

2015 THROUGH 2019: ILLINOIS MAINTENANCE GUIDELINES (Including Pub. Act 100-923)

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Maintenance Guidelines 2015 to 2019:

Overview of Five Sets of Changes to Illinois Law re Maintenance since 2015

Original 2015 Maintenance Guidelines: PA 98-961: [Pub. Act 98-961 \(eff. Jan. 1, 2015\)](#).
[Original maintenance guidelines amendments) [P.A. 99-90](#). [Family Law Rewrite]

2016 Family Law Rewrite: [Pub. Act 99-90](#) (eff. Jan. 1, 2016).

The rewrite provided, among other things, added to Section 504(b-1)(1)(B) the phrase, “at the time the action was commenced” regarding when presumptive duration factor commences.

2017 Rewrite Technical Corrections: Pub. Act 99-763 (eff. Jan. 1, 2017). (Adding section b-8 regarding reviews)

2018 Maintenance Guidelines Amendments: Pub. Act 100-520
[Pub. Act 100-520](#) / Pub. Act 100-565 (eff. January. 1, 2018). This contained a major series of amendments including raising combined gross income amount to \$500,000 and incorporating a more granular formula for presumptive lengths.

2019 Maintenance Guidelines Amendment: [Pub. Act 100-923](#) (Eff. January. 1, 2019).

Specific Language of Illinois Maintenance Guidelines

§504 – Maintenance Amendments

This article focuses on an understanding of the 2015 maintenance guidelines as tweaked by the family law rewrite, and more substantially by the amendments that went into effect in 2018 and in 2019. The Illinois maintenance guidelines amended Section 504(a) by adding the title “Entitlement to maintenance.” The 2019 amendments, before the list of statutory factors that the court considers in awarding maintenance includes the language: “The court shall first *make a finding* as to whether a maintenance award is appropriate, ...” The existing statute then lists the relevant factors that include (1) to (12).

The critical language in the maintenance guidelines is at 504(b-1) to (b-4.5).

Subsection (b)(1) had read:

(b-1) Amount and duration of maintenance. *If the court determines that a maintenance award is appropriate, the court shall order maintenance in accordance with either paragraph (1) or (2) of this subsection (b-1): ****

The 2019 amendments make substantial changes so that it now reads:

(b-1) Amount and duration of maintenance. *Unless the court finds that a maintenance award is appropriate, it shall bar maintenance as to the party seeking maintenance regardless of the length of the marriage at the time the action was commenced. Only if ~~if~~ the court finds ~~determines~~ that a maintenance award is appropriate, the court shall order guideline maintenance in accordance with either paragraph (1) or non-guideline maintenance in accordance with paragraph (2) of this subsection (b-1).*

If the application of guideline maintenance results in a combined maintenance and child support obligation that exceeds 50% of the payor's net income, the court may determine non-guideline maintenance in accordance with paragraph (2) of this subsection (b-1), non-guideline child support in accordance with paragraph (3.4) of subsection (a) of Section 505, or both. [Changes made with 2019 amendments.]

(1) **Maintenance award in accordance with guidelines.** ~~If situations when~~ the combined gross income of the parties is ~~less than \$250,000~~ **[\$500,000 under the 2018 amendments]** and ~~no multiple family situation exists~~ the payor has no obligation to pay child support or maintenance or both from a prior relationship, maintenance payable after the date the parties' marriage is dissolved shall be in accordance with subparagraphs (A) and (B) of this paragraph (1), unless the application of the guidelines would be inappropriate.

(A) The amount of maintenance under this paragraph (1) shall be calculated by taking 33 1/3% of the payor's net annual income minus 25% of the payee's net annual income. The amount calculated as maintenance, however, when added to the net income of the payee, shall not result in the payee receiving an amount that is in excess of 40% of the combined net income of the parties.

(A-1) Modification of maintenance orders entered before January 1, 2019 that are and continue to be eligible for inclusion in the gross income of the payee for federal income tax purposes and deductible by the payor shall be calculated by taking 30% of the payor's gross annual income minus 20% of the payee's gross annual income, unless both parties expressly provide otherwise in the modification order. The amount calculated as maintenance, however, when added to the gross income of the payee, may not result in the payee receiving an amount that is in excess of 40% of the combined gross income of the parties. [*2019 amended language at (A) and (A-1).

(B) The *duration* of an award under this paragraph (1) shall be calculated by multiplying the length of the marriage by whichever of the following factors applies:

less than 5 years (.20);
5 years or more but less than 6 years (.24);
6 years or more but less than 7 years (.28);
7 years or more but less than 8 years (.32);
8 years or more but less than 9 years (.36);
9 years or more but less than 10 years (.40);
10 years or more but less than 11 years (.44);
11 years or more but less than 12 years (.48);
12 years or more but less than 13 years (.52);
13 years or more but less than 14 years (.56);
14 years or more but less than 15 years (.60);
15 years or more but less than 16 years (.64);
16 years or more but less than 17 years (.68);
17 years or more but less than 18 years (.72);
18 years or more but less than 19 years (.76);

¹The phrase “no multiple family situation exists” was patently ambiguous.

19 years or more but less than 20 years (.80).

~~5 years or less (.20); more than 5 years but less than 10 years (.40); 10 years or more but less than 15 years (.60); or 15 years or more but less than 20 years (.80).~~

For a marriage of 20 or more years, the court, in its discretion, shall order ~~either permanent maintenance or~~ maintenance for a period equal to the length of the marriage or for an indefinite term.

(1.5) In the discretion of the court, any term of temporary maintenance paid by court order under ~~pursuant to~~ Section 501 may be a corresponding credit to the duration of maintenance set forth in subparagraph (b-1)(1)(B).

(2) **Maintenance award not in accordance with guidelines.** Any non-guidelines award of maintenance shall be made after the court's consideration of all relevant factors set forth in subsection (a) of this Section.

(b-2) **Findings.** In each case involving the issue of maintenance, the court shall make specific findings of fact, as follows:

(1) the court shall state its reasoning for awarding or not awarding maintenance and shall include references to each relevant factor set forth in subsection (a) of this Section; ~~and~~

(2) *if the court deviates* from ~~otherwise~~ applicable guidelines under paragraph (1) of subsection (b-1), it shall state in its findings the amount of maintenance (if determinable) or duration that would have been required under the guidelines and the reasoning for any variance from the guidelines; and

(3) the court shall state whether the maintenance is fixed-term, indefinite, reviewable, or reserved by the court. [Pub. Act 100-923]

(b-3) **Gross income.** For purposes of this Section, the term "gross income" means all income from all sources, within the scope of that phrase in Section 505 of this Act, except maintenance payments in the pending proceedings shall not be included. [change in 2019 amendments to prevent the recursive problem.]

(b-3.5) **Net income.** As used in this Section, "net income" has the meaning provided in Section 505 of this Act, except maintenance payments in the pending proceedings shall not be included. [Pub. Act 100-923]

(b-4) **Modification of maintenance orders entered before January 1, 2019.** For any order for maintenance or unallocated maintenance and child support entered before January 1, 2019 that is modified after December 31, 2018, payments thereunder shall continue to retain the same tax treatment for federal income tax purposes unless both parties expressly agree otherwise and the agreement is included in the modification order.

(b-4.5) **Maintenance designation.** ~~Fixed-term maintenance in marriages of~~

~~less than 10 years.~~ (1) Fixed-Term Maintenance. If a court grants maintenance for a fixed term the court shall ~~may also~~ designate the termination of the period during which this maintenance is to be paid. Maintenance is barred after the end of the period during which fixed-term maintenance is to be paid.

(2) Indefinite maintenance. If a court grants maintenance for an indefinite term, the court shall not designate a termination date. Indefinite maintenance shall continue until modification or termination under Section 510.

(3) Reviewable maintenance. If a court grants maintenance for a specific term with a review, the court shall designate the period of the specific term and state that the maintenance is reviewable. Upon review, the court shall make a finding in accordance with subdivision (b-8) of this Section, unless the maintenance is modified or terminated under Section 510.

Changes to the Child Support Statute that Impact Maintenance:

§505(a)(3)(B) Changes in 2019 in Defining Net Income

"Net income" includes maintenance not includable in the gross taxable income of the payee for federal income tax purposes under a court order in the pending proceedings or any other proceedings and shall be included in the payee's net income for purposes of calculating the parent's child support obligation.

§505(a)(3) – Original Income Shares Amendments re Maintenance as a 505(a)(3)(F)(2) “Adjustment” in Determining Child Support

There have also been amendments to Section 505 [child support] providing that maintenance paid to the spouse / former spouse of this marriage is a statutory deduction when determining support. So, there is a new subsection (F)(3) providing “adjustments” in determining net income. It now reads with the changes highlighted by Pub. Act 100-923 (eff. January 1, 2019):

(II) Spousal Maintenance adjustment: Obligations pursuant to a court order for spousal maintenance in the pending proceeding actually paid or payable to the same party to whom child support is to be payable or actually paid to a former spouse pursuant to a court order shall be deducted from the parent's ~~gross income~~ after-tax income, unless the maintenance obligation is tax deductible to the payor for federal income tax purposes, in which case it shall be deducted from the payor's gross income for purposes of calculating the parent's child support obligation.

This was taken from former subsection (g-5) – following the deduction for prior obligations of support or maintenance actually paid per court order – which had read:

(g-5) Obligations pursuant to a court order for maintenance in the pending proceeding actually paid or payable under Section 504 *to the same party* to whom child support is to be payable;

And this, in turn, had stemmed from former section (g) which had provides that there is a deduction simply for, “Prior obligations of support or maintenance actually paid pursuant to a court order.”

So, child support in cases where maintenance is paid actually goes substantially down. In most cases involving less than long-term marriages, maintenance awards based upon the guidelines will involve *substantially higher awards*. (The exception is long term marriage cases where the court would have otherwise come much closer to income equalization). But even where the court deviates from the support guidelines (and perhaps orders less maintenance than per the guidelines), child support awards are reduced.

Problems with the Amendments: There are many problems with this original 2015 maintenance guidelines. Then changes to our statutory scheme that have occurred annually since then have only partially addressed the problems. The largest issues with the guidelines as currently drafted are:

- **On the Nature of Presumptions:** Proponents of the Illinois maintenance guidelines had contended that maintenance guidelines are permissive in nature – providing a guidepost that the court could choose to follow. But consider the case law involving the nature of the child support guidelines on which the maintenance guidelines are based. They are not permissive but *presumptive*. For example, a recent case ([IRMO Pratt](#), 2014 IL App (1st) 130465) addressing the nature of the support guidelines stated:

The guidelines create a rebuttable presumption that child support conforming to the guidelines is appropriate. This presumption also applies in modification proceedings. If a deviation is sought, the party seeking the deviation bears the burden of showing a *compelling reason* to justify the deviation. [citations omitted.]

It can be argued that the *Pratt* case was wrongly decided, as addressed in [Gitlin on Divorce: A Guide to Illinois Family Law](#). But nevertheless, the fact remains that the guidelines do more than merely set forth a starting point. They set forth a starting point resulting in the necessity of maintaining the burden due to the presumption – and judges are inclined to defer to the rebuttable presumptions, except in unusual circumstances.

- **Amount in Illinois Guidelines is Not Tied To the Length of the Marriage:** In the better drafted maintenance guidelines (in those few areas that have guidelines), maintenance amounts are crafted to dovetail with the length of the marriage, with the percentages being higher as the marriage is longer. The presumptive Illinois guidelines provide for an amount that would be the same if the marriage were one year or 41 years. This is because these guidelines were based on what has been referred to as the AAML Guidelines – even though the AAML never formally adopted these guidelines. Nor were they guidelines. Instead, the AAML used the term *considerations*. See: [Rethinking Alimony: The AAML’s Considerations for Calculating Alimony](#)”.

Regarding the length of the maintenance, assume a ten-year marriage. The length of alimony in Illinois would be the longest as compared to any other state or county guideline that had a duration formula. Also, Illinois exceeded the caps for awards in those states that had caps.

- **Sophisticated Maintenance Guidelines – Would Likely Have Been Too Complex to Pass Legislative Muster – Even if Relatively Easy for Divorce Professionals to Handle:** It is suggested that if there were to be guidelines they should have been far

more comprehensive in order to better ensure fairness in those cases where the guidelines are followed. Our maintenance guidelines should have provided for lower percentages for shorter-length marriages. This was the *sine quo non* of Illinois case law involving maintenance awards after the passage of the Illinois Marriage and Dissolution of Marriage Act (IMDMA). See, e.g., *Gitlin on Divorce: A Guide to Illinois Family Law*. More sophisticated guidelines had increased the amount of maintenance depending upon the length of the marriage.

- **Length of Presumptive Awards through to Date of Filing:**

Mrg Yrs	Years Mn	MrgYears		MrgYears	
		Yrs	Mn	Yrs	Mn
1	0.2	8	2.9	15	9.6
2	0.4	9	3.6	16	10.9
3	0.6	10	4.4	17	12.2
4	0.8	11	5.3	19	14.1
5	1.2	12	6.2	19	15.2
6	1.7	13	7.3	20	20
7	2.2	14	8.4		

- **Change to Statute to Refer to Commencement Date Throughout:** The 2016 amendments to the maintenance guidelines had a negative public policy incentive, i.e., that one must file a divorce within certain time frames to reduce one’s presumptive length of maintenance (assuming maintenance is awarded).

Legislation encouraging a divorce filing is generally considered to against public policy. But the alternative may have been equally bad. The original statutory scheme had provided an incentive to delay the pending divorce proceedings while the current one provides an incentive to file for divorce from the perspective of the potential obligor.

- **Definition of Income Largely the Same for Support and Maintenance Purposes Despite Public Policy for Support and Maintenance Differing:** The maintenance guidelines borrow the same general language regarding deviations from the support guidelines. And the guidelines define gross income as income “from all sources” consistent with the child support guidelines². Accordingly, per *Rogers* and its progeny, we generally include one-time income as income. This includes such items as gifts and loans from family members. Only then can the court deviate from the support guidelines – if there is a compelling reason to justify the deviation.
- Compare the amendments adoption of the definition of income to a recent case where the Illinois appellate court pointed to the reason that income for maintenance purposes should be treated somewhat differently than income for support purposes. Maintenance is based on the historical lifestyle (the lifestyle established during the marriage), while

²Consider this in conjunction with the language of 750 ILCS 504(a)(10) as part of the 2016 “rewrite” of the IMDMA that includes as a statutory factor, “all sources of public and private income including, without limitation, disability and retirement income.”

the child is entitled to share, in part, in post-decree good fortune of the payor of support. See, e.g., *IRMO Micheli*, 2014 IL App (2d) 121245. *Micheli* involved a 24 year marriage and the trial court awarded maintenance of \$3,700 per month plus 20% of future bonuses. The appellate court ultimately ruled that the percentage should be capped. The appellate court stated:

On remand, the trial court should recalculate the monthly maintenance amount or at least cap the amount from John's future bonuses. If the trial court determines that \$3,700 per month is inadequate to meet Ellen's needs and maintain her standard of living during the marriage, it may add a capped portion of John's future bonuses.

So one additional query is whether a case such as this would remain "good law."

- **What Constitutes Income – Choice Not to Include AAML Language re Imputing Income and the Impact of the Income Shares “Underemployment and Unemployment” Language:** The AAML Considerations contained differently language regarding defining income as compared to the Illinois guidelines. They provided, “Gross Income” is defined by a state's definition of gross income under the child support guidelines, *including actual and imputed income.*” As stated, the Illinois maintenance guidelines define “gross income” as “income from all sources, within the scope of that phrase in Section 505 of this Act (except maintenance payments in the pending proceedings shall not be included).”
- The 2017 income sharing amendments provided for the first time statutory guidance to use in imputing income and provide in Section 3.2:

“Unemployment or underemployment. If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income. A determination of potential income shall be made by determining employment potential and probable earnings level based on the *obligor's work history, occupational qualifications, prevailing job opportunities, the ownership by a parent of a substantial non-income producing asset, and earnings levels in the community.* If there is insufficient work history to determine employment potential and probable earnings level, there shall be a rebuttable presumption that the parent's potential income is 75% of the most recent United States Department of Health and Human Services Federal Poverty Guidelines for a family of one person.”
- Note however, that Illinois case law for child support previously had imputed income to the payor due to “bad faith” termination of employment or reduction in the payor’s income. But there would be a different public policy in imputing a certain income level to a prospective maintenance recipient, even if, for example she or he is “underemployed” or unemployed – even though this underemployment or unemployment may not be in bad faith. Addressing this complication at greater length is beyond the scope of this article.

- The 2019 amendments tweak the language in the 504(a) statutory factors by breaking out factor (a)(6) into (a)(6) and (a)(6.1). The new subsection 6.1 reads, “the effect of any parental responsibility arrangements and its effect on a party's ability to seek or maintain the party seeking employment.”

- **Income Sharing Amendments: Do They Change the Equation for Imputing Income in Maintenance Cases?** Consider the following Q&A:
 - Q: If income is imputed for child support, will it also be imputed for the maintenance?
 - A: Generally yes.

 - The syllogism is:
 - As stated above, the child support amendments provide:

(3.2) Unemployment or underemployment. If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income. A determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor's work history, occupational qualifications, prevailing job opportunities, the ownership by a parent of a substantial non-income producing asset, and earnings levels in the community.

Gross income is defined as total of all income from all sources per 3(a) and includes maintenance received with (a)(3) providing:

"Gross income" ~~also includes spousal~~ *includes spousal maintenance treated as taxable income for federal income tax purposes to the payee and received pursuant to a court order in the pending proceedings or any other proceedings and shall that must be included in the payee's recipient's gross income for purposes of calculating the parent's child support obligation.*
 - Since we define potential income as being included and we define gross for support purposes as the same, there is a far stronger argument for imputing income for maintenance purposes.

- **Maintenance Reviews and the 2019 Maintenance Amendments:** Prior to the 2019, maintenance amendments, it was clear that the maintenance guidelines case close to eliminating maintenance reviewed in any award not following the guidelines. Consider the history of Illinois case law following the enactment of the IMDMA in 1977. When reviewing Illinois appellate cases as a whole, the first trend was to reverse cases where maintenance was for a set period of time with no review. Many of those cases involved fact patterns with medium term marriage cases – with the case law ruling that it was error to set a fixed term maintenance when it would be speculation to determine the less monied spouse would be sufficiently “rehabilitated.” But there is nothing within the maintenance guidelines addressing maintenance reviews – even though, based upon Illinois case law, these reviews are the preferred approach when awarding maintenance that is not fixed term (often involving short term marriages) or indefinite

maintenance. In fact, the guidelines presumptively set maintenance at specific terms. This brings up two questions if the court is following the guidelines;

- Can the court award maintenance with a review date – which may have been the usual scenario prior to the enactment of these amendments?
- Is maintenance generally modifiable during its term, as to length and amount?

The answer to the first question of whether the court can set a date following the guidelines, the answer, unfortunately, remains: no. The guidelines simply provide for a set term and the court has a “safe harbor” by following the guidelines and the presumptive specific term of years.

The answer to the second question about the modifiability of maintenance during its term is that maintenance should be modifiable during its term – both as to length and amount – considering the Latin maxim is “*expressio unius est exclusio alterius*” – (the expression of one means the exclusion of the other). The sole exception is where the court sets maintenance for a fixed term.

It is *permissible* for the court to set maintenance for a fixed term. Under the law through to 2019, fixed-term maintenance was limited to cases involving marriages of less than ten years. The 2019 amendments now provide that the court can designate the term of maintenance as fixed-term. What that means is that further maintenance would be barred *ab initio* – from the date maintenance is ordered – beyond the set term. The implication is that when the court has not set maintenance at a fixed term, during its term maintenance should be modifiable as to amount and length.

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- **David Hopkins Summary – A Starting Place:** David Hopkins presented on November 12, 2014, for the McHenry County Bar Association. As much as anyone, David was significant responsible for the passage of these guidelines. So, both the official commentary as well as David’s article are of note.

David wrote:

It is anticipated that an important effect of the new maintenance guidelines will be that parties, attorneys, and judges will all have a common *starting point* to begin analysis and that, as a result, there will be far more consistency and predictability for maintenance awards. This anticipated result does not compromise the role of skilled attorneys in advocating for deviations in appropriate cases.

Attorney Hopkins suggested that the guidelines would operate as a starting point similar to considering an equal division of the marital estate. This is not necessarily how the maintenance guidelines were written (because there is no presumption in Illinois of an equal property division). But it does reflect the intent of those who were responsible for drafting the guidelines.

- **The Double-Dipping Problem:** An area where Attorney Hopkins and I had agreed is the double-dipping problem. Hopkins had written:

It is beyond the scope of this article to fully explore cases that inconsistently address the concept of "gross income." The effect of P A

98-961, of course, is to make clear that the same term under both the maintenance and child support Sections is to now be construed consistently. *As to troublesome precedents, a statutory resolution is surely the soundest course.* Thus, the ISBA Family Law Section Council now has a new task on which to focus.

It may have been anticipated that this problem would have been addressed with the income sharing amendments. Yet in seeking to smooth the way for passage, the committee did not take on this task and accordingly we still have the problem with this troublesome precedent.

The Law of Unintended Consequences: The goal of the statute was to create greater uniformity in maintenance awards. The goal was recognize that “downstate” many believed that awards of maintenance were less than generous and to force higher awards and for a longer period of time. But they were also designed with the belief that individuals could not “afford” to litigate over maintenance and therefore create a one size fits all solution might be helpful. But, obviously, we do not have the same problems in collaborative practice. Already the process (when it results in an agreement) tends to be less expensive than traditional adversarial divorce. We collaborative professionals have the opportunity to understand that guidelines (an inside the box solution) are not appropriate for maintenance if our negotiations are not to be in the shadow of the law.

There are [two groups of negative unintended consequences](#) that can occur:

A negative, unexpected detriment occurring in addition to the desired effect of the policy. An example is that while irrigation schemes provide people with water for agriculture, they can increase waterborne diseases that have devastating health effects..

A perverse effect contrary to what was originally intended (when an intended solution makes a problem worse). This has been dubbed the “cobra effect,” after an anecdote about how a bounty for killing cobras in British India caused people to breed cobras.

The law of unintended consequences as a result of this legislation has been to create:

- Incentives toward bringing a divorce case on behalf of the potential obligor;
- Greater incentives in arguing against an award of any maintenance award (including an emphasis with the “only if” language of the 2019 amendments.
- Additional child support litigation with:
 - Potential obligor’s attempting pre-decree to urge imputed income to the potential maintenance recipient – based on the interplay between the maintenance guidelines defining income for maintenance the same as child support and the income sharing provisions discussed above;
 - Obligor’s trying post-decree to conform support awards to the guidelines including a §505(a)(3) adjustment for current maintenance;
- Arguments regarding what constitutes income based upon the division among the districts, etc., regarding such issues as double dipping in the sense of considering income once for the purposes of property settlement and a second time for the purposes of support and, in the near future, maintenance. See: Double Dipping and Determining Child Support by Gunnar Gitlin.

- Far fewer awards of maintenance reviews, even with the language of the 2019 amendments.

Conclusion and Three Largest Problems: Because of the language of the legislation including the 2018 and 2019 amendments, there are a host of unintended consequences. The three largest problems with the maintenance amendments are:

1. **Amounts in Shorter Term Marriages Where Support Is Being Paid:** Note that at lower income level under income shares, one pays a greater percentage of the relative net income. Because of the impact of this, what we have already seen is that individuals to a greater and greater extent are attempting to game the system by seeking 146 overnights in order to meet the substantial shared parenting discount. The fact is that presumptive guideline maintenance awards – where there is also an award of child support (in shorter or medium term marriages) – will often result in the payor spouse finding it difficult to live in the lower income cases – without this shared parenting discount.
2. **Maintenance Reviews – What Had Been the Mainstream Approach to “Rehabilitative” Maintenance Awards:** The presumptive elimination of maintenance reviews in the court’s initial awards, i.e., without deviating from the maintenance guidelines (of course there is no impact on currently existing reviewable maintenance orders in terms of the fact that there will be a review, etc, – but the big question in these cases will be whether the maintenance guidelines re length and amounts will apply.
3. **Length of Maintenance in Medium Term Marriages:** There are multiple problems with the length of marriage including the length simply not providing a sufficient incentive for what has traditionally been considered “rehabilitative maintenance.” The more incremental approach of Public Act 100-520 has been salutary by not providing the leaps of length at 5, 10, and 15 years of marriage, but not in the sense of it expanding the reach of the guidelines to \$500,000 per year.

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