Labor and Employment Law Information Memo

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STATE PENSION REFORMS SIGNED INTO LAW BY GOVERNOR PATERSON

On October 10, 2008, Governor Paterson signed into law legislation designed to drastically reform the state pension system in light of numerous widely published reports of abuses within school districts and other municipal entities. The impetus for the legislation stems from the discovery of attorneys who were being paid as both an employee and independent contractor of school districts and other municipal entities as well as abuses of the pension system by recent retirees who received waivers which allowed them to work and get paid a salary for essentially the same positions for which they were simultaneously collecting pensions.

In order to curb these abuses, the legislation amends several sections of the Education Law as well as the Retirement and Social Security Law. First, the legislation adds "Part 3" to Article 41 of the Education Law which addresses certain prohibitions concerning attorneys who provide services to school districts and Board of Cooperative Educational Services (BOCES). Specifically, this new section of the Education Law:

- Prohibits attorneys from simultaneously serving a school district or BOCES as an employee and independent contractor;
- Prohibits an attorney who is an independent contractor of a school district or BOCES from obtaining employee benefits such as health insurance, pension benefits and all other employment-related benefits;
- Subjects any attorney who violates this new section to a civil penalty of up to three times the amount of money collected for services performed or salary received by the school district or BOCES as well as to a Class E felony; and
- Requires school districts and Boards of Cooperative Educational Services to report annually (on or before the forty-fifth day after the commencement of its fiscal year) all lawyers who provided them services, their classification as either employees or independent contractors, their compensation and other factors to the State Education Department, Comptroller and Attorney General. This new annual reporting requirement is also reflected in the newly created Section 217 of the Retirement and Social Security Law.

In an effort to increase the overall transparency and accountability of school district and BOCES, the legislation amends several provisions of the Education Law that deal with reporting and disclosure requirements including;

- Section 2601(a)(3) which has been amended and imposes broader reporting and disclosure requirements on school districts in cities with less than 175,000. Going forward, such school districts must list the compensation, salaries and benefits of all administrators and supervisors, including business administrators, superintendents and deputy, assistant, associate or other superintendent in the school budget.

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- Sections 1608(4) and 1716(4) have also been amended and henceforth require school budgets of all common schools and union free school districts to list all compensation, salary and other benefits of administrators and supervisors, including business administrators, superintendents and deputy, assistant, associate or other superintendent.
- Sections 1608(2) and 1716(2) now require all school districts to post their budget on their Internet webpage (where available) and in public libraries within the district.

The legislation also takes aim at fixing the problem of "double dipping" which has allowed employees to earn both salaries and pensions simultaneously. The focus of the legislation is to close the various loopholes in the waiver process which allows State and local governments to hire retirees while they receive a pension for two-year periods if there are no available non-qualified retirees to fill the position. The newly established requirements are set forth in Section 211 of the Retirement and Social Security Law which applies to retirees under the age of sixty-five. The new legislation requires that:

- Waivers will only be granted when an "urgent need" for the retiree's services can be demonstrated due to an unplanned, unpredictable and unexpected vacancy and where despite engaging in an "extensive recruitment" process, there is simply not enough time to recruit a qualified replacement for the position;
- After the appointment of a retiree, the employer must prepare a detailed recruitment plan to fill the job on a permanent basis;
- Any appointment of a retiree will be deemed non-permanent;
- Waivers that are granted may not exceed two (2) years; and
- Waivers may not be granted to allow any retired public sector employee to return to work in the same or similar position for a period of one (1) year following retirement.

Lastly, in addition to the substantive changes to both the Education Law and the Retirement and Social Security Law, the legislation enhances the civil and criminal penalties for persons who defraud the pension system under the Retirement and Social Security Law. Specifically, the penalties for engaging in pension fraud have been increased to either a Class E or D felony depending on how much money they have improperly received.

The effective date of the different pieces of this legislation vary with most provisions becoming effective ninety (90) days after the legislation was signed. However, the provisions increasing the penalties to Class E and D felonies are effective immediately. In addition, the amendments to the retiree-waiver process described above do not apply to retirees to whom waivers were granted prior to the effective date of the legislation.

If you have any questions or wish to discuss options for appropriate courses of action, please contact:

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