



## 2020 South Dakota Legislature

# Senate Bill 34

*Introduced by: The Committee on Retirement Laws at the request of the South Dakota Retirement System*

1 **An Act to establish a qualified benefit preservation arrangement for eligible**  
 2 **members of the South Dakota Retirement System.**

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 **Section 1.** That a NEW SECTION be added:

5 **3-12C-1801. Participant--Defined.**

6 For the purposes of this part, a participant is a member, retiree, or the surviving  
 7 spouse of a member or retiree, who is eligible to participate in the qualified benefit  
 8 preservation arrangement as determined by § 3-12C-1804.

9 **Section 2.** That a NEW SECTION be added:

10 **3-12C-1802. Qualified benefit preservation arrangement--Defined.**

11 For the purposes of this part, the qualified benefit preservation arrangement is an  
 12 arrangement under section 415(m) of the Internal Revenue Code and established in § 3-  
 13 12C-1803.

14 **Section 3.** That a NEW SECTION be added:

15 **3-12C-1803. Qualified benefit preservations arrangement--Established--**  
 16 **Purpose.**

17 The qualified benefit preservation arrangement is established and placed under the  
 18 management of the board. The purpose of the qualified benefit preservation arrangement  
 19 is solely to provide a portion of the benefit that would otherwise have been payable by  
 20 the system except for the limitations under section 415(b) of the Internal Revenue Code,  
 21 as determined in § 3-12C-1805. The qualified benefit preservation arrangement is  
 22 intended to constitute a qualified governmental excess benefit arrangement under section  
 23 415(m) of the Internal Revenue Code and shall be interpreted and construed consistently  
 24 with that intent. The qualified benefit preservation arrangement is a portion of the system

1 solely to the extent required under, and within the meaning of, code section 415(m)(3)  
2 and § 3-12C-1805.

3 The qualified benefit preservation arrangement is an exempt governmental  
4 deferred compensation plan described in code section 3121(v)(3). Code sections 83,  
5 402(b), 457(a) and 457(f)(1) do not apply to the qualified benefit preservation  
6 arrangement. With respect to code section 457(a), the maximum amount that may be  
7 deferred under the qualified benefit preservation arrangement on behalf of any participant  
8 for the taxable year may exceed both the amount in code section 457(b)(2), as adjusted  
9 for cost of living increases, and the percent of the participant's includible compensation  
10 referred to in that code section. The system may not hold any assets or income under the  
11 qualified benefit preservation arrangement in trust for the exclusive benefit of participants.

12 **Section 4.** That a NEW SECTION be added:

13 **3-12C-1804. Eligibility to participate.**

14 Effective as of July 1, 2020, a participant is eligible to participate in the qualified  
15 benefit preservation arrangement for any calendar year, or portion of the calendar year,  
16 during which the participant is entitled to receive a benefit payment from the system, but  
17 the benefit is required to be reduced due to the application of the maximum benefit  
18 provisions of section 415(b) of the Internal Revenue Code. In that case, the participant  
19 may be eligible for a benefit as determined in § 3-12C-1805.

20 The system shall determine which participants are eligible to participate in the  
21 qualified benefit preservation arrangement. Eligibility for participation begins in any month  
22 in which a participant is entitled to receive a benefit from the system that is required to  
23 be reduced due to the application of the maximum benefit provisions of section 415(b) of  
24 the Internal Revenue Code and ends in any month in which the benefit is not limited by  
25 code section 415(b) or when all benefits under the system have ended.

26 Eligibility to participate in the qualified benefit preservation arrangement is limited  
27 to those retirees or beneficiaries whose benefits under the system are required to be  
28 reduced based upon either of the following:

29 (1) The rules for retirement before age sixty-two under section 415(b)(2)(C) of the  
30 Internal Revenue Code; or

31 (2) The rules regarding benefits for which there is not an actuarial increase due to  
32 retirement after age sixty-five as set forth in section 415(b)(2)(D) of the Internal  
33 Revenue Code.

1 **Section 5.** That a NEW SECTION be added:

2 **3-12C-1805. Benefit payable.**

3 A participant shall receive a portion of the participant's benefit that is equal to the  
4 difference between the amount of that participant's monthly retirement benefit paid under  
5 the system and the amount that would have been payable to the participant from the  
6 system in that month if not for the reduction due to the application of section 415(b) of  
7 the Internal Revenue Code, limited by the following conditions:

8 (1) For any retirement benefit that begins before the member attains age sixty-two,  
9 the maximum total benefit payable is equal to the Internal Revenue Code's  
10 applicable benefit limit for the calendar year for a retirement at age sixty-two to  
11 sixty-five, as if the reduction for retirement before age sixty-two was not applied.  
12 Specifically, the qualified benefit preservation arrangement shall pay the amount  
13 that exceeds the Internal Revenue Code's benefit limit as actuarially reduced for  
14 commencement before age sixty-two but may only pay a benefit up to the  
15 applicable benefit limit under section 415(b) of the Internal Revenue Code for the  
16 calendar year unreduced for early commencement. When the participant's benefit  
17 from the qualified benefit preservation arrangement is combined with the  
18 participant's benefit from the system, the participant's total benefit may not exceed  
19 the applicable benefit limit under section 415(b) of the Internal Revenue Code for  
20 the calendar year, unreduced for early commencement;

21 (2) For any retirement benefit that begins after age sixty-five, the maximum total  
22 benefit payable is equal to the Internal Revenue Code's applicable benefit limit for  
23 a retirement at age sixty-two to sixty-five, inclusive, as if the limit was actuarially  
24 increased for a retirement at the participant's retirement age, up to age seventy,  
25 and the qualified benefit preservation arrangement shall pay the amount that  
26 exceeds the code's benefit limit for retirement at age sixty-two to sixty-five,  
27 inclusive. When the participant's benefit from the qualified benefit preservation  
28 arrangement is combined with the participant's benefit from the system, the  
29 participant's total benefit may not exceed the applicable benefit limit under section  
30 415(b) of the Internal Revenue Code for the calendar year, actuarially increased  
31 to the participant's age at retirement, up to age seventy.

32 For purposes of the benefits payable from the qualified benefit preservation  
33 arrangement, if a participant receives an annual incentive payment based on performance,  
34 the incentive payment will be treated as paid in the same calendar quarter of each year  
35 considered in the computation of final average compensation. If an annual incentive

1 payment is paid in different calendar quarters in the years considered in the computation  
2 of final average compensation, the annual incentive payment will be treated as if it was  
3 consistently paid in the fourth calendar quarter.

4 The benefit payable from the qualified benefit preservation arrangement is limited  
5 to the amount that, if combined with the participant's benefit from the system, does not  
6 exceed the amount that would have been payable to the participant from the system in  
7 that month if not for the reduction due to the application of section 415(b) of the Internal  
8 Revenue Code as adjusted in accordance with section 415(d)(1)(A) of the Internal  
9 Revenue Code.

10 The qualified benefit preservation arrangement shall be computed and is payable  
11 under the same terms, at the same time, and to the same person as the related benefit  
12 payable under the system. A participant may not elect to defer the receipt of any part of  
13 the payment due under the qualified benefit preservation arrangement.

14 **Section 6.** That a NEW SECTION be added:

15 **3-12C-1806. Cost of living adjustment after benefit begins--Change in**  
16 **benefit payable.**

17 After retirement, the monthly retirement benefit that would have been payable to  
18 the participant if not for the application of section 415(b) of the Internal Revenue Code  
19 will increase with any cost of living adjustment as determined by the system, and the  
20 applicable benefit limits under 415(b) of the Internal Revenue Code will be adjusted in  
21 accordance with section 415(d)(1)(A) of the Internal Revenue Code. As a result, the  
22 benefit payable from the qualified benefit preservation arrangement may increase or  
23 decrease due solely to the interaction of the cost of living adjustment as determined by  
24 the system and the applicable benefit limit adjustment in accordance with section  
25 415(d)(1)(A).

26 **Section 7.** That a NEW SECTION be added:

27 **3-12C-1807. Qualified benefit preservation arrangement--Funding.**

28 The qualified benefit preservation arrangement is, and shall remain, unfunded  
29 within the meaning of federal tax laws, and the rights, if any, of any participant to any  
30 benefit under the qualified benefit preservation arrangement are limited to those specified  
31 in this part.

32 **Section 8.** That a NEW SECTION be added:

1           **3-12C-1808. Contributions.**

2           The system shall determine the amount necessary to pay the benefits under § 3-  
3 12C-1805 for each calendar year. The required contribution will be the aggregate of the  
4 benefits payable under § 3-12C-1805 to all participants for the calendar year and an  
5 amount determined to be a necessary and reasonable expense of administering the  
6 qualified benefit preservation arrangement. Contributions may not be calculated in a  
7 manner designed to pay future benefits under § 3-12C-1805. Each payment of  
8 contributions by an employer that would otherwise be made to the system fund will be  
9 reduced by the amount necessary to pay the benefits under § 3-12C-1805, and these  
10 contributions will be deposited in the qualified benefit preservation arrangement trust  
11 fund. The employer contributions otherwise required under the terms of this chapter shall  
12 be divided into those contributions required to pay the benefits under § 3-12C-1805, and  
13 those contributions paid into and accumulated in the system fund to pay the maximum  
14 benefits permitted. Under no circumstances may employer contributions to fund the  
15 benefits under § 3-12C-1805 be credited to or commingled with contributions paid into  
16 and accumulated in the system fund, as otherwise prohibited by §§ 3-12C-219 and 3-  
17 12C-1803. The amount deducted from employer contributions and deposited into the  
18 qualified benefit preservation arrangement fund does not increase the amount of employer  
19 contributions required under the system fund. Any contributions not used to pay the  
20 benefits under § 3-12C-1805 for a current calendar year, together with any income  
21 accruing to the qualified benefit preservation arrangement fund, shall be used to pay the  
22 administrative expenses of the qualified benefit preservation arrangement for the calendar  
23 year. Any contributions not used to pay the benefits under § 3-12C-1805 for the current  
24 calendar year that remain after paying administrative expenses shall be used to fund  
25 administrative expenses or benefits of participants in future years.

26           The system shall account separately for the amounts determined to be necessary  
27 to provide the benefits under § 3-12C-1805 for each participant. However, this separate  
28 accounting does not constitute setting aside these amounts for the benefit of a participant.  
29 Benefits under § 3-12C-1805 shall be paid from the qualified benefit preservation  
30 arrangement fund.

31           Any consultant or outside auditor, attorney, or actuary performing services for the  
32 system may also perform services for the qualified benefit preservation arrangement. Any  
33 fees attributable to services performed with respect to the qualified benefit preservation  
34 arrangement are payable solely from the qualified benefit preservation arrangement fund.

35 **Section 9.** That a NEW SECTION be added:

1           **3-12C-1809. Qualified benefit preservation arrangement trust fund--**  
2           **Establishment--Purpose.**

3           The qualified benefit preservation arrangement trust fund is established as a valid  
4           trust under the laws of the state, separate from the system fund, to hold contributions of  
5           the employers. Contributions to the qualified benefit preservation arrangement fund shall  
6           be held separate and apart from the funds comprising the system fund and may not be  
7           commingled with assets of the system fund and must be accounted for separately.

8           The qualified benefit preservation arrangement fund is maintained solely to provide  
9           certain benefits under a qualified governmental excess benefit arrangement within the  
10           meaning of section 415(m) of the Internal Revenue Code and to pay reasonable and  
11           necessary administrative expenses of the arrangement.

12           The qualified benefit preservation arrangement fund is intended to be a grantor  
13           trust, of which the employer is the grantor, within the meaning of subpart E, part I,  
14           subchapter J, chapter 1, subtitle A of the code, and shall be construed accordingly. This  
15           provision may not be construed to create an irrevocable trust of any kind.

16           The South Dakota Investment Council may, if it is determined advisable, hold  
17           assets of the qualified benefit preservation arrangement fund uninvested for making  
18           distributions under the qualified benefit preservation arrangement or may invest assets of  
19           the qualified benefit preservation arrangement as otherwise permitted by law.

20           **Section 10.** That a NEW SECTION be added:

21           **3-12C-1810. Qualified benefit preservation arrangement assets--Income.**

22           Any assets held by the qualified benefit preservation arrangement to assist in  
23           meeting the employer's obligations under the qualified benefit preservation arrangement,  
24           including all amounts of employer contributions made under the qualified benefit  
25           preservation arrangement, all property and rights acquired or purchased with these  
26           amounts, and all income attributable to these amounts shall be held separate and apart  
27           from other funds of the employer and will be used exclusively for the uses and purposes  
28           of participants and general creditors as set forth in this part. Participants have no preferred  
29           claim on, or any beneficial interest in, any assets of the qualified benefit preservation  
30           arrangement fund. Any rights created under this part are unsecured contractual rights of  
31           a participant against the employer. Any assets held by the qualified benefit preservation  
32           arrangement fund are subject to the claims of the employer's general creditors under  
33           federal and state law in the event of the employer's insolvency.

1 Income accruing to the qualified benefit preservation arrangement fund constitutes  
2 income derived from the exercise of an essential governmental function upon which the  
3 qualified benefit preservation arrangement fund is exempt from tax under sections 115  
4 and 415(m)(1) of the Internal Revenue Code.

5 **Section 11.** That a NEW SECTION be added:

6 **3-12C-1811. Qualified benefit preservation arrangement--Administration.**

7 The system shall administer the qualified benefit preservation arrangement. The  
8 system shall compile and maintain all records necessary for administration. The board has  
9 the same rights, duties, and responsibilities respecting the qualified benefit preservation  
10 arrangement as it has with respect to the system. The board shall, as necessary and  
11 appropriate, take the following actions:

12 (1) Establish procedures to administer the qualified benefit preservation arrangement  
13 not inconsistent with this part and the Internal Revenue Code, and to amend or  
14 rescind any of these procedures;

15 (2) Determine, consistent with this part, applicable law, rules, or regulations, all  
16 questions of law or fact that may arise as to eligibility for participation and eligibility  
17 for distribution of benefits, and the status of any person claiming benefits under  
18 the qualified benefit preservation arrangement;

19 (3) Make payments from the qualified benefit preservation arrangement fund to  
20 participants pursuant to this part;

21 (4) Contract with a third party to perform designated administrative services under  
22 this part;

23 (5) Construe and interpret this part as to administrative issues and to correct any  
24 defect, supply any omission, or reconcile any inconsistency in the qualified benefit  
25 preservation arrangement, subject to and consistent with the code; and

26 (6) Seek appropriate rulings from the Internal Revenue Service with regard to the  
27 status of the qualified benefit preservation arrangement under the Internal  
28 Revenue Code.

29 **Section 12.** That a NEW SECTION be added:

30 **3-12C-1812. Qualified benefit preservation arrangement--No assignment.**

31 The rights of a person to a benefit, and the benefit itself, payable under this part  
32 are hereby exempt from any state, county, municipal, or other local tax and may not be  
33 subject to execution, garnishment, attachment, operation of bankruptcy or insolvency

1 laws, or any other process of law whatsoever and is unassignable and nontransferable,  
2 except as otherwise provided by § 3-12C-1809 or otherwise in the same manner as a  
3 retirement benefit under the system.

4 **Section 13.** That a NEW SECTION be added:

5 **3-12C-1813. Conflicts.**

6 In resolving any conflict between provisions of this part, and in resolving any other  
7 uncertainty as to the meaning or intention of any provision of the qualified benefit  
8 preservation arrangement, the prevailing interpretation shall be the one that causes:

- 9 (1) The qualified benefit preservation arrangement to constitute a qualified  
10 governmental excess benefit arrangement under the provisions of section 415(m)  
11 of the Internal Revenue Code and the qualified benefit preservation arrangement  
12 fund to be exempt from tax under sections 115 and 415(m) of the Internal Revenue  
13 Code;  
14 (2) The qualified benefit preservation arrangement and the system to comply with all  
15 applicable requirements of the code; and  
16 (3) The qualified benefit preservation arrangement and the system to comply with all  
17 applicable state laws.

18 **Section 14.** That a NEW SECTION be added:

19 **3-12C-1814. Limitation of rights.**

20 Neither the establishment or maintenance of the qualified benefit preservation  
21 arrangement, nor any amendment to the qualified benefit preservation arrangement, nor  
22 any act or omission under the qualified benefit preservation arrangement or resulting from  
23 the operation of the qualified benefit preservation arrangement, may be construed:

- 24 (1) As conferring upon any participant or any other person a right or claim against the  
25 system, board, executive director, trustees, or any employer, except to the extent  
26 that the right or claim is specifically expressed and provided in the qualified benefit  
27 preservation arrangement;  
28 (2) As creating any responsibility or liability of any employer for the validity or effect  
29 of the qualified benefit preservation arrangement;  
30 (3) As a contract between any employer and any participant or other person;  
31 (4) As being consideration for, or an inducement or condition of, employment of any  
32 participant or other person, or as affecting or restricting in any manner or to any



1 extent whatsoever the rights or obligations of any employer or any participant or  
2 other person to continue or terminate the employment relationship at any time; or  
3 (5) As giving any participant the right to be retained in the employer's service or to  
4 interfere with the employer's right to discharge any participant or other person at  
5 any time.

6 **Section 15.** That a NEW SECTION be added:

7 **3-12C-1815. Erroneous payments--Corrections.**

8 Any benefit payment that should not have been made, according to the terms of  
9 the qualified benefit preservation arrangement and the benefits provided under the  
10 qualified benefit preservation arrangement, may be recovered as provided in § 3-12C-  
11 214.

12 If in doubt concerning the correctness of any action in making a payment of a  
13 benefit, the payment may be suspended until verification as to the correctness of the  
14 payment or the person to receive the payment.

15 **Section 16.** That a NEW SECTION be added:

16 **3-12C-1816. Administration of benefit--Release and receipt.**

17 Any payment to any participant shall, to the extent paid, be in full satisfaction of  
18 the participant's claim being paid and may be conditioned on the delivery by the  
19 participant of the duly executed receipt and release in a form determined by the system.

20 **Section 17.** That a NEW SECTION be added:

21 **3-12C-1817. Reservation of power to change.**

22 The Legislature reserves the right at any time and, from time to time, to modify or  
23 amend, in whole or in part, any or all of the provisions of the qualified benefit preservation  
24 arrangement. No member of the system and no beneficiary of a member acquires any  
25 vested right to a payment under the qualified benefit preservation arrangement.