

TITLE 34. PUBLIC FINANCE
PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS
CHAPTER 31. EMPLOYMENT AFTER RETIREMENT

SUBCHAPTER A. GENERAL PROVISIONS AND PROCEDURES

34 TAC §31.5 and §31.6

The Teacher Retirement System of Texas (TRS) proposes to amend §31.5 (relating to Notice and Forfeiture Requirements for Certain Service Retirees) and §31.6 (relating to Second EAR Warning Payments) under Subchapter A (relating to General Provisions and Procedures) of Chapter 31 in Part 3 of Title 34 of the Texas Administrative Code.

BACKGROUND AND PURPOSE

In 2021, the Texas Legislature passed House Bill 1585 which added, among other provisions, an employment after retirement (“EAR”) notice procedure (also called a “three strikes” procedure) that ensured TRS would issue at least two warnings to a TRS service retiree before that retiree would forfeit his or her entire annuity for a month because the retiree exceeded the limits on employment after retirement during that month.

Importantly, this notice procedure, which is under Government Code §824.601(b-3), requires that a TRS service retiree cannot be subject to a second warning (and the possible dollar-for-dollar partial forfeiture associated with a second warning) until the month after the month TRS issues a first warning to a TRS retiree for exceeding the limits on EAR. Further, a TRS retiree cannot be subject to mandatory full forfeiture of his or her annuity until the month after the month TRS issues the second warning letter. These requirements are clear in the statute.

However, §31.5 and §31.6 currently provide, at least in part, that a TRS service retiree is not subject to a second warning until the retiree receives, rather than TRS issues, a first warning. Further, the rules provide that a TRS retiree is not subject to a mandatory forfeiture until the retiree receives, rather than TRS issues, both required notices.

By requiring that the retiree receive, rather than TRS issue, these EAR notices before the retiree can be subject to the next level of EAR forfeiture, §31.5 and §31.6 are in conflict with Government Code §824.601(b-3). In addition, the receipt, rather than issue, standard creates a substantial administrative hurdle for TRS in administering the EAR “three strikes” procedure.

Specifically, TRS sends EAR notices to service retirees by both first class and certified mail to the retiree’s current mailing address on file with TRS to ensure that the retirees timely receive their EAR notices. However, if a retiree did not maintain an accurate current mailing address with TRS, and TRS was unable to locate (or at least was delayed in locating) the retiree, the retiree could arguably not be subject to the next EAR notice and potentially full forfeiture until TRS receives a current mailing address for the member.

In addition, because the month TRS issues an EAR notice can be different from the month a TRS service retiree receives that notice, the month in which a TRS retiree is subject to the next level of EAR forfeiture could, in some cases, be ambiguous even if the retiree receives the EAR notice.

If adopted, TRS intends for proposed amended §31.5 and §31.6 to become effective on February 1, 2024.

FISCAL NOTE

Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years the proposed amended rules will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed amended rules.

PUBLIC COST/BENEFIT

For each year of the first five years the proposed amended rules will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of adopting the proposed amended rules will be for the proposed amended rules to conform with statute.

Mr. Green has also determined that the public will incur no new costs as a result of complying with the proposed amended rules.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed amended rules. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT

TRS has determined that there will be no effect on local employment because of the proposed amended rules. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

TRS has determined that for the first five years the proposed amended rules are in effect, the proposed amended rules will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; will not create a new regulation; will not expand, limit or repeal an existing regulation; will not increase or decrease the number of individuals subject to the rule's applicability; and will not affect the state's economy.

TAKINGS IMPACT ASSESSMENT

TRS has determined that there are no private real property interests affected by the proposed amended rules, therefore, a takings impact assessment is not required under Government Code §2007.043.

COSTS TO REGULATED PERSONS

TRS has determined that Government Code §2001.0045 does not apply to the proposed amended rules because the proposed amended rules do not impose a cost on regulated persons.

COMMENTS

Comments may be submitted in writing to Brian Guthrie, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the *Texas Register*.

STATUTORY AUTHORITY

The proposed amended rules are proposed under the authority of Government Code §824.604, which provides that board of trustees may adopt rules to administer laws under Subchapter G of Chapter 824 of the Government Code and Government Code §825.102, which authorizes the board of trustees to adopt rules for the transaction of the business of the board.

CROSS-REFERENCE TO STATUTE

The proposed amended rules affect the following statutes: Government Code §824.601, which relates to loss of monthly benefits; Government Code § 824.602, which relates to exceptions; and Government Code §824.6021, relating to temporary exception to mitigate learning loss attributable to COVID-19 pandemic.

PROPOSED RULES

§31.5 Notice and Forfeiture Requirements for Certain Service Retirees

(a) A service retiree with an effective date of retirement after January 1, 2021, shall only forfeit the service retiree's monthly annuity payment based on the service retiree's employment by a Texas public educational institution during a calendar month if TRS ~~[the retiree]~~ has previously issued ~~[received]~~ the warnings required by subsections (b) and (c) of this section to the retiree.

(b) If TRS determines that a service retiree's employment by a Texas public educational institution does not qualify for an exception under Subchapter B of this chapter (relating to Employment after Retirement Exceptions), TRS shall issue a written EAR warning to the service retiree notifying the retiree of this fact. The EAR warning under this subsection may address multiple months of the service retiree's employment.

(c) If TRS determines that a service retiree's employment by a Texas public educational institution does not qualify for an exception under Subchapter B of this chapter and that employment occurs in a month after the month TRS issued to the service retiree the warning under subsection (b) of this section, then TRS shall issue a second EAR warning to the service retiree that:

(1) notifies the service retiree of this fact; and

(2) requires the service retiree to pay TRS an amount equal to the lesser of the total amount of either:

(A) the service retiree's gross monthly annuity payments for the months addressed by this warning; or

(B) the total gross amount of compensation earned by the service retiree during the months addressed by this warning as described by §31.6 of this title (relating to Second EAR Warning Payments).

(d) The EAR warning under subsection (c) of this section may address multiple months of the service retiree's employment.

(e) If TRS determines that a service retiree's employment by a Texas public educational institution does not qualify for an exception under Subchapter B of this chapter and that employment occurs in a month after the month TRS issued to the retiree the second EAR warning under subsection (c) of this section, the service retiree is not entitled to receive a monthly annuity payment for any such month and TRS shall collect any annuity payments the service retiree received to which the service retiree was not entitled.

(f) If TRS determines after issuing an EAR warning under subsections (b) or (c) of this section that the service retiree's employment by a Texas public educational institution did not qualify for an exception under Subchapter B of this chapter and that employment occurred in a month prior to or during the month TRS issued such a warning but was not included in the warning, then TRS shall:

(1) issue an EAR warning in accordance with subsection (b) of this section if the excluded month was the month TRS issued the EAR warning under that subsection or an earlier month; or

(2) issue an EAR warning and request for payment under subsection (c) of this section if the excluded month was the month TRS issued the EAR warning under that subsection or in an earlier month that was also after the month TRS issued the EAR warning under subsection (b) of this section.

(g) If a service retiree appeals a TRS determination regarding the service retiree's employment with a Texas public educational institution during a month or months that TRS included in an EAR warning under subsection (b) or (c) of this section, the EAR warning shall still be considered to have been issued by TRS unless the service retiree's appeal contests every month addressed by the applicable warning. If the service retiree contests the TRS determination for every month included in an EAR warning, that EAR warning shall not be considered to have been issued during the pendency of the service retiree's appeal.

(h) If a service retiree prevails on an appeal of every month included in an EAR warning under subsection (b) or (c) of this section, then TRS shall rescind the EAR warning. If the service retiree's appeal does not prevail on any month included in an EAR warning under subsection (b) or (c) of this section, then the EAR warning shall be reinstated and TRS shall adjust the amounts owed by the service retiree to TRS, if any, for months after the issuance of the reinstated EAR warning in which TRS determined the service retiree's employment by a Texas public educational institution did not qualify for an exception to the limits on EAR as provided by Subchapter B of this chapter.

(i) TRS shall consider an EAR warning under this section to have been issued on the date TRS sends the warning to the service retiree.

§31.6. Second EAR Warning Payments

(a) If TRS issues [A service retiree who receives] a second EAR warning as provided in §31.5 of this title (relating to Notice and Repayment Requirements for Certain Service Retirees) to a service retiree, the service retiree shall pay to TRS an amount equal to the lesser of either:

(1) the service retiree's gross monthly annuity payments for the months addressed by this warning; or

(2) the total gross amount of compensation earned by the service retiree during the months addressed by this warning as described by this section.

(b) The amount in subsection (a)(2) of this section shall only include all compensation earned by the service retiree based on the service retiree's employment with a Texas public educational institution during a month subject to the second EAR warning regardless of when such an amount is paid to the service retiree. The amount shall not include:

(1) compensation paid to the service retiree during the applicable months unless the service retiree also earned the compensation based on the service retiree's employment with a Texas public educational institution during a month subject to the second warning;

(2) compensation earned by the service retiree in a position that qualifies for the exception under §31.16 of this title (relating to Federally-funded COVID-19 Personnel); and

(3) compensation paid to the service retiree that would not qualify as creditable compensation if paid to an active member by an employer for the same services.

(c) A service retiree may elect to pay the greater of the two amounts described by subsection (a) of this section. If a retiree elects to pay the greater amount, the retiree must notify TRS of this election in writing.

(d) If an employer adjusts the compensation earned by a service retiree in a month subject to a second EAR warning payment under this section but does not adjust the hours or days worked by the retiree relating to that compensation, the amount due shall be adjusted for that payment, and TRS shall request or return any amounts necessary to correct the payment so long as the adjustment is received no later than 12 months after the end of the school year in which the compensation was earned.

CERTIFICATION

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.