

Legal Update

ICCCFO

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Presented by: Joseph J. Perkoski

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Pension Rules on End-of- Career Earnings



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State Universities Retirement System

- Article 15 of the Pension Code imposes a penalty for total reportable creditable earnings increases in excess of 3% during the period used to calculate an employee's retirement annuity (the "final rate of earnings").

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Effective Date of SURS' 3% Cap

- The SURS 3% cap is effective for school years beginning on or after July 1, 2018 and for salary paid under a contract or collective bargaining agreement entered into, amended, or renewed on or after June 4, 2018.

Grandfathered Contracts

- Contracts or collective bargaining agreements are grandfathered if entered into, amended, or renewed prior to June 4, 2018.
- Contracts or collective bargaining agreements amended on or after June 4, 2018 in a manner that does not impact earnings increases during the FRE period or extend the expiration date remain grandfathered.

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Notice of Intent to Retire Under a Grandfathered Status

- Grandfathered status will not be lost so long as earnings are provided to the member within four years after expiration of the grandfathered contract or collective bargaining agreement.

Pending
Legislation
Affecting End-
of-Career
Earnings



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Bills Seeking to Restore 6% Threshold

- House Bill 350
- Senate Bill 60
- Senate Bill 1952

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Bill Seeking to Create Exemptions to SURS' 3% Rule

- Senate Bill 1948 seeks to create SURS exemptions to the 3% rule for:
 - Salary increases resulting from overload work; or
 - A promotion if certain requirements are met.

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Strategies For Addressing End-of-Career Earnings Penalties



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Retirement Incentives

- Primary Objective: Limit exposure by knowing when an employee will retire and by controlling earnings in the annuity determination timeframe.

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Retirement Incentives

- Provide retirement incentives which require an irrevocable notice of retirement in exchange for a financial incentive (e.g., guaranteed controlled annual increases in the years before retirement).

Retirement Incentives

- Example: If an eligible faculty member provides irrevocable, advance written notice of an intent to retire by April 1st of the 2018-19 school year, and March 1st of any subsequent school year up to six (6) years prior to the retirement year and is approved by the Board of Trustees, the faculty member shall stop receiving salary schedule annual increases and receive an increase in total creditable earnings of 3% for each of their remaining years of employment with the College.

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Retirement Incentives

- Annual increases before retirement are challenging with the SURS 3% cap on earnings. As such, post-retirement payments have become more important.

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Retirement Incentives

- Bargaining Considerations: Have control over earnings in the years before retirement.
 - Model a 3% incentive with a post-retirement payment
 - Reopener clause to address a possible change back to 6%

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Retirement Incentives

- Employment Contracting
Considerations:

- Maintain flexibility when dealing with multi-year non-union administrator contracts.
- Limit overall creditable earnings to the cap – not just the salary.

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Redesign the Method of Providing Salary Increases Under a CBA

- Eliminate step schedules
- Redesign the salary schedule

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Creditable Earnings Cap Clauses

- CBA Earnings Cap Clause: The College reserves the right to adjust the total creditable earnings of any faculty member who is within five (5) years of retirement eligibility under applicable SURS rules to prevent a faculty member from exceeding a 3% increase in total creditable earnings over the previous year's total creditable earnings. A faculty member's retirement which results in the College's obligation to pay a monetary penalty to the State Universities Retirement System disqualifies the faculty member from eligibility for retirement incentive under this Article.

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Creditable Earnings Cap Clauses

Employment Contract Cap Clause: The Employee and the Board acknowledge and agree that the compensation and benefits provided under this Agreement are not intended to exceed the SURS three percent (3%) cap on salary increases. The Board reserves the right to adjust the compensation and benefits provided under this Agreement to prevent exceeding, and/or to address the consequences of having exceeded, the SURS three percent (3%) cap. The adjustment of the Employee's SURS creditable earnings under this Paragraph shall be in implementation of this provision of this Agreement and shall not constitute or require an amendment to this Agreement.

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Creditable Earnings Cap Clauses

- Bargaining and Contract Considerations:
 - An employee's years of service are not always easy to determine.
 - Beware of employee and union age discrimination assertions.

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Are End-of-Career
Compensation
Cap Clauses
Defensible?



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EEOC Charges

- Contractual cap clauses are being challenged through EEOC Charges asserting violation of the Age Discrimination in Employment Act (“ADEA”) because the clauses take an employee’s age into consideration.

EEOC Charges

- CBA Provisions at Issue: Provisions seeking to limit end-of-career pay raises to 6%.
- Liability Assessment: There is no evidence that the employers adopting these provisions were motivated by stigmatizing age-based stereotypes.

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Favorable Case Law

- Private and public sector case decisions indicate that limitations based on retirement eligibility criteria are permissible.
 - *O'Brien v. Caterpillar, Inc.*, No. 17-2956 (7th Cir. 2018)
 - *Kentucky Retirement Sys. v. EEOC*, 554 U.S. 135 (2008)

*Dayton v.
Oakton
Community
College*

- 7th Circuit Decision:

- The District Court correctly applied the “reasonable factor other than age” test when concluding that the College met its burden in establishing that its decision to no longer employ SURS annuitants was based upon a reasonable factor other than age.
- The fact that the College was actually penalized for inadvertently employing SURS annuitants was reason enough to discontinue their employment.

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*Dayton v.
Oakton
Community
College*

- Applies to compensation governor caps based on retirement eligibility because employers can articulate a reasonable basis other than age (financial penalties) for the clause.

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Questions?

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