



## **NEW JERSEY LAW REVISION COMMISSION**

### **Tentative Report to Clarify the Teaching Role Exception in the PERS Re-Enrollment Statute**

**March 17, 2022**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” N.J.S. 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **May 16, 2022**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Project Summary

In New Jersey, the Public Employees' Retirement System Act (PERS) governs enrollment, membership, termination, and disbursement of retirement pensions for eligible State employees.<sup>1</sup> Pursuant to N.J.S. 43:15A-57.2 (re-enrollment statute), retired members who are re-employed in PERS-eligible roles must re-enroll in the PERS until the member again retires, with certain relevant exceptions.<sup>2</sup>

In March 2021, the Commission authorized a project related to the “critical need” exception to re-enrollment in the PERS.<sup>3</sup> Preliminary review of the “critical need” exception led to the identification of an issue concerning the “teaching role” exception, which exempts retired members returning to teaching staff positions at qualifying public institutions of higher education.<sup>4</sup>

The “teaching role” exception contains a reference to the \$10,000 maximum yearly compensation that a retired member could earn without re-enrolling in PERS under a third “salary cap” exception.<sup>5</sup> After the enactment of the “teaching role” exception, however, the “salary cap” exception was amended to allow aggregate compensation up to \$15,000 per year without re-enrollment, eliminating the source of the \$10,000 amount referenced in the “teaching role” exception.<sup>6</sup>

In January 2022, the Commission authorized work to address this issue in the “teaching role” exception.<sup>7</sup> The proposed statutory language set forth in the Appendix clarifies that the “teaching role” exception applies to all retired members in qualifying teaching staff positions, regardless of compensation, by eliminating the reference to an outdated annual salary amount and adding language which makes the legislative intent on this issue clear.

## Relevant Statute

The statute at issue is N.J.S. 43:15A-57.2, which provides in relevant part that:

a. Except as provided in subsections b., c., and d. of this section, if a former member of the State Employees' Retirement System or the retirement system, who has been granted a retirement allowance for any cause other than disability, becomes employed again in a position which makes him eligible to be a member of the retirement system, his retirement allowance and the right to any death benefit as a

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<sup>1</sup> N.J. STAT. ANN. §§ 43:15A-6 through -161 (West 2022).

<sup>2</sup> N.J.S. 43:15A-57.2 (“[r]e-employment of retired former member”).

<sup>3</sup> Preliminary work on the “critical need” project was conducted by Christopher Mrakovcic, former Legislative Law Clerk, during his tenure at the New Jersey Law Rev. Comm’n.

<sup>4</sup> N.J.S. 43:15A-57.2b.(2).

<sup>5</sup> N.J.S. 43:15A-57.2b.(1).

<sup>6</sup> See *infra* p. 3 and note 17.

<sup>7</sup> N.J. Law Revision Comm’n, *Minutes NJLRC Meeting*, at \*3, Jan. 20, 2022, [www.njlrc.org](http://www.njlrc.org) (last visited Feb. 24, 2022) (unanimously agreeing to conclude work on the “critical need” exception to re-enrollment, which arose from an analysis of the exception by the Appellate Division in *Yamba v. Bd. of Tr., Pub. Emp. ’s Ret. Sys.*, 2019 WL 2289209 (N.J. Super. Ct. App. Div. May 29, 2019), and authorizing additional research and outreach on the “teaching role” exception); see also N.J. Law Revision Comm’n, Memorandum Regarding Re-Enrollment in PERS as a Critical Need Employee (*Yamba v. Bd. of Tr., Pub. Emp. ’s Ret. Sys.*, 2019 WL 2289209 (N.J. Super. Ct. App. Div. May 29, 2019)) (Jan. 10, 2022), [www.njlrc.org](http://www.njlrc.org) (last visited Feb. 7, 2022).

result of his former membership, shall be canceled until he again retires.

Such person shall be re-enrolled in the retirement system and shall contribute thereto at a rate based on his age at the time of re-enrollment . . . .

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b. The cancellation, re-enrollment, and additional retirement allowance provisions of subsection a. of this section shall not apply to a former member of the retirement system who, after having been granted a retirement allowance, becomes employed again by: (1) an employer or employers in a position or positions for which the aggregate compensation does not exceed \$15,000 per year; or (2) if the compensation exceeds \$10,000 per year, by an employer that is a public institution of higher education as defined in N.J.S.18A:62-1 in a teaching staff position. The Director of the Division of Pensions and Benefits may from time to time adjust the amount in paragraph (1) of this subsection. This adjustment shall be 3/5 of the percentage of change in the index, as defined in section 1 of P.L.1958, c.143 (C.43:3B-1), over a period of time as determined by the director . . . .<sup>8</sup>

### Legislative History

As originally enacted, the PERS re-enrollment statute did not provide for any exception to re-enrollment when a retired member resumed employment in a PERS-eligible position.<sup>9</sup> The statute has been amended five times since its enactment in 1966 to expand the categories of retirees returning to work who are exempt from re-enrolling in the PERS system.<sup>10</sup>

The first exception to re-enrollment was added in 1997.<sup>11</sup> This “salary cap” exception excluded retirees who were re-employed in positions “for which the compensation does not exceed \$10,000 per year.”<sup>12</sup> In 2001, the “teaching role” exception was enacted.<sup>13</sup> Rather than create an additional subsection, the Sponsors of the bill proposed adding the new “teaching role” exception to the same subsection as the existing “salary cap” exception:

b. The cancellation, re-enrollment, and additional retirement allowance provisions of subsection a. of this section shall not apply to a former member of the retirement system who, after having been granted a retirement allowance, becomes employed again by: (1) an employer in a position for which the compensation does not exceed \$10,000 per year; or (2) if the compensation exceeds \$10,000 per year, by an

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<sup>8</sup> N.J.S. 43:15A-57.2 (emphasis added).

<sup>9</sup> L. 1966, c.217, §27.

<sup>10</sup> L. 1997, c.23, §2, eff. Feb. 27, 1997; L. 2001, c.253, §1, eff. Nov. 15, 2001; L. 2001, c.278, §1, eff. Dec. 27, 2001; L. 2001, c.355, §2, eff. Jan. 6, 2002; L. 2011, c.78, §34, eff. June 28, 2011.

<sup>11</sup> L. 1997, c.23, §2, eff. Feb. 27, 1997.

<sup>12</sup> N.J.S. 43:15A-57.2b.(1).

<sup>13</sup> L. 2001, c.253, §1, eff. Nov. 15, 2001.

employer that is a public institution of higher education as defined in N.J.S.18A:62-1 in a teaching staff position. . . .<sup>14</sup>

The Sponsor's Statement explained that the "teaching role" exception permitted retirees to accept a qualifying teaching role "if the compensation is in excess of \$10,000 per year."<sup>15</sup> The Statement clarified that "[u]nder current law, the retired member may already accept such employment if the compensation does not exceed \$10,000 per year."<sup>16</sup> The Sponsor's Statement made clear that retirees returning to qualifying teaching positions remained exempt even if the annual salary exceeded the \$10,000 limit in the "salary cap" exception.<sup>17</sup>

In addition, the Senate Education Committee Statement accompanying the bill subsequently enacted as the "critical need" exception<sup>18</sup> confirmed the legislative intent to completely exempt qualifying teaching staff from re-enrollment. The Statement indicated that "PERS retirees employed in a PERS-covered position with compensation of \$10,000 or less or employed in a teaching staff position by a public institution of higher education . . . are exempt from the reenrollment requirement."<sup>19</sup>

About six weeks after the "teaching role" exception became effective on November 15, 2001, however, the Legislature amended the "salary cap" exception to permit retirees to earn up to \$15,000 annually without re-enrolling in PERS.<sup>20</sup> This amendment severed the connection between the "salary cap" exception in N.J.S. 43:15A-57.2b.(1) and the "teaching role" exception in 43:15A-57.2b.(2) by eliminating the \$10,000 yearly compensation amount from subsection b.(1) *only*.<sup>21</sup> As a result, the phrase "if the compensation exceeds \$10,000 per year" at the beginning of the "teaching role" exception is currently untethered to any other provision in the re-enrollment statute.<sup>22</sup>

The reference to a yearly compensation amount in the "teaching role" exception appears to be both outdated and unnecessary at this point in light of the expressed legislative intent to exempt retirees returning to qualifying teaching positions without regard to their yearly compensation.

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<sup>14</sup> Sponsor's Statement to A.B. 988, 2000 Leg., 209<sup>th</sup> Sess. (identical to: S.B. 2249), later codified as L. 2001, c.253, §1, eff. Nov. 15, 2001 ("[m]atter underlined thus is new matter").

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* ("[t]here is a wealth of expertise among these retirees and they could provide significant contributions to higher education if they were assured that their retirement benefits would not be affected").

<sup>18</sup> L. 2001, c. 355, §2, eff. Jan. 6, 2002.

<sup>19</sup> Senate Education Committee Statement to S.B. 2718, 209<sup>th</sup> Leg., 2<sup>nd</sup> Sess., at 1 (N.J. Dec. 13, 2001) (emphasis added).

<sup>20</sup> L. 2001, c.278, §1, eff. Dec. 27, 2001.

<sup>21</sup> Sponsor's Statements to S.B. 517, 2000 Leg., 209<sup>th</sup> Sess. (identical to: A.B. 2495), later codified as L. 2001, c.278, §1, Dec. 27, 2001 (increasing "from \$10,000 to \$15,000 the annual amount of compensation a PERS retiree is permitted to receive without having to re-enroll in PERS").

<sup>22</sup> N.J.S. 43:15A-57.2b.(2).

### **New Jersey Administrative Code Section 17:2-2.3**

In addition to reviewing the legislative history of N.J.S. 43:15A-57.2, Staff also identified a New Jersey Administrative Code provision setting forth categories of individuals who are *ineligible* for enrollment in the PERS.<sup>23</sup> The rule, entitled “Ineligible persons,” contains subsections that parallel the statutory exceptions to re-enrollment in N.J.S. 43:15A-57.2.<sup>24</sup>

N.J.A.C. 17:2-2.3(a)10 parallels the statutory “teaching role” exception.<sup>25</sup> Subsection (a)10 makes ineligible “[a]ny retired member . . . who returns to employment with an institution of higher education in a teaching position covered by the PERS pursuant to N.J.S.A. 43:15A:57.2.”<sup>26</sup> The language of the rule tracks the language of the statutory “teaching role” exception closely, but does not reference yearly compensation.

According to the Division of Pension and Benefits (Division) summary that accompanied the Rule Proposal, this category of ineligible person was proposed because of the enactment of “P.L. 2001, c.253 [which] permits PERS retirees to take employment in teaching positions at institutions of higher education without having to reenroll in the PERS regardless of income.”<sup>27</sup>

Although the interpretation of statutory language by the Division is informational, rather than binding, it aligns with the expressed legislative intent to create a re-enrollment exception based on qualifying teaching staff positions unrelated to yearly compensation.

#### **Administrative Decisions**

Staff undertook a review of decisions issued by the PERS Board of Trustees and the Office of Administrative Law related to the statutory exceptions to re-enrollment in N.J.S. 43:15A-57.2b.(2), but did not find any opinions addressing the “teaching role” exception.

#### **Conclusion**

Based on the legislative history and the related administrative provision, the Appendix sets forth proposed modifications to N.J.S. 43:15A-57.2 to clarify that the “teaching role” exception applies to all retired members in qualifying teaching staff positions regardless of the amount of compensation.

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<sup>23</sup> N.J.A.C. §17:2-2.3 (Lexis Advance through the New Jersey Register, Vol. 54 No. 2, January 18, 2022).

<sup>24</sup> N.J.A.C. §17:2-2.3(a)7, (a)10, and (a)11 (Lexis Advance through the New Jersey Register, Vol. 54 No. 2, January 18, 2022).

<sup>25</sup> N.J.A.C. §17:2-2.3(a)10 (Lexis Advance through the New Jersey Register, Vol. 54 No. 2, January 18, 2022).

<sup>26</sup> *Id.*

<sup>27</sup> 36 N.J.R. 619(a), Rule Proposal 2004-39 (Vol. 36, No. 3, Feb. 2, 2004) (emphasis added).

## Appendix

The proposed modifications to N.J.S. 43:15A-57.2 (shown with ~~strikethrough~~, and underlining) follow:

a. Except as provided in subsections b., c., and d. of this section, if a former member of the State Employees' Retirement System or the retirement system, who has been granted a retirement allowance for any cause other than disability, becomes employed again in a position which makes ~~him~~ them eligible to be a member of the retirement system; ~~his~~

(1) the former member's retirement allowance and the right to any death benefit as a result of ~~his~~ former membership, shall be canceled until ~~he~~ the former member again retires; and,

(2) ~~Such person~~ the former member shall be re-enrolled in the retirement system and shall contribute thereto at a rate based on ~~his~~ age at the time of re-enrollment. Such person shall be treated as an active member for determining disability or death benefits while in service and no benefits pursuant to an optional selection with respect to ~~his~~ former membership shall be paid if ~~his~~ the former member's death shall occur during the period of such re-enrollment; and,

(3) ~~Upon~~ subsequent retirement of such member, ~~his~~ any former retirement allowance shall be reinstated together with any optional selection, based on ~~his~~ former membership. ~~In addition, he~~ The former member shall receive an additional retirement allowance based on ~~his~~ subsequent service as a member, computed in accordance with applicable provisions of chapter 84 of the laws of 1954; provided, however, that ~~his~~ the total retirement allowance upon such subsequent retirement shall not be a greater proportion of ~~his~~ the final compensation than the proportion to which ~~he~~ the former member would have been entitled had ~~he~~ they remained in service during the period of ~~his~~ prior retirement. Any death benefit to which such member shall be eligible shall be based on ~~his~~ their latest retirement, but shall not be less than the death benefit that was applicable to ~~his~~ the former retirement.

b. The cancellation, re-enrollment, and additional retirement allowance provisions of subsection a. of this section shall not apply to a former member of the retirement system who, after having been granted a retirement allowance, becomes employed again by:

(1) an employer or employers in a position or positions for which the aggregate compensation does not exceed \$15,000 per year, an amount which may be adjusted from time to time by the Director of the Division of Pensions and Benefits and which adjustment shall be 3/5 of the percentage of change in the index, as defined in section 1 of P.L.1958, c.143 (C.43:3B-1), over a period of time as determined by the Director; or,

(2) ~~if the compensation exceeds \$10,000 per year, by an employer that is a public institution of higher education as defined in N.J.S.18A:62-1 in a teaching staff position, regardless of the amount of compensation.~~<sup>28</sup>

~~The Director of the Division of Pensions and Benefits may from time to time adjust the amount in paragraph (1) of this subsection. This adjustment shall be 3/5 of the percentage of change in the index, as defined in section 1 of P.L.1958, c.143 (C.43:3B-1), over a period of time as determined by the director.~~

c. Unless the former member becomes employed within 120 days of retirement in a position with the employer from which the member retired,<sup>29</sup> ~~the cancellation, reenrollment, and additional retirement allowance provisions of subsection a. and the compensation limitations of subsection b. of this section shall not apply to a former member of the retirement system who, after having been granted a retirement allowance, becomes employed by~~

(1) the State Department of Education in a position of critical need as determined by the State Commissioner of Education, or; ~~becomes employed by~~

(2) a board of education in a position of critical need as determined by the superintendent of the district on a contractual basis for a term of not more than one year; except that the cancellation, reenrollment, and additional retirement allowance provisions and the compensation limitations shall apply if the former member becomes employed within 120 days of retirement in a position with the employer from which the member retired, which may be renewed for one additional year, provided that the total period of employment with any individual board of education does not exceed a two-year period.

~~Nothing herein shall preclude a former member so reemployed by a board of education from renewing a contract for one additional year, provided that the total period of employment with any individual board of education does not exceed a two year period.~~

d. The cancellation, reenrollment, and additional retirement allowance provisions of subsections a., b., and c. of this section shall not apply to a former member of the retirement system who was granted a retirement allowance pursuant to section 1 of P.L.1985, c.414 (C.43:15A-47.2) prior to the effective date of P.L.2011, c.78.

#### COMMENT

##### *Subsection a.*

Subsection a. consists of three paragraphs. The beginning of the first paragraph sets forth the events which trigger the cancellation, re-enrollment, and additional retirement allowance provisions in that subsection, namely the

<sup>28</sup> See *supra* pp. 4-5 and notes 17 & 25 (discussing the legislative intent to exempt *all* qualifying teaching staff positions and the Division of Pension and Benefits' summary of the "teaching role" exception as allowing "PERS retirees to take employment in [qualifying] teaching positions . . . without having to reenroll in the PERS regardless of income.").

<sup>29</sup> Senate Education Committee Statement to S.B. 2718, 209<sup>th</sup> Leg., 2<sup>nd</sup> Sess. (N.J. 2001) (explaining that the purpose of the language was to "eliminate the requirement that a member of the retirement system not accept employment for 120 days following retirement" but maintaining "the 120 day requirement . . . for a retiree who accepts employment with the employer from which he retired . . .").

re-employment of a retired member of the PERS in a PERS-eligible role. There are no modifications proposed with respect to this part of the first paragraph.

In order to improve the accessibility of subsection a., the modifications propose dividing the remainder of the subsection into additional subsections. The latter part of the first paragraph, describing the cancellation of retirement, is designated as subsection a.(1). The second paragraph in subsection a. is designated subsection a.(2), as it addresses the consequences of re-enrollment in the retirement system. The third paragraph is designated as subsection a.(3) because it sets forth the effects of subsequent retirement of a PERS member falling within the parameters of subsection a.

Finally, the proposed modifications to subsection a. render the language gender-neutral. The substance of N.J.S. 43:15A-57.2 subsection a. remains unchanged.

#### *Subsection b.*

As currently written, N.J.S. 43:15A-57.2b.(2), setting forth the “teaching role” exception to re-enrollment, references an outdated \$10,000 yearly compensation amount that was contained in a prior version of the “salary cap” exception immediately preceding it in N.J.S. 43:15A-57.2b.(1).

The proposed modifications to Subsection b.(2) eliminate this reference and add the language “regardless of the amount of compensation,”<sup>30</sup> to make clear that the “teaching role” exception is applicable to qualifying teaching positions no matter the annual compensation amount earned. This clarification of the “teaching role” exception is consistent with the expressed legislative intent and the corresponding administrative provision at N.J.A.C. 17:2-2.3a(10). It also ensures that subsections b.(1) and b.(2) remain consistent with each other, regardless of any subsequent adjustments to the compensation amount in the “salary cap” exception.

In addition, the proposed modifications move the final paragraph of subsection b., which provides that the Director of the Division of Pensions and Benefits is permitted to “adjust the amount in paragraph (1)” pursuant to enumerated guidelines, to subsection b.(1). This modification is suggested on the basis that the authority to adjust the compensation amount is applicable only to subsection b.(1), as already specified in the statute.

#### *Subsection c.*

Subsection c. contains the “critical need” exception, and sets forth two categories of “critical need” employment which are exempt from the provisions of subsections a. and b. The proposed modifications divide these two categories of employment into separate subsections: c.(1) and c.(2), to improve accessibility.

Additionally, subsection c. specifies that former members employed by “the employer from which the member retired” are exempt from the provisions in subsection a., as long as employment was not resumed within 120 days of retirement. The proposed modifications move this condition to the beginning of subsection c. because it is applicable to both categories of “critical need” employment.

Subsection c. also imposes time limits on “critical need” positions with boards of education, specifying that “a former member so reemployed by a board of education [may renew a contract] for one additional year, provided that the total period of employment with any individual board of education does not exceed a two-year period.” The proposed modifications move this language to subsection c.(2) because the time limits are applicable only to employment with a board of education, as already specified in the statute.

The proposed modifications do not alter the substance of N.J.S. 43:15A-57.2c.

#### *Subsection d.*

No modifications are proposed with respect to N.J.S. 43:15A-57.2d.

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<sup>30</sup> The Tentative Report, originally released to the public and uploaded to the NJLRC website on March 22, 2022, contained a misquote of the proposed language in the Appendix which was corrected on March 24, 2022.