Public Employees' Retirement System

Board of Trustees

April 27, 2010

Regulatory Change

Regulation 34 Reemployment After Retirement

The proposed amendment to Regulation 34 conforms the regulation to the statutory changes made to Miss. Code Ann. § 25-11-127 in H. B. 957 and S. B. 3083 (2010 Legislative Session). The primary focus of the amendment is a) to reflect that a local elected official may only retire and remain in office if such member has reached age 62 or such other requirement as may be determined by the Internal Revenue Service to avoid a prohibited in-service distribution, and b) to reflect that the county or municipality is now required to pay employer contributions on the full amount of regular compensation for any local elected position occupied by a retiree.

The effective date of this regulatory amendment will be July 1, 2010, which is the effective date of the legislative change. **Staff requests the Board's initial approval of the proposed amendment.**

Chapter 34 Reemployment After Retirement

100 Purpose

The purpose of this regulation is to identify the terms and conditions under which a retiree may be reemployed by a covered employer after retirement.

101 Background

In accordance with Miss. Code Ann. § 25-11-127 (1972, as amended), the Board of Trustees of the Public Employees' Retirement System of Mississippi (PERS) has adopted the following rules and regulations governing the provisions for reemployment of PERS service retirees who are reemployed after service retirement under the above-cited Section on or after the effective dates of the applicable provisions of this Regulation.

102 Loss of Monthly Benefits upon Employment or Reemployment

No person who is being paid a retirement allowance~~,~~ or a pension after retirement under Article 3 of the Mississippi Code of 1972, as amended, shall be employed or paid for any service by the State of Mississippi or any of its departments, agencies, or subdivisions participating in the Retirement System, except as provided in Section 103 of this Regulation. This provision specifically applies to all PERS service retirees employed or reemployed by or providing services for any and all covered employers as 1) an employee, 2) a contractual employee/worker, or 3) any other contract personnel paid directly or indirectly by a covered employer who do not meet the criteria of ~~an~~ a true independent contractor as determined by PERS. **(See Sections 110 and 111 for work as an independent contractor or for work through a third party.)**

1. Elected offices are deemed to be full time positions. Therefore, retirees may not be employed or reemployed in a covered elected office under the provisions of Section 103 so as to receive both salary and retirement benefits concurrently as provided in that Section, except as provided in Section 103.2.b. ~~below~~ of this regulation.
2. Elected or appointed officials paid on a per diem basis as provided by statute are not considered employees for purposes of this Regulation on reemployment.

103 Exceptions under which a retiree may be reemployed while in receipt of a retirement allowance

1. <u>Retirees reemployed in other than an Elected Position</u>

The Retirement System may not withhold a monthly benefit payment if the retiree is employed by a covered employer in the following instances:

a. For a period of time not to exceed one-half (1/2) of the normal working days for the position in any fiscal year during which the retiree will receive no more than one-half (1/2) of the salary in effect for the position at the time of employment, or

b. For a period of time in any fiscal year sufficient in length to permit a retiree to earn not in excess of twenty-five percent (25%) of the retiree's average compensation.

"Fiscal Year" shall mean the period beginning on July 1 of any year and ending on June 30 of the next succeeding year as provided by statute.

2. **Retirees reemployed as a Municipal or County Elected Official**

~~Any retiree~~ A member may retire and continue in municipal or county ~~elected~~ elective office provided that the member has reached age 62 or such other requirement as may be determined by the Internal Revenue Service, or a retiree may, after the required separation period, be elected to a municipal or county office, provided the retiree:

a. Files annually, in writing in the office of the employer and of PERS, before he or she takes office or as soon as possible after retirement, a waiver of all salary or compensation and elects to receive in lieu of that salary or compensation a retirement allowance, in which event no salary or compensation shall thereafter be due or payable for those services, or

b. Files annually, in writing in the office of the employer and of PERS, an election to receive compensation for that municipal or county ~~elected~~ elective office ~~in~~ an amount not to exceed twenty-five percent (25%) of the retiree's average compensation, which shall be prorated over a twelve month time frame.

A retiree who continues in or is elected to municipal or county office under Section 103.2.a. or Section 103.2.b. may receive any office expense allowance, mileage or travel expense authorized by any applicable statute of the State of Mississippi.

3. **Retirees employed in both a non-elective position and a Municipal or County Elected position**

If at any point during the fiscal year, a retiree is reemployed in both a local elected position (and thus considered a full time employee) and is also reemployed on a limited basis in a non-elective position, he/she must either a) begin or continue under the 25% of average compensation limitation and apply what has already been earned from any other position during the fiscal year to that limitation or b) stay under an existing election to work no more than one-half of the normal working days and earn no more than one-half of the salary for a non-elected position and waive the salary for the local elected position.

4. **Municipal or County Elected Positions**

a. For purposes of reemployment limitations under Miss. Code Ann. Section 25-11-127(5) (1972, as amended), municipal or county elected office shall include:

Municipal: Mayor, ~~Board of~~ Alderman (Councilman or Selectman), Police Chief or Marshal, Municipal Judge, Tax Collector, Tax Assessor, City or Town Clerk, unless any such position is made appointive pursuant

to Miss. Code Ann. Section 21-3-3, or any other salaried official elected by popular vote and eligible for coverage in PERS.

County: County Supervisor, Chancery Clerk, Circuit Clerk, Tax Assessor, Tax Collector (if separate from Tax Assessor), Sheriff, County Surveyor, Justice Court Judge, County Judge/Family Court Judge, Constable, County Coroner or Medical Examiner, Elected County Prosecutor/Elected County Attorney, Elected Superintendent of Education, or any other salaried official elected by popular vote and eligible for coverage in PERS.

b. Municipal or county elected positions shall not include:

Governor, Lieutenant Governor, Secretary of State, Attorney General, State Auditor, State Treasurer, Commissioner of Agriculture and Commerce, Commissioner of Insurance, Public Service Commissioner, Transportation Commissioner, State Senator, State Representative, Supreme Court Justice, Court of Appeals Judge, Chancery Court Judge, Circuit Court Judge, District Attorney, or other office not included in the municipal or county elected offices listed under this section.

104 <u>Determination of Required Number of Working Days for the Position</u>

For purposes of Section 103.1.a., the employer shall determine the required number of working days for the position on a full-time basis and the equivalent number of hours representing the full-time position. The retiree then may work up to one-half (1/2) of the required number of working days or up to one-half (1/2) of the equivalent number of hours and receive up to one-half (1/2) of the salary for the position. In the case of employment with multiple employers, the limitation shall equal one-half (1/2) of the number of days or hours for a single full-time position.

105 <u>Notification Requirement and Failure to Comply with Regulation</u>

To lawfully employ a PERS service retiree under Section 103, the employer must notify the Retirement System in writing of the terms of the eligible employment within five days from the date of employment and also from the date of termination on a form prescribed by the Board. Failure by the employer to timely notify the Retirement System may result in the assessment of a $300.00 penalty per occurrence payable by the employer.

A service retiree reemployed under Section 103 may make one election per fiscal year to either **a)** limit the number of days/ hours worked for all covered employers to that allowed under Section 103.1.a. , or **b)** limit the amount of compensation that will be earned from all covered employers as provided under Section 103.1.b. of this Regulation. A retiree who continues in or is elected to municipal or county office (and who is not also reemployed in a non-elective position) may make one election per fiscal year to either **a)** waive his or her salary and continue to receive a retirement allowance under Section 103.2.a. or **b)** elect to receive an amount not to exceed twenty-five (25%) of the retiree's average compensation in Section

103.2.b. Note that such elected official does not have the option of limiting the number of days or hours worked.

106 Withdrawal from Service or Termination from Service

1. "Withdrawal from service" or "termination from service" is defined by statute as the complete severance of employment in state service of any member by resignation, dismissal or discharge. Retirement benefits may not begin until the member has withdrawn from service as required in Miss. Code Ann. § 25-11-111 (1972, as amended). If the retired member is reemployed by the same or another covered employer in any capacity, including that of an independent contractor, within forty-five (45) days from the effective date of retirement, or is guaranteed such reemployment, the member shall be considered to have continued in the status of an employee and not to have separated from service. In the absence of such forty-five (45) day period of separation, any retirement allowance payments received by the retired member shall be repaid to the Retirement System and the retirement shall be negated. If such retiree is so employed or reemployed in a covered position without the requisite separation, such reemployed retiree shall continue to be reported to the Retirement System.

2. In order to fall within one of the exceptions of Miss. Code Ann. § 25-11-127 (1972, as amended), as outlined in Section 103, or the provisions for waiver of compensation where the retiree elects to receive a retirement allowance in lieu of such salary, such complete severance shall mean the absence of any employment in any capacity, including service without pay, with a covered employer for a minimum of forty-five (45) consecutive calendar days beginning with the effective date of retirement. Provided, however, any employee of an educational institution employed on less than a twelve-month basis who retires at the end of the school year and is reemployed the beginning of the next school year shall not have terminated his employment within the meaning of Miss. Code Ann. § 25-11-111 (1972, as amended). In order to fall within the exceptions of the reemployment provisions of Miss. Code Ann. § 25-11-127 (1972, as amended), such retiree retiring at the end of one school year may not be reemployed in an educational institution any earlier than forty-five (45) consecutive calendar days after the beginning of the next school year. Where such retiree is reemployed prior to the expiration of such forty-five (45) day time frame, any benefits received during the summer months prior to reemployment shall be recovered.

3. An exception to the forty-five (45) day separation period for reemployment may be granted by PERS under the following circumstances:

- **a.** For a retiree who is to be reemployed as a certificated classroom teacher at the beginning of a school year, or
- **b.** For any other retiree who is reemployed in state service, where sufficient documentation is provided to demonstrate that such emergency employment is necessary. The employer shall provide documentation to PERS for approval prior to any emergency reemployment. Such documentation shall include, but may not be limited to: 1) a notarized

certification setting forth the facts upon which the emergency exists which is signed by the chief executive officer of the employing entity and the chairman of the governing board, if applicable, 2) information and/or documentation supporting efforts to fill such vacant position, and 3) a statement by the employer that no prior promises or guarantees of reemployment have been made by the employer to the employee.

For purposes of this section, "emergency" shall mean a sudden unexpected happening, an unforeseen occurrence or condition, a sudden or unexpected occasion for action, or an unforeseen combination of circumstances that call for immediate action. Reemployment under this provision shall be limited to emergencies beyond the control of the employer. Any employment during this period shall be included in the employment limitation of Section ~~2~~103.1.

4. If such member is reemployed prior to the requisite forty-five (45) day separation period and continues employment in a noncovered position in accordance with Regulation 36, the member will become eligible for service retirement benefits once a complete severance of employment has been made as provided herein.

107 Effect of Waiver for Elected Officials

Pursuant to Miss. Code Ann. § 25-11-127 (1972, as amended), qualifying county and municipal elected officials who are in office and elect to retire and waive salary under Section 103.2.a. or to receive compensation for that elective office in an amount not to exceed twenty-five (25%) of the retiree's average compensation under Section 103.2.b. may continue in office and begin to draw a retirement allowance without the required separation period. Qualifying ~~C~~county and municipal elected officials who continue in office are not subject to the forty-five (45) day waiting period.

108 Effect of Reemployment under the Exceptions of Miss. Code Ann. § 25-11-127 (1972, as amended) on Service Credit and Contributions

1. Employment of a retiree described in Section 103 does not entitle a retiree to additional service credit for such limited period of reemployment, and the retiree so employed shall not make contributions to the System from compensation for that employment. However, whether a retiree holding elective office chooses to waive salary as described in Section 103.2.a. or receive limited compensation as described in Section 103.2.b, the employing municipality or county shall pay to the board the amount of the employer's contributions on the full amount of the set salary for that elected position as if the position were filled by a covered employee. In the case of fee officials covered by a joinder agreement, the following shall apply:
   a. For constables, the county shall pay the amount of the employer's contributions on the total direct payments that would otherwise have been issued to the constable for direct services to the county, which includes the allowance from the board of supervisors and bailiff fees, if applicable, as if the position were filled by a covered employee.

b. For coroners and surveyors, the county shall pay the amount of the employer's contributions on the total direct payments that would otherwise have been issued to the coroner or surveyor for direct services to the county as if the position were filled by a covered employee.

c. For chancery and circuit clerks, the county shall pay the amount of the employer's contributions on the amount that would otherwise have been the clerk's total County Payroll Income as reported on the Annual Financial Report filed by the clerk with the Office of the State Auditor and PERS, not to exceed any applicable employee compensation limits, as if the position were filled by a covered employee.

2. Compensation as used in this section does not include office expense allowance, mileage or travel expense authorized by any applicable statute of the State of Mississippi.

109 Effect of Reemployment Outside the Exceptions of Miss. Code Ann. § 25-11-127 (1972, as amended) on Service Credit and Contributions

1. Where a retiree is reemployed under PERS after retirement in a covered position outside one of the exceptions in Section 103 of this Regulation, such retiree shall have his benefits terminated, and he shall again become a contributing member of the Retirement System with contributions paid by both the employer and the employee. The retiree shall not be entitled to benefits for any month in which reemployment commences and for which creditable service is awarded for such month. Where such reemployment as a contributing member continues for a period in excess of six calendar months, the member shall have his benefit recomputed upon subsequent retirement, including service credit after again becoming a contributing member. However, persons who are reported under this provision and who do not complete the requisite reemployment period for recalculation of benefits shall have their contributions refunded to them by the employer after such contributions are refunded or credited to the employer by the Retirement System along with the contributions of the employer and the original benefits reinstated prospectively the first of the month following termination from employment at an amount no less than the retirement allowance authorized before cancellation of benefits. The employer shall provide written notice to the Retirement System of any such termination from employment upon subsequent retirement.

2. The recalculation of benefits at the member's subsequent retirement, where the member has completed the requisite reemployment period for recalculation of benefits, shall be based on the applicable benefit formula, average compensation definition and actuarial factors (based on the ages of the member and his beneficiary(ies)) in effect at the time of the subsequent retirement and the optional benefit payment plan selected by the member at the time of the subsequent retirement.

a. Where a member has selected Option 4-C during a previous retirement so as to draw additional retirement benefits from PERS, pending eligibility for receipt of Social Security benefits, then to the extent PERS has not

recovered all benefits advanced pursuant to such additional optional provision at the time of reemployment of the retiree, then PERS may 1) reduce the retiree's benefit upon his subsequent retirement over the retiree's actuarial life expectancy to recover such unrecovered advances, or 2) recover such unrecovered advances in a lump sum by withholding part or all monthly benefit payments until such advances are recovered.

b. Further, where a member has selected the Partial Lump Sum Option on initial retirement, then upon subsequent retirement, the new maximum benefit as noted above, shall be reduced by the same dollar amount plus 1% of that amount for each month that the retiree's benefit was terminated due to the retiree's return to covered employment .

3. Upon a subsequent retirement effective after July 1 of a given year, the retiree's annual benefit adjustment shall resume immediately with the first benefit payment upon such subsequent retirement. When resumed, the annual benefit adjustment will be based on the current retirement allowance and the number of full fiscal years in retirement and shall be prorated and paid in equal monthly installments based on the number of months a retirement allowance is payable during the fiscal year. Beginning with the succeeding fiscal year, the annual benefit adjustment shall be paid in a lump sum or monthly installments in accordance with the election made by the retiree.

110 **Reemployment as an Independent Contractor**

A retiree must have separated from service with all covered employers after retirement for the forty-five (45) day separation period prior to being engaged to perform services as an independent contractor. For purposes of this Regulation, this term shall mean any individual (or firm for which an individual performs substantially all the work) who contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the results of the work, and who has the right to employ and direct the outcome of the workers independent of the employer and who is free from any superior authority in the employer to say how the specified work shall be done or what the laborers shall do as the work progresses, or one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains the result.

After the requisite forty-five (45) day separation period as defined in Section 106, a retiree may contract to provide such services as a true independent contractor outside the limitations of Section 103 while in receipt of a retirement allowance. However, prior to contracting for such services, such retiree must submit to PERS for its approval, documentation, including but not limited to, the following: the nature of the engagement, including services to be performed; how the services were performed previously, including whether they were performed by an employee and whether the independent contractor previously performed those services as an employee; nature of compensation and treatment of expenses; where the services are to be performed, i.e. on the service recipient's premises; who provides the equipment to perform the services; whether the service provider provides such services to other service recipients; whether such services are

offered for other persons through advertising or other solicitation and if so; whether the service provider has provided such services to any other service recipient in the last year and if so to how many; whether there is a written contract for the performance of such services; and other information to substantiate that the service provider is a true independent contractor and not an employee. In addition, PERS will utilize the IRS test as a factor in determining whether an individual is an employee versus an independent contractor in making this determination.

If, after a review of all pertinent information, PERS determines that the individual will be performing services as a true independent contractor, the retiree will be notified of same and contracting for such services shall not affect his or her retirement allowance. If, however, PERS determines that such individual is actually an employee, then the retirement allowance will be terminated and benefits repaid unless such reemployment follows the guidelines and limitations of this Regulation.

111 Employment Through a Third Party

The limitations on reemployment while in receipt of a retirement allowance may not be circumvented by contracting to perform services through a third party, i.e. a placement or temporary employment agency. If an individual is performing services with a covered agency as an employee, then the reemployment limitations will apply, whether a particular retiree has been reemployed directly by the covered agency or through a third party. Whether a retiree has been reemployed with a PERS covered agency, directly or indirectly, is a question of fact to be determined by the Public Employees' Retirement System. In making such determination, PERS will use the Internal Revenue Service factors to determine whether an individual is an employee along with other factors such as the extent to which control is exercised over details of the work by the individual; whether or not the retiree employed is engaged in a distinct occupational business; the skill required in the occupation; whether the employer supplies the tools and place of work; the length of time for which the person is employed; the method of payment; whether the work involved is part of the "regular business" of the employer.

112 Recovery of Benefits Issued in Error Due to Noncompliance with Provisions of this Regulation

Should a retiree fail to comply with the provisions of this Regulation resulting in the issuance of benefits in error, monthly benefits shall be canceled where necessary, and a demand shall be made for the return of any such benefits erroneously issued. The retiree shall be given thirty (30) days to return any benefit overpayment without an interest penalty. If any overpayment is not returned within thirty (30) days from the date that notification is issued, the retiree shall be liable for the return of the overpayment plus interest thereon at ten percent (10%) per annum plus all costs of collection with a minimum interest assessment of $50.00.

(History: Amended October 28, 1997 to be effective December 15, 1997, except as specifically otherwise provided; amended effective July 1, 2001; amended effective April 1, 2002; amended July 1, 2002; amended February 1, 2004; amended 6/21/2005 to be effective 8/1/2005; reformatted August 1, 2007; amended effective July 1, 2010)