California Public Agency Labor and Employment Blog - Useful Information for Navigating Legal Challenges

Published By Liebert Cassidy Whitmore

FROM DIEGO TO THE BAY: CALIFORNIA VOTERS LOVE PENSION REFORM, BUT IT'S NOT AS SIMPLE AS IT LOOKS FOR PUBLIC EMPLOYERS

Posted by Frances Rogers on June 12, 2012

Two pension reform ballot measures were overwhelmingly passed by voters in San Diego and San Jose last week. Now, other cities, counties and districts in California that participate in CalPERS or STRS, or maintain a '37 Act system are asking, "can we do the same thing?" The short answer is, "no," at least not at the local level. The following is an abbreviated look at why the San Diego and San Jose measures will not directly impact other California public employers, but how other public employers may see some pension reform in the future at the State level.

The Difference Between San Diego/San Jose and Many Other Public Employers in California

Some employers have their own pension investment fund or system, some contribute to a much larger fund or system maintained by a larger entity and in which other employers participate, and/or some pool their funds with other employers called "risk pools." The City of San Diego and the City of San Jose, for example, are employers that have their own pension system established and governed by city charter, as well as city ordinances. Other entities have elected to be a part of those pension systems, as well. For example, the San Diego Unified Port District, while a separate entity from the City, participates in the City's pension system, but it is the *City's* Charter that governs the system.

Many cities, counties and special districts in California are contracted with the California Public Employees' Retirement System ("CalPERS"). CalPERS is the largest public pension system in the country. Originally established by the State to provide for pensions of State employees, other public employers in the State may also contract with CalPERS to handle contributions, investments, and retirement allowances for their employees. However, it is the *State*, not the individual public employers, that decide who will be CalPERS members, how contributions will be made, how investments will be handled, and the terms and conditions for retirement benefits. This leaves public employers contracting with CalPERS with little control.

The State Teachers' Retirement System ("STRS") is the second largest defined benefit pension system

in the country and is a mandatory pension system for, among others, all eligible public K-12 and community college certificated or academic employees in the State. There are also several other defined benefit pension systems in the State including for superior court judges, State legislators, and employees of the University of California.

Just over half of all counties in the State that have their own pension system, but the law that governs their system is established by State legislation known as the County Employees Retirement Law of 1937 (" '37 Act"). While each '37 Act county maintains its own system, the administration of that system is governed by State law. Cities and special districts that are situated within these '37 Act counties may opt to contract with the county's retirement system, as well.

There are very few public employers in the State that do not have defined benefit pensions. This has to do with an evolution of laws both at the state and federal level. Thus, there may be a few public entities that only offer 401(k) type plans. In addition, federal law does not require public employers to participate in Social Security unless the public employer chooses to opt-in, or previously opted-in and did not withdraw before 1983.

Because the Cities of San Diego and San Jose maintain their own pension systems governed by their own charters, ballot measures like Measure B and Proposition B passed last week, cannot be done by CalPERS, STRS, and '37 Act employers, at least not at the *local* level. CalPERS employers are heavily restricted to the changes that can be made to save on pension costs by State law, such as Government Code sections 20474 and 20475. Because CalPERS is governed by the California Constitution and ensuing State legislation, any change to the governing law must be made only through State legislation implemented by State legislators. STRS employers have even less flexibility and again, any change in the governing system must be made at the State level. Similarly, '37 Act systems are also governed by State law and substantial changes to any individual '37 Act system would require legislation at the State level.

However, Governor Jerry Brown unveiled his 12-Point Pension Reform Plan last October which will apply to, among other systems, CalPERS, '37 Act, and STRS. Some commentators believe that the ballot measures passed in San Diego and San Jose will act to hasten and embolden the Governor's 12-Point Pension Reform Plan, but this remains to be seen.

A Side-By-Side Comparison of San Diego, San Jose, and the Governor's Plans

The San Diego and San Jose ballot measures passed last week proposed to amend each of the Cities' Charters. Those Charter amendments are intricate and lengthy. Similarly, the Governor's 12-Point Plan while appearing simple in theory, if implemented, would require substantial legislative changes. Here, we provide you with a simplified and abbreviated, though not all inclusive, comparison of each plan.

Proposed Changes	**San Diego's Prop. B**	**San Jose's Measure B**	**Governor's 12-Point Plan**
Limiting pensionable compensation to only base pay and exclude specialty pays from computation of retirement allowance	**X** (prospective service for existing employees)	**X** (for future employees)	**X** (for future employees)
Salary freezes for the next five years	**X**		

Establishment of new defined contribution retirement plan which will be the only plan for all future employees	**X** (except for sworn police officers)		
Establishment of a "hybrid" plan incorporating a defined benefit and defined contribution plan and/or Social Security as the only plan for all future employees		**X**	**X**
Voluntary option for current employees to opt into new retirement plan for prospective service	**X**	**X** (see below)	
Establishment of a new voluntary defined benefit retirement plan for current employees providing lesser benefits for prospective service		**X** (one-time voluntary enrollment)	
Make employer and all employee contributions to retirement plan substantially equal for the costs of a normal retirement allowance	**X** (except for City liabilities for past service)	**X** (for future employees; incremental increase for existing employees)	**X**
Prohibit employers from "picking-up" employee contributions to retirement plan	**X**	**X** (City's cost for new Tier 2 defined benefit plan shall not exceed 50% of total cost)	**X**
Loss of retirement allowance for any officer or employee convicted of a felony relating to their employment duties	**X**		**X**
Online posting of retirement allowance paid to each retiree identified by classification last held	**X**		(Considered public record already)
Limits on maximum amount of defined benefit retirement allowance for future employees	**X** (for sworn police: 80% of comp at age 55 decreasing by 3% for each year prior to age 55)	**X** (2% per year of service not to exceed 65% of comp)	
Increase in minimum retirement age for full defined retirement		**X**	**X**

benefit for future employees		(age 60 for safety; 65 for general)	
Retirement allowance for any defined benefit plan will be based only on average of highest three consecutive years of service for future employees	**X** (for sworn police)	**X**	**X**
Require voter approval for any increase in pension and/or retiree healthcare benefits		**X**	
Redefining eligibility criteria for disability retirement		**X**	
Suspension of cost-of-living adjustments for retirees upon declaration of fiscal and service level emergency		**X**	
Requiring that new and existing employees contribute a minimum of 50% of the cost for future retiree healthcare		**X**	
Specific provisions which provide that no retirement plan or retiree healthcare plan shall create a vested right		**X**	
Further limits on post-retirement employment with public employers			**X**
Prohibit employers from suspending employer and/or employee contributions necessary to fund annual pension costs			**X**
Prohibit purchase of service credit for time not actually worked			**X**

San Diego and San Jose Ballot Measures Will Face Legal Challenges

The San Diego and San Jose ballot measures, while approved by voters, are not without their opponents, particularly labor unions. Prior to the June 5th vote, the Public Employment Relations Board ("PERB"), on behalf of one City labor organization, filed suit against the City of San Diego alleging the City failed to meet and confer with labor unions before placing the matter on the ballot. The superior court rejected attempts to prevent the measure from being placed on the ballot, but will allow the parties to litigate the issue after voter approval. Further lawsuits are anticipated, as well.

In San Jose, at least three lawsuits were filed before all ballots were completely counted. The City filed a preemptive complaint for declaratory relief on June 5th to find that Measure B does not violate the

Contracts Clauses of the U.S. and State Constitutions, or constitutional rights of due process or promissory estoppels and for a judicial declaration that the City may implement Measure B as enacted by voters. Meanwhile, the San Jose Police Officers' Association and active and retired members of the San Jose Police and Fire Department Retirement Plan filed complaints for declaratory and injunctive relief on June 6th. The respective plaintiffs allege Measure B impairs vested retirement benefits, violates the Contracts Clause and Takings Clause of the U.S. and California Constitutions, violates constitutional principles of due process and right to petition, as well as separation of powers. The Police Officers' Association also alleges other violations of State law including the Meyers-Milias-Brown Act and the California Pension Protection Act.

Thus, while these pension reform measures are designed to control the spiraling pension costs and unfunded liabilities, the measures may be held hostage in costly litigation. The fate of these measures has yet to be seen.

In sum, public employers will anxiously watch as the San Diego and San Jose pension reform measures unfold. In the meantime, California has a long road ahead to effectively reform public pensions for all local and State employers.

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Liebert Cassidy Whitmore
Los Angeles
6033 West Century Blvd
Suite 500Los Angeles, CA 90045 Phone: (310) 981-2000
San Francisco
153 Townsend Street
Suite 520San Francisco, CA 94107 Phone: (415) 512-3000
Fresno
5250 N. Palm Avenue
Suite 310Fresno, CA 93704 Phone: (559) 256-7800
San Diego
501 W. Broadway
Suite 800San Diego, CA 92101 Phone: (619) 400-4955

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