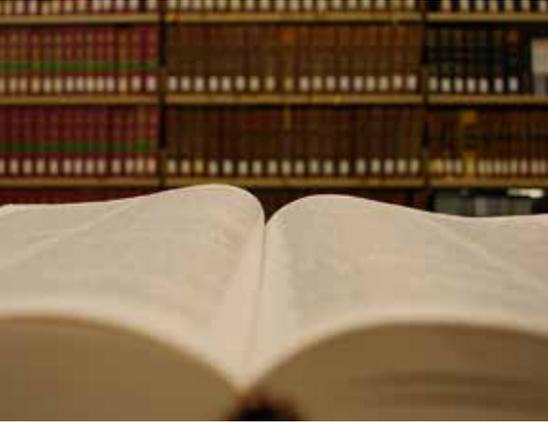


PENSION POINTERS



Challenges for Fiduciaries

By Carolyn Welch Clifford
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With no clear end in sight to the disruption caused by the COVID-19 pandemic, pension fund trustees will need to navigate a myriad of unique concerns created by social distancing and near shutdown of the world economy that has driven sudden losses in pension fund investment portfolios. There are steps fiduciaries can take, however, to begin addressing those challenges to ensure you are meeting your responsibilities and duties to your members and the fund as a whole.

Conducting Board Meetings Remotely

With strict social distancing guidelines in place, conducting in-person meetings is nearly impossible. Even if members of your pension board routinely work together at the station, it is unwise to bring additional individuals into fire and police stations where there is a priority on keeping first responders safe and well. Many municipalities and fire protection districts have closed their facilities to the public and even to family members.

In mid-March, Governor Pritzker issued Executive Order 2020-07, in which he suspended certain provisions of the Open Meetings Act to help facilitate electronic meeting attendance. The order suspends the requirement in Section 2.01 of the Act that a quorum of the board be physically present, and also suspends the conditions in Section 7 of the Act as to when remote participation is permitted (5 ILCS 120/2.0 and 7).

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The order also encourages public bodies to postpone consideration of public business when possible. Thus, if there are no pending matters that require the board's review and action in the near future, the board may decide to simply to cancel or postpone the meeting. The Attorney General's office has given guidance that a notice of cancellation of a meeting should be posted in the same place as the original meeting notice.

However, if there are matters that require the board's review (such as investment concerns on rebalancing the portfolio or providing for cash needs), or action on items that are time sensitive (such as retirement applications), boards should consider conducting a meeting by teleconference or video conferencing. There are several issues to keep in mind when conducting a board meeting by electronic means:

- The method of the electronic meeting (teleconference or video conferencing) must provide a means for all participants to clearly hear each other at all times, and should also provide a means for the public and the press to monitor the meeting and submit public comment (5 ILCS 5/2.06 and 7).

- Agendas will still need to be posted in accordance with the Open Meetings Act, even if the meeting is being conducted entirely by phone or video (5 ILCS 120/2.02). The agenda should include a statement regarding the electronic method by which the meeting will be held and the access information for the public and the press to participate and/or submit public comment.
- If the pension board does not have access to a phone or video option for its meeting through its municipality or fire protection district, service providers to your fund will likely have teleconference platforms or subscriptions to video conferencing tools (like Zoom) that can facilitate the meeting.
- Out of an abundance of caution, it is also recommended that any action taken by pension boards at electronic meetings should be ratified at a future in-person meeting, once COVID-19 pandemic limitations have subsided. This is a cautionary measure, should there be any future determination that the meeting method was in any way flawed.

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Pension Pointers

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Managing Disability Processes and Annual Medical Exams

Medical facilities have cancelled non-essential medical care, and this includes independent medical examination for the near future. This means pending disability matters will have unforeseen delays and annual IMEs of disabled members will need to wait. The concern, however, is that applicants who are waiting for disability processes to be completed may suffer some financial hardship in the interim, particularly if they have expended their paid leave or are not receiving worker's compensation benefits.

These matters will need to be evaluated on a case by case basis, particularly as there becomes more clarity on when medical facilities will be able to begin scheduling IMEs once risks associated with the pandemic begin to subside. There may be an opportunity to conduct records-only IMEs supplemented by a telephone interview of the applicant or pensioner, but these will need to be considered by the board and the IME physician, after consulting with the affected member and his or her legal counsel.

At this time, it is not advisable to proceed with disability hearings by electronic means. Given the determinations that the board must make regarding credibility of witnesses, the process is better served by in-person processes. Currently, the courts have suspended many non-urgent matters, and by analogy, administrative proceedings similarly should be postponed.

If disability applicants and their attorneys have any due process concerns with postponement, those concerns should be presented in writing and considered by the board at a meeting for that purpose. There may be situations, for example, where the IME physician reports have been received and concur on a finding of disability. In those instances, an initial hearing conducted by teleconference or video conferencing could be considered to address an interim award of non-duty disability benefits, if requested by the applicant.

Investment Monitoring

Trustees, as fiduciaries of the fund, have an obligation to monitor the fund's investments, despite the fact that the portfolio is being managed by investment professionals in accordance with the board's investment policy, asset allocation plans, and state statutes. If your investment portfolio was well selected and monitored in the past, it is likely that your fund's portfolio continues to be prudent despite significant losses in value during the market downturn.

That said, it is important that board members continue to receive information on the status of the portfolio from the fund's investment advisors. Conducting a teleconference or video conference meeting with the investment professional may provide an opportunity to be reassured about the condition of the fund's assets, as well as discuss any rebalancing of the portfolio or cash flow needs during this unusual time period. Communicating with your members that the fund's fiduciaries are actively monitoring the fund's assets is important, as well.

Benefit Determinations, Delayed Retirements, Return to Active Service, and Monitoring

Request for retirement benefits and similar routine applications will continue, despite the COVID-19 pandemic. The board should continue to facilitate calculation of benefit determinations and monitor beneficiaries as it has in the past. However, some challenges are likely to present themselves in what are usually routine:

- Some planned retirements may be deferred, particularly where staffing challenges may require seasoned firefighters or police officers to continue in service and delay previously planned retirement. The board should request modifications to previously submitted retirement applications be presented in writing.
- Similarly, some recently retired members may be asked to return temporarily to active service. Where a firefighter or police officer returns to active service, the board must suspend the member's retirement

benefits (40 ILCS 5/3-124.1(a) and 4-117). This is true even if the member only returns in a paid-on-call or part-time basis.

- Annual affidavits of eligibility that provide monitoring of beneficiaries and prevent fraud require notarization. However, given that securing notarization of documents is difficult with stay-at-home orders, the Illinois Secretary of State has issued temporary authority and guidance to Illinois notaries public who are equipped to perform notarizations remotely using real-time electronic technologies. The requirements for this type of notarization to take place are cumbersome, and thus, our recommendation to pension boards is to suspend the notarization requirement on annual affidavits for this year.

Unusual Circumstances

The COVID-19 pandemic has raised additional questions from municipalities and members, such as:

- *Are temporary or emergency hires subject to membership in the fund and/or required to make contributions to the fund?* No, only full-time, commissioned firefighters and police officers are eligible to participate in the pension fund (40 ILCS 5/3-109(a)(1) and 4-106).
- *How should we handle election procedures or appointments that have been disrupted by social distancing?* If the board is unable to conduct its election processes for either its active or retired members, they can be postponed or converted to appropriate and secure online methods, as long as all eligible voters are able to participate. Any board member whose term has expired will continue to hold the position until his or her successor is duly elected or appointed (40 ILCS 5/3-128 and 4-121).
- *May the board provide a "hardship loan" to its members?* No; unlike a 401(k) or 457 plan, Article 3 and 4 pension funds may not provide loans to its members.

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What's Ahead?

As the COVID-19 pandemic continues, it is likely additional executive orders and legislation will continue to be considered as the social and economic impacts are weighed. For example, some states have already introduced legislation to expand worker's compensation laws to include COVID-19 as a presumptive occupational disease. In Illinois, emergency rules

were issued by the Illinois Workers' Compensation Commission in mid-April 2020 to provide that it will be rebuttably presumed that a first responder's exposure to COVID-19 arose out of and in the course of employment, and is rebuttably presumed to be causally connected to their employment. Depending on the medical outcomes for first responders who contract the virus, such legislation might be proposed on disability or death benefits under pension laws, as well.

Meanwhile the financial impact on Illinois pension funds will be substantial.

Even with smoothing of returns in actuarial valuations, it is possible that legislative changes to funding may be proposed to address the impact of the pandemic and expected recession on municipalities and fire protection districts. As fiduciaries, pension board members should monitor these issues carefully and consider the impact any developments might have on benefit payments and the financial security of the fund in the near term, as well as in the future. ■

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