

Perception is Reality: Executive Compensation for Senior Management of Florida Public Employers

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I. What Has Caused the Compensation Issue to Surface?

A) Instances of Overpayment:

1. Bell, California:

- a. In July, 2010, L.A. Times reporters revealed that municipal leaders in Bell, California (a suburb of Los Angeles) were being paid exorbitant salaries.
 - i. Chief Administrative Officer, Robert Rizza, was being paid a \$787,637 salary;
 - ii. Police Chief, Randy Adams, was being paid a \$457,000 salary (approximately 50% more than the L.A. Police Chief and double New York City's police commissioner);
 - iii. Assistant City Manager, Angela Spaccia, was being paid a \$376,288 salary.¹
- b. The Bell scandal was heavily publicized, causing widespread criticism throughout California and the country.

2. Overcompensation in Florida:

- a. Miami-Dade County Manager, George Burgess: Burgess stepped down in March, 2011, at age 52. Burgess's contract granted him a year's pay, totaling \$326,340, and benefits (including medical and dental coverage) to him and his family for the next thirteen years.²
- b. Former Hillsborough County Administrator, Pat Bean: Bean's contract entitled her to a year of pay and other benefits if she was terminated for a reason short of committing a crime. Bean's total payout by Hillsborough

¹ Jeff Gottlieb and Ruben Vives, "Is a city manager worth \$800,000?," *LA Times* (July 15, 2010), <http://www.latimes.com/news/local/la-me-bell-salary-20100715,0,7352605.story>.

² Martha Brannigan and Matthew Haggman, "Outgoing county manager gets pay and benefits package," *The Miami Herald*, (March 18, 2011), <http://www.miamiherald.com/2011/03/18/2122653/outgoing-county-manager-gets-pay.html>.

County taxpayers potentially reaches \$455,000. Bean was recently paid \$191,000 (for unused sick and vacation pay) and is seeking the rest of her severance.³

B) Tangentially, Private Sector Chief Executive Officer Salaries, Scandals:

1. Executive pay has increased significantly in the United States since the early 1990s. Median C.E.O. compensation in the S&P 500 firms has increased from approximately \$2 million in 1993, to roughly \$7.7 million in 2008.⁴ In 2010, CEO salaries jumped 11% alone.

a. Such salaries are widely reported in Media:

1. Examples (CEO, Company, Pay in millions):

- a. Rex Tillerson, ExxonMobil, 21 million;
- b. Randall Stephenson, AT&T, 19.8 million;
- c. Martin E. Franklin, Jardeen, 45.2 million.⁵

2. Other scandals: Enron, Lehman Brothers.

C) State Budgetary Constraints:

1. Reducing salaries, eliminating severance payments, and eliminating employees' ability to collectively bargain for certain benefits represent approaches various states are taking to save money and decrease state budget deficits.

a. Examples: budgetary constraints in other states (Ohio, Wisconsin, New Jersey, Tennessee) have resulted in restrictions on collective bargaining, limits on government employees' compensation, and limits on employee benefits.

2. In general, people want a faster, better, and cheaper government.

II. State and Federal Laws Regarding Senior Executive Compensation

1. Federal Guidelines on Executive Compensation:

On June 10, 2009, the Department of Treasury issued guidelines on executive compensation for financial institutions that receive financial assistance from the federal government under the Troubled Asset Relief Program (TARP). Although these guidelines were largely aimed at larger private companies (for example, Citi, Bank of America), the guidelines

³ Bill Varian, "Poking holes in golden parachutes," *St. Petersburg Times* (May 14, 2011), <http://www.tampabay.com/news/politics/poking-holes-in-golden-parachutes/1169748>.

⁴ Martin J. Conyon, *Executive Compensation Consultants and Ceo Pay*, 64 Vand. L. Rev. 399, 400 (2011)

⁵ Joann S. Lublin, "CEO Pay in 2010 Jumped 11%," *The Wallstreet Journal*, (May 9, 2011), <http://online.wsj.com/article/SB10001424052748703992704576307332105245012.html>.

may generally help shed light on good practices to implement in making decisions regarding senior management compensation in any setting.

The federal guidelines seek to balance the needs of recruiting highly qualified executives, the need for organizations to operate, and accountability for executive compensation. The guidelines are comprised of several requirements, including:

- Maximum limits on the amount of compensation paid to senior executives (cannot exceed \$500,000 per year);
- Shareholders must vote on senior executive's compensation structure and sign off on how compensation is tied to sound risk management (known as a "say-on-pay" provision);
- Mandatory clawback provisions that allow for the clawing back of bonuses and incentives where executives are found to have knowingly provided inaccurate information relating to financial statements;
- Limitations on top executives' ability to receive large severance packages (known as "golden parachutes") upon severance from employment;
- Requiring approval from the board of directors on the use of certain expenses (for example, entertainment, holiday parties, conferences).⁶

A consideration of these guidelines/requirements may be useful when setting senior management compensation and drafting contracts.

2. Florida's Approach to Senior Executive Compensation: Senate Bill 88:

a) The Bill. The Florida House and Senate have passed a bill, SB88/HB 43 (titled "Public Employee Compensation"), which is awaiting presentation to Governor Scott. The bill would limit compensation packages for public employees. Some of the key aspects of the Public Employee Compensation Act include the following:

- The bill amends Fla. Stat. § 215.425, which currently prohibits municipalities from paying "extra compensation" to existing employees for services already performed and compensated. Specifically, the bill adds specific prohibitions and restrictions on "bonuses" and "severance pay" to that section.
- The bill does not apply to bonuses or severance pay paid from nontax revenues and non state-appropriated funds to an officer, agent, employee, or contractor of a public hospital operated by a county or special district; or to a clothing and maintenance allowance given to plainclothes deputies.
- The bill deletes current provisions allowing counties, municipalities, or special districts to give bonuses as long as they have "policies in place." Instead,

⁶ Deloitte LLP, "The New Executive Compensation Guidelines: Treasury TARP Guidelines and Guidance for Regulatory Reform", (2009), http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_consulting_ExecutiveCompensationPoV_072009.pdf

the bill creates requirements for any policy, ordinance, rule, or resolution designed to implement a bonus scheme. Specifically, the bonus scheme must:

- Base the award of a bonus on work performance;
 - Describe the performance standards and evaluation process by which a bonus will be awarded;
 - Notify all employees of the policy, ordinance, rule, or resolution before the beginning of the evaluation period on which a bonus will be based; and,
 - **Consider all employees for the bonus.**
- The statute would impose a cap on severance pay: Starting July 1, 2011, a “unit of government” that enters into a “contract or employment agreement,” (or a renews or renegotiates an existing contract/employee agreement containing a severance pay provision) with an officer, agent, employee, or contractor must incorporate specific provisions in the contract, including:
 - A requirement that severance pay not exceed more than 20 weeks (5 months) of compensation;
 - A prohibition on severance pay when the employee has been terminated for misconduct by the unit of government.
 - The bill includes provisions regarding severance pay as part of an employment dispute settlement: Starting July 1, 2011, an officer, agent, employee, or contractor may receive severance pay not otherwise a part of his contract/employment agreement if the severance pay represents a settlement of an employment dispute. However, the severance pay in this situation may not exceed 6 weeks, and the settlement cannot include a confidentiality provision.
 - Defines “Severance Pay” as: Actual or constructive compensation (including salary, benefits, and perquisites) for services not yet rendered for an employee who has recently been terminated or is about to be terminated.
 - Importantly, “severance pay” excludes: 1) earned and accrued annual sick, compensatory, or administrative leave; 2) early retirement of pension plans; and 3) any subsidy for the cost of a group insurance plan available to an employee upon normal or disability retirement.
 - The bill provides that agreements or contracts executed on or after July 1, 2011, which provide extra compensation, cannot include a confidentiality provision prohibiting the parties from discussing the agreement/contract.
 - The bill deletes subsection (7) of Fla. Stat. § 166.021 allowing municipalities to provide extra compensation programs, including a lump sum

bonus payment program to reward outstanding employees whose performance exceeds standards, under specified conditions.

- The bill deletes paragraph (bb) of Fla. Stat. § 125.01(1), allowing counties to provide extra compensation programs. It also repeals s. 373.0795, F.S., which prohibits severance pay (under an inconsistent definition) for water management districts.

b) Applying SB 88, Questions Concerning the Bill:

In the wake of SB 88, there are still remaining issues and questions surrounding how the bill will function in practice. Some of these questions include the following:

- *Does the bill apply only to contracts for a governmental entity?*

The bill clearly states that it applies to a “unit of government” that enters into a “contract or employment agreement.” Based on Florida law, “[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning . . . the statute must be given its plain and obvious meaning.” Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (citations removed). Here, a “unit of government” is broad and would include any city, municipality, county, etc. but would not include any private entity. Moreover, unlike some other Florida statutes, such as the Public Records Statute (Fla. Stat. § 119.011), which applies to units of government and any “entity acting on behalf of any public agency,” the bill does not include such language. Thus, based on the clear language of the bill, it appears that SB 88 applies only to contracts for a governmental entity.

- *Would the bill apply to a charter provision or ordinance? Does state law trump an ordinance or charter?*

Although a municipal ordinance or charter may dictate certain aspects of a senior management executive’s compensation package, based on Florida case law, a Florida statute will “trump” a municipal charter or ordinance that conflicts the statute. See Phantom of Brevard, Inc. v. Brevard County, 3 So. 3d 309, 314 (Fla. 2008). In Phantom, the Florida Supreme Court clarified that local ordinances are inferior to state statutes, and must not conflict with any controlling provision of a statute. Id. The Court further states that, “[a] municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.” (citations omitted). Id. Moreover, Florida courts have clarified that any doubt existing as to the extent of a power attempted to be exercised by an ordinance, which may affect the operation of a state statute, should be resolved against the ordinance and in favor of the statute. Communications Workers of Am., AFL-CIO, CLC v. City of Gainesville, No. 1D10-1616, 2011 WL 1744371, *4-5 (Fla. 1st DCA May 9, 2011). As such, it appears that any charter or ordinance that 1) provides for more than twenty weeks of severance; 2) provides for severance pay despite a finding of misconduct; or 3) allows for bonuses in any way contrary to the scheme defined in the bill, would be null and void.

- *Would a city or county be able to adopt something other than a contract that might help with severance and/or bonus issues?*

Based on SB 88, a city will have to tread lightly when adopting an ordinance regarding severance and bonuses for senior executive management. It may be worth noting that the bill does not apply to bonuses or severance pay paid from nontax revenues. As such, a municipal ordinance may provide, for example, that the chamber of commerce can issue bonuses or compensation to a government employee which it desires to see employed by the city. However, in this hypothetical, there may potential conflicts of interest.

Also, because the bill requires that all employees be considered for proposed bonuses, an ordinance may lay out the process that a municipality will use to provide bonuses. The reality, however, is that SB 88 will likely cause cities and municipalities to not issue bonuses to senior management executives because it is impractical to implement a system where all public employees are considered for the bonus.

A city ordinance may, however, dictate the circumstances surrounding the termination of a senior management executive as long as it does not conflict with the bill. For instance, a city may pass an ordinance stating that senior management executives may only be terminated, other than for misconduct, by a supermajority of the city commission.

III. Senior Management Compensation In Practice

a) Routine Issues/Considerations Arising in Local Government Contracts:

- **Overarching Theme with All Contracts.** You have to negotiate with the end game in mind. You need to step back and consider: What can you live with? Not live with? You should be able to play out various scenarios in your mind and visualize how each will unfold.
- **Consistency with Charters and Ordinances.** When negotiating or drafting contracts, it is important to consider the restrictions and/or limitations that any applicable charter or ordinance may place on the contract. For example, if an ordinance requires three city commissioners to terminate a senior management employee, a local government would not want a provision in an employment contract stating that a supermajority would be required before the employee may be terminated.
- **Provisions Defining Cause for Termination.** Whether to include a provision requiring that an employee be terminated for cause, and/or defining what constitutes “cause” for termination, frequently arises in local government contracts. In reality, determining whether to include a provision defining cause is akin to making a choice that you will one day fight over whether there was cause to terminate the employee to begin with. Local governments should only attempt to define cause if they are willing to go through potentially costly litigation. Alternatively, a local government may evaluate how much money it would be willing to spend (i.e. how much severance pay does the local government want to provide the employee) to painlessly terminate the employee.

Regardless of what approach is taken, it is advisable to implement provisions defining circumstances that would result in no severance pay and immediate termination (for example, a felony conviction).

- **Consider Fringe Benefits.** Often times, a senior executive will be provided with a car or cell phone as a fringe benefit of their position. Other contracts may provide for moving or relocation stipends. Contracts with these employees should specify the extent to which such fringe benefits may be used for personal use. Additionally, it may be important to define the tax implications of such items.
- **Employee Benefits.** Local governments must be careful not to commit to certain benefits through the use of particularized language. For example, it may not be advisable for a local government to guarantee that a senior management executive receive BlueCross, BlueShield for health insurance. Rather, it is advisable to tether that employee's health benefits to the health benefits that all other public employees receive. This would avoid a frustrating scenario where the local government switches health insurance providers from BlueCross to Cigna for all of its employees, but must provide a senior executive employee with BlueCross, BlueShield because his or her contract requires that specific insurance carrier.
- **Due Process.** Local governments should think about what due process an executive employee would receive in the event that the employee faces termination. When drafting contracts, local government should verify whether its charter or ordinances provide employees with certain due process rights. Also, local governments should be aware that in certain scenarios, an employee may be entitled to a due process hearing (for example, a public employee may be entitled to a name clearing hearing).
- **Incapacity Provision.** Another issue that sometimes arises in these contracts concerns contract provisions relating to scenarios where the employee becomes incapacitated. A contract may, for example, provide that the employee's contract is contingent upon the employee's ability to render services.

b) Other Practical Considerations:

- **Severance to avoid litigation.** An agreement to provide a severance package may help avoid costs otherwise associated with litigating an employment case.
 - For example, a severance agreement that provides for \$50,000 to be paid to a senior management executive upon termination may avoid or prevent the executive from filing suit against the local government. Legal costs associated with defending such a suit may well exceed \$50,000.
- **Expectation of Fiscal Responsibility.** When dealing with the use of government funds, there is generally an expectation that the funds will be used in a fiscally responsible manner.

- **Consistency.** Providing like situated employees with consistent compensation packages will help avoid George Burgess nightmare scenarios.
- **Expectations from Government Employees.** With more money, comes more expectations. It may be helpful to explain such a reality to an employee or official when creating an employment contract.
- **Media and Money.** There is a certain expectation of responsibility that comes along with a high salary. Importantly, the media tends to focus not on what a high paid individual accomplishes, but rather how much they get paid.
- **Collective Bargaining Considerations.** From a bargaining standpoint, bargaining may become strained or difficult by high executive management salaries.
 - Example: While a high level management employee may well deserve a \$175,000 salary, it becomes difficult to explain the justification for such a high salary to lower paid hourly workers who request for a twenty-five cent hourly raise during collective bargaining.