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TO: PERS Certifying Officers

FROM: New Jersey Division of Pensions & Benefits (NJDPB)

SUBJECT: Determining Enrollment in the Defined Contribution Retirement Program (DCRP) or Eligibility of Professional Services Providers

This Certifying Officer Letter is issued to address and clarify discrepancies between enrollment in the Public Employees' Retirement System (PERS) and the Defined Contribution Retirement System (DCRP). With more than a decade since the establishment of the DCRP under P.L. 2007, c. 92, (Chapter 92) a reminder or reintroduction to DCRP enrollment is merited. Specifically, this letter addresses the proper enrollment of Elected or Appointed Officials and the status of individuals hired under Professional Services Contracts or as Independent Contractors.

DCRP ELIGIBILITY FOR ELECTED OR APPOINTED OFFICIALS

Chapter 92 established DCRP eligibility for elected or appointed officials – as defined below – and who are hired with a minimum base salary of \$5,000 or more.

Elected Officials

An elected official is any individual who holds a State or local (county, municipal, etc.) elected public office. All newly elected officials can only be enrolled in the DCRP and cannot enroll in the PERS.

- The only exception is for an elected official who was already enrolled in the PERS prior to July 1, 2007, based on an elected office and who has remained continuously serving in that same elected office. If there is a break of service in that elected office, or the official is elected to a different elected office, the official must be enrolled in the DCRP and cannot continue with PERS membership under the new elected office.

(Note: service in either house of the State Legislature is considered a single elected public office.)

If the elected official is also a retired member of a State-administered retirement system (PERS, TPAF, PFRS, etc.), the elected official may either:

- a) Continue to receive the retirement benefit from the other retirement system but cannot be enrolled in the DCRP; or
- b) Suspend the retirement benefit from the other retirement system and enroll in the DCRP while serving in the elected office (upon termination of the elected office, the retirement benefit from the other retirement system would be reinstated).

Appointed Officials

State appointees are individuals appointed by the Governor, including those requiring the advice and consent of the Senate, or pursuant to an appointment by the Governor to serve at the pleasure of the Governor only during his or her term of office.

Local appointees are individuals appointed by the Governor, including those requiring the advice and consent of the Senate; or individuals appointed in a substantially similar manner by the governing body of a local entity (county, municipality, etc.).

All newly appointed officials with a minimum base salary of \$5,000 or more can only be enrolled in the DCRP and cannot enroll in the PERS. Limited exceptions follow:

- A regular employee who was enrolled in the PERS prior to July 1, 2007, and who is appointed — without a break in membership — to a DCRP eligible position can remain a PERS member while in the appointed position.
- An appointed official who was enrolled in the PERS and already serving in the appointed position prior to July 1, 2007, can also remain a PERS member while serving in the same appointed position.
- A State appointed official who was enrolled in the TPAF prior to July 1, 2007, and is appointed — without a break in membership — to certain State educational positions can remain a TPAF member while in the appointed position.
- Similarly, an appointed official serving in a position that is otherwise eligible for membership in the TPAF, PFRS, SPRS, or JRS will not be enrolled in the DCRP. In these instances, application should be made to enroll in that other retirement system regardless of former retirement system affiliations.
- Chapter 92 also excludes certain appointees from DCRP enrollment if the individual holds a professional license or certificate and is appointed as a certified health officer; tax assessor; tax collector; municipal planner; chief financial officer; registered municipal clerk; construction code official; licensed uniform subcode inspector; qualified purchasing agent; or certified public works manager.
- Conversely, the statutory-based, untenured chief administrative officer of an organization, such as a business administrator; county administrator; municipal or county manager; or municipal or county administrator appointed under the authority of a local ordinance; or similar, are DCRP positions and excluded from the PERS when the individuals are employed as *bona fide* legitimate employees (not pursuant to a professional services contract – see page 3).

DCRP Enrollment

Upon taking office, all newly elected or appointed officials earning an annual base salary of \$5,000 or more are to be enrolled in the DCRP. Enrollment is submitted online by the employer using the *DCRP Enrollment Application* on the Employer Pensions and Benefits Information Connection (EPIC). The online enrollment applications in EPIC are designed to guide employers to the correct fund and enrollment tier; however, accurate and candid answers to the enrollment questions are required. Ultimately, the employer — using the guidance and policies issued by the NJDPB and the New Jersey Department of Community Affairs Local Finance Board (see below) — is responsible for correctly enrolling an eligible elected or appointed official as of the starting date in the elected or appointed office.

Once enrolled, an employee contribution of 5.5% will be deducted from compensation and invested in the DCRP. The employer contributes an additional 3% to the DCRP based on the annual compensation (base salary).

Service time from enrollment in the DCRP *cannot* be used to qualify for State Health Benefits Program coverage at retirement.

Additional Information

More information about DCRP retirement, group life insurance, long term disability benefits, and other topics are found in the NJDPB's fact sheet, *Defined Contribution Retirement Program — Elected or Appointed Officials*.

The New Jersey Department of Community Affairs Local Finance Board has a significant role in guiding local employers and have issued specific guidance on DCRP enrollment policies. For employers operating under the supervision of the Division of Local Government Services, supplemental information is provided in *Local Finance Notices 2007-28* and *2008-10*.

DCRP guidance for employers is also available on the NJDPB website at:
www.nj.gov/treasury/pensions/dcrp-admin.shtml

PROFESSIONAL SERVICES CONTRACTS

Chapter 92 provides that a person is *prohibited* from becoming a member of the PERS or DCRP if employed under a professional services contract or if the person meets the definition of an independent contractor as set forth in regulation or policy of the federal Internal Revenue Service for the purposes of the Internal Revenue Code.

A professional service is one that meets the definition in the Local Public Contracts Law at N.J.S.A. 40A:11-2 and is entered into without public bidding (i.e., exempt from public bidding).

The term “professional” or “professional services” further refers to the definition of professional services as follows:

"Professional services" means services rendered or performed by a person authorized by law to practice a recognized profession, whose practice is regulated by law, and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training.

Professional services may also mean services rendered in the provision or performance of goods or services that are original and creative in character in a recognized field of artistic endeavor.”

Typically these positions include attorneys, engineers, architects, planners, public health professionals; but exclude for example, construction and fire code officials. (These professions are used for example and are not an exhaustive list of positions.)

Chapter 92 provides that if a person is employed under a professional services contract, membership in the PERS, TPAF or the DCRP is *prohibited* with regards to that service.

- It is important to note that State contracting laws do not permit professional service contracts to be for more than one year and they cannot be extended. Therefore, for local governing bodies operating on a calendar year basis, no individual holding a professional services contract with these locations should have contributed to the retirement system after December 31, 2007 (one year after the effective date of Chapter 92). Similarly, entities operating on a fiscal basis may have contracts which extend to the end of the fiscal year; the latest allowable date for reporting of retirement system service would be June 30, 2008.

As can be seen, pension eligibility — or ineligibility — under Chapter 92 may be highly fact sensitive. For example, a full-time in-house counsel may be providing professional services to a public entity pursuant to a professional services contract and therefore ineligible for PERS membership. However, a full-time in-house counsel may be eligible to continue in the PERS *if* the counsel was a member of the PERS prior to July 1, 2007; the employment is not tied to a

professional services contract; and the individual does not meet the independent contractor test as set forth later in this letter.

Employers with specific questions regarding professional services contracts or independent contractors should address them in writing — by letter or e-mail — to the Division of Pensions & Benefits. If sending an e-mail, list “professional services” as the subject line. If an employer has reported service or salary to the retirement system in error with regards to an individual covered by a professional services contract, the employer must contact the Division of Pensions & Benefits - Audit Section to initiate the correction.

INDEPENDENT CONTRACTORS

In addition to prohibiting retirement system membership for certain professionals that perform services under a professional service contract, Chapter 92 also requires elimination of independent contractors from membership in either the PERS, TPAF, or the DCRP. This should be considered when local employers make decisions on hiring and contracting.

The law brings Internal Revenue Service (IRS) rules into play when determining if an individual is an employee or independent contractor. The Certifying Officer of each local employer must review their current and future professional employees and use the IRS criteria (below) to determine if the individual meets the requirements of an employee and thus membership in the PERS, TPAF, or DCRP (this review should also be made by both the Certifying Officer and Supervisor of the Certifying Officer as part of the Chapter 52 Annual Certification of Enrollments). If an individual fails the employee test, the individual is considered to be a contractor. This requires termination of pension reporting for the individual from that employer location, termination of related benefits, and affects federal employment taxing requirements.

While Chapter 92 specifies the elimination of independent contractors who perform professional services from retirement system membership, please note that independent contractors have historically been ineligible for retirement system membership, as an employee/employer relationship has always been one of the conditions of retirement system membership.

IRS 20-Factor Test for Independent Contractors

The Division uses the IRS 20-Factor Test to determine whether an individual is an independent contractor. All of the factors listed below must be evaluated to render a determination.

1. **Instructions:** If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status.
2. **Training:** Worker training (e.g., by requiring attendance at training sessions) indicates that the person for whom services are performed wants the services performed in a particular manner (which indicates employee status).
3. **Integration:** Integration of the worker's services into the business operations of the person for whom services are performed is an indication of employee status.
4. **Services rendered personally:** If the services are required to be performed personally, this is an indication that the person for whom services are performed is interested in the methods used to accomplish the work (which indicates employee status).
5. **Hiring, supervision, and paying assistants:** If the person for whom services are performed hires, supervises or pays assistants, this generally indicates employee status. However, if the worker hires and supervises others under a contract pursuant to which the worker agrees to provide material and labor and is only responsible for the result, this indicates independent contractor status.

6. **Continuing relationship:** A continuing relationship between the worker and the person for whom the services are performed indicates employee status.
7. **Set hours of work:** The establishment of set hours for the worker indicates employee status.
8. **Full time required:** If the worker must devote substantially full time to the business of the person for whom services are performed, this indicates employee status. An independent contractor is free to work when and for whom he or she chooses.
9. **Doing work on employer's premises:** If the work is performed on the premises of the person for whom the services are performed, this indicates employee status, especially if the work could be done elsewhere.
10. **Order or sequence test:** If a worker must perform services in the order or sequence set by the person for whom services are performed, that shows the worker is not free to follow his or her own pattern of work, and indicates employee status.
11. **Oral or written reports:** A requirement that the worker submit regular reports indicates employee status.
12. **Payment by the hour, week, or month:** Payment by the hour, week, or month generally points to employment status; payment by the job or a commission indicates independent contractor status.
13. **Payment of business and/or traveling expenses:** If the person for whom the services are performed pays expenses, this indicates employee status. An employer, to control expenses, generally retains the right to direct the worker.
14. **Furnishing tools and materials:** The provision of significant tools and materials to the worker indicates employee status.
15. **Significant investment:** Investment in facilities used by the worker indicates independent contractor status.
16. **Realization of profit or loss:** A worker who can realize a profit or suffer a loss as a result of the services (in addition to profit or loss ordinarily realized by employees) is generally an independent contractor.
17. **Working for more than one firm at a time:** If a worker performs more than de minimis services for multiple firms at the same time, this generally indicates independent contractor status.
18. **Making service available to the general public:** If a worker makes his or her services available to the public on a regular and consistent basis, this indicates independent contractor status.
19. **Right to discharge:** The right to discharge a worker is a factor indicating that the worker is an employee.
20. **Right to terminate:** If a worker has the right to terminate the relationship with the person for whom services are performed at any time he or she wishes without incurring liability, this indicates employee status.

No one of these factors is controlling and the response to all factors must be weighed together. However, one of the most important factors for consideration is whether the employer has the right to instruct and control the employee with respect to the details of the work that is performed by the employee.

The IRS has also identified three categories of evidence that are relevant in determining whether the requisite control exists under the common-law definition of "employment." and has grouped

illustrative factors under these three categories: (1) behavioral control; (2) financial control; and (3) relationship of the parties. The IRS emphasizes that factors in addition to the 20 factors may be relevant, that the weight of the factors may vary based on the circumstances, that relevant factors may change over time, and that all facts must be examined.

By applying the IRS 20-Factor Test, the local employer Certifying Officer must document that all professionals are not independent contractors. If an individual fails the test (and is considered an independent contractor), appropriate actions must be taken (i.e., canceling pension system membership).

Additional Information

Since the NJDPB uses the established IRS 20-Factor Test (also known as *Revenue Ruling 87-41*) as the basis for determining employee or independent contractor status, local employers have a standard assessment tool and the opportunity for formal guidance. There are several IRS documents that discuss how to evaluate the individual circumstance: These are:

- IRS *Publication 1779*, a two-page brochure that summarizes the IRS Employee Test. It is available from the IRS at: www.irs.gov/pub/irs-pdf/p1779.pdf
- IRS *Publication 15a*, about employees and the employer-employee relationship which includes examples of employees and contractors. It also discusses employee tax liability issues. It is available from the IRS at: www.irs.gov/pub/irs-pdf/p15a.pdf
- IRS *Publication 963*, the “Federal-State Reference Guide”, a comprehensive reference source for Social Security and Medicare coverage and Federal Insurance Contributions Act (FICA) tax withholding issues. Chapter 4 of this document provides details on determining worker status. It is available from the IRS at: www.irs.gov/pub/irs-pdf/p963.pdf

Additional information along with the 20 factors for defining “Self Employment Issues” of an independent contractor are listed in the NJDPB’s fact sheet, *Independent Contractors, Professional Services Contracts, and Pension Enrollment*.

Employers with specific questions regarding the classification professional services providers, independent contractors, or reports of suspected pension fraud or abuse should address them in writing to the Pension Fraud and Abuse Unit, N. J. Division of Pensions & Benefits, P.O. Box 295, Trenton, NJ 08625-0295 or by email to: Pension.FraudandAbuseUnit@treas.nj.gov

General questions outside of the scope listed above can be addressed to the NJDPB or emailed to: pensions.nj@treas.nj.gov