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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 01/28/11  
**LAST UPDATED** 02/28/11     **HB** \_\_\_\_\_

**SPONSOR** Beffort

**SHORT TITLE** Forfeiture of Retirement for Certain Crimes     **SB** 247/aSJC

**ANALYST** Aubel

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY11	FY12	FY13		
	Indeterminate*	Indeterminate*	Nonrecurring*	PERA Fund, ERB Fund, Magistrate Retirement Fund, or Judicial Retirement Fund

(Parenthesis ( ) Indicate Revenue Decreases)

\* Most likely minimal on an intermittent basis.

Senate Bill 247 conflicts with Senate Bill 259

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Office of the Attorney General (OAG)  
 Public Employees Retirement Association (PERA)  
 Educational Retirement Board (ERB)  
 Retiree Health Care Authority (RHCA)  
 Administrative Office of the District Attorneys (AODA)

### SUMMARY

#### Synopsis of SJC Amendment

The Senate Judiciary Committee amendment adds a section to address the issue of preserving a spouse's community interest in the pension subject to the order of forfeiture, as follows:

"D. Before issuing an order pursuant to Subsection B or C of this section, the court shall determine the community interest of any spouse of the member or retired member in the pension or other benefits provided for in the applicable state system, and the order shall not affect the spouse's interest."

Furthermore, the amendment adds a subsequent section that directs the respective pension system to carry out the court order as specified:

"(6) if the court did not order the forfeiture of all of the forfeited member's pension and other retirement benefits but ordered the forfeiture of a portion of the pension and benefits, then the actions of the state system pursuant to Paragraphs (1), (2) and (3) of this subsection shall be carried out only to the extent provided in the court order."

## **SIGNIFICANT ISSUES**

ERB suggests that the amendment to SB 247 protects the spouse's interest in the pension by requiring the court to determine the community interest of any spouse of the member or retired member before issuing a forfeiture order and ensure that the order does not affect the spouse's interest.

ERB suggest "it is recommended that a provision also be included to address unresolved child support obligations, consistent with the recognition of child support orders in Section 22-11-42 (C) NMSA 1978."

ERB provided an amendment, as follows:

Revised 2/16/11 – An amendment to include unresolved child support obligations may be drafted as follows:

D. Before issuing an order pursuant to Subsection B or C of this section the court shall determine the community interest of any spouse of the member or retired member in the pension or other benefits provided for in the applicable state system and the order shall not affect the spouses interest. A forfeiture proceeding shall be stayed pending the resolution of any child support case initiated prior to or during the forfeiture proceeding.

An amendment to include the bill's provision for compliance with existing orders affecting community property interests or existing child support obligations is as follows:  
Page 3, Line 22:

The court may, subject to the requirements of Subsection D ~~of this section~~ and Subsection G (4) (Relettered) of this section, order the forfeiture of all or a portion of the members or retired members right to a pension...

Page 4, Line 17 may be similarly amended:

The court may, subject to the requirement of Subsection D ~~of this section~~ and Subsection G(4) (Relettered) of this section, order the forfeiture of all or a portion of the members or retired members right to a pension...

## Synopsis of Original Bill

Senate Bill 247 is anti-corruption legislation that provides for forfeiture proceedings of state pension benefits against government employees convicted of, or who have accepted a "no contest" plea for, a state or federal felony involving the misuse of public monies arising out of conduct related to a member or retired member's public employment.

ERB summarizes the provisions, as follows:

SB 247 provides for forfeiture of pension benefits from the Educational Retirement Act (ERA), the Public Employees Retirement Act (PERA), the Judicial Retirement Act (JRA), and Magistrate Retirement Act (MRA) upon a finding that a defendant in a criminal proceeding has been convicted of a state or federal felony or has accepted a plea of *nolo contendere* arising out of conduct from the misuse of public money including but not limited to, a felony arising out of the act of bribery, extortion, theft of public money, embezzlement of public money or forgery. In order for forfeiture to occur, the felony must be related to the persons public employment. SB 247 will apply prospectively and apply only to criminal acts committed after the effective date of the legislation. All public employees, elected officials, appointed officials, judicial members, and magistrates would be subject to the legislation.

Depending on where the prosecution occurs, the state attorney general or the district attorney may initiate forfeiture proceedings in either the criminal matter or in certain designated state courts. A court may issue an order of forfeiture if the prosecution establishes by clear and convincing evidence that the defendant is a member or retired member of a state pension system (“state system”) who has been convicted of a felony arising out of the misuse of public money and related to the person’s public employment.

Upon receipt of the order of forfeiture, the state retirement system shall suspend the person’s service credit if not yet retired and if retired shall suspend the pension. Retirees may however, still continue to receive health care benefits under the Retiree Health Care Act.

If the felony conviction and the order of forfeiture are upheld on final appeal or if no appeal is pursued on either, the state system shall revoke the person’s service credit and refund any accumulated contributions made by the person. If the person is a retiree, pension payments shall be terminated and any unexpended accumulated contributions made by the person shall be refunded. In addition, any benefits under the Retiree Health Care Act shall be terminated.

SB 247 provides for an exception to forfeiture if a court has, prior to the order of forfeiture, issued an order relating to a community property interest in the retirement benefits or enforcing child support obligations. If the court order predates the order of forfeiture then the state system shall comply with the court order. A second exception applies if the person returns to work while receiving a pension from his previous employment and the felony at issue does not arise from conduct related to the previous employment.

The forfeiture order is voided if either the forfeiture order or the felony conviction are overturned on final appeal. The state system shall reinstate the forfeited service credit of the person if not yet retired or if the person is a retiree, pay in full all pension payments which were suspended, with interest, at a rate determined by the state system board.

The effective date would be 90 days after the end of the 2011 Legislative Session.

## FISCAL IMPLICATIONS

Both the OAG and AODA anticipate that the number of cases brought under this bill would be small and current staff levels would absorb the additional work. AODA provides the following detail: “Any time a new law is created, it increases the work responsibilities of law enforcement, prosecutors, public defenders and the court system. Since there is no funding attached to his bill, these different groups will have to stop handling a certain number of crimes currently in the system in order to free up the time needed by the above systems to properly enforce this law. ...due to the small number of these cases, the fiscal impact on the District Attorneys would be minimal.”

All responding agencies noted the potential savings due to the pension plans for forfeited pensions, but all expect the amount to be indeterminate and intermittent, and most likely minimal over the long run. The legislative intent of the bill appears to focus on creating a deterrent to public employee misuse of public money, which also could conceivably have fiscal implications that remain indeterminate.

## SIGNIFICANT ISSUES

The primary policy decision is whether forfeiture of a pension account is appropriate when a felony is committed by public officers, elected officials and public employees arising out of conduct related to their public employment. Many states -- including California, Florida, Michigan and Pennsylvania -- have enacted anti-corruption legislation that includes forfeiture of retirement benefits specific only to felonies relating to the misuse of public monies, such as bribes, extortion, theft of public money, embezzlement of public money, and forgery.

AOC provides additional background on this issue:

The National Association of State Retirement Systems compiled an analysis of selected state policies governing the termination or garnishment of public pensions in December 2010. New Mexico was included in the 41 states for which state policies were described. Of the 41 states included in the compilation, 23 have some provision for the forfeiture or revocation of a public employee’s pension due to a variety of felony convictions, most related to the individual’s employment. In at least one state, the forfeiture, of all or part of the pension or retirement benefit, can be made due to “misconduct...which renders the member’s service or part thereof dishonorable.” Four states included in the report allow pension benefits to be garnished for various types of restitution.

AOC concludes that, based on this report, SB247 as proposed is “consistent with similar policies in other states and seems to fall somewhere in the middle in terms of defining the type of criminal act that could result in pension forfeiture.”

OAG notes that the “bill is careful to comply with State v. Nunez, 129 N.M. 63 (1999) which held that, because forfeiture of property, such as money allegedly associated with the crime, was punishment, a second a separate forfeiture proceeding would therefore violate the double jeopardy guaranteed by the New Mexico Constitution and the state's double-jeopardy statute.”

Most of the responding agencies raised the issue of how SB247 would impact property rights, both of the vested member subject to the legislation or family members. There appears to be a

difference of opinion regarding the issue of the members' property rights. ERB explains its point of view as follows:

The New Mexico Constitution states that upon meeting the minimum service requirements of a "retirement plan created by law for employees of the state or any of its political subdivisions or institutions, a member of a plan shall acquire a vested property right with due process protections under the applicable provisions of the New Mexico and United States constitutions." N.M. Const. art. xx, § 22 (D). There may be a question whether the pension and other retirement benefits of a retiree or member whose interests in those benefits vested prior to effective date of SB 247, could be forfeited pursuant to the act. This issue might be resolved by an amendment providing that SB 247 either would apply to (1) all members whose pension rights have not vested as of the effective date of the act, or (2) all members first hired after the effect date of the act.

However, PERA seems to indicate that the bill provides for due process as required:

Upon meeting the minimum service requirements of a state retirement plan, a member of a retirement plan acquires a vested property right with due process protections under both the New Mexico and United States Constitutions. SB 247 provides the defendant member of the retirement system with due process protections under a forfeiture proceeding, which includes the right to counsel.

On the other hand, respondents appear in agreement that the bill could potentially deprive family members of their property rights, as explained most thoroughly by ERB:

An additional issue relates to the community property interest that a spouse has in a pension from a state retirement system in cases where a spouse remained in a marriage. A spouse of a member or retiree of a state pension system who was subject to a forfeiture order might challenge forfeiture of the *entire* pension on the basis that it is in effect a taking of the non-convicted spouse's community property interest in the pension.

SB 247 provides that any forfeiture order will be subject to orders addressing community property interests in the pension and child support orders entered prior to the forfeiture order. If no such orders are entered prior to entry of a forfeiture order, this could have the effect of harming the persons spouse not involved in the criminal activity who did not seek, or could not obtain a divorce prior to a conviction or acceptance of a plea of *nolo contendere*. Many factors can affect how interests in retirement accounts are divided or child support is awarded; the division is not always equally to each spouse or a fixed percent to each child entitled to child support. Resolving these questions can delay the entry of orders for the community property interest and child support. The forfeiture proceedings should be stayed in instances where a final order settling community property interests has not yet been obtained and in instances where a divorce is pending. Alternatively, the bill could allow the court with jurisdiction over the related forfeiture order to direct that a civil proceeding be opened in cases where a order settling community property interests has not yet been obtained or a divorce is pending or where the spouse files for divorce within a reasonable time after the order of forfeiture is issued. If a spouse files for divorce after the order of forfeiture is issued the spouse should be required to show that the proceeding is a bonafide divorce proceeding and not initiated solely for the purpose of avoiding the consequences of the forfeiture order.

ERB raises a final issue related to the pension as a property right:

SB 247 does not address the issue of whether pension rights would be restored in the event a convicted member or retiree is subsequently pardoned and, if so, how that would be accomplished. This also involves the question of calculating the cost of repurchasing service credit. The bill should be amended to address this issue.

### **ADMINISTRATIVE IMPLICATIONS**

ERB and PERA will be required to comply with the notice requirements of SB247 and will be required to promulgate rules concerning the administration of forfeiture proceedings as they apply to pension benefits payable, refunds of member contributions, and compliance with prior domestic relation and child support orders.

All pension plan administrators would be required to comply with the forfeiture requirements of SB247.

### **RELATES**

Senate Bill 247 relates to Senate Bill 259. AODA provides a comparison:

This bill is similar to SB 259 in that both provide for forfeiture of pension funds when a state employee commits certain felonies. In SB 259 the forfeiture action is triggered when the adjudication of a public official is for a felony offense that relates to, arises out of or is in connection with the offender's holding of an elected office. In this bill (SB 247) the triggering standard is that the felony is one arising from the misuse of public money and is related to the member's or retired member's public employment, the district attorney or attorney general shall, in addition to the felony complaint, file for an order of forfeiture of pension. In all other regards, the bills are nearly identical.

### **RELATIONSHIP**

PERA notes the following relationships to SB247:

The Judicial Retirement Act [NMSA 1978, Section 10-12B-17] provides for the forfeiture of pension benefits if a member is removed from office pursuant to the provisions of Article 6, Section 32 of the Constitution of New Mexico.

The Magistrate Retirement Act [NMSA 1978, Section 10-12C-16] provides for the forfeiture of pension benefits if a member is removed from office pursuant to the provisions of Article 6, Section 32 of the Constitution of New Mexico.

The Public Employees Retirement Act [NMSA 1978, Section 10-11-136] allows for court ordered division of retirement funds as community property.

The Public Employees Retirement Act [NMSA 1978, Section 10-11-136.1] allows for legal process to satisfy child support obligations.

The Judicial Retirement Act [NMSA 1978, 10-12B-7] allows for court ordered division of retirement funds as community property and legal process to satisfy child support obligations.

The Magistrate Retirement Act [NMSA 1978, 10-12C-7] allows for court ordered division of retirement funds as community property and legal process to satisfy child support obligations.

## **TECHNICAL ISSUES**

The following potential technical issues were noted in the agency analyses:

PERA: The retirement system is only directed to revoke the forfeited member's service credit or stop paying the forfeited member's pension after receipt of 1) an order of forfeiture of pension; and 2) verification the order was either not appealed or upon final appeal, the order was upheld. As drafted, SB 247 does not require verification that the order was either not appealed or upon final appeal, the order was upheld.

**See amendment below.**

AGO: The bill also raises potential problems related to overlapping jurisdiction where an existing court, whether in-state or out-of-state, already exercises jurisdiction over community property and/or child support issues.

## **OTHER SUBSTANTIVE ISSUES:**

PERA provides additional insight into current provisions for forfeiture of benefits related to misconduct under the Judicial and Magistrate retirement systems:

Currently, only members of the judicial and magistrate retirement systems are subject to a forfeiture of pension benefit provision. Under both the Judicial and Magistrate retirement systems, if a judge or magistrate is removed from office by the Judicial Standards Commission [Article 6, Section 32 of the Constitution of New Mexico], his or her only entitlement from the retirement fund is a refund of the member's own contributions. The forfeiture provisions of the Judicial and Magistrate retirement systems only pertain to active members and cannot be exercised against a retired member already receiving pension benefits (The Judicial and Magistrate Retirement Acts bar retirees from returning to work with another state system).

PERA also points out that all pension benefits received by a person subject to the provisions of this bill might not be forfeited:

Many PERA retirees retire with reciprocal service credit under more than one state retirement system. Under current law retired members may, subject to certain conditions, return to public employment or take office as an elected official. SB 247 will not affect a retired member's pension benefits earned through previous public employment if the felony in question did not arise from the misuse of public money related to the previous employment from which the pension was accrued.

**POTENTIAL AMENDMENTS**

1. On page 5, line 12, after the word “section” strike “or” and insert “and.”

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Members and retired members of state retirement plans would remain members or retirees, regardless of whether they have been convicted of a felony arising from conduct related to misspending funds in their public employment. Members of the Judicial Retirement system would continue to be subject to the forfeiture provisions of the Judicial Retirement Act [NMSA 1978, Section 10-12B-17]. Members of the Magistrate Retirement system would continue to be subject to the forfeiture provisions of the Magistrate Retirement Act [NMSA 1978, Section 10-12C-16].

MA/svb