

View from the 82nd Lege: The Impact of Selected Legislation on Superintendents

The 82nd Legislature ended its regular session on May 30, 2011. According to the Texas Legislative Reference Library, a total of 5,796 bills were introduced during the session.¹ Of that total, 1,379 were passed and sent to Governor Rick Perry.² 25 were vetoed.³ The rest of the bills were either signed by the Governor or allowed to become law by the Governor's failure to exercise his veto power.⁴ During the First Called Session, 114 bills were introduced and 8 passed.⁵ All of the bills passed during the called session were signed by the Governor.⁶

This article addresses two bills that have a direct impact on Texas superintendents: S.B. 1669, which relates to the resumption of service by retirees under the Texas Retirement System of Texas ("TRS") and S.B. 8, which relates to a school district's board of trustees "flexibility" in the management and operation of a school district during a fiscal crisis.

The Path to Employment after Retirement under Senate Bill 1669

*Two roads diverged in a yellow wood,
And sorry I could not travel both
And be one traveler, long I stood
And looked down one as far as I could
To where it bent in the undergrowth;*

-Robert Frost-

It is believed by many that, given the option, most Baby Boomers will choose to work after retirement for one reason or another. Some may explore more fun and creative jobs such as working at sports arenas, golf courses or marinas, or sharing life tidbits and lessons learned through freelance writing. Others may wish to return to public education and continue to serve and educate the children in their particular community/district. Until recently, however, public education employees tended to view retirement and reemployment as an either-or solution similar to the divergent paths in one of Robert Frost's most popular poems *The Road Not Taken*. The previous return-to-work provisions in the TRS scheme were limited, confusing, difficult to administer and came with the ultimate risk—loss of retirement benefits. The penalty for not meeting all requirements for a particular exception was a loss of monthly retirement benefits for any month in which the retiree worked in position by a Texas public educational institution.⁷ In passing S.B. 1669, the legislature eliminated many of the confusing, more trap-weary

¹ Legislative Reference Library of Texas, 82nd Legislature Legislative Statistics (August 10, 2011).

² *Id.*

³ *Id.*

⁴ As a general rule, the governor has ten (10) days upon receipt of a bill to sign it, veto it, or allow the bill to become law without a signature. However, if a bill is sent to the governor within ten (10) days of final adjournment, he has until twenty (20) days after adjournment to act on the bill. If the governor neither signs nor vetoes the bill within the allotted time, the bill becomes law. TEX. CONST. art. 4, §14.

⁵ Legislative Reference Library of Texas, 82nd Legislature Legislative Statistics (August 10, 2011).

⁶ *Id.*

⁷ TEX. GOV'T CODE § 824.601(b).

exceptions to a loss of benefits under section 824.601(b) and opened a path to employment in public education after retirement.

TRS retirees who retired before January 1, 2011, may now work in a Texas public educational institution **in any capacity** without a loss of monthly TRS annuity benefits.⁸

For TRS retirees who retire after January 1, 2011, the amendments of S.B. 1669 provide a clear path to full time employment after retirement. Now, persons who retire after January 1, 2011 may work full time for as much as twelve (12) months each school year without any loss of monthly TRS annuity benefits if the retiree has been separated from service with all Texas public educational institutions for at least twelve (12) full consecutive months.⁹ The bill also repeals the six-month exception¹⁰, acute shortage exception,¹¹ the principal/assistant principal exception,¹² bus driver exception,¹³ and nurse faculty exception.¹⁴ Thus, retirees who have not been separated from service with a Texas public educational institution for the full twelve (12) consecutive calendar months after retiring may only work as a substitute¹⁵ or on a one-half time basis.¹⁶ Working full time without the break in service will still result in a loss of TRS monthly annuity benefits for the month in which the full-time work occurs. Also, working in any capacity for a TRS-covered employer, will restart the counting toward the required full-twelve-consecutive-calendar-month break in service.¹⁷

The Impact of Senate Bill 8 on Superintendent Contracts during a Fiscal Crisis

During the 82nd Legislature's First Called Session, the Legislature passed Senate Bill 8 which, according to the caption of the bill, was designed to give a school district's board of trustees "flexibility" in the management and operation of a school district.¹⁸ S.B. 8 includes language that adds both a "fiscal exigency" provision to the Texas Education Code ("Code") and a provision that permits a school district's board of trustees to amend a superintendent's contract when the board declares a "financial exigency" that requires a reduction in personnel. Specifically, S.B. 8 added the following subsection (f) to section 21.212 of the Code:

- f) On the basis of a financial exigency declared under Section 44.011 that requires a reduction in personnel, the board of trustees of a school district may choose to amend the terms of the contract of a superintendent employed under a term contract. A superintendent

⁸ TEX. S.B. 1669, § 1 (2011) (to be codified at TEX. GOV'T CODE § 824.601(b-1)).

⁹ TEX. S.B. 1669, § 2 (2011) (to be codified at TEX. GOV'T CODE § 824.602 (a)(3)).

¹⁰ Id. (formerly TEX. GOV'T CODE § 824.602(a) (3)).

¹¹ Id. (formerly TEX. GOV'T CODE § 824.602(a) (5)).

¹² Id. (formerly TEX. GOV'T CODE § 824.602(a) (6)).

¹³ Id. (formerly TEX. GOV'T CODE § 824.602(a) (7)).

¹⁴ Id. (formerly TEX. GOV'T CODE § 824.602(a) (8)).

¹⁵ TEX. GOV'T CODE § 824.602(a) (1) and (2).

¹⁶ TEX. GOV'T CODE § 824.602(a) (4).

¹⁷ TEX. GOV'T CODE § 824.602(a) (3).

¹⁸ TEX. S.B. 8, 82nd Leg., 1st Called Sess. (2011).

whose contract is amended under this subsection may resign without penalty by providing reasonable notice to the board and may continue employment for that notice period under the prior contract.¹⁹

According to S.B. 8, a board of trustees may adopt a resolution declaring a “financial exigency” for the district if certain “minimum standards concerning school district financial conditions” exist for declaring a financial exigency.²⁰ The term “financial exigency” is not defined in S.B. 8. The minimum standards utilized to determine whether a “financial exigency” exists must be adopted by the Commissioner of Education.²¹

S.B. 8 also does not expressly state what the Legislature had in mind when it adopted section 21.212(f) in terms of whether it intended to authorize a board of trustees to unilaterally modify the terms of a superintendent’s existing contract when a “financial exigency” has been declared. Testimony on the House floor demonstrates that the amendment is to be prospective in nature and is not intended to impair or otherwise affect a superintendent’s rights under an existing contract.²² However, even if the Legislature intended to authorize a board of trustees to modify an existing contract during a “financial exigency,” such a law would be unenforceable with respect to existing contracts because of the United States and Texas constitutional prohibitions against the enactment of laws that impair existing contractual obligations.^{23, 24} In summary, section 21.212(f) is intended to be applied prospectively and, under current law, a board of trustees would be constitutionally prohibited from unilaterally terminating or otherwise modifying a superintendent’s existing contract even if a board declares a “financial exigency” for the district.

This article is for informational purposes only and is not intended to be a substitute for legal or tax advice. Specific questions and circumstances regarding the issues addressed in this article should be individually discussed with legal counsel and a qualified tax professional.

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¹⁹ TEX. S.B. 8, §11 82nd Leg., 1st Called Sess. (2011)(to be codified at TEX. EDUC. CODE §21.212(f)).

²⁰ TEX. S.B. 8, §19 82nd Leg., 1st Called Sess. (2011)(to be codified at TEX. EDUC. CODE §44.011)).

²¹ Id.

²² H.J. OF TEX., 82nd Leg., 1st Called Sess. 571 (2011).

²³ See U.S. CONST. art. I, § 10 (“No State shall...pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts...”); TEX.CONST. art. 1, § 16 (“No bill of attainder, ex post facto Law, retroactive law, or any law impairing the obligation of contracts, shall be made.”).

²⁴ In general, a statute is unconstitutionally retroactive "if it takes away or impairs vested rights acquired under existing law." *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997); Also, under article I, section 16, a contractual "obligation is impaired when a statute is enacted that releases a part of [an] obligation or to any extent or degree amounts to a material change or modifies it." *Price Pfister, Inc. v. Moore & Kimmey, Inc.*, 48 S.W.3d 341, 356 (Tex. App.--Houston [14th Dist.] 2001, pet. denied).