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DEPARTMENT OF THE TREASURY  
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**TO:** Certifying Officers of Local Government and Local Education Employers participating in the Public Employees' Retirement System or the Defined Contribution Retirement Program

**FROM:** Florence J. Sheppard, Acting Director,   
Division of Pensions and Benefits

**SUBJECT: Professional Services Contracts and Review of PERS Enrollment**

On July 17, 2012, the Office of the State Comptroller (OSC) released its report, *Improper Participation by Professional Service Providers in the State Pension System*<sup>1</sup>. In the report the OSC cited continued instances of improper pension enrollment by local employers of individuals working under Professional Services Contracts.

Individuals who meet 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 are not considered to be "employees" and have never been eligible for membership in the Public Employees' Retirement System (PERS) or the Defined Contribution Retirement Program (DCRP) as a result of the contracted services.

In 2007, the New Jersey Legislature passed Chapter 92, P.L. 2007, enacting significant reforms recommended in the *Final Report of the Joint Legislative Committee on Pension and Health Benefit Reform*. These reforms, specifically those codified at N.J.S.A. 43:15A-7.2 and 43:15C-2b(4) expressly provide that, effective January 1, 2008 and after, 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 accord 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 (pursuant to Section 20 of Chapter 92).

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 and also 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.

<sup>1</sup> [www.state.nj.us/comptroller/news/docs/pr\\_pensions.pdf](http://www.state.nj.us/comptroller/news/docs/pr_pensions.pdf)

### **EMPLOYER REVIEW REQUIREMENTS**

In its report the OSC indicates that many employing locations have apparently failed to implement Chapter 92 and remove ineligible individuals from the PERS or DCRP who are performing services under no bid Professional Services Contracts or who are performing professional services as independent contractors. Employing locations will now be required to review the employment status with regards to these professionals and take corrective actions regarding improper pension enrollment.

In reviewing the eligibility for membership of individuals performing professional services under no bid contracts, or as independent contractors, the employer must first review the pre-Chapter 92 service, i.e. the status of the individual prior to January 1, 2008, to determine whether the individual was an employee or an independent contractor in accord with IRS guidelines. If the enrollment was based solely upon work as an independent contractor in accordance with the Internal Revenue Code, these individuals were not employees and therefore were not eligible for membership in the PERS (or DCRP). In these cases, the pension service is subject to review of the facts by the Division of Pensions and Benefits to determine if the individual was in fact an employee or an independent contractor.

There are also no "grandfathering" provisions under N.J.S.A. 43:15A-7.2 to permit individuals who were already enrolled in the PERS, to remain PERS (or DCRP) members after January 1, 2008, if the enrollment was based solely upon work as a professional services provider. All individuals with Professional Services Contracts, or who met the definition of a professional services provider, were required to be removed from PERS or DCRP membership after January 1, 2008 (June 30, 2008 for fiscal year contracts).

In both of the situations described above, individuals found to have been improperly enrolled will be issued a return of pension contributions and any pension service based upon an ineligible position will be canceled by Division of Pensions and Benefits.

### **ENROLLMENT CERTIFICATIONS**

The review and correction of these professionals' status is of added importance under the requirements of Chapter 52, P.L. 2011 (N.J.S.A. 43:3C-15), insofar that law requires:

"the certifying officer and the officer's immediate supervisor to certify...  
...annually for each member of the retirement system, that the person enrolled is eligible for enrollment in the pension fund or retirement system in accordance with the relevant law and the rules or regulations promulgated thereto"

and 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 as a result of such act shall be guilty of a crime of the fourth degree."

Beginning in early 2013, the Chapter 52 Annual Certification of Enrollments will be required of all employing locations. (Additional information about the Chapter 52 Annual Certification of Enrollments will be distributed when the certification application becomes available for use.) However, in advance of the Annual Certification, and in order to avoid potential penalties under Chapter 52 for the improper enrollment of professional services providers or independent contractors into the retirement system, Certifying Officers

should review the employee/independent contractor status of their staff and take immediate corrective action for any individuals who may be improperly enrolled.

On the recommendation of the OSC, the Division of Pensions and Benefits has developed the accompanying *Employee/Independent Contractor Checklist* form to certify the PERS eligibility of employees and exclude from enrollment ineligible professional service contractors and independent contractors. Certifying Officers should complete this checklist for each individual who has provided professional services and was reported as a member of the PERS or DCRP since January 1, 2008, regardless of whether the individual is still working at your location. Submit the completed forms to the Division of Pensions and Benefits **no later than February 15, 2013**.

In addition, upon completion of this form employing locations must take all appropriate action to remove ineligible individuals from PERS or DCRP membership, prior to completing the Chapter 52 Annual Certification of Enrollments.

To remove an ineligible individual from PERS enrollment:

- Stop reporting pension contributions for the individual on the quarterly *Report of Contributions*; and
- Immediately notify the Division of Pensions and Benefits, External Audit Unit in writing or by sending e-mail to [pensions.nj@treas.state.nj.us](mailto:pensions.nj@treas.state.nj.us) with "External Audit" in the e-mail subject line. When writing, please identify your employing location, a contact name and phone number, the name of the independent contractor or professional service provider, the position held, and the original date of hire or appointment.

#### **ADDITIONAL INFORMATION**

For specific questions regarding the classification of employees or Independent Contractors, please refer to the information provided by the Internal Revenue Service at: [www.irs.gov](http://www.irs.gov) or seek the advice of an attorney.

A Certifying Officer Letter of August 2007 regarding Chapter 92, P.L. 2007, — including the ineligibility of Professional Services Contracts — can be found on the Division's Web site at: [www.state.nj.us/treasury/pensions/coltr07.shtml](http://www.state.nj.us/treasury/pensions/coltr07.shtml)

Additional information on the ineligibility of Professional Services Contracts was provided for Local Employers by the Department of Community Affairs in the December 2007 *Local Finance Notice 2007-28* at: [www.state.nj.us/dca/divisions/dlgs/lfns/07/2007-28.doc](http://www.state.nj.us/dca/divisions/dlgs/lfns/07/2007-28.doc) and the April 2008 *Local Finance Notice 2008-10* at: [www.state.nj.us/dca/divisions/dlgs/lfns/08/2008-10.doc](http://www.state.nj.us/dca/divisions/dlgs/lfns/08/2008-10.doc)

Employers with general questions about this letter, PERS enrollment, or the provisions of Chapter 92, P.L. 2007 or Chapter 52, P.L. 2011, can contact the Division of Pensions and Benefits, Employer Education unit at (609) 292-7524, or send e-mail to: [pensions.nj@treas.state.nj.us](mailto:pensions.nj@treas.state.nj.us)

Enclosures

Fact Sheet #84, *Professional Services Contracts, Independent Contractors, and Pension Enrollment*

*Employee/Independent Contractor Checklist*