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Year in review—some reform, but a long way to go

by Jonathan Holtzman

This may seem like a strange time to write a “year in review,” but for public-sector labor lawyers, the fiscal year ended July 1. In the old days, that usually meant the negotiating season ended and we could go on vacation. “This year” refers roughly to the Jewish calendar, which reminds me of the old Jewish prayer, “Next year in Jerusalem.” That prayer is a wish for a happy next year, and although things are moving in the right direction, we ain’t there yet.

Retiree benefits

The year began with the California Supreme Court’s important decision in *REAOC v. Orange County*, in which the court grappled with whether vested obligations to retirees (in this case, promises related to retiree medical care) could ever be implied in the absence of express statutory language. The court’s answer was yes—but only if the legislative intent to create a vested benefit is very clear. Initially, reviews of the decision focused on the concern that it could make vesting cases more discovery-intensive and therefore longer and more costly.

However, since the court’s ruling was handed down, early decisions suggest that it was a win for public employers because courts require actual proof of legislative intent to create a vested benefit; employees often had taken the position that all retiree benefits are inherently vested. While the *REAOC* case wasn’t the silver bullet many of us had hoped for, it is proving to be helpful because it establishes that vesting must be an intentional act of the legislative body.

Straddling the *REAOC* decision was the pension reform ballot measure in San Jose. The negotiations that occurred before the measure was placed on the ballot were difficult for the same reason that the more recent state pension reform efforts should have been easy: San Jose was attempting to solve the real problem—that is, the inability of many cities to pay for the unfunded liabilities accumulated because of (1) pension enhancements, (2) the failure of equity markets to perform at anywhere near the level necessary to meet actuarial projections, and (3) from a pension perspective, other overly optimistic assumptions.

The negotiations, which spanned nearly eight months, failed to achieve agreements with the unions,

but the ballot measure was approved by nearly 70 percent of San Jose voters. Similar results in San Diego sent a clear message—the public is furious about the runaway costs of public retirement benefits. Both measures are subject to lengthy administrative and court challenges by the unions.

City’s bankruptcy has ripple effect

Then came Stockton. Stockton’s bankruptcy creates probably the only legal forum in the country in which an investor community is directly engaged in a battle with unions and retirees. Because of mediation preceding the bankruptcy under newly enacted Assembly Bill 506, most of the unions reached agreements with the city. However, so far, the backers of municipal debt have not.

The city’s interim plan for operating during bankruptcy eliminates retiree health benefits over two years and suspends its debt payments, but the plan doesn’t propose reducing pension benefits. The retirees sought to restrain the city from cutting retiree health benefits and lost. On the one hand, the court’s opinion flatly says bankruptcy trumps vested benefits. On the other hand, the financial community is incensed that the city didn’t eliminate vested pension benefits. Unfortunately, I can’t sell tickets.

Finally, there’s the statewide pension reform package, which reforms the benefits of employees who have yet to become employees—a notoriously weak political interest group. But the package does very little to help cities and counties pay for the benefits of existing employees—even benefits that have yet to be earned. In political terms, the result is predictable, maybe even better than expected, but it doesn’t come to terms with the scope of the financial crisis that threatens to overwhelm many cities.

In short, the critical employment law issues challenging government are coming into sharper relief, but the dispositive legal and political battles still are in progress. It seems there is a disconnect between the progress being made and the urgency of the problems. At the rate things are going, I hope Jerusalem is warm in the winter.



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