.7 – 9.8% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

Feasibility of State Plan—Employee Impact
(Clerical, Customer Service, Engineers, Accountants, Admin, Supervisors, IT–509)

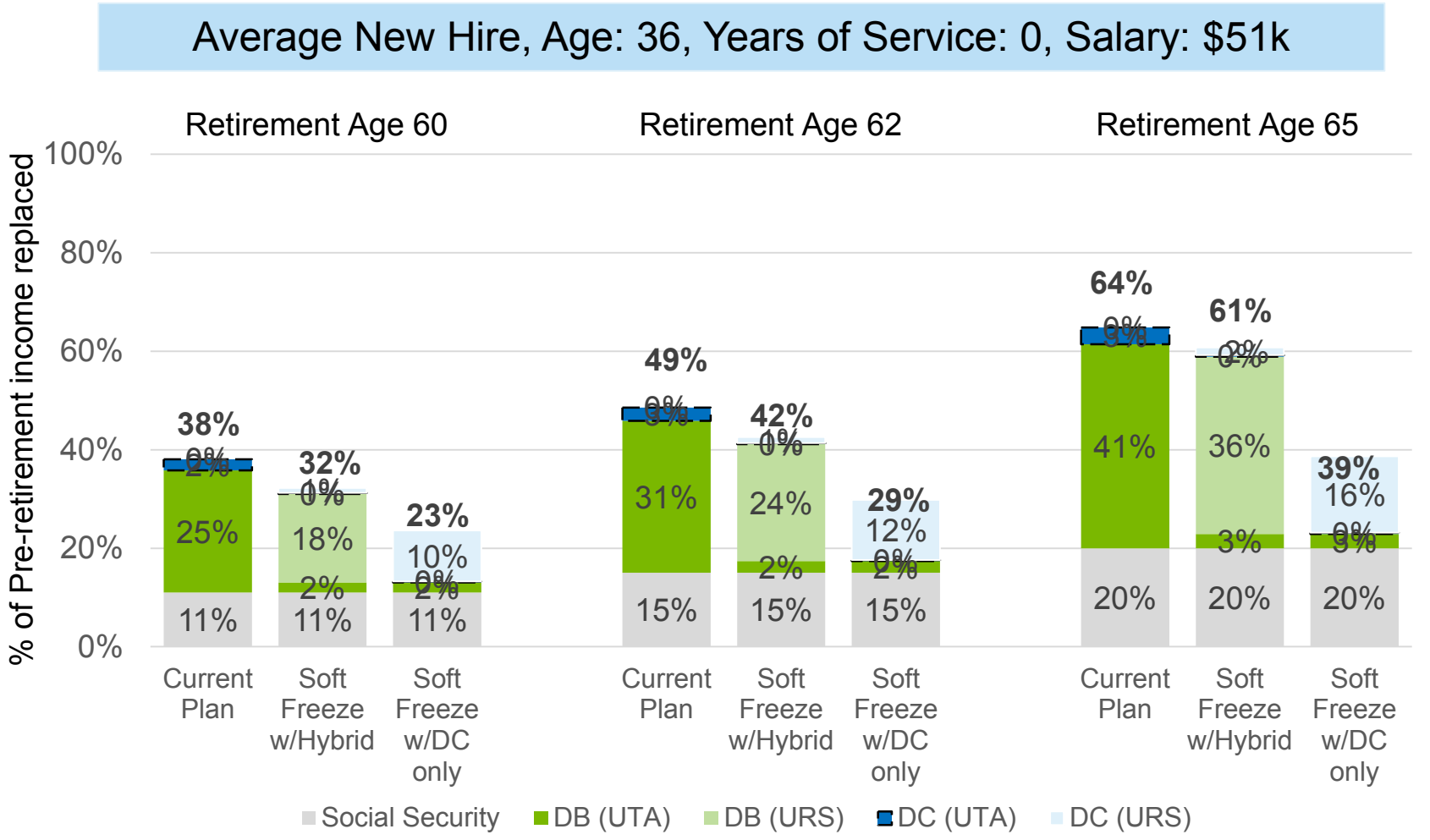
Late Career, Age: 57, Years of Service: 22, Salary: $75k



Hard freeze will replace 0.8 – 6.3% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

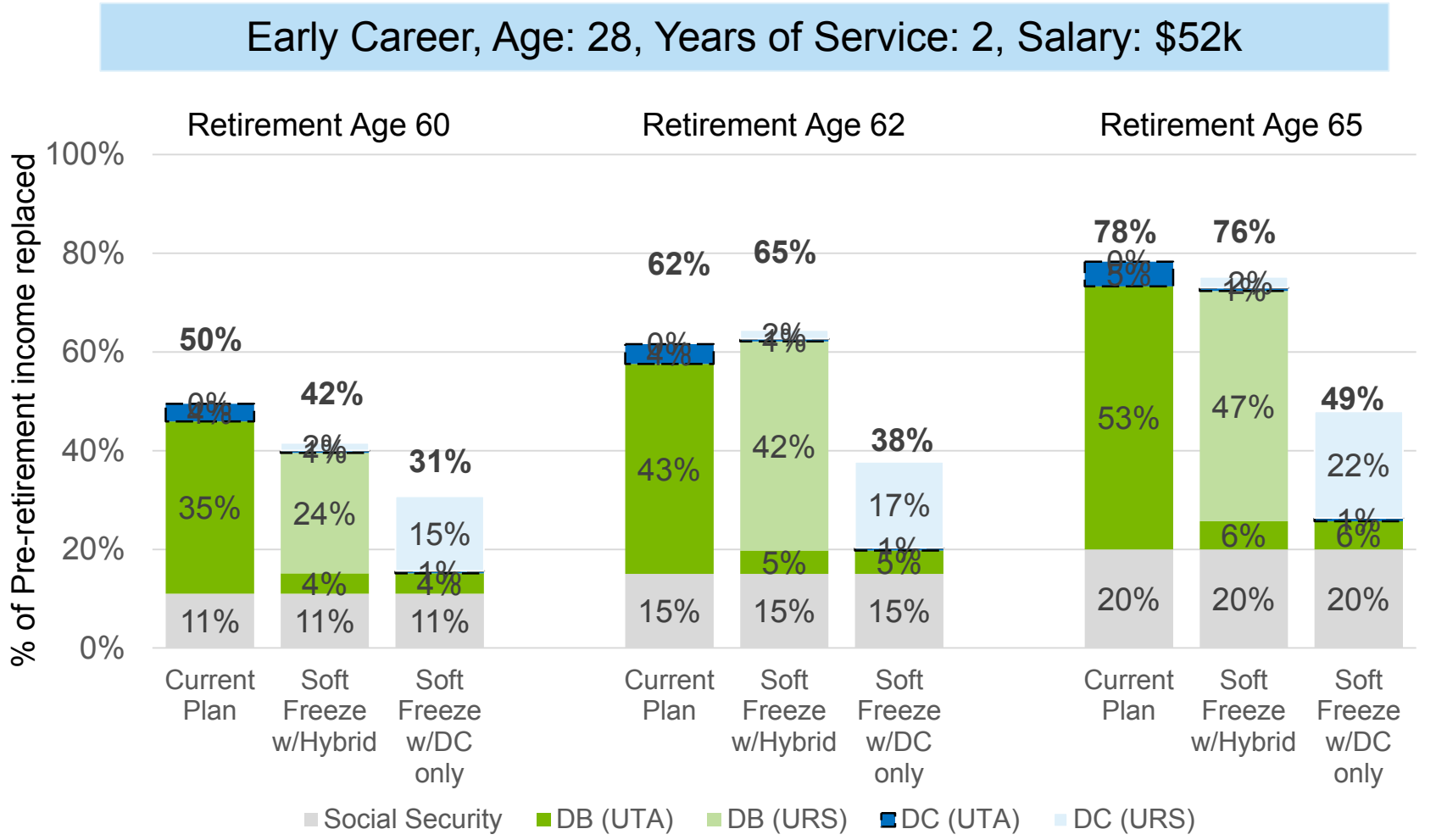
Feasibility of State Plan—Employee Impact
(Technicians, Mechanics–386)



Hard freeze will replace 1 – 1.7% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

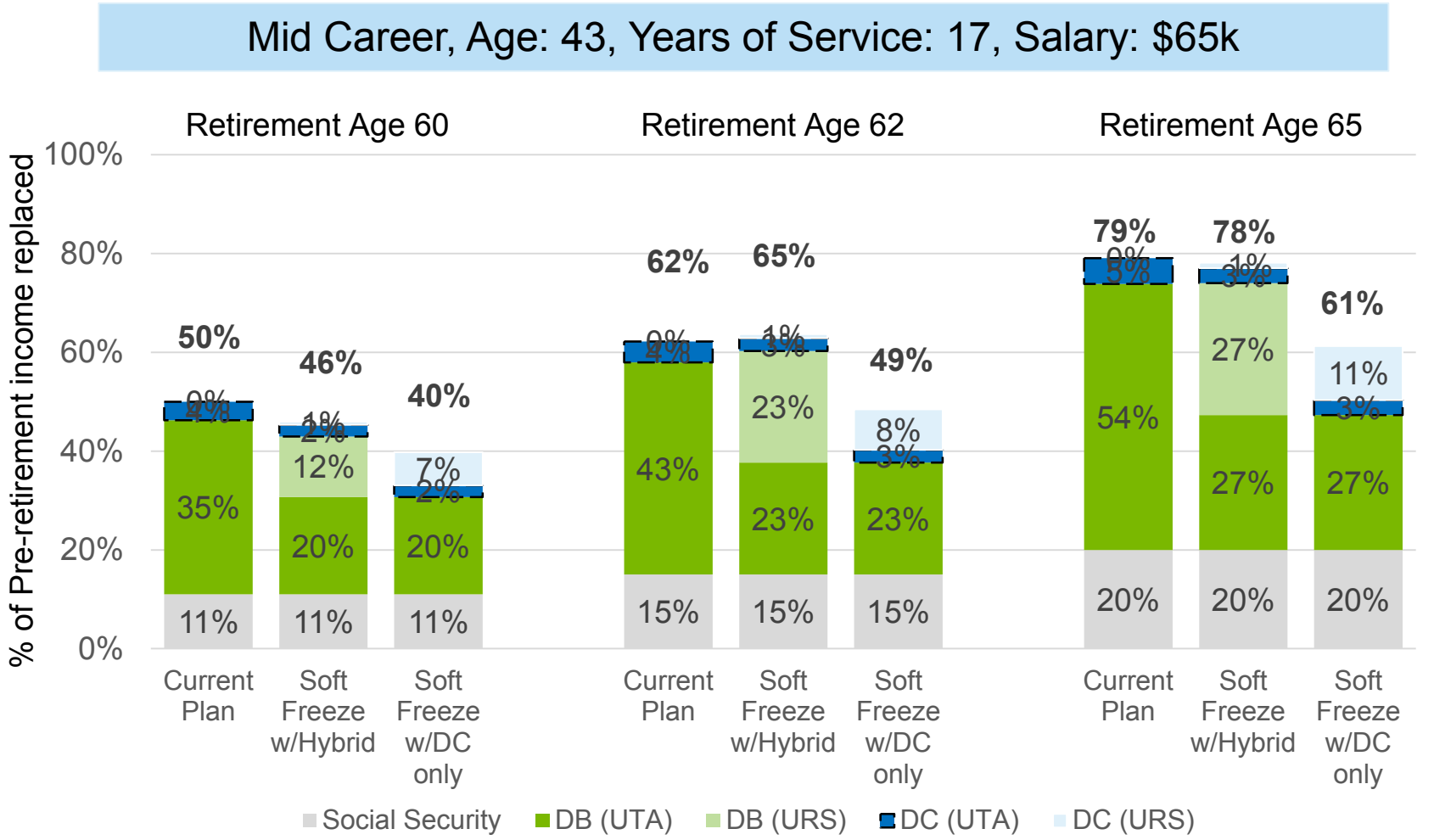
Feasibility of State Plan—Employee Impact
(Technicians, Mechanics–386)



Hard freeze will replace 2.6 – 4% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

Feasibility of State Plan—Employee Impact
(Technicians, Mechanics–386)

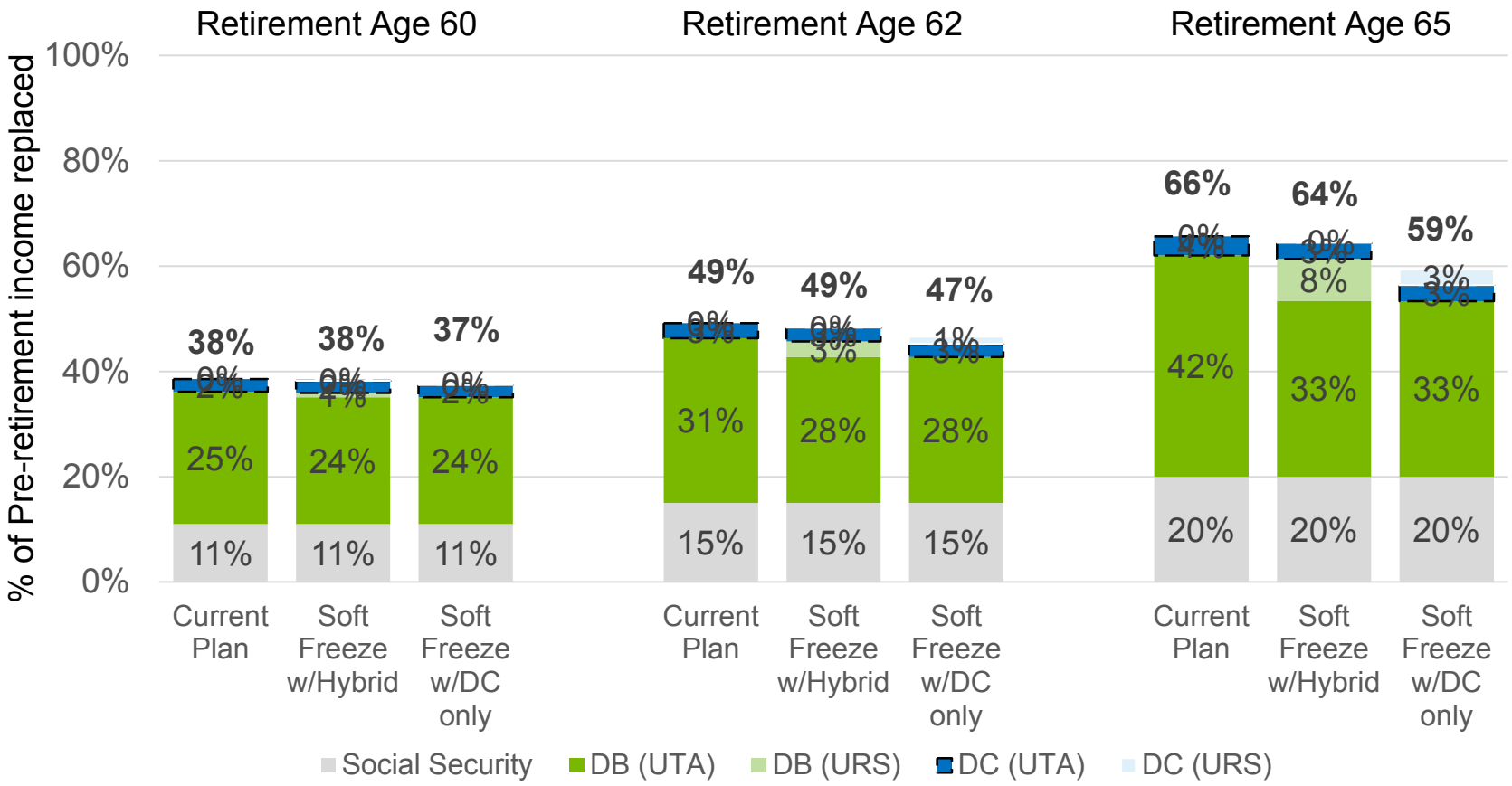


Hard freeze will replace 7.8 – 13.3% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

Feasibility of State Plan—Employee Impact
(Technicians, Mechanics–386)

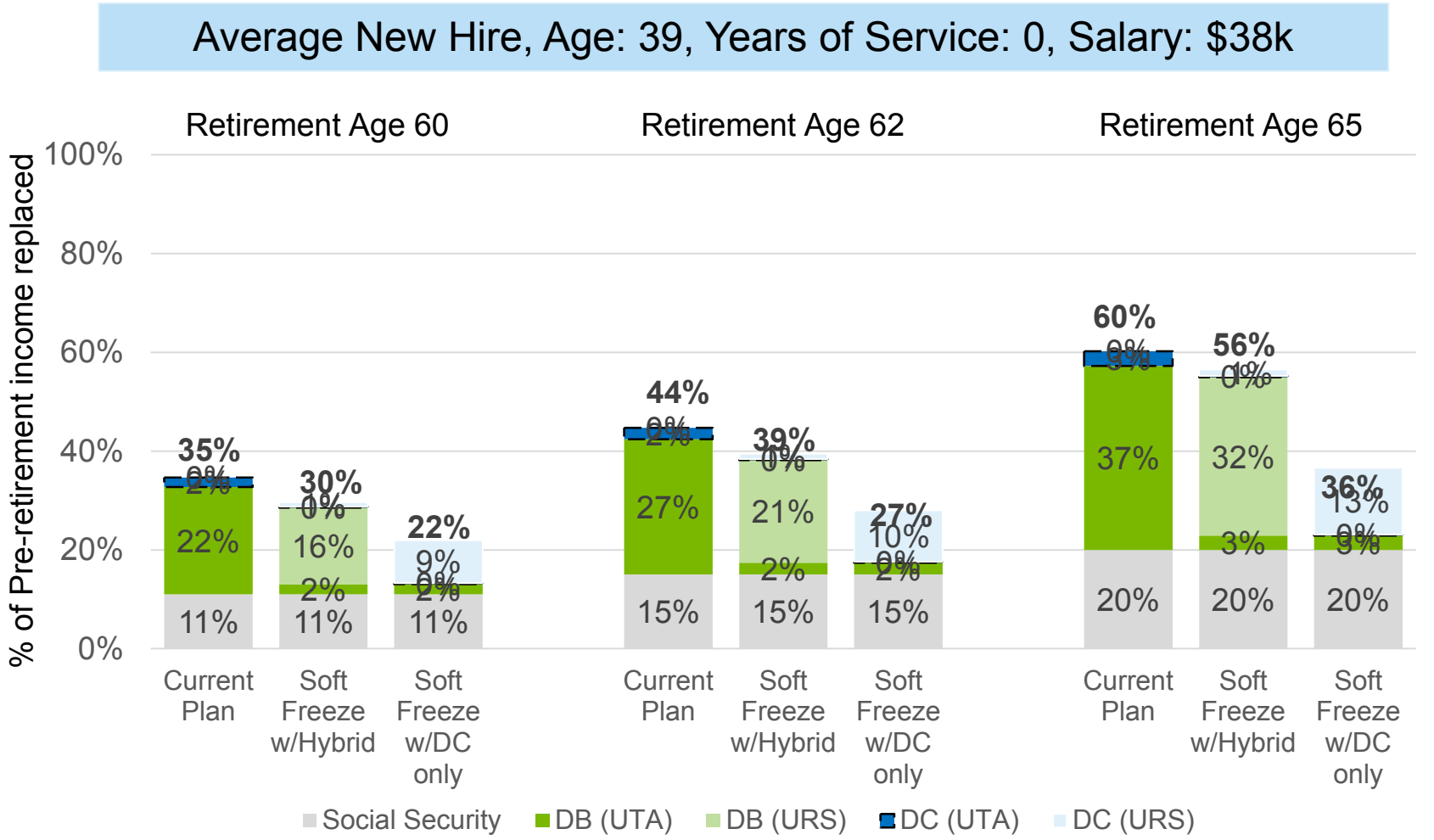
Late Career, Age: 57, Years of Service: 21, Salary: $80k



Hard freeze will replace 0.8 – 6% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

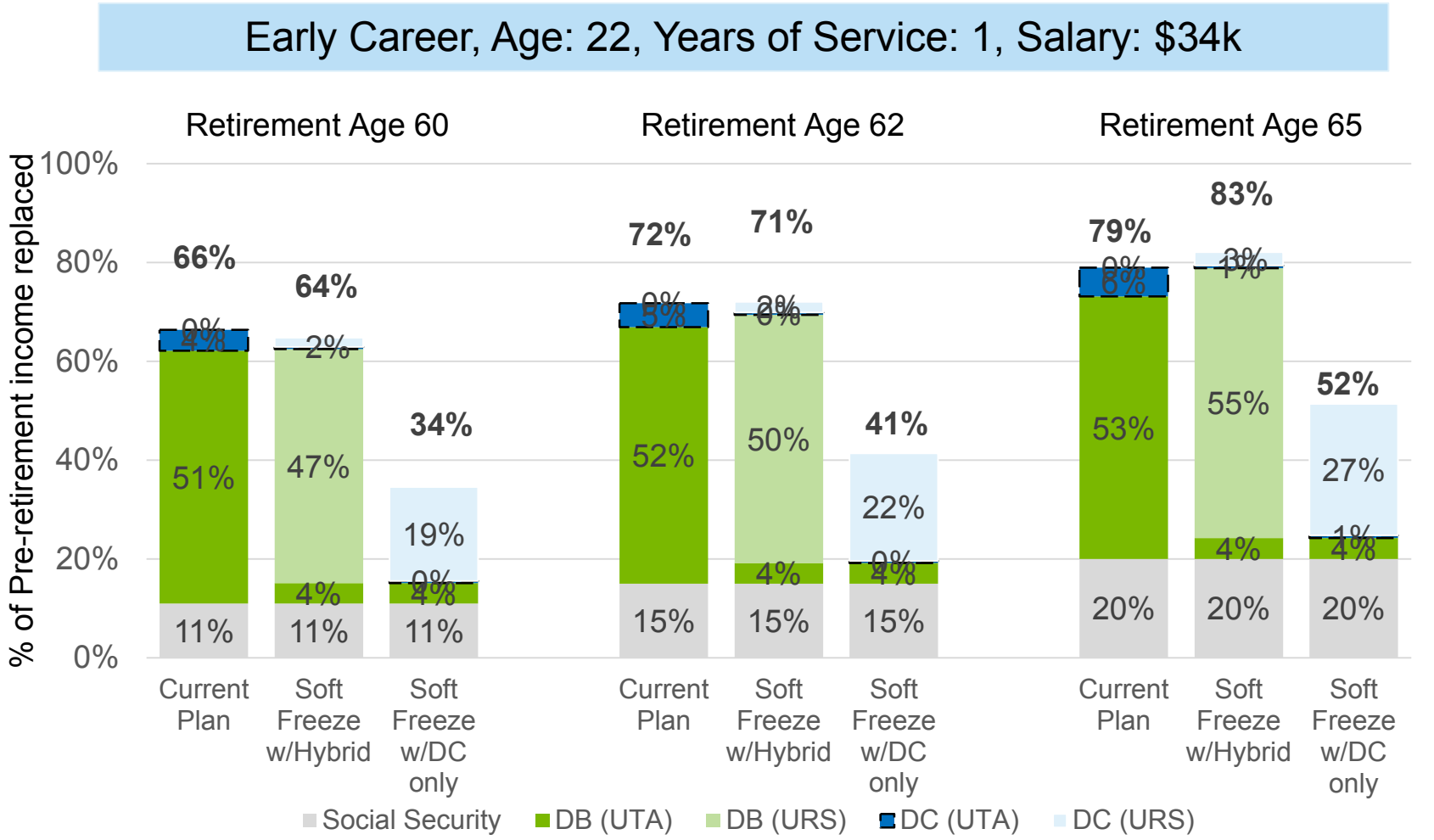
Feasibility of State Plan—Employee Impact
(Cleaners, Security, Transit Police–248)



Hard freeze will replace 1 – 1.6% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

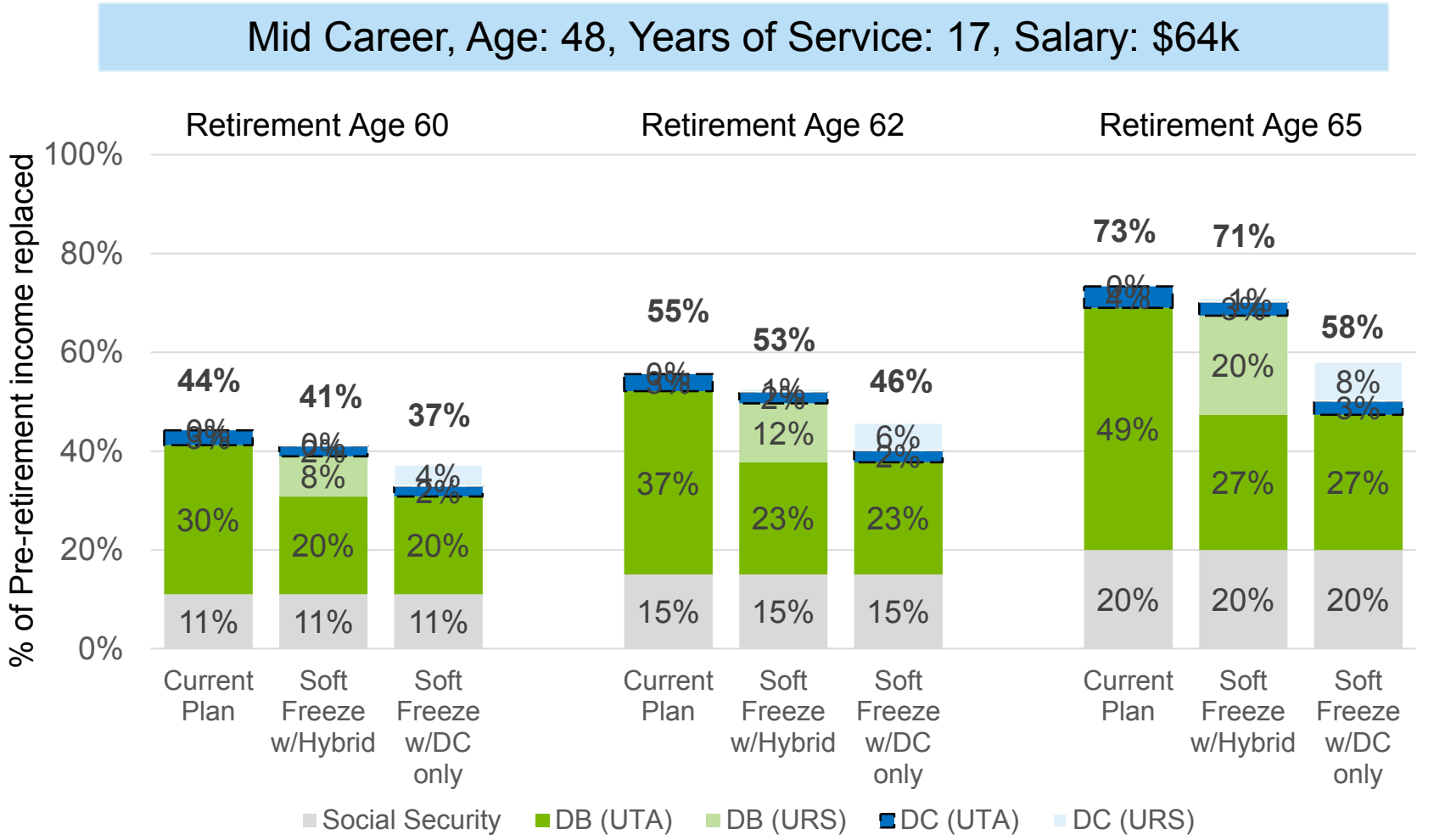
Feasibility of State Plan—Employee Impact
(Cleaners, Security, Transit Police–248)



Hard freeze will replace 2.9 – 3.2% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

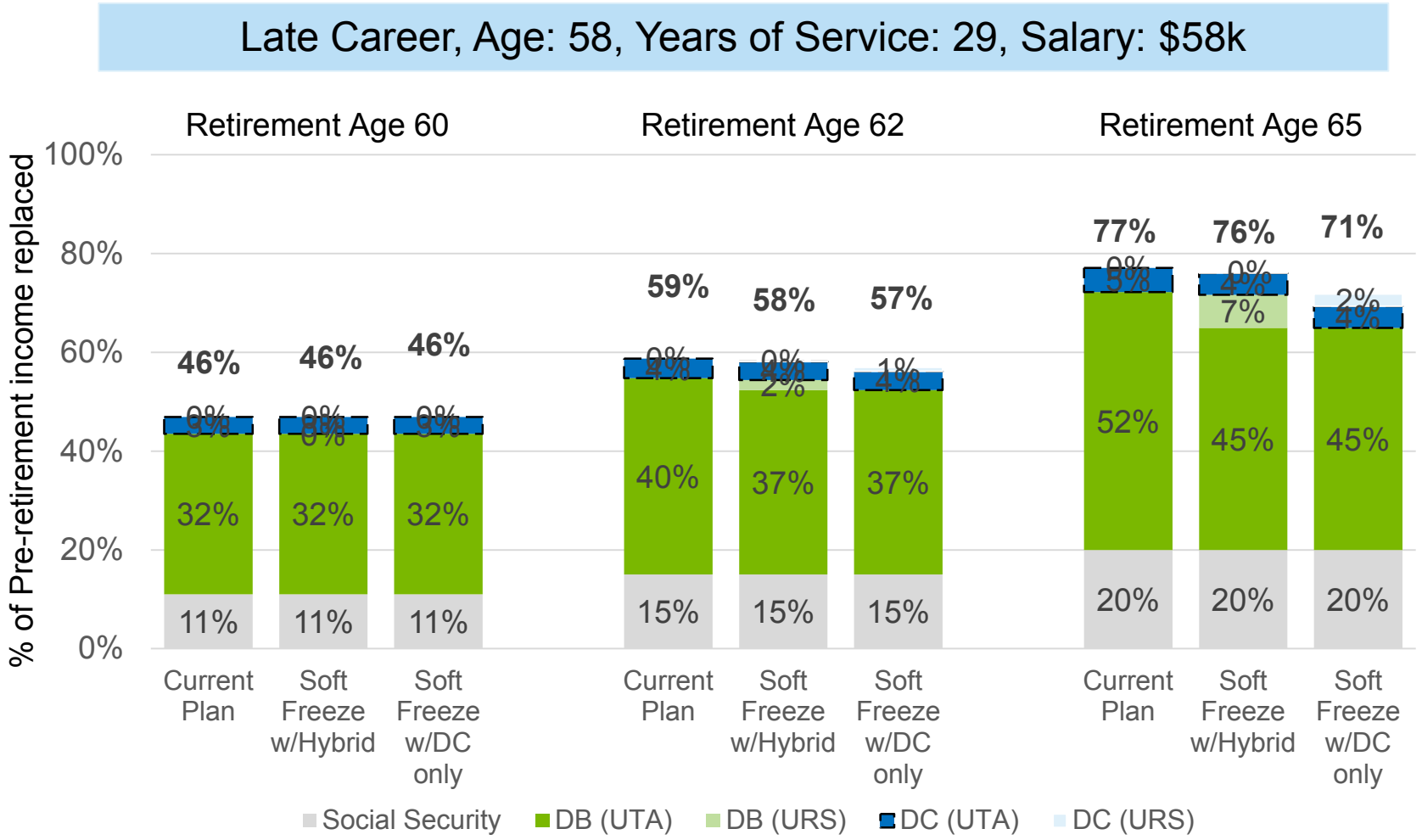
Feasibility of State Plan—Employee Impact
(Cleaners, Security, Transit Police–248)



Hard freeze will replace 5.6 – 10.8% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

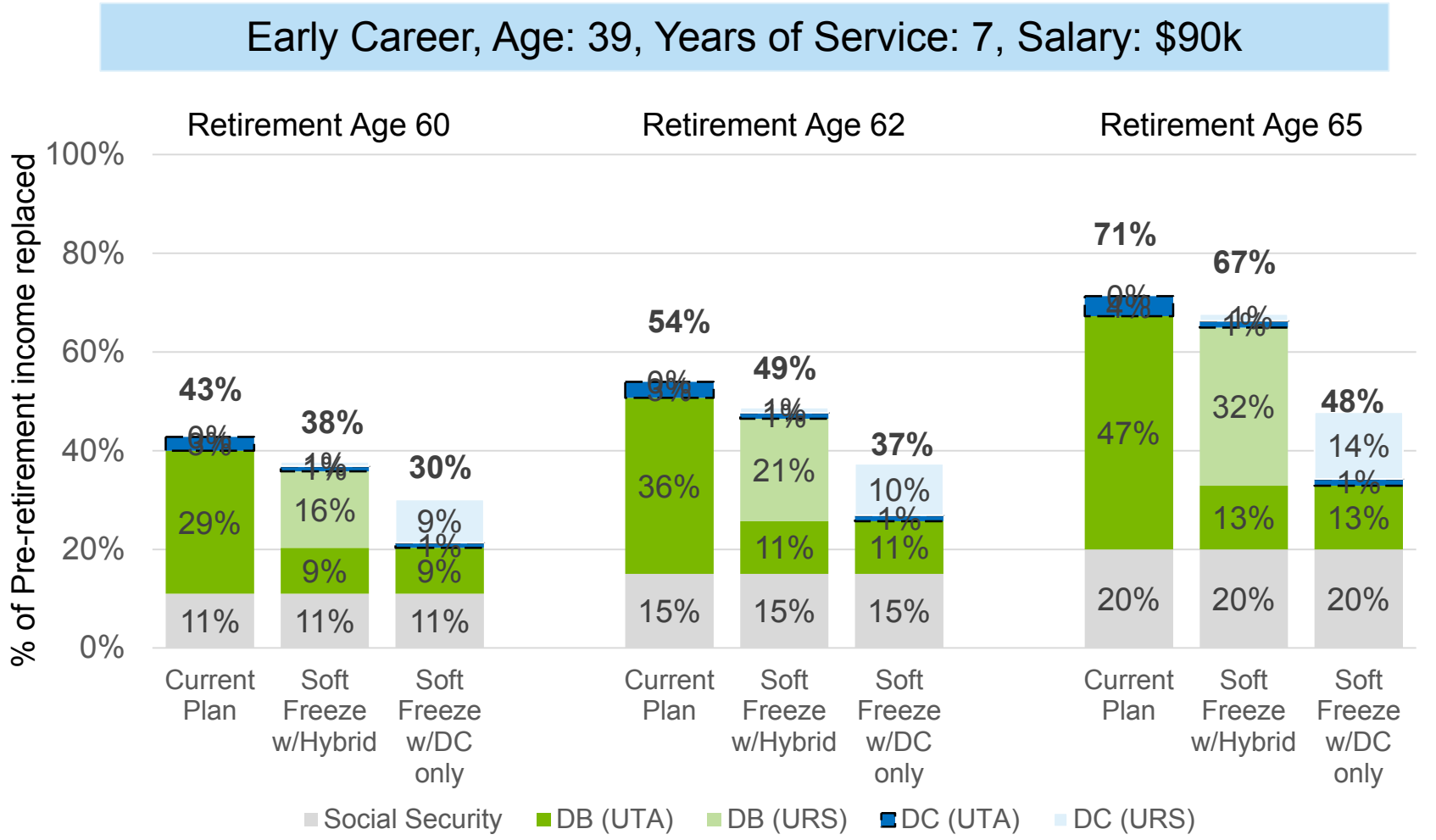
Feasibility of State Plan—Employee Impact
(Cleaners, Security, Transit Police–248)



Hard freeze will replace 0 – 6.9% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.

Feasibility of State Plan—Employee Impact
(Managers, Executives–96)



Hard freeze will replace 4.4 – 7.1% less income than the soft freeze.

Note: Amounts shown are only the employer-provided amounts assuming the employee is making any necessary or required contributions to receive the benefits. Social Security reflects the expected employer portion of Social Security amount paid.