

MINUTES
PENSION REVIEW COMMITTEE
Tuesday, April 14, 2020
County-City Building
Meeting Conducted by Teleconference

Present: Kerry Eagan, Chief Administrative Officer; Scott Gaines, Chief Deputy Assessor/Register of Deeds; Doug Cyr, Chief Deputy County Attorney; David Derbin, Deputy County Attorney; Joe Nigro, Public Defender; Dennis Meyer, Budget & Fiscal Officer; Sean Flowerday, County Commissioner; Robert Holbrook, FOP 32; and Kevin Nelson, County Clerk Accountant

Other Participants: Julie Klassen, Prudential Vice President, Key Accounts

Absent: Rick DeBoer, AFSCME; Kenny Nolan, FOP 77; and FOP 29 representative

Eagan called the meeting to order at 2:00 p.m.

1. Approval of Pension Review Committee Meeting Minutes for March 26, 2020

MOTION

Cyr moved and Flowerday seconded to approve the Pension Review Committee meeting minutes for March 26, 2020. The motion passed unanimously.

2. Recommendation on CARES Act Directive from Prudential

Eagan began the discussions by indicating that a preliminary question needs to be answered as to whether a governmental money purchase pension plan is subject to the provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act. He indicated he had done some preliminary research which indicates such plans cannot be used for Coronavirus-Related Distributions (CRD). Specifically, he referred to an article published by the National Association of Governmental Defined Contribution Administrators (NAGDCA) entitled, "401(a) Plans and CARES Act Relief." A copy of this article is included with these minutes as Attachment A.

Julie Klassen indicated Prudential has also done some research on this question and determined the CARES Act has limited applicability to governmental money purchase 401(a) plans. She added the CARES Act does not authorize these plans to make CRD's; but does allow the temporary waiver of minimum required distributions (RMD).

Doug Cyr indicated he has reviewed the NAGDCA article and the CARES Act, and he concurs in the opinion that CRD'S cannot be made available under a governmental money purchase 401(a) plan. David Derbin also agrees that CRD's are not available under a governmental money purchase 401(a) plan.

Cyr added that under our existing 401(a) plan loans are not allowed under Section 21.1, and hardship distributions are not allowed under Section 22.1.

Since CRD'S are not allowed under the County's 401(a) plan, the Committee addressed the question of whether CRD's should be allowed under the 457(b) Deferred Compensation Plan. Cyr stated that loans are not allowed under the 457(b) plan. The plan does allow hardship distributions, which are similar to CRD's. Circumstances under which a hardship distribution can be made include medical expenses, purchase of a residence, education expenses, foreclosure, funeral costs, and casualty losses. The 457(b) plan would need to be amended to allow CRD's during the year 2020 by no later than the end of 2024.

Klassen said that from an administrative point of view, Prudential can start making CRD's within two days after receiving the Directive from the County. She concurred with Cyr that plan amendments must be made no later than the end of 2024. Since Prudential is the document provider for the County those amendments would be made by Prudential.

Nigro inquired as to whether there have been any requests from employees for distributions. Eagan responded that requests have been received from two employees. However, Eagan further indicated that most likely neither employee met the requirements under the CARES Act for a CRD. Cyr added that the CARES Act is very specific about who qualifies for a CRD. To be entitled to a CRD from an eligible retirement plan, the person must be an individual:

- who is diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention
- whose spouse or dependent (as defined in Code section 152) is diagnosed with such virus or disease
- who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors as determined by the Secretary of the Treasury.

Flowerday asked for clarification that the CRD applies only to the employee, and not the spouse. Cyr responded yes, except in the case where the spouse is diagnosed with the virus. Nigro asked if the employee's spouse is laid off our employee would not be entitled to a CRD? Cyr indicated that is correct, but the employee may still be eligible under existing hardship provisions in the 457(b) plan. Klassen concurred, indicating that existing provisions for unforeseen emergency withdrawals may be available.

Nigro stated that if we already have hardship withdrawal provisions, why would we not allow CRD's from the 457(b)? Eagan responded that it's a question of balancing retirement security against an economic hardship. Allowing an employee to take a CRD may alleviate an existing hardship but at the expense of having enough money for retirement.

Nigro then asked if allowing employees to take CRD's creates any problems for the County? Cyr responded that the County would need to amend the 457(b) plan to allow CRD's. He continued that

it depends on whether the County wants to play a paternalistic role. If an employee takes a CRD, then Prudential will issue a 1099-R which will be filed with the IRS. The distribution will be taxed as ordinary income. The 10% early withdrawal penalty is waived, as is the automatic 20% withholding requirement. Consequently, the employee may experience a severe tax consequence of which they are not fully aware. Klassen added that the employee can still request that 20% be withheld from the distribution.

Meyer asked who makes the determination on whether the employee meets the requirements. Eagan responded that the employee must be diagnosed with the virus by a test approved by the Centers for Disease Control and Prevention. He added that the County can rely on the self-certification of the employee that they meet the criteria. Klassen indicated Prudential uses a recorded line when taking requests for CRD's and advises participants to keep good records to support their request. Cyr indicated the CARES Act protects the employer, or provides a safe harbor, by allowing the employer to accept as true what the employee provides, so long as the employee certifies a reason which falls within the grounds for a CRD under the CARES Act.

Eagan then asked for viewpoints from other Committee members. Derbin stated that since we already allow hardship withdrawals from the 457(b), he can see no reason why we wouldn't allow CRD's which provide more favorable treatment to the employees, as opposed to less favorable treatment, for similar circumstances, under the existing hardship provisions. Nigro indicated he is in favor of allowing CRD's; but would require a letter to be sent to all employees explaining all the potential consequences of taking a CRD. Klassen indicated that Prudential can provide the communications to employees explaining the need to balance the consequences of taking a CRD's versus the need to adequately save for retirement.

Meyer indicated he is willing to allow CRD'S from the deferred compensation side; but would be leery of allowing it from the 401(a) retirement plan.

Cyr stated that he is not in favor of allowing CRD's from the 457(b) plan. He believes it is a short-term solution which can create long-term problems. Nebraska is experiencing a light amount of the virus and the CRD program will end in 8 months. However, the consequences to the employee could be long lasting. He continued by stating the 457(b) plan is a part of our entire retirement program and should be used as a last resort to address an economic hardship. However, some employees do not treat their 457(b) account this way. He stated there is already a vehicle to withdraw these funds through the hardship process. He questions the need to amend the plan to provide another way to access funds, which requires only a showing of having COVID-19, regardless of whether the money is actually needed.

Klassen stated there is a provision in the CARES Act allowing the participant to pay back the funds to the plan in 3 years. The participant is responsible for handling the tax situation and should talk to an accountant.

Cyr responded this is a complicated path fraught with peril, requiring unsophisticated people to understand the tax consequences and to be responsible for hiring an accountant. Meyer responded

that he agrees with Cyr's concern, but the entire pension matter is complicated. He believes the employee needs to make this decision by themselves, regardless of whether we believe they understand the consequences.

Cyr stated the concern goes back to how paternalistic we should be with these decisions. He noted the County already prevents participants from taking money out by prohibiting loans from the 401(a) and 457(b) plans. In response to Meyer's question about what if the participant needs the money now, Cyr responded they can rely on the existing hardship provisions, which allow a participant to withdraw money from the 457(b) for medical expenses, purchase of a residence, education expenses, foreclosure, funeral costs, and casualty losses. Meyer responded that he believes not a lot of employees will be affected and the amount of funds involved would be small.

Eagan added that the CARES Act allows CRD's up to \$100,000, but the Prudential Directive allows the County to limit the amount of CRD's to either \$50,000 or \$25,000.

Holbrook asked if we have the authority to design our own plan, with our own limits and repayment provisions, etc. Eagan responded that if allow CRD's we only have the authority to limit the amount of the withdrawal, and other provisions would be dictated by the CARES Act.

Klassen added that the entire decision on allowing CRD's is optional. She then explained that Prudential has stopped issuing required minimum distributions (RMD) pursuant to authority granted under the CARES Act. RMD's made prior to April of 2020 have already gone out and would be difficult to reverse; but going forward RMD's will be suspended for the rest of 2020. She indicated the rationale underlying this decision is that participants should not be forced to sell assets at depressed prices. A participant can still request the RMD for 2020.

Nigro stated that only a small number will qualify for a CRD, that have funds in the 457(b) plan, and are in a desperate financial situation. While he agrees with Cyr on the need for paternalism, especially for younger employees, he is in favor of allowing CRD's from the 457(b) plan. He believes the coronavirus situation is not going away and very few participants will request a CRD. Eagan responded that the small number of participants could also indicate there is not a need to amend the plan, especially with the fact that some CRD's require only a showing that the employee or the employee's spouse has the virus. Cyr added that CRD's would be made from assets with depressed values, which could also hurt the participant.

Gaines stated that he agrees with Cyr's position. If an employee is experiencing a hardship because of the virus, there is an existing avenue for a hardship withdrawal. He emphasized the importance of avoiding knee jerk reactions to use dollars that will be needed for years to come. Klassen noted that hardship withdrawals from a 457(b) plan are not subject to the 10% tax penalty. Holbrook stated he agrees with the paternalistic approach.

Cyr commented on the interest of all participants to keep the pension fund as large as possible. The more assets we have in the fund the lower the fees for participants. It is better for the health of our retirement program to have money coming into the plan rather than going out.

There being no further discussion, Eagan asked for a motion.

MOTION

It was moved by Cyr and seconded by Holbrook to not allow Coronavirus-Related Distributions from the 457(b) Deferred Compensation Plan for calendar year 2020. Voting for the motion: Cyr, Holbrook, Gaines, and Eagan. Voting against the motion: Nigro, Derbin, Flowerday, Nelson, and Meyer. The motion failed on a 5-4 vote.

MOTION

It was moved by Nigro and seconded by Flowerday to allow Coronavirus-Related Distributions up to \$50,000 from the 457(b) Deferred Compensation Plan for calendar year 2020. Voting for the motion: Nigro, Derbin, Flowerday, Nelson, and Meyer. Voting against the motion: Cyr, Holbrook, Gaines, and Eagan. The motion passed 5-4.

Loans under the CARES Act

The Committee then considered the question of what recommendation should be made to the Lancaster County Board on whether to allow participant loans under the provisions of the CARES Act.

After a brief discussion it was determined that loans under the CARES Act could be allowed under both a 401(a) and 457(b) plan. However, Cyr indicated that presently loans are not allowed under either the 401(a) plan or the 457(b) plan.

Nigro raised the question of whether loans under the CARES Act should be treated any differently than CRD's. Cyr responded that loans need to be paid back. He explained the mechanics of how a loan is handled under a 457(b). A participant is entitled to borrow their entire vested balance but with a hard limit of \$100,000 (which is the same as the loan limit under the CARES Act). Since our 457(b) consists entirely of employee contributions, it would be possible for an employee to borrow 100% of the balance. If the loan is not repaid it is taken from the balance of the 457(b). Eagan added that if the employee does not repay the loan, the amount could be subject to the 10% early withdrawal penalty and taxes.

Nigro again asked the question, from a policy point of view, whether we should adopt a different position regarding loans for purposes of the Prudential Directive. Derbin responded that loans can be administratively burdensome. Since we already have hardship provisions under the 457(b) it makes sense to allow CRD's. However, we do not allow loans. Cyr added we have never allowed loans under either the 401(a) or the 457(b). Flowerday indicated he agrees with Derbin, and does not favor allowing loans. Nelson added he is concerned with the ability of employees to repay loans; and he is afraid that more employees would be negatively affected if we allow them.

MOTION

It was moved by Flowerday and seconded by Nelson to recommend to the Lancaster County Board that loans not be allowed under the CARES Act for both the 401(a) and the 457(b) plans. The motion passed unanimously.

As a final comment, Nigro reiterated the need for the County to communicate with employees indicating that CRD's are available and setting forth the possible consequences for employees who choose to request them.

There being no further business the meeting was concluded at 2:57 p.m.

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