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Public Agency Risk Managers Association (PARMA) 2017 Annual Conference

Reducing OPEBs: The New Strategies

2/14/2017

Presented by:

Steven M. Berliner

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Public Agency Risk Managers Association (PARMA) Annual Conference | February 14, 2017

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Reducing OPEBs: The New Strategies

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Agenda

- Review of Vesting Principles
  - Traditional View
  - Recent Changes
- Strategies If Vested
- Strategies If Not Vested
- PERS Medical Issues

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Vesting Principles

- U.S. and California Constitution
  - Contracts Clause
    - The Government may not impair vested contractual rights
  - Longstanding interpretation of Law made it difficult for employers to cut or modify retiree medical benefits

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Traditional View

- Pension benefits interpreted in favor of Pensioner
- Same theories apply to OPEBs (Retiree Medical)
- Once any work performed after promise of future benefits, employer could not reduce or modify the benefits
- These benefits were deemed "vested"

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Traditional View

- Once vested:
  – Retirees receiving benefits could not be subjected to reduced benefits or modifications that "impair" the vested benefit.
  – Future Retirement benefits to be received in the future by current employees could only be modified if necessary to preserve retirement system, and any decreases must be offset by equal benefits.
  – Future employees – Usually not vested until hired, so if hired after a reduction in benefits, no vested right to old benefits.

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Traditional View

- Result:
  – Current Retirees untouchable.
  – Reducing Current Employees: benefits would not lead to a lot of savings.
  – Proliferation of tiers was only strategy.

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Traditional View

- Why? Because there was a presumption, supported by anti employer case law, that benefits (pension and retiree medical), became vested very easily and became largely untouchable.

Recent Changes

- In last few years, courts started becoming more and more skeptical of the notion that retiree medical benefits were automatically vested.
- Presumption is now that they are NOT vested.
- Does this new interpretation apply only to retiree medical or pension benefits as well?
  - Gray area

What Do We Do Now?

- Must first determine if employees and/or retirees vested in benefits.
  - Main inquiry: Was a contract formed in which the governing body explicitly indicated an intent to create a lifetime or non-changeable benefits?

Vesting Principles

- Are your employees or retirees vested?
  - Look at the “contract” language.
    - Resolution
    - Municipal/County Code
    - Charter
    - Personnel Rules and Regulations
    - MOUs
  - Does the contract simply say the employee or retiree will receive retirement benefits or does it reserve any rights to the employer to modify or delete?

Vesting: Other Post-Employment Benefits

- Language of document(s) creating/maintaining the benefit are key.
- MOUs.
  - Does the language of the contract indicate a promise to continue benefits after expiration of the MOU?
  - Is there a past practice creating a promise to continue benefits after expiration of MOU?
- Resolutions/Ordinances.
  - Does the resolution/ordinance reflect an intent to create a contractual right?
  - Creation of contractual right may be implied in some circumstances.
- General Rule: a statute, ordinance or resolution does not create private contractual right.

Vesting: Other Post-Employment Benefits

Retiree Benefits Created by MOU:

- Must be ratified by resolution of the governing board.
- Presumed benefit does not extend beyond the life of the MOU unless:
  - MOU expressly indicates.
  - Implied by convincing extrinsic evidence to establish a benefit extending beyond the term of employment.
- Who has the burden of proof?

Vesting: Other Post-Employment Benefits

Retiree Benefits Created by Resolutions & Ordinances:

- If found to be a contract, does it promise a *vested* right to a future benefit?
- There must be a clear basis in the contract or convincing extrinsic evidence to establish a benefit extending beyond the term of employment.
- Employees/Retirees have a "heavy burden" to demonstrate the governing body intended to create vested rights.

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Strategies If Vested

- If the language of the documents creating a benefit reveal that it is vested, traditional view still applies.
- 3 part inquiry.
  - Current retirees receiving benefits, largely untouchable
    - Individual agreements?
  - Current employees – maybe.
    - Issue: Can employee association agree to modify benefits that are vested?
  - Future employees – likely can modify statutory preclusions? PEMHCA.
- Meet and Confer Issue.

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Strategies If Not Vested

- If not vested, 3 part analysis is unnecessary.
- Retirees and current employees can receive lesser or no benefits.
- Reality check:
  - Most agencies do not change benefits received by current retirees.
  - Complete elimination might start turning pendulum back against employers.

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Strategies If Not Vested

- Reduce benefits over time
- Offset reductions to some degree
- Lump sum payments in lieu
- Cap at current amounts
- Give window period to retire and still receive benefits before reduction

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Strategies If Not Vested

- If changing non vested benefits:
  - Be careful that you do not use language making it vested.
  - Avoid terms such as “lifetime”, “for life of employee”, “permanent”, etc.
  - Be blunt:
    - “The benefit may be reduced, modified, or eliminated by the (name of agency) at any time and is not intended to be vested”.

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PEMHCA Health Benefits

- Employers can contract with CalPERS under the Public Employees’ Medical & Hospital Care Act (PEMHCA) for medical benefits
- Separate from CalPERS Pension
- Participants
  - “Employees”
  - “Annuitants”
    - Effective Retirement date within 120 days of separation
    - Receives a retirement allowance from CalPERS (GC 22760)

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PEMHCA Health Benefits

- PEMHCA Agencies Bound by Additional Restrictions Hindering Ability to Reduce Benefits:
  - Equal Contribution Rule.
    - Employees = Annuitants
    - Annuitants = Employees
  - Minimum Contribution Rule.
    - 2017 - $128 per month

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PEMHCA Health Benefits

Two Exceptions:

- Unequal Method.
  - Lesser contribution for annuitants
  - Establish at time of contract with CalPERS
  - Annual contribution increases
    - Increase by 5% x years in CalPERS Health up to $100
- Vesting Schedule (Gov. Code § 22893).

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PEMHCA Health Benefits

- Creating New Tier of Retiree Health Benefits Under PEMHCA
  - Reduce PEMHCA contribution on behalf of employees and annuitants to minimum requirement
  - Pay additional amount to existing employees through cafeteria plan, and additional amount to current retirees through health reimbursement account so that combined contribution amount remains the same
  - New hires eligible only for minimum PEMHCA contribution (not additional amount) upon retirement

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PEMHCA Health Benefits

- Terminating PERS health benefits:
  - Must meet and confer.
  - Resolution passed by majority vote of governing body.
  - Within 60 days of rate announcement for coming year (~Summer).
  - Effective at end of current contract year.
  - Cannot re-join PEMHCA for five years.

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Thank You!

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