

## Department of Planning and Budget 2020 Fiscal Impact Statement

**1. Bill Number:** SB 324

|                        |                          |              |                                     |            |                          |           |
|------------------------|--------------------------|--------------|-------------------------------------|------------|--------------------------|-----------|
| <b>House of Origin</b> | <input type="checkbox"/> | Introduced   | <input checked="" type="checkbox"/> | Substitute | <input type="checkbox"/> | Engrossed |
| <b>Second House</b>    | <input type="checkbox"/> | In Committee | <input type="checkbox"/>            | Substitute | <input type="checkbox"/> | Enrolled  |

**2. Patron:** Deeds

**3. Committee:** Finance and Appropriations

**4. Title:** School bus drivers; critical shortages.

**5. Summary:** Requires the Superintendent of Public Instruction, with the assistance of each school board or division superintendent, to survey each local school division to identify critical shortages of school bus drivers by geographic area and local school division and to report any such critical shortage to each local school division and to the Virginia Retirement System. The bill permits any school bus driver in any geographic area or school division in which a critical shortage of school bus drivers has been so identified to elect to continue to receive a service retirement allowance if the driver meets certain other conditions.

**6. Budget Amendment Necessary:** Yes. Item 494, HB/SB 29. VRS estimates implementation costs for the bill at \$205,000 nongeneral funds in FY 2020, with minimal ongoing costs in FY 2021 and beyond.

Programming will be required for employers to be able to enroll these retirees, to ensure that their retirement benefits are not suspended, and that service is not added to their records. Although this is the same as the current procedure for retirees in the teacher critical shortage program, there may nevertheless be impacts on VRS' continued modernization program, which, among other initiatives, has migrated from a mainframe-based system to a client server environment, but the cost and length of any delay cannot be calculated at this time.

**7. Fiscal Impact Estimates:** Preliminary. See fiscal implications in section 8 below for a detailed breakdown of estimated costs.

**8. Fiscal Implications:** Outside benefits counsel has confirmed that Internal Revenue Service (IRS) guidance allows specifically for a bona fide break in service with no prearrangement for re-employment, and the IRS makes the determination of whether or not there is a break in service using a facts and circumstances test. The IRS has not established a safe harbor severance period. IRS regulations under Internal Revenue Code (IRC) § 410, as cited in Private Letter Ruling 201147038, suggest that a one-year period without performing service might be considered a safe harbor.

Failure to meet the facts and circumstances test for a bona fide break in service could jeopardize VRS' plan qualification status, thereby affecting all members and retirees. Typically, individual

retirees who return to work at more than 80% of a full-time position or are found not to have legitimately retired by completing the bona fide break in service must un-retire, with their retirement benefit ceasing, and the retirees must repay any benefit payments received since the time they returned to work. This may also affect eligibility for the State Retiree Health Plan administered by DHRM for state retirees or other retiree health insurance for local retirees.

VRS uses a one-year break in service for the teacher critical shortage program, and school bus drivers would be added to this program and be subject to the same one-year break in service under this bill. The one-year break in service serves to mitigate the impact of changes to retirement patterns and the potential for impermissible prearrangements. In 2001, the Joint Legislative Audit and Review Commission (JLARC) adopted a resolution concurring with VRS regarding the minimum twelve-month separation before a retiree could be rehired into a critical shortage position without loss of retirement benefits, consistent with the recommendation of the JLARC actuarial consultant. In addition, to be eligible for the teacher critical shortage program the teaching position must be identified by the Superintendent of Public Instruction pursuant to subdivision 4 of § 22.1-23, by the relevant division superintendent, pursuant to § 22.1-70.3, or by the relevant local school board, pursuant to subdivision 9 of § 22.1-79.

To illustrate, since members would be able to receive a retirement benefit and continue to receive compensation for working in a VRS-covered position, provisions of the bill could change retirement patterns. As an example, if members retire earlier than anticipated, the plan pays benefits earlier than expected and for a longer period of time. In addition, the plan has less time in which to earn investment income on member and employer contributions, which is necessary to fund benefits.

VRS employer contribution rates are established as a percentage of an employer's VRS-covered payroll. When a position is removed from VRS coverage by a return-to-work exception or otherwise, there is a decrease in the funding of retirement benefits. In particular, legacy unfunded liabilities will not be paid off as expected.

Benefits for bus drivers are currently covered under the individual political subdivision plans. However, not all localities choose to cover bus drivers in their VRS plans. Of the 133 school divisions in Virginia, VRS is aware of at least 25 of these localities that do not cover bus drivers in their VRS local plan.

Determining the cost impact for this bill is difficult for several reasons:

- Bus drivers are currently covered under the individual political subdivision plans, so impacts will vary by school district depending on the number of positions vacant, and the number that would be filled by current retirees.
- Not all localities cover bus drivers under VRS, so the provisions of a return to work bill would not impact those employers. As stated above, we have identified 25 school divisions that currently do not cover bus drivers under VRS.
- The extent of vacancies to be filled has not been formally identified.

Because impacts will be dependent on the number of school bus driver positions that will be filled by retirees, as well as the status of the individual political subdivision plans that use the provision, it is difficult to develop a cost impact that would be applicable and meaningful to all employers impacted by this bill.

Using information collected by the Department of Education, 133 school divisions reported approximately 15,000 full-time equivalent bus driver positions across the Commonwealth. Using surveys conducted by the Department of Education in 2019 and by VRS in 2020, a combined 94 localities responded to the surveys and reported approximately 719 bus driver vacancies. The figure below highlights that bus driver vacancies exist across the state, but appear to be most prevalent in larger school districts in Tidewater, Central Virginia, the Valley, and specific larger schools in Northern Virginia.

| Region | Full-Time<br>Equivalents<br>Bus Drivers<br>Positions | Reported<br>Bus Driver<br>Vacancies | Percentage<br>Vacant |
|--------|--|-------------------------------------|----------------------|
| 1      | 1,830  | 129                                 | 7.0%                 |
| 2      | 2,920  | 259                                 | 8.9%                 |
| 3      | 1,150  | 9                                   | 0.7%                 |
| 4      | 4,950  | 148                                 | 3.0%                 |
| 5      | 1,480  | 99                                  | 6.7%                 |
| 6      | 1,030  | 32                                  | 3.1%                 |
| 7      | 940  | 18                                  | 1.9%                 |
| 8      | 740  | 25                                  | 3.4%                 |
| Total  | 15,040   | 719                                 | 4.8%                 |



While the bill may encourage recently retired bus drivers to return to work and continue to receive their retirement benefit while drawing a salary, the proposed bill, as written, could also influence current bus drivers to retire and return to work so that they could receive retirement income and salary simultaneously. This bill does not restrict members from other VRS plans from retiring early and returning to work as a bus driver in order to receive retirement income in addition to salary.

The implications of incentivized early retirement would impact individual political subdivision plans under the provisions of the proposed legislation, and the amount of impact would vary based on utilization of the provision within each political subdivision plan. The additional costs of earlier than expected retirements would be borne by the local employers of the retiring members through additional pension and, if applicable, health insurance credit payments paid over longer periods of time.

The Department of Education anticipates that it can absorb any additional costs required by the provisions of this bill.

- 9. Specific Agency or Political Subdivisions Affected:** Virginia Retirement System, Department of Education, local school divisions.

- 10. Technical Amendment Necessary:** No.

- 11. Other Comments:** This legislation adds bus drivers to the existing Teacher critical shortage program in § 51.1-155(B)(3), which sunsets on July 1, 2025, unless it is reenacted. The Teacher critical shortage program requires a one-year break in service between a member's retirement and her or his return to work in a VRS-covered position under this program—currently limited to teachers and administrative personnel, and expanded to include bus drivers under this legislation. There is no requirement for employer contributions for these retirees who return to active service. Service performed and compensation received during the period of reemployment will not increase, decrease, or affect in any way the individual's retirement benefits. Additional information on the Teacher critical shortage program is provided below.

### Background

Currently, a VRS retiree cannot collect a VRS retirement benefit while simultaneously working full-time in a VRS-covered position absent specific statutory authority that is in compliance with applicable Internal Revenue Code provisions. There are limited exceptions to this rule under the *Code of Virginia*, such as retirees working in statutorily-defined critical shortage teaching positions. Most often, however, an individual working in a full-time position for a VRS-participating employer cannot simultaneously collect a VRS retirement benefit. In the case of a VRS retiree returning to work full-time in a VRS-covered position, the retiree must “unretire” and resume active VRS participation. When the individual chooses to subsequently retire again, VRS will recalculate the new retirement benefit to include the additional service credit earned.

### One-Year Break in Service

The legislation requires that a certain period of time pass before a retiree can return to work as a bus driver, which is necessary to create a bona fide break in service as required by the IRS. Consistent with the existing teacher critical shortage provisions, VRS would require a one-year break. As stated in the section relating to the critical shortage teaching positions, there are two primary reasons why specifying a one-year break in service before a retiree would be eligible to return to work in a position contemplated by the bill is appropriate. First, a one-year break in service mitigates any possibility of an unlawful prearrangement under the Internal Revenue Code to return to work. Likewise, the one-year break in service reduces the likelihood that the bill will create any major shift in retirement patterns. Further, in 2001, the Joint Legislative Audit and Review Commission (JLARC) adopted a resolution concurring with VRS regarding the minimum one-year separation before a retiree could be rehired into a teacher critical shortage position without loss of retirement benefits, consistent with the recommendation of the JLARC actuarial consultant. In addition, to be eligible for this program the teaching position must be identified by the Superintendent of Public Instruction pursuant to subdivision 4 of § 22.1-23, by the relevant division superintendent, pursuant to § 22.1-70.3, or by the relevant local school board, pursuant to subdivision 9 of § 22.1-79.

### Current Return-to-Work Options

Retirees may currently return to work part-time without losing VRS retirement benefits following a bona fide break in service with no prearrangement. In most cases, a VRS retiree may return to work on a part-time basis with a VRS-participating employer and continue receiving retirement benefits. When working in a “non-covered” (i.e., part-time, temporary, or provisional) position, a VRS retiree is not in violation of § 51.1-155(B) and may continue to work while also collecting his or her retirement benefit. To be considered working in a non-covered position on the basis of part-time employment, a retiree must work 80% or less of the hours required of the comparable full-time position.

In the case of someone working under a 9-, 10-, or 11-month contract, this 80% threshold would be based on the 9-, 10-, or 11-month full-time equivalent position. Alternatively, for a twelve-month employee, the 80% threshold may be based on a normal full-time work schedule (i.e., 2,080 hours per year). Under this latter scenario, a VRS retiree would be able to work more hours per year in a part-time position compared to a retiree with a 9-, 10-, or 11-month contract.

The following table demonstrates the number of hours that a VRS retiree may currently work on a part-time basis depending on the nature of the full-time equivalent position:

| Contract duration for full-time equivalent position: | Part-time work limit (hours per year) based on the 80% threshold: | Approximate part-time work limit (hours per week)* |
|--|---|--|
| 12 months  | 1,664   | 32   |
| 11 months  | 1,525   | 29   |
| 10 months  | 1,387   | 27   |
| 9 months   | 1,248   | 24   |

\*Part-time work in excess of 29 hours may implicate requirements of the Affordable Care Act (ACA).

Current bus driver return-to-work options may vary by school division depending on how many hours each week a full-time bus driver works. The table above assumes a standard work week of 40 hours.

### Health Insurance Impact

Health care issues related to retirees returning to work should also be considered. Each political subdivision's health insurance provisions likely differ, but typically if a retiree is eligible for active employee coverage, he or she would move to the active plan, if eligible. In most cases, when a retiree comes back to active employment that provides eligibility for health insurance coverage, the retiree prefers to have the employer contribution. In general, Medicare would consider that the active coverage should be primary when coverage due to current active employment is available. While the state's policy allows for a retiree to return to the retiree health insurance program immediately upon loss of active coverage, because each political subdivision may offer different health care insurance coverage, it is difficult to generalize about the health care impact of a retiree returning to work for a non-state employer.

The employer shared responsibility provisions of the Affordable Care Act (ACA) require that applicable large employers (generally, 50+ employees) offer affordable, minimum essential coverage to full-time (30 or more hours/week) employees and their dependents. The employee does not have to take the coverage, but in order to comply with ACA requirements, the employer would need to confirm through ACA reporting that the offer was made. A retiree health plan may or may not include provisions allowing for the retiree to leave the retiree health care program in order to receive coverage in another plan and then return to the former retiree health plan at a later date.

### Teacher Critical Shortage Program

The program is a limited exception in § 51.1-155(B)(3) that allows a VRS retiree to return to work full-time in a VRS-covered, critical shortage teaching position without impact to his or her retirement allowance. These provisions were intended to address the difficulty that some schools face in recruiting qualified teachers. In order to take advantage of this provision, however, each of the following requirements must be met (including school bus drivers under the proposed legislation):

- The VRS retiree must have been receiving a retirement allowance for a certain period of time preceding his employment as provided by law;
  - Note: Since the original implementation of the teacher critical shortage legislation in 2001, VRS, with the concurrence of the Superintendent of Public Instruction, JLARC, and its consulting actuary, has required one year for the “certain period of time.”
- The VRS retiree cannot be receiving a retirement benefit pursuant to an early retirement incentive program from any local school division within the Commonwealth; and
- At the time the VRS retiree is employed, the teaching (or school bus driver) position to which he or she is assigned must be among those identified by the Superintendent of Public Instruction pursuant to subdivision 4 of § 22.1-23, by the relevant division superintendent, pursuant to § 22.1-70.3, or by the relevant local school board, pursuant to subdivision 9 of § 22.1-79.

A key reason that the teacher critical shortage program has not resulted in major shifts in retirement patterns is because of the requirement that an individual must have been receiving a retirement allowance for at least one full year before becoming eligible to return in the critical shortage capacity and without impact to the retirement allowance. In addition, the one-year requirement reduces the risk for abuse of the rules that might otherwise result in an unlawful prearrangement, which is contrary to provisions of the IRC, between an employer and retiring employee to establish post-retirement employment. Ensuring that an unlawful prearrangement to return to work does not take place is critical in pension plans, because not doing so can adversely impact both the member and VRS’ qualified plan status under the IRC. In addition, the eligibility criteria for the teacher critical shortage program is narrowly tailored.

Based on information reported by school divisions to VRS, below are statistics on the number of full-time critical shortage teaching positions filled with a VRS retiree over the last decade.

| DOE Region | 2008-09 | 2009-10 | 2010-11 | 2011-12 | 2012-13 | 2013-14 | 2014-15 | 2015-16 | 2016-17 | 2017-18 | 2018-19* | Total CS Positions | % of total CS positions |
|------------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|----------|--------------------|-------------------------|
| Region 1   | 9       | 12      | 9       | 6       | 5       | 8       | 3       | 1       |         | 4       | 3        | 60                 | 12.96%                  |
| Region 2   | 13      | 7       | 8       | 11      | 8       | 6       | 5       | 6       | 15      | 14      | 9        | 102                | 22.03%                  |
| Region 3   | 7       | 5       | 3       | 3       | 2       | 2       | 2       | 2       | 1       | 7       | 1        | 35                 | 7.56%                   |
| Region 4   | 29      | 17      | 14      | 13      | 17      | 16      | 3       | 5       | 18      | 18      | 11       | 161                | 34.77%                  |
| Region 5   | 2       | 2       | 2       | 2       | 2       | 2       | 1       | 1       | 1       | 3       | 3        | 21                 | 4.54%                   |
| Region 6   | 5       | 4       | 2       | 2       | 2       | 3       | 5       | 1       | 3       | 6       | 4        | 37                 | 7.99%                   |
| Region 7   | 7       | 5       | 3       | 3       | 3       |         |         |         |         | 2       |          | 23                 | 4.97%                   |
| Region 8   | 2       | 1       | 3       | 4       | 2       | 1       | 1       | 1       | 1       | 4       | 4        | 24                 | 5.18%                   |
|            | 74      | 53      | 44      | 44      | 41      | 38      | 20      | 17      | 39      | 58      | 35       | 463                | 100.00%                 |

\* 2018-2019 data may be incomplete. Critical shortage information is not due to VRS until November 1st. This is the current number for the 2018-19 school year.

**Region 1** - Charles City, Chesterfield, Dinwiddie, Goochland, Hanover, Henrico, New Kent, Powhatan, Prince George, Surry, Sussex, Colonial Heights, Hopewell, Petersburg, Richmond

**Region 2** - Accomack, Isle of Wight, James City (Williamsburg), Northampton, Southampton, York, Chesapeake, Franklin, Hampton, Newport News, Norfolk, Poquoson, Portsmouth, Suffolk, Virginia Beach, Williamsburg (James City County)

**Region 3** - Caroline, Essex, Gloucester, King George, King William, King and Queen, Lancaster, Mathews, Middlesex, Northumberland, Richmond, Spotsylvania, Stafford, Westmoreland, Colonial Beach, Fredericksburg, West Point

**Region 4** - Arlington, Clarke, Culpeper, Fairfax, Fauquier, Frederick, Loudoun, Madison, Orange, Page, Prince William, Rappahannock, Shenandoah, Warren, Alexandria, Falls Church, Manassas, Manassas Park, Winchester

**Region 5** - Albemarle, Amherst, Augusta, Bath, Bedford, Campbell, Fluvanna, Greene, Highland, Louisa, Nelson, Rockbridge, Rockingham, Buena Vista, Charlottesville, Harrisonburg, Lexington, Lynchburg, Staunton, Waynesboro

**Region 6** - Alleghany, Botetourt, Craig, Floyd, Franklin, Henry, Montgomery, Patrick, Pittsylvania, Roanoke, Covington, Danville, Martinsville, Roanoke, Salem

**Region 7** - Bland, Buchanan, Carroll, Dickenson, Giles, Grayson, Lee, Pulaski, Russell, Scott, Smyth, Tazewell, Washington, Wise, Wythe, Bristol, Galax, Norton, Radford

**Region 8** - Amelia, Appomattox, Brunswick, Buckingham, Charlotte, Cumberland, Greenville, Halifax, Lunenburg, Mecklenburg, Nottoway, Prince Edward

As stated above, the costs for individual political subdivision plans relative to adding school bus drivers to the provisions of the teacher critical shortage program are difficult to model due to each plan being separately rated. The provisions of the bill would create an increased incentive to take an in-service distribution and return to work, which will have cost implications on both the plans the members retire from and the plans that hire retirees to fill these positions.

SB 324S1 is identical to HB 351.