

**EMPLOYEE BENEFITS AND CITY BUDGETS:  
CAN THE PLANETS ALIGN?**

*Eight Potential Areas of Cost Savings  
in Employee Compensation*

**League of California Cities  
City Attorneys Spring Conference  
Santa Barbara, California  
May 6, 2010**

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**LOCC CITY ATTORNEYS CONFERENCE**  
**Santa Barbara, California**  
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1. Retiree Health
  - a. Financial Concerns
    - (1) GASB
      - (a) Actuarial Accounting for Other Post Employment Benefits (OPEBs)
      - (b) Unfunded liabilities on financial statements
      - (c) Failure to fund can impact bond and credit ratings, and the cost of borrowing
    - (2) Rising cost of health and retiree health insurance
    - (3) Retirees living longer
    - (4) Investments performing poorly
  - b. Legal Concerns
    - (1) Distinguish status of person at issue
      - (a) Future employees – total flexibility
      - (b) Current employees – likely flexibility, though will depend on the circumstances
      - (c) Retirees – potential restrictions, though will depend on the circumstances
    - (2) Labor Law (Meyers-Milias-Brown Act)

- (a) Must meet and confer re changes in retiree health benefits
  - (b) Absent a City right to “impair” a labor contract, a City may not modify retiree health benefits for represented employees during the term of an MOU
  - (c) Given the difficulties in getting agreement on changes to retiree health benefits, legal compliance with bargaining obligations and applicable impasse procedures is essential.
- (3) Statutory law / PEMHCA statute

Issue: General PEMHCA rule is that agency must make same “PEMHCA Contribution” to retirees as actives.

- (a) Adopt the “unequal method”
  - (b) Pay the “PEMHCA minimum” per a bona fide cafeteria plan
  - (c) Adopt vesting schedule under Gov’t Code § 22893
  - (d) Change health care provider
- (4) Vested rights doctrine
- (a) Law is not yet definitive that vested rights doctrine applies to retiree health benefits. But, assuming it can apply, consider (b) through (e) below:
    - (b) Did agency do anything to prevent vesting?
      - + For Counties, presumption against vesting of retiree medical benefits that are adopted by ordinance (Gov’t Code § 31692)

- + -State that benefit is *not* vested, and is subject to elimination or modification
  - (c) Analyze nature of the promise to determine what may have vested
  - (d) The Ninth Circuit recently held that the City of San Diego could impose an increase in the number of years of service required for an employee to qualify for retiree health benefits upon retirement as the promise in the expired MOU only applied for the term of that MOU and was subject to change in subsequent negotiations. (*San Diego Police Officers Association v. San Diego City Employees' Retirement System*, 568 F.3d 725 (9th Cir. 2009), attached)
  - (e) Doctrine from pension cases supports being able to make changes for actives contrary to an otherwise vested right if replaced with an equivalent benefit. An example may be replacing a defined benefit with a defined contribution.
- (5) Recent Retiree Health Vested Rights Case: *REAOC v. County of Orange*, U.S. District Court, Central District of California, June 19, 2009
- (a) County stopped “pooling” retirees with actives when setting premiums
  - (b) Retiree organization sued on behalf of approximately 5,000 retirees alleging a variety of theories, including violation of their vested rights under the State and Federal Constitutions
  - (c) District Court granted the County’s summary judgment motion, holding that specific statutory authority is required to create a vested retirement benefit obligation and may not be simply implied or inferred (decision attached)

- c. Potential Retiree Health Options
  - (1) More years of service to qualify
  - (2) Lesser agency contribution
  - (3) Stop paying for dependent coverage
  - (4) Eliminate expensive “Cadillac” plans
  - (5) Require “retirement” at time of separation to qualify
  - (6) Move to defined contribution rather than defined benefit (e.g. VEBA or Medical After Retirement Account)
  - (7) Adopt retiree medical trust to reduce GASB liability
  - (8) Require retiree to enroll in Medicare
  - (9) If tied to what actives get, reduce what actives get
  - (10) End pooling of actives with retirees for rate setting
- 2. Health Benefits for Actives
  - a. Flat dollar cap on agency’s obligation
  - b. Cost sharing above current obligation
  - c. Different amount for employee only, employee +1 and employee + family
  - d. Reduce health plan options or peg obligation to cheaper plan
  - e. Change health plan provider
- 3. Pensions
  - a. Second tier for new hires

- (1) Lesser formula
  - (2) Lesser features (e.g. average of highest three years rather than single highest year)
  - (3) “White Papers” of regional City Manager organizations are generally supporting:
    - Safety employees - 2% at 50
    - Miscellaneous employees – 2% at 60
    - Average of highest three years
  - b. Require employees to contribute to the cost of their pension. The Ninth Circuit recently held that employee did not have a vested right to not have to contribute toward, or only contribute a certain amount toward, the cost of their pension plan. (*San Diego Police Officers’ Association v. San Diego City Employees’ Retirement System*, 568 F.3d 725 (9th Cir. 2009), attached)
  - c. Cost sharing of increased rates
  - d. Consider deferred compensation alternatives
4. Layoffs
- a. Update and/or assure compliance with applicable rules
  - b. Meet and confer regarding impacts
  - c. Consider employees’ pre and post-layoff procedural rights under *Levine v. City of Alameda*, 525 F.3d 903 (9th Cir. 2008)
5. Work Hours Reduction and Furloughs

- a. Determine whether there is an obligation to meet and confer regarding only the impacts, or also regarding the decision and/or whether changes may be imposed over union objection.
- b. Determine if layoff procedures apply. See, for example, *Arbitration Decision of Morris Davis, SEIU Local 1021 v. Association of Bay Area Governments*, September 12, 2009, attached, in which Arbitrator Davis held that the Association of Bay Area Governments was not required to follow layoff procedures in order to reduce the hours of a represented and grant funded employee.
- c. Consider the potential legal right of public agencies to modify a term of an MOU under the impairment of contract doctrine. (See, for example, *Fraternal Order of Police v. Prince George's County*, (U.S.D.C. Maryland August 18, 2009), attached)
- d. Recent State of California Furlough Cases
  - (1) *Professional Engineers in California Government; California Association of Professional Scientists v. Schwarzenegger*, Third Appellate District Case No. C061011 (held that furloughs of State employees were lawful)
  - (2) *SEIU Local 1000 v. Schwarzenegger*, First Appellate District Case No. A127776 (held that furloughs of State employees were not lawful because governor failed to take into account the “varying needs of the state agencies” in violation of its duty in Government Code section 19851(a) and furloughs to increase internal borrowing from a particular special fund was done without regard to whether such borrowing violated another provision of the he Government Code)
  - (3) *California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Scharzenegger*, \_\_\_ Cal.Rptr.3d \_\_\_, 2010 WL 987129 (Cal.App.1 Dist., March 19, 2010) (issued a writ of mandate directing the

Governor to set aside Executive Order S-16-08 as it applied to certain State Compensation Insurance Fund employees because the authority to determine staffing needs of SCIF employees was vested in the SCIF board and not the Governor)

6. Overtime
  - a. Consider an FLSA Audit
  - b. Distinguish between FLSA required overtime and overtime paid pursuant to an MOU or personnel rule or past practice
  - c. Donning and Doffing: The Ninth Circuit recently held that the time spent by police officers donning and doffing their uniforms and safety equipment is not compensable time under the Fair Labor Standards Act if the officers are not required to don and doff at the police station. (*Bamonte v. City of Mesa*, \_\_\_\_ F.3d \_\_\_\_ (9th Circuit March 25, 2010),
  - d. Potential Changes to Overtime Practices
    - (1) Stop paying overtime to FLSA exempt employees
    - (2) Pay overtime based on an hours worked threshold rather than an hours paid threshold or hours outside the regular schedule
    - (3) Adopt a 7(k) work period for public safety (firefighters and police officers). For example, for sworn law enforcement personnel, adopt an overtime threshold of hours actually worked over 171 in a 28 day work period or over 86 in a 14 day work period
    - (4) Evaluate benefit of a 7(b) work period for 12 hour employees and employees who do not regularly work 40 hours each week
    - (5) Take greater control of comp time accrual and use



- (6) Require or permit flexing of work hours within a workweek to avoid overtime

Note: Agencies must comply with their meet and confer obligations under the Meyers-Milias-Brown Act prior to changing how they pay overtime.

7. Wages

- a. Freeze on increases or implement decreases
- b. Make effective date of increases on last day of year
- c. Freeze step advancements or merit increases
- d. 1-time stipend rather than wage increase
- e. Revisit assumptions of survey based wage adjustments

8. Leaves

- a. Lower accrual rates
- b. Lower maximum accruals
- c. Eliminate or reduce annual cash-outs or conversions
- d. Eliminate or reduce cash-out at separation
- e. Control impact of compensatory time off