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TRS Waiting Period Could Affect Pension-Plan Arrangements for New Employees

A legislative measure intended to save the state money has created some uncertainty for public school administrators who manage employee benefits. HB 3459 by Pitts, enacted during the regular session of the 78th Legislature, requires new public education employees to wait 90 days before becoming eligible for health-care and pension benefits through the Teacher Retirement System (TRS). Because federal law requires employers to offer an alternate pension plan to employees who are not covered by Social Security, about 1,000 school districts that do not offer Social Security to their employees have had to make new arrangements to accommodate the 90-day delay.

Background

When the U.S. Congress created the Social Security system in 1935, state and local government employees were excluded from coverage due to a legal question about the federal government's authority to tax state and local governments. In 1951, states and localities were permitted to enter into voluntary agreements ("section 218 agreements") to provide an additional level of Social Security coverage to public employees covered by an existing retirement plan. The state of Texas provides Social Security coverage to its employees under a section 218 agreement as well as providing retirement benefits through the Employees Retirement System (ERS), but most school districts offer TRS benefits only. In order for a school district to adopt a section 218 agreement, its governing authority (usually the school board) must conduct a district-wide referendum for the affected group of employees, allowing them to choose whether to participate fully in Social Security and Medicare or to participate in a reduced federal benefits package, such as Medicare only. Fewer than 10 percent of Texas districts have entered into section 218 agreements.

Public sector employers that do not have section 218 agreements either must withhold Medicare and Social Security taxes (i.e., FICA taxes) from employee wages or provide a qualifying retirement plan under Internal Revenue Service (IRS) regulations. A qualifying plan is one that provides a retirement benefit comparable to the benefit offered under Social Security. A contribution of 7.5 percent of the employee's salary must be made to a defined-contribution plan by either the employee, the employer, or both. Because the majority of school district

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Health Board Rules on Abortion Brochure Spark Controversy

The Texas Board of Health has adopted final rules concerning the Women's Right to Know Act, HB 15 by Corte, which the 78th Legislature enacted during the 2003 regular session. This legislation directed the board to promulgate rules requiring an abortion provider to obtain informed consent from a woman seeking an abortion at least 24 hours before performing the procedure. The legislation also instructed the Texas Department of Health (TDH) to compile certain informational materials concerning the implications of abortion and a resource guide and supply them at no charge in appropriate quantities to abortion providers. Both supporters and opponents of HB 15 have claimed that the board has exceeded its authority and that the rules do not adhere to legislative intent. Supporters of the law say that the rules fail to ensure that patients receive the information, while opponents say that the information in the brochure goes beyond what the law requires.

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employees participate in TRS, they had no reason before the 2003-04 school year to pay FICA taxes or provide an alternative pension plan for their employees.

Under the current TRS arrangement, a TRS-eligible employee contributes 6.4 percent of his or her salary to TRS, the state contributes 6.0 percent to TRS up to the minimum salary schedule, and the school district contributes 6.0 percent of any salary paid above the minimum schedule. For example, the state minimum salary schedule requires a district to pay a beginning teacher $24,240 per year. If a school district paid a beginning teacher $30,000 per year, the state would contribute 6.0 percent of the first $24,240 in salary, and the district would contribute 6.0 percent for the $5,760 in salary that exceeded the minimum. All employees hired after April 1, 1986, must have Medicare taxes withheld from their paychecks.

What the new state law does

Effective September 1, 2003, the 90-day waiting period for membership in TRS applies both to new public school employees and to those returning to employment after withdrawing contributions for previous service credit. Because the waiting period is tied to TRS membership, new employees are excluded until their 91st day of employment from receiving all TRS benefits, including health insurance, retirement benefits, and passthrough coverage. Unless extended by the Legislature, the waiting period will expire September 1, 2005, (Government Code, sec. 822.001)

According to the Legislative Budget Board, delaying state TRS contributions for new employees for 90 days results in general revenue savings of $42.0 million in fiscal 2004 and $43.3 million in fiscal 2005. However, TRS reports that this provision will increase its actuarial unfunded liability by approximately $15 million, mainly because public school employees earn service credit in TRS on a semester basis. Any employee who is a TRS member for four-and-one-half months of a school year earns one year of service credit in the system. Therefore, new employees who start in September and work through an entire school year still can earn a full year of service credit in TRS, even though TRS collects no revenue from state, employee, or district contributions during the first 90 days of the credited year.

Waiting period for state employees

A similar waiting period applies to state employees hired on or after September 1, 2003. HB 2359 by Ritter, enacted during the 2003 regular legislative session, delays membership in ERS for new state employees until their 91st day of employment. The 90-day delay for new state employees expires September 1, 2005, unless extended by the Legislature. However, the state still pays FICA taxes on new state employees during their first 90 days of employment, even though it makes no ERS contribution on their behalf. No unfunded actuarial liability is created in the ERS system, because state employees earn service credit in ERS on a month-by-month basis.

How does the delay affect districts?

Since TRS is a qualified public retirement system, some argue that a 90-day wait for TRS eligibility should not trigger mandatory Social Security coverage. However, federal law requires Social Security coverage from the first day of employment in the absence of a qualifying retirement plan or a section 218 agreement. TRS administrative guidelines (34 TAC, part 3) explain how to determine the date of eligibility for TRS pension plan membership, but state guidelines do not require school districts to offer a qualifying plan for employees in the absence of Social Security coverage. Thus, without guidance from the state, many districts were unaware that they needed to choose between Social Security coverage or a qualifying retirement plan during the 90-day waiting period until late in the summer, when the new school year was about to begin, leaving many administrators unsure of how to deal with the problem.

Some say that the waiting period creates an unfunded mandate for local schools. While the state saves about $85 million over the biennium by imposing the 90-day waiting period, school districts were saddled with an administrative burden nearly impossible to comply with on such short notice. Those districts that were unable to offer an acceptable qualifying plan had to start paying the

employer's share of FICA taxes — 7.65 percent of salary — for new employees. This amount far exceeds the current match required of school districts by state law. Many districts have had to set up two separate payroll systems for new and established employees. Further, districts are hesitant to enter into a section 218 agreement because of the expense of holding a local election, and the agreement cannot be revoked once it is in place.

Because state law contains no reporting mechanism, it is unclear how many school districts are in compliance, meaning that some school employees may not be receiving pension benefits to which they are entitled under federal law. In theory, noncompliance could lead to an IRS audit because withholding for retirement contributions appears on an employee's W-2 tax form and a district's failure to provide either Social Security or another pension plan might raise a red flag. Short of conducting a time-intensive compliance check of each school district, however, the IRS is unlikely to detect a noncompliant district.

Much confusion at the local level still exists as to whether school employees who sign up for an alternate plan later may roll those initial contributions back into their TRS pension plans. Also, while it is possible for an employer to petition the IRS for a refund of FICA taxes paid by both the employer and the employee, this cumbersome and time-sensitive process rarely results in a refund.

What can be done?

Because the new law did not take effect until September 1, 2003, many school districts were able to skirt the issue this school year by bringing all new employees onto the payroll in August. However, next school year they will not be able to do so. They say that state lawmakers concerned with lowering the proportion of administrative costs to classroom expenses may wish to repeal the 90-day waiting period sooner rather than later, or authorize some other accommodation.

During the first called session in 2003, the Senate amended HB 5 by McCall to require school districts either to provide Social Security coverage or to enter into salary reduction agreements with employees affected by the 90-day waiting period. Districts that do not provide Social Security coverage would have been required to deduct 7.5 percent of affected employees' wages for the duration of the TRS waiting period and deposit the money into a retirement plan that met IRS guidelines. Although the conference committee report for HB 5 included the amendment and both houses approved it, the bill was not sent to the governor because the lack of a Senate quorum prevented the lieutenant governor's signature, and the amendment was not reintroduced in subsequent called sessions.

While the Senate amendment would have provided state guidance to districts, school administrators say it still would not have addressed district concerns about administrative costs. Short of a full repeal, some suggest that lawmakers still could save money by allowing an employee to contribute 6.4 percent to TRS from the first day of employment, but waiting until the 91st day of employment before contributing the state's 6.0 percent share. Others say this is unrealistic, because pension eligibility does not stand alone. The law ties the 90-day delay to membership in TRS, meaning that health benefits and passthrough coverage also come into play as soon as an employee becomes a member of TRS. Further, requiring an employee contribution to TRS without a state contribution could have constitutional problems, as Texas Const., Art. 16, sec. 67(b)(3) requires the state to contribute between 6 percent and 10 percent for all participating TRS members.

— by Dana Jepson

Another TRS waiting period issue

In addition to the difficulties faced by school districts that must make special pension-plan arrangements for new employees, the waiting period also raises a fairness issue for some of these new employees. Because TRS service credit accrues on a semester basis rather than on a month-by-month basis, an employee must contribute to TRS for four-and-one-half months in a school year to earn a full year of service credit. As a result of the 90-day waiting period, a new employee who started work midway through the school year could be in the position of having to buy back an entire year of service credit, while another employee who started work at the beginning of the school year would be unaffected by the waiting period in terms of earning credit.

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Women's Right to Know Act

HB 15 focuses primarily on informed consent before an abortion is performed. The informed consent portion of the legislation requires that at least 24 hours before performing an abortion, the physician must inform the woman of:

- the name of the physician performing the abortion;
- medical risks associated with abortion, including infection and hemorrhage;
- danger to subsequent pregnancy and risk of infertility;
- increased risk of breast cancer and the natural protective effect of a completed pregnancy in avoiding breast cancer;
- probable gestational age of the unborn child at the time of abortion;
- medical risks associated with carrying a child to term;
- medical assistance that might be available for mother and baby care;
- the father's liability for paying child support;
- the statistical likelihood of collecting child support;
- contraception counseling and referrals available from public and private agencies;
- her right to review TDH materials; and
- the website address for viewing TDH materials online.

Before the abortion, a woman must certify in writing that she received the information, and the physician who performs the abortion must receive a copy of the written certification. The bill also directed TDH to develop a brochure that describes the unborn child and lists agencies offering alternatives to abortion. In addition to the informed consent provisions, the legislation made certain licensing changes by requiring that an abortion of a fetus age 16 weeks or older be performed at an ambulatory surgical center or at a hospital licensed to perform an abortion.

Supporters of HB 15 said that the new requirements will ensure that women seeking abortion receive the same kind of medically accurate information they receive for any surgery, including risks, benefits, and the chance for a second opinion. Opponents of the bill said HB 15 was based on the erroneous and patronizing assumption that women make uninformed choices about abortion and noted that the Texas Medical Practice Act already requires informed consent for all surgical procedures.

Identification requirement in Board of Health's new rules

The new rules promulgated by the Texas Board of Health on January 15, 2004, require abortion providers to obtain a copy of a patient's identification that includes the woman's date of birth before performing the procedure and to keep that copy on file. If the woman does not have identification stating her date of birth, she must execute an affidavit indicating her birth date.

Opponents of this requirement say that TDH overstepped legislative intent by including it in the new rules because HB 15 did not address identification requirements. They say that requiring a patient to show identification is intimidating and designed to make women think they are being tracked in some way. Clinics that offer abortion services say that they already require confirmation of a woman's age to comply with laws regulating abortion services for minors.

Supporters of the new identification requirement say that while it was not specifically addressed in HB 15, it was part of the September 2003 settlement of *Herrera v. The State of Texas*, a lawsuit alleging that the state failed to enforce ch. 245 of the Health and Safety Code, regulation of abortion facilities. Some of the elements in HB 15 also were in the settlement agreement, including the publication of an informational pamphlet. To ensure that facilities comply with the laws regulating abortions when the patient is a minor, the state agreed to recommend to the Board of Health that facilities be required to obtain a copy of the patient's identification. The rule was not designed to intimidate patients, but rather to ensure that facilities comply with the law and provide TDH a method of verifying that compliance, say its supporters.

HB 15 took effect on September 1, 2003, and applies to all abortions performed on or after January 1, 2004. In implementing the legislation, TDH has prepared a brochure, entitled "A Woman's Right to Know," that includes information required by the new law. As

prescribed by the legislation, the brochure uses text and color pictures to describe, at two-week gestational increments, an unborn child's probable anatomical and physiological characteristics, dimensions, and likelihood of survival outside the womb. The agency also prepared a separate resource guide that lists agencies offering alternatives to abortion, adoption agencies, and geographically indexed information on agencies to help a woman through pregnancy, childbirth, and the child's dependency.

Controversial language. The controversy over the final rules, which the board promulgated on January 15, 2004, hinges on the word "provide." HB 15, as enacted, requires that a physician inform the patient of her right to review the printed materials published by TDH. It states, in sec. 171.012 (4)(b), that "the information required to be provided ... must be provided at least 24 hours before the abortion is to be performed." The final rule, as presented to the board, directed physicians to provide a copy of the informational brochure, but then was amended to add "if the woman chooses to view it." The board used the Merriam-Webster Collegiate Dictionary, Tenth Edition, definition of the word "provide" — "to supply or make available" — in interpreting the intent of the legislation. The board added the amended language to make clear that physicians were not required to hand the materials to a patient, but rather to make them available.

The controversy surrounding the Board of Health's final rules hinges on the interpretation of the word "provide."

The debate

Supporters of the board's decision to clarify that physicians are not required physically to hand patients a brochure say that it was in line with legislative intent. They say that floor debate when the bill was in the House shows that directly supplying the brochure to the patient was never intended to be a requirement. The purpose of creating a brochure and resource directory was to offer patients access to important information so that the patient could give informed consent.

Supporters of the board's interpretation say it is most appropriate that the information be offered rather than physically handed to a patient because the policy takes into account the range of reasons for the procedure, from termination because of congenital defects to elective abortions. The brochure was never intended to cause emotional distress to a mother facing a difficult decision, particularly if the decision is made in light of amniocentesis results, but rather to offer information and resources critical to making a fully informed decision.

Other supporters of the board's decision say that the creation of the brochure was designed to intimidate and mislead pregnant women and that patients should have the option to decline viewing it. They contend that the brochure contains deliberately inflammatory color pictures of embryos at two-week increments when black-and-white pictures convey the equivalent information. They also say the brochure reflects misinformation about the safety of abortion versus carrying a baby to term, links breast cancer to abortion where no scientific evidence exists, and exaggerates other risks, such as post-partum depression.

Opponents of the board's interpretation say that it thwarts legislative intent by allowing activist physicians to deprive pregnant women of a valuable informational resource essential to informed consent. Before HB 15, abortion providers were not conveying this information to their patients, yet considered the consent they obtained to be "informed." Without requiring physicians to hand the brochure to a patient, nothing has changed to make a patient's decision better informed. Opponents say that clinics often conduct only perfunctory counseling sessions before abortions and rush women through the process without ensuring that they understand the information and have considered their options. Abortion providers see nothing wrong with this, the opponents say, which is why the state should require a provider physically to place the brochure in a patient's hand or at least send it by mail.

Opponents of the board rule say it is ineffective public policy to create a source of information that no one will ever read. The goal of the legislation was to ensure that women seeking abortion receive the same kind of medically accurate information they would receive for any surgical procedure, including risks, benefits, and the chance for a

second opinion. However, women seeking abortion never receive complete information about what the procedure will entail or its possible health risks. Some women say they would not have had an abortion if they had known more about the procedure, their unborn child, or the post-procedure medical complications. Defenders of the brochure say it does not contain misinformation, but is based in scientific fact that was chosen for inclusion by a panel of physicians who advised TDH. Because this is a decision with grave finality, the information must be presented at a critical time. Opponents of the rule say if no one ever reads the information, or if they do so only after the decision is made, the public policy objective of a truly informed patient was not achieved.

— by Kelli Soika

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