



The Florida Senate

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Committee on Governmental Oversight and Accountability

RETIRED JUDGES RETURNING TO TEMPORARY DUTY STATUS WITHIN SIX MONTHS OF RETIREMENT

Statement of the Issue

The Florida Retirement System (FRS) is a multi-employer plan that provides retirement income benefits to active members, retired members and beneficiaries, and members of the Deferred Retirement Option Program (DROP). It is the primary retirement plan for employees of state and county government agencies, district school boards, community colleges, and universities. The FRS also serves as the retirement plan for participating employees of the cities and independent special districts that have elected to join the system.

Current statutory law provides that any member of the FRS who retires or terminates DROP participation on or after July 1, 2010, and who becomes employed by any FRS employer during the first six calendar months after such time, does not meet the requirements for "termination." Such persons are therefore not considered retired and may not receive retirement benefits. The Florida Statutes also provide that a member of the FRS who retires or terminates DROP participation on or after July 1, 2010, who is not retired under the disability retirement provisions and who becomes employed by any FRS employer during the seventh to twelfth calendar months after his or her effective retirement date or DROP termination date, must suspend receipt of his or her retirement benefit during that time period. There are currently no exceptions to either of these requirements.

The purpose of this issue brief is to provide a primer on the current state of the law pertaining to the return of judges retired from the FRS to temporary duty status within six months of retirement, and to explore related legal and administrative issues.

Discussion

Background on the Florida Retirement System

General

The FRS was created in 1970 to consolidate then-existing state-administered retirement systems for state and county officers and employees, teachers, and Highway Patrol officers. The Judicial Retirement System was consolidated into the FRS in 1972, and in 2007, the Institute of Food and Agricultural Sciences Supplemental Retirement Program was consolidated under the Regular Class of the FRS as a closed group.¹

Today, the FRS is a multi-employer plan that provides retirement income benefits to active members, retired members and beneficiaries, and members of the Deferred Retirement Option Program (DROP).^{2,3} It is the primary retirement plan

¹ The Florida Retirement System Annual Report, July 1, 2009 – June 30, 2010, at 60.

² The Deferred Retirement Option Program allows a member of the pension plan to retire while continuing employment for up to 60 months. Specified instructional personnel may participate in DROP for up to an additional 36 months. While in DROP, the member's retirement benefits accumulate in the FRS Trust Fund. The accumulated retirement benefits of members enrolled in DROP before July 1, 2011, earn a monthly interest equivalent to an annual rate of 6.5 percent; accumulated retirement benefits of members enrolled in DROP on or after that date earn a monthly interest equivalent to an annual rate of 1.3 percent. Upon termination of employment, the member receives a lump sum DROP payment as a direct payment, a rollover, or a combination partial lump sum payment and rollover. *See* s. 121.091(13), F.S.

³ Chapter 121, F.S.

for employees of state and county government agencies, district school boards, community colleges, and universities.⁴ The FRS also serves as the retirement plan for participating employees of the cities and independent special districts that have elected to join the system.⁵

The membership of the FRS is divided into five membership classes: the Regular Class,⁶ the Special Risk Class,⁷ the Special Risk Administrative Support Class,⁸ the Elected Officers' Class,⁹ and the Senior Management Service Class.¹⁰ Members of the FRS may elect to participate in either the defined benefit plan (Pension Plan)¹¹ or the defined contribution plan (Investment Plan)¹².

Reemployment with an FRS Employer After Retirement

Current statutory law provides that any member of the FRS who retires or terminates DROP participation on or after July 1, 2010, and who becomes employed by any FRS employer during the first six calendar months after such time, does not meet the requirements for "termination." Such members are therefore not considered retired and may not receive retirement benefits.¹³ A member who violates this provision must repay all benefit payments received, including a DROP payout. Active membership will be reestablished and the member must reapply to establish a future retirement date.¹⁴

The Florida Statutes also provide that a member of the FRS who retires or terminates DROP participation on or after July 1, 2010, who is not retired under the disability retirement provisions and who becomes employed by any FRS employer during the seventh to twelfth calendar months after his or her effective retirement date or DROP termination date, must suspend receipt of his or her retirement benefit during that time period.¹⁵ When notified, the Division of Retirement suspends the retirement benefit during such months; suspended benefits are forfeited. The employer and retiree are jointly and severally liable for repayment of benefits received in violation of this reemployment limitation.¹⁶

There are currently no exceptions to either of the above requirements.

⁴ Section 121.051, F.S.

⁵ *Id.*

⁶ Regular Class members are those who are not eligible for membership in any other membership class. *See s. 121.021(12)*, F.S.

⁷ Special Risk Class members include law enforcement officers, firefighters, correctional officers, correctional probation officers, paramedics, emergency medical technicians, certain professional health care workers within the Department of Corrections and the Department of Children and Family Services, and certain forensic employees. *See s. 121.0515*, F.S.

⁸ Special Risk Administrative Support Class members include former members of the Special Risk Class who were transferred or reassigned to an administrative support position in specified circumstances. *See s. 121.0515(7)*, F.S.

⁹ Elected Officers' Class members include those participants who hold specified elective offices in either state or local government, which includes any county court judge assuming office on or after October 1, 1974. *See s. 121.052*, F.S.

¹⁰ Senior Management Service Class members include high level executive and legal staff or as specifically provided for in statute. *See s. 121.055*, F.S.

¹¹ Members of the Pension Plan enrolled before July 1, 2011, vest upon completion of six years of service with an FRS employer; members enrolled on or after that date vest upon completion of eight years of service with an FRS employer. *See s. 121.021(45)*, F.S. The normal Pension Plan benefit is based upon a fixed formula and is determined by the member's age, years of service, the average of his or her highest five or eight years of pay (dependent upon time of enrollment), membership class, and the payment option selected at retirement. *See s. 121.091(1)*, F.S.

¹² Members of the Investment Plan vest upon completion of one year of service with an FRS employer. *See s. 121.4501(6)*, F.S. The normal Investment Plan benefit is determined by the member's ending account balance. *See s. 121.4501(7)* and *s. 121.591(1)*, F.S.

¹³ Section 121.021(39), F.S.

¹⁴ My FRS, *Reemployment After Retirement*,

http://www.myfrs.com/portal/server.pt/community/comparing_the_plans/235/reemployment_after_retirement (last viewed August 24, 2011).

¹⁵ Section 121.091(9), F.S.

¹⁶ My FRS, *Reemployment After Retirement*,

http://www.myfrs.com/portal/server.pt/community/comparing_the_plans/235/reemployment_after_retirement (last viewed August 24, 2011).

Actuarial and Funding Impact

The Florida Constitution provides that any retirement or pension system supported in whole or part by public funds shall not increase benefits to the members or beneficiaries of the system after January 1, 1977, unless the provision of the funding increase is made on a sound actuarial basis.¹⁷ In addition, the “Florida Protection of Public Employee Retirement Benefits Act” prohibits “the use of any procedure, methodology, or assumptions the effect of which is to transfer to future taxpayers any portion of the costs which may reasonably have been expected to be paid by the current taxpayers.”¹⁸

The creation of an exception to the six-month termination period in s. 121.021(39), F.S., would constitute an increase in benefits to which both provisions would apply. Therefore, a special actuarial study would be required to determine the fiscal impact.

Internal Revenue Service Qualified Plan Status Impact

The FRS is a qualified plan under Section 401(a) of the Internal Revenue Code¹⁹ and, as such, is subject to special tax treatment, including deferral of taxation of accrued retirement benefits until benefits are received.²⁰ To maintain its qualified plan status, the FRS must comply with Internal Revenue Service standards and regulations, which include a requirement that a bona fide termination from employment occur upon retirement.²¹

The current statutory prohibition against employment with an FRS employer within six months after retirement complies with this bona fide termination requirement.²² Amending the law to allow retired judges to be reemployed during the six-month termination period and remain retired could be construed by the IRS as failure to require a bona fide termination, which could jeopardize the tax-qualified status of the FRS.

Additionally, this change would create different termination requirements not only for judges retired from the judicial sub-class of the Elected Officers’ Class, but also for retirees of other membership classes who qualify for this exception.

Other Considerations

The creation of an exception to the termination provisions of s. 121.021(39), F.S., for retirees reemployed as judges would create different termination standards for that employee group and for all other employees. Such disparate treatment may not violate IRS rules and regulations.²³ However, it could invite litigation by other members of the Elected Officers’ Class and other FRS members generally, as well as lead to pressure from other stakeholders that perceive a need to reemploy a retiree without impacting his or her retirement benefit.

¹⁷ Section 14, Art. X, Florida Constitution.

¹⁸ Section 112.61, F.S.

¹⁹ 26 U.S.C. § 401(a).

²⁰ Email correspondence with Division of Retirement staff, July 19, 2011 (on file with the Governmental Oversight and Accountability Committee).

²¹ See 26 C.F.R. § 1.409A-1(h) and email correspondence between State Board of Administration staff and tax counsel for the State Board of Administration, March 31, 2009 (on file with the Governmental Oversight and Accountability Committee).

²² Email correspondence between State Board of Administration staff and tax counsel for the State Board of Administration, March 31, 2009 (on file with the Governmental Oversight and Accountability Committee).

²³ Telephone call with Division of Retirement (August 3, 2011). Also see 26 U.S.C. § 401(a)(5), “Special rules relating to nondiscrimination requirements.”