



Independent Contractors, Professional Services Contracts, and Pension Enrollment

Information for:
Public Employees' Retirement System (PERS)
Defined Contribution Retirement Program (DCRP)

Individuals are prohibited from membership in the Public Employees' Retirement System (PERS) or the Defined Contribution Retirement Program (DCRP) if employed under a Professional Services Contract, or if the individual meets the definition of an independent contractor as set forth in regulation or policy of the federal Internal Revenue Service (IRS) for the purposes of the Internal Revenue Code.

Independent contractors are not considered to be employees and have never been eligible for membership in the PERS or DCRP as a result of the contracted services.

Professional services are defined in N.J.S.A. 40A:11-2(6) to be services performed by a person authorized by law to practice a recognized profession, whose practice is regulated by law, the performance of which requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction, or the performance of services that are original and create in character in a recognized field of artistic endeavor. Accordingly, attorneys, physicians, engineers, architects, accountants, auditors, and other individuals providing professional services who perform services as a result of a Professional Services Contract with a public employer, are ineligible for participation in the PERS or DCRP as a result of those services.

N.J.S.A. 43:15A-7.2 and 43:15C-2b(4) expressly provide that, effective January 1, 2008,* persons performing professional services 1) under a contract awarded pursuant to N.J.S.A. 40A:11-5, 18A:18A-5, or 18A:64A-25.5 (no bid contracts) and/or 2) under an independent contract as determined in accordance with the rules and policy of the IRS, are ineligible for membership in the PERS based on that service, and correspondingly are ineligible for participation in the DCRP.

In cases where evidence exists to indicate an individual may be improperly classified as an employee, the PERS or DCRP membership is subject to a review of the facts to determine if the individual was, or is, an employee or a professional services provider or independent contractor. Individuals who are found to have been improperly enrolled will be issued a return of pension contributions, and any pension service based upon an ineligible position as an independent contractor or professional services provider will be canceled by the New Jersey Division of Pensions & Benefits (NJDPB).

EMPLOYEE VS. SELF EMPLOYMENT

Whether an individual is an independent contractor or an employee is the threshold question in determining whether the individual is eligible for membership in the PERS or DCRP. While it is the employ-

er's responsibility to correctly classify an individual's employer-employee relationship, the NJDPB's experience indicates that individuals are frequently identified incorrectly as employees of the agency when they are, in fact, independent contractors (or vice versa).

The NJDPB applies the tests and standards adopted by the IRS to determine the employer-employee relationship. This is known as the IRS 20-Factor Test which focuses on whether the employer has the right to direct and control the individual as to the manner and means of job performance.

When applying the 20-Factor Test, certain factors may weigh more heavily depending on the nature of the duties and position. Employers must ascertain whether an individual is an employee or independent contractor to determine whether the individual is eligible to participate in the PERS or DCRP.

Note: The employer's responsibility to pay employment taxes alone is not the deciding factor in the determination of whether the individual is an employee or independent contractor for purposes of eligibility for enrollment in the retirement system. The IRS requires payment of tax for all positions covered by a Section 218 agreement, and most public employers participate in the Section 218 agreement between the State of New Jersey and the Social Security

*Contracts prior to 2008 — A person deemed a bona fide employee retained under a Professional Services Contract established prior to January 1, 2008, who was enrolled in the PERS at that time, was permitted to continue to accrue PERS service credit during the term of the existing annual contract; however, the person was not eligible for PERS service credit for the performance of those services after the contract expired. This limitation on PERS service credit included any extension, modification, or other agreement to continue a Professional Services Contract beyond its original term. In addition, if the person does not meet the definition of a bona fide employee, enrollment will be disallowed regardless of the nature of such an arrangement.

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Administration. See IRS *Publication 963, the Federal-State Reference Guide*. The NJDPB uses the 20-Factor Test to assist in determining the employer-employee relationship and ultimately eligibility for members in a retirement system. The NJDPB does not use this test to assist the employer with issues related to federal tax liability, and the employer should not rely upon any determination by the NJDPB with regard to the same.

IRS 20-Factor Test

The IRS test to assess the employer-employee relationship includes the following factors:

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.

All facts and circumstances are considered. No one of these factors is controlling and the response to all factors is examined together.

The IRS has also identified three categories of evidence that are relevant in determining whether the requisite control exists under the common-law defi-

inition 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.

There are several IRS documents that discuss how to evaluate individual circumstances that are available at: www.irs.gov

OTHER FACTORS IN DETERMINING ENROLLMENT ELIGIBILITY

The rules and regulations governing enrollment in the retirement systems have changed significantly over time; it is important that employers know the proper enrollment procedures, and keep abreast of any pending changes.

PERS eligibility and enrollment information — including PERS Membership Tiers — is detailed in the *PERS Member Guidebook* on the NJDPB website at: www.nj.gov/treasury/pensions

Detailed employer training in enrollment is also provided by the NJDPB under the provisions of P.L. 2011, c. 52 (Chapter 52).

Chapter 52 Requirements and Training

N.J.S.A. 43:3C-15 (enacted as Chapter 52) requires that all enrollments and/or transfers into a New Jersey State-administered retirement system must be certified by the employing location’s Certifying Officer and the immediate supervisor of the Certifying Officer.

The law also requires the Certifying Officer and the immediate supervisor of the Certifying Officer to annually certify that each member enrolled is eligible

for enrollment in accordance with the statutes and regulations of the retirement system.

Under Chapter 52, the certification process also requires acknowledgment that any person who knowingly makes a false statement, or falsifies or permits to be falsified any record, application, form, or report of a pension fund or retirement system, in an attempt to defraud the fund or system, will be guilty of a crime of the fourth degree.

Online training in retirement system enrollment is provided by the NJDPB through the eLearning program designed by the State of New Jersey’s Human Resources Development Institute (HRDI). Additional information about Chapter 52 and enrollment training is available on the NJDPB website.

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