

School Law Update

October 23, 2015

The combination of budget cuts and Wisconsin's recently-enacted "double-dipping" statute has put Wisconsin school districts in a difficult spot when trying to find qualified teachers for hard-to-fill positions. 2013 Wisconsin Act 20 (Act 20) made substantial changes to the statutory provisions governing Wisconsin Retirement System (WRS) annuitants who return to work for WRS-participating employers after retirement. These double-dipping provisions effectively force many recently retired teachers to choose between receiving their WRS annuity or returning to work for a district in need of their particular expertise. This FYI will briefly summarize Act 20 and offer solutions for districts looking to fill open positions with retired teachers.

Before Act 20, districts could re-hire any retired teacher after a 30-day period of separation (break-in-service) from all WRS employment. Upon re-hire, the retiree could choose to suspend receipt of the annuity and become a WRS participant, or to continue to receive the annuity, but not be a WRS-eligible participating employee. Many teachers chose the latter option and, under this arrangement, the teacher and the district were not required to make annual contributions to WRS (each paying 6.8% of the teacher's earnings in 2015 and 6.6% in 2016). This allowed districts to save money and fill vacant positions while making use of retirees' considerable expertise.

This option is still available for teachers who retired on or before July 1, 2013. However, Act 20 made significant changes to the law as it applies to retirees who terminated WRS participating employment after that date. First, it increased the required minimum break-in-service period from 30 to 75 days. In addition—and particularly problematic for districts seeking to re-hire these teachers—it added a provision which automatically suspends the annuities of certain re-hired retirees. Under Act 20, a retiree hired to work in a WRS-eligible position for at least two-thirds of what the Employee Trust Fund (ETF) considers to be full time (880 hours per year for teachers) will be forced to re-enroll in WRS and will be ineligible to receive annuity payments for the duration of that employment. Thus, Act 20 no longer permits all retirees to continue receiving their annuity and opt out of further participation in WRS. As a result of this change, districts are finding it more difficult to attract recent retirees to hard-to-fill positions because many are unwilling to forego their annuity payments for the duration of their re-employment.[1]

Districts having trouble filling positions while staying on budget may consider the following alternatives and stay in compliance with Act 20:

- **Re-hire annuitants who retired on or before July 1, 2013.** These annuitants are covered by the old law and retain the right to choose between keeping their annuity or participating in WRS. Many will choose to keep their annuity and the district and teacher will avoid paying into WRS.
- **Re-hire recently retired annuitants in part-time positions.** If a position is expected to be less than 2/3 of full time, which ETF considers to be less than 880 hours per year for teachers, Act 20 does not apply. For these positions, re-hired annuitants would be able to continue receiving annuity payments while collecting wages and would not be required to participate in WRS during their period of re-employment. For example, a district would be free to hire a recently retired annuitant on a "standby" or "substitute teacher" basis without forcing the retiree to forego annuity payments, so long as the retiree was not expected to and did not actually work more than 880 hours per year. Similarly, a district could hire a retired Spanish teacher to work half-time and the retiree could continue the annuity payments.

- **Re-hire recently retired annuitants for a period of less than a year (365 days).** A position expected to last less than one year is not WRS-eligible, so a re-hired retiree may continue to receive annuity payments while collecting wages. For example, an annuitant could be hired as a long-term substitute or replacement teacher to teach full-time for a nine-month school year and still be eligible to receive annuity payments, so long as the district does not expect the teacher to be employed for a 365-day year or more. In addition, a district could hire a retiree in a full-time temporary teaching position with a duration of less than a year. If expectations about the position's duration change or the teacher is offered a contract to teach the following year, the retiree may then become WRS-eligible, triggering an automatic suspension of the retiree's annuity at that point. One way to avoid this and assure that the district expects the employment to last less than a year is to include in the annuitant's contract a provision that the annuitant agrees to resign at the end of the contract term, so that when the Board approves the contract, it also accepts the annuitant's resignation.
- **Take advantage of flexible certifications.** If the district is unable to find a teacher qualified to teach an in-demand subject, it may take advantage of Wisconsin's emergency license provisions, Wis. Admin. Code PI §34.21(1). This allows teachers licensed in one subject to teach in another subject for one specific assignment if the district certifies to DPI that it was unable to find an acceptable teacher licensed in that subject to fill the position.

[1] Districts that provide stand alone Healthcare Reimbursement Accounts (HRAs) to their retirees should be aware that rehiring a retiree may place at risk the HRA's status as a "retiree only" plan, exempt from the Affordable Care Act (ACA) market reform rules. Final clarification on ACA regulations in this area is still pending, so districts should consult legal counsel about their particular situation.

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