F I S C A L   I M P A C T   R E P O R T

SPONSOR Senate Floor | **ORIGINAL DATE** 02/16/10 | **LAST UPDATED** 02/17/10 | **HB**

SHORT TITLE Public Employees Returning to Work | **SB** 207/SFlS

ANALYST Aubel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in millions)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Grandfathered RTW employees- total fiscal impact		($2,248.0)*	($1,870.1*	($4,118.1)*	Recurring	All funds*- State agencies
General fund portion of total fiscal impact		($1,400.0)	($1,164.8)	($2,564.8)	Recurring	General Fund Only**- State agencies

(Parenthesis ( ) Indicate Expenditure Decreases)

*Retirees in the RTW program prior to July 1, 2010 are "grandfathered" but the bill requires the grandfathered RTW employee pick up the employee contribution. Current statute requires the employer pay both employee and employer contributions.

*Minimum savings (ALL FUNDS) for state agencies by having RTW employees pick up the employee contribution.

**See Fiscal Implications for the general fund impact generated by this bill. The analysis projects a $1.2 million general fund savings for FY11 and the Department of Finance and Administration specifies a $1.4 million general fund savings for FY11. Thus, the general fund savings would represent about 62 percent of the total savings accruing to state agencies for that fiscal year.

SB207 was a governor-sponsored bill.
Relates to House Bill 2

SOURCES OF INFORMATION
LFC Files

NOTE: The FIR has been updated to reflect a 2/17/10 email provided by the Department of Finance and Administration regarding the general fund fiscal impact of the "grandfathered" RTW employees (highlighted).

Response Received From (For SB207 or CS/SB207/SPACS/aSPAC/aSFC)
Municipal League
Public Employees Retirement Association (PERA) (via email)
State Personnel Office (SPO)
Office of the Attorney General (AGO)

SUMMARY

Synopsis of Bill

The Senate Floor substitute for Senate Public Affairs Committee substitute as amended for Senate Bill 207 amends the return-to-work (RTW) program in the Public Employees Retirement Act. For retirees returning to a PERA-affiliated employer after July 1, 2010, the following conditions will apply:

- The "wait out" period is extended from 90 days to 12 months;
- The pension of the RTW employee shall be suspended;
- The RTW employee has the option to not become a member, in which case no service credit is earned and no contributions are made by the employee or the employer on his or her behalf;
- When the RTW employee subsequently leaves employment, his or her pension shall resume under the original provisions; and
- The RTW employee has the option to elect to become a member, in which case both the employee and employer contributions shall be made and the pension shall be adjusted accordingly if the employee works for a period of at least three years.

RTW employees in the program prior to that date shall be subject to current provisions in effect, effectively "grandfathering" these employees. Currently, RTW employees wait out 90 days, do not suspend pension, and the employer pays both the employee and employer contributions (or the actuarial cost as determined by PERA). However, the bill would require those employees pick up the employee contribution as of the effective date, leading to savings for employers.

The bill deletes the exemptions for an appointed chief of police or undersheriff but retains the exemptions for a retired member who works for the legislature during the legislative session and for a retiree who is an elected official. Exempted employees do not suspend their pensions for the duration of employment or term of office.

The bill adds a restriction to the 12-month "wait out" period that the retiree can not be retained as an independent contractor by the employer from which he or she retired during that time.

The effective date is July 1, 2010.

FISCAL IMPLICATIONS

The fiscal impact is separated into three components.

1. Fiscal Impact Related to RTW Employees Prior to July 1, 2010
The bill will produce total fund savings of about $2.2 million for state employers for FY11, with an estimated general funds savings of about $1.2 million.

The bill grandfathers employees returning to work prior to the effective date under current provisions, except that Section G provides that on and after July 1, 2010, the RTW employee shall pay the employee contribution in amount specified by the PERA Act for that position. Current statute requires the employer pay both the employer and employee PERA contributions (or the actuarial value to keep the program cost-neutral to the fund, which could be higher).

Although the language specifying the current contribution schedule is deleted, PERA notes that it clarified the intent for continued contributions to PERA under the new language added concerning current RTW employees.

The bill does not address the RTW program for the Educational Retirement Board (ERB); thus, contributions related to RTW employees to that pension fund are not affected by the bill. Excluding pension payments paid by state agencies to ERB, the total cost to state employers for RTW employees is about $6.1 million in all funds based on the RTW employee profile as of September 2009:

Table 1 –FY11 Contributions-Includes 1.5% Swap*

PLAN	Employee	Employer	Total
~~State Agencies Paying ERB**~~	~~$99,934.75~~	~~$115,881.78~~	~~$215,816.53~~
Juvenile Corrections	$3,216.49	$12,404.98	$15,621.47
State Police and Adult Corrections	$99327.87	$257,597.55	$356,925.41
State General Plan 3	$2,145,486.50	$3,629,528.18	$5,775,014.68
TOTAL	**$2,248,030.86**	**$3,899,530.70**	**$6,147,561.56**

*Includes 1.5% employer-employee contribution swap from Laws 2009, Chapter 127
**Educational Retirement Board

The fiscal impact, assuming the current number of RTW employees remain constant, would result in $1.2 million general fund savings for FY11 and about $1 million for FY12.

Table 2 - Estimated General Fund Savings

		Employee Contributions			
		Employee Rate w/1.5% Swap (FY11)*		Normal Employee Rate (FY12)	
	GF%	TTL	GF%	TTL	GF%
~~State Agencies Paying ERB~~	~~0.688~~	~~$ 99,934.75~~	~~$ 68,755.11~~	~~$ 83,987.71~~	~~$ 57,783.55~~
Juvenile Corrections	0.688	3216.49	$ 2,212.94	$ 2,448.22	$ 1,684.37
State Police and Adult Corrections	0.784	99327.87	$ 77,873.05	$ 82,955.14	$ 65,036.83
State General Plan 3	0.54	2145486.50	$ 1,158,562.71	$ 1,784,698.41	$ 963,737.14
Estimated General Fund Savings			$ 1,238,648.70		$ 1,030,458.35

Source of data: SHARE September 2009
GF%: from FY10 Public Employee Compensation 1% Table

*Includes 1.5% employer-employee contribution swap from Laws 2009, Chapter 127

This estimate based on the 1% table underestimates the general fund savings to the extent that the current RTW employees working under State General Plan 3 occur in agencies where the general fund portion of the operating budget is higher than 54 percent. Many agencies are 100 percent funded by a general fund appropriation.

A new fiscal analysis provided by the Department of Finance and Administration on 2/17/2010 via email scores the general fund savings for FY11 at $1.4 million, “assuming that all current RTW employees stay in their current position for a full fiscal year.” The FY12 impact is generated by applying the ratio of general fund savings provided in Table 2 for FY12 compared with FY11 to the $1.4 million:

83.2% * $1.4 million = $1,164.8 projected general fund savings for FY12.

This bill can be assumed to relate to House Bill 2, which estimated the general fund savings of $4 million associated with “a bill…prohibiting retirees from a state system without suspending their retirement”:

> House Bill 2, Section 10 (Appropriation Reductions) A(4): (4) to agencies covered by a state system employing persons who have retired from a state system and returned to work without suspending their retirement are reduced by a total of four million dollars ($4,000,000) to reflect savings resulting from the elimination of the right of such retired persons to return to work for an agency covered by a state system without suspending their retirement. This reduction is contingent on enactment of a law by the second session of the forty-ninth legislature prohibiting retirees from a state system from returning to work with an agency covered by a state system without suspending their retirement. As used in this subsection, “state system” means a retirement program provided for in the Educational Retirement Act, the Public Employees Retirement Act, the Magistrate Retirement Act or the Judicial Retirement Act;

This estimated general fund savings of $4 million, originating from the introduced version of House Bill 2, could have been calculated using the proposal of having all public RTW employees pay the employee contribution rather than the employer. Given the definition for “state system” that includes both the Educational Retirement Act (ERB) and PERA, it is reasonable to assume that this calculation was based on this premise since $4 million would have been a conservative estimate for general fund savings using this methodology. The actual method for calculating this projected amount is unknown. ERB is not included in this bill. No fiscal impact would arise from including the Magistrate and Judicial plans because, as elected officials, such retirees fall under the exemption to the RTW program.

Additional savings to state agencies will accrue in FY12 to the extent current RTW leave employment and the positions are filled with a new RTW employee under the bill’s provision to elect not to be a member of PERA. In this case, the employer will make no employer contributions. This impact is presumed to be minimal under the assumption there will be few participants given that the longer wait out period and the program design that no longer provides an incentive to participate by allowing a retiree to receive both a pension and a paycheck.

2. Fiscal Impact Related to RTW Employees After July 1, 2010
The number of future retirees returning to work under the new 12-month “wait out” period is unknown and the fiscal impact of the new contribution schedule cannot be determined. The savings would relate to employers not paying the employer contribution by hiring a RTW employee (who chooses not to be a member) compared to hiring a regular employee (or RTW employee who chooses to become a member) for which the employer contribution would have to be paid. One could assume that because the employee has to separate from service for a longer period of time and there is no incentive to retire under the new RTW program, the new RTW employees returning to work under this bill would be minimal.

3. Actuarial Impact to PERA
The bill continues both the employee and employer contributions to PERA for RTW employees in the program prior to July 1, 2010. Currently there are about 570 state RTW employees and 910 municipal RTW employees. Thus, the bill does not hold a fiscal impact to PERA regarding

these employees.

Plan	Re-employed Retirees
Municipal Fire Plan 5	19
Municipal Plan 1	27
Municipal Plan 2	203
Municipal Plan 3	358
Municipal Plan 4	31
Municipal Police Plan 1	3
Municipal Police Plan 2	2
Municipal Police Plan 3	5
Municipal Police Plan 4	14
Municipal Police Plan 5	240
State General Plan 3	539
State Police & Adult Corr Officer Plan 1 20% Added	31
Total	**1,481**

Source: PERA

However, the bill requires all new RTW employees suspend their pensions. This would have a positive impact on the fund. Another positive fiscal impact may develop if the bill encourages current employees to stay working longer as an active employee to the maximum service credit of 26 years and eight months or longer (22 years plus three months for enhanced plans). PERA's latest experience study indicates that the current RTW program may be encouraging people to retire earlier than they would have otherwise—which is costing the fund about 5 percent. In other words, in order to make the current RTW program actuarially cost-neutral to PERA, contributions would have to be raised by 5 percent for RTW employees to cover the unexpected additional years of pensions being drawn. This impact would most likely diminish over time as the effect of the new 30-year service requirement established for many PERA plans for new hires effective July 1, 2010, phase in over time.

PERA will not receive contributions for the new RTW employees choosing the non-membership option, which will have a negative impact. PERA's assumes this impact will be minimal due to the low expected number of retirees entering the program.

The net effect of these impacts on the PERA fund could only be determined through an actuarial study.

SIGNIFICANT ISSUES

Prior testimony on the PERA RTW program has indicated that state employees may feel low morale and perceive a ceiling for advancement because retirees return to top-level positions. In addition, unemployment remains high in the state. This bill will help provide more opportunity for employment as current RTW employees leave positions and a reduced pool of RTW employees develops due to the new disincentives. i.e., having to wait out 12 months rather than 90 days and having to suspend one's pension.

The bill allows two options for a new RTW employee after the effective date: to suspend the pension and not become a member or suspend the pension and become a member. PERA has stated in prior analyses that “any RTW measure that denies the retiree the pension he or she has earned under a governmental plan without providing a commensurate benefit, such as accrual of service credit, may violate the Age Discrimination in Employment Act (ADEA).” Presumably, allowing the RTW employee to choose one or the other option addresses this issue but a legal interpretation of this part of the bill has not been provided.

The Municipal League expresses a concern that the police chief and sheriff exemptions have been deleted and offers an amendment to add them back. PERA agrees. Small municipalities and counties note the difficulty of filling certain positions in rural areas. However, adding an exemption for “critical need” to allow governing bodies hire a retiree may open the door to other exemptions, which could have a significant negative impact to the PERA fund. In addition, “best practices” for human resources management includes a system of employee development and replacement for key positions.

The bill addresses the issue of retirees working on contract during the wait out period by preventing this practice. Who will monitor the contracts for violation is not specified, but it could present an administrative issue for PERA if they are to police the program.

The Office of the Attorney General did not submit an agency analysis for the Senate Floor substitute, leaving the issue of whether the state has a contractual obligation with current RTW employees unanswered for this bill. It may be the final answer to whether RTW employees are protected by terms of public-employment contracts could only be determined by a court decision, although there is case law on this matter and there are state and national constitutional provisions against impairment of contracts. The current bill sides on the opinion RTW employees are protected by a public-employment contract by grandfathering current RTW employees, presumably out of consideration that people made certain life decisions based on current statute.

How many people retire in the next couple of weeks to enter into the RTW program under current statute as “grandfathered” RTW employees is not addressed.

CS/SB207/SPAC Compared to HB616

House Bill 616, another bill revamping the RTW program, passed during the 2009 Legislative Session and was vetoed. The main difference between this bill and House Bill 616 is that HB616 essentially phased out the current RTW employees over a one-year period by capping salaries at $30,000 rather than grandfathering them. HB616 proposed the following:

- A one-year phase-in of a $30,000 cap for RTW employees that required pension suspension when met;
- A “max-out” of retirement eligibility requirements to be eligible for the reduced RTW program;
- The continued ability to work part time up to $30,000 without pension suspension;
- A program that allowed small employers to have a RTW work program not subject to the $30,000 salary cap with certain restrictions up to 2015;
- A program that provided a “critical need” RTW program not subject to the $30,000 salary cap with certain restrictions up to 2012; and
- The RTW employee paid the employee contribution to PERA.

The primary similarity between the two bills is that the Senate Floor substitute for CS/SB207/SPAC/aaa requires the current RTW employee to pay the employee pension contribution to PERA.

Key Policy Issues

The key policy issues raised when comparing HB616 to the plan proposed under this bill include:

- Whether current RTW employees should be grandfathered due to a contractual agreement with the state or can be or phased out over time;
- Whether a special provision is made for small employers or a "critical need";
- Who pays and how much contributions should be made to PERA; and
- Whether to have a provision for part-time work under a salary limit.

It is possible that an employee could retire under a relatively lower final average salary, wait the 12 months, reenter the workforce as a PERA member under the new RTW program proposed by this bill in a position paying a higher salary, work for the three years required for recalculation of benefit, and re-retire with a higher benefit that had not been paid for during the career lifetime. However, PERA anticipates the number of employees returning to work under the new requirements will be minimal.

OTHER SUBSTANTIVE ISSUES

There is not a consensus on whether RTW employees should pay the employee contribution. PERA has consistently expressed concern over collecting nonrefundable contributions from reemployed retired members, noting that New Mexico was the only state to do so under prior statute that required employees make contributions after earning $25,000. The agency cautions that any statutory provision requiring PERA retired members to make nonrefundable contributions without receiving any associated benefit (additional accrued service credit) may violate the federal Age Discrimination in Employment Act (ADEA). However, a case brought by Albuquerque police officers in state court (Archunde v PERA) was dismissed on the concept that to be able to receive a retirement benefit and go back to work and also receive a salary *was* a benefit. This lawsuit was not brought under ADEA.

Current RTW employees have not been impacted by the 1.5 percent contribution shift implemented by Laws 2009, Chapter 127, that reduced employees' take home pay by 1.5 percent by shifting 1.5 percent employer contribution to employees making more than 20,000. Presumably, the RTW employees making more than $20,000 will now have to pay the statutory rate that includes the 1.5 percent swap for FY11.

New Mexico Department of Transportation

NMDOT provided this analysis of its current RTW program for the original SB207:

> "There would be little incentive for retired employees with invaluable experience and critical skills to return to work under this bill, especially into NMDOT's hard to fill positions. NMDOT has several critical positions (25), such as the surveyor's job class with the majority approaching retirement.
>
> NMDOT as of January 27, 2010 has 44 employees who have retired and have returned to work:

- 3 retirees who have returned to work are Surveyors
- 6 retirees who have returned to work are Civil Engineers
- 4 retirees who have returned to work are Engineer Coordinator Specialists non-licensed

> −3 retirees who have returned to work are Civil Engineer Technicians non-licensed
> −9 retirees who have returned to work are Highway Maintenance Workers
> NMDOT, under the current law, pays both the employer and employee portion PERA allotment for Return-to-Work retirees. NMDOT pays 24.01% of these employees' salaries, which amounts to $492,848.09 a year for current retirees who have returned to work."

NMDOT's discussion raises the issue of how state agencies or large municipalities will deal with potential labor shortages for key positions under the new RTW program.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The RTW program will continue as currently structured and PERA will continue to receive the actuarial value of contributions for all RTW employees. PERA-affiliated employers will continue to pay both portions of the pension contributions. The exemptions will remain unchanged.

MA/mt:mew:svb:mew