



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 employer'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. Historically, this has been known as the IRS 20-Factor Test which has been reorganized into the three areas of inquiry which focus 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.

*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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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 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:

Behavioral Control — This test determines whether the employer has a right to direct and control how the work is performed. At times, when work is satisfactorily performed, it may appear that the employer does not exercise much control. However, the question is whether the employer has the right to control the manner in which the services are performed. Relevant factors include instructions, training and required procedures, government identification, nature of the occupation, and evaluation systems.

- (1) **Instructions** — if the individual receives extensive instructions on how work is to be done, it suggests an employer-employee relationship exists. Ask the questions: how, when, or where the person is asked to do the work; what and who owns the tools or equipment used; what assistants are hired to help with the work; and where and by whom supplies and services are purchased. If one receives less extensive in-

structions about what should be done, but not how it should be done, the person may be an independent contractor. Each of these factors will vary dependent upon the actual position.

- (2) **Training** — If the business provides training about required procedures and methods, it indicates that the business wants the work done in a certain way, and that suggests that the individual may be an employee.

Financial Control — This test considers whether the employer controls the business and financial aspects of the individual's services. The factors to be considered include the method of payment of salary, whether services are offered to the public, the corporate form of business, part-time or full-time status, the right to discharge or terminate services, the means of termination of the contract, provisions for non-performance, and the permanency of the relationship between the individual and employer. For example:

- (1) **Investment** — If the individual has made a significant investment in a position, he/she may qualify as an independent contractor.
- (2) **Expenses** — If the individual is not reimbursed for some or all business expenses, then he/she may qualify as an independent contractor, especially if unreimbursed business expenses are high.
- (3) **Profit/Loss** — If the individual can realize a profit or incur a loss, it suggests that the person is in business for him/herself and may be an independent contractor.

Relationship to Parties — These are facts that illustrate how the business and the individual worker perceive their relationship. This examines the agreement between the individual and employer. For example:

- (1) **Benefits** — Does the individual receive benefits such as paid leave or insurance? This may indicate employee status.
- (2) **Written contracts** — A written contract may

show what both the individual and the employing location intend.

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

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 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 acknowledgement that any person who knowingly makes a false statement, or falsifies or permits

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This fact sheet is a summary and not intended to provide all information. Although every attempt at accuracy is made, it cannot be guaranteed.

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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