

ALLOW CERTAIN RETIRED STATE EMPLOYEES TO WORK FOR STATE WITHOUT LOSING BENEFITS

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Senate Bill 911 as enacted

Public Act 230 of 2020

Sponsor: Sen. Ken Horn

House Committee: Ways and Means

Senate Committee: Economic and Small Business Development [Discharged]

Complete to 10-20-20

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

Senate Bill 911 amends the State Employees' Retirement Act to allow certain retired state employees to work for the state under certain circumstances without forfeiting their retirement benefits.

Section 68c of the act requires the forfeiture of retirement benefits during any period in which a retired state employee returns to state work, whether employed directly by the state or indirectly through a third-party contract or as an independent contractor.

Under the bill, until December 31, 2020, the forfeiture provisions do not apply to a retiree who was hired after March 15, 2020, by the Unemployment Insurance Agency if both of the following conditions are met:

- The Department of Labor and Economic Opportunity (LEO) determines that, because of his or her previous employment with the state, the retiree has specialized expertise and experience necessary for his or her hiring and that hiring him or her is the most cost-effective option for the state.
- LEO reports to the State Budget Office and the Department of Technology, Management, and Budget (DTMB) as to the hiring of the retiree within 30 days after his or her employment or 30 days after the bill takes effect, whichever is earlier, and within 30 days after his or her employment ends or 30 days after the end of each fiscal year, whichever is earlier. This report must include the retiree's name, the capacity in which he or she is employed, the equivalent civil service position in which he or she is employed, his or her hourly wage, and the total hours of service provided by the retiree for the fiscal year. LEO could submit this report electronically.

In addition, until the effective date of the bill, the forfeiture provisions do not apply to a retiree who was hired after March 15, 2020, by the Michigan Occupational Safety and Health Administration (MIOSHA) if both of the following conditions are met:

- MIOSHA determines that, because of his or her previous employment with the state, the retiree has specialized expertise and experience necessary for his or her hiring and that hiring him or her is the most cost-effective option for the state.
- MIOSHA reports to the State Budget Office and DTMB as to the hiring of the retiree within 30 days after his or her employment or 30 days after the bill takes effect, whichever is earlier, and within 30 days after his or her employment ends or 30 days after the end of each fiscal year, whichever is earlier. This report must include the retiree's name, the capacity in which he or she is employed, the equivalent civil service position in which he

or she is employed, his or her hourly wage, and the total hours of service provided by the retiree for the fiscal year. LEO could submit this report electronically.

MCL 38.68c

BACKGROUND:

State Employees' Retirement Act

Section 68c of the State Employees' Retirement Act was added by 2007 PA 95 to eliminate the practice, often referred to as "double-dipping," in which a state employee retires and returns to work for the state, drawing both retirement benefits and a salary. It initially required the forfeiture of retirement benefits during any period in which a retiree returned to state work if he or she were either directly employed or indirectly hired through a third-party contract. 2010 PA 185 expanded the benefit forfeiture to include employment with the state indirectly as an independent contractor.

Section 68c has been subsequently amended several times to create specific exceptions to this rule, typically for hard-to-fill positions or professions. Currently, it includes the following exceptions, each of which has specifically applicable provisions:

- An individual hired by DOC to provide health care services.
- An individual appointed by the Attorney General as a special assistant attorney general who was an assistant attorney general and has specialized expertise and experience.
- An individual with whom the Attorney General contracts as a witness, expert, or consultant because he or she has specialized expertise and experience.
- An individual hired by the Department of Natural Resources for active wildland fire suppression.
- An individual hired by the Department of Health and Human Services as a psychiatrist to provide mental health services in state operated psychiatric hospitals.
- An individual hired by the Department of Health and Human Services as a mental health professional other than a psychiatrist to provide mental health services in state operated psychiatric hospitals.
- An individual employed by the Legislative Service Bureau as legal counsel through a contractual arrangement.

Executive Order 2020-76

On October 2, 2020, in a 4–3 opinion, the Michigan Supreme Court ruled that the governor did not have the authority to declare a state of emergency or issue emergency orders after April 30, 2020.¹

The governor's declarations of a state of emergency, and the executive orders issued under them, were primarily based on two acts: 1945 PA 302 (commonly known as the emergency powers of the governor act) and the Emergency Management Act (1976 PA 390).

Each act authorizes the governor to proclaim a state of emergency and issue orders responding to the emergency. 1945 PA 302 provides that these orders are effective until the state of

¹ <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Documents/2020-2021/161492/In%20re%20Certified%20Questions-OP.pdf>

emergency ends. Under the Emergency Management Act, a state of emergency or disaster must be terminated after 28 days unless the legislature approves an extension.

In its opinion, the Supreme Court ruled 1945 PA 302 to be an unconstitutional delegation of legislative power. Because the legislature had extended the state of emergency under the Emergency Management Act to April 30 but did not extend it past that time, the court also ruled that the governor had no authority to declare a state of emergency or issue emergency orders under that act after that date.

Although some COVID-19-related orders can be effective under other authority (the Public Health Code, for example), the governor's orders issued after April 30 have no continuing legal effect. In a court filing, the governor said that over 30 executive orders in effect on October 2 were based on authority granted under 1945 PA 302.

Senate Bill 911 puts into law provisions of Executive Order 2020-76 that were also in an earlier order, EO 2020-57, which EO 2020-76 replaced.² Among other things, EO 2020-76 allowed retirees to return to work at the Unemployment Insurance Agency and MIOSHA to meet the demands on those agencies created by the COVID-19 pandemic. By putting these provisions into the State Employees' Retirement Act, the bill ensures that these retirees will not be penalized for acting in good faith under the provisions of an executive order whose basis was later determined by the court to be invalid.

FISCAL IMPACT:

The bill could increase costs to the state by an indeterminate, but likely limited, amount. By allowing employees of the Unemployment Insurance Agency and Michigan Occupational Safety and Health Administration to return to work without forfeiting retirement benefits, the bill could create an incentive for employees to retire earlier than they might have otherwise, knowing they can earn both current compensation as well as a pension and retiree health benefits. That said, because the term by which the employee could retire and return to work without foregoing retirement benefits ends on December 31, 2020, the incentive to retire would be diminished.

When retirees retire earlier than anticipated under the retirement system's actuarial assumptions, it increases the unfunded liabilities in a pension system. Increased unfunded liabilities would be borne by the state through increased departmental costs for the State Employees' Retirement System (SERS), which are assessed across all state departments as an equal percent of payroll. However, the candidate pool is likely to be small, and costs increase only if the bill changes the behavior of currently active employees.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

² Executive Order 2020-76, issued May 6, 2020 (<http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-76.pdf>).