

# RETIREE RETURN TO WORK GUIDELINES

February 15, 2012

# Tax Overview

- SEPP qualified defined benefit pension plan
  - Pre-tax contributions
  - Employer contributions nontaxable to members
  - Investment earnings nontaxable to members (24% last year on \$7 billion)
  - Tax advantages on foreign investments

# Recertifying Qualified Status

Two issues are hot topics with public systems across the country :

- **Normal Retirement Age** when plan eligibility is years of service
- **In-service distributions** - a defined benefit pension plan is intended to provide income to employees once they have retired and no longer receive income from their former employer. The IRS prohibits the practice of earning a pension and a salary from the same employer, commonly referred to as “double dipping”. The IRS considers salary paid to an employee who is also receiving a pension from the same employer an in-service distribution. This includes working for a contractor, being an independent contractor, or working for a temporary agency.

# Audit findings & BOPT Action

- Employer who abused in-service distributions
- Fraud complaints
- Board of Pension Trustees exercised fiduciary responsibility:
  - Pension Office to review R&R
  - Pension Office to monitor retiree return-to-work situations more closely

# Consequences of Losing Qualified Status

- If IRS finds we violated in-service distributions
  - Lose our tax qualified status
    - e.g on \$50K earnings
      - \$1500 in e/e contributions taxable
      - \$5500 in e/r contributions taxable
      - Members share of 24.3% on \$7b ( $1,638,000/60,000$ ) = \$27,300 taxable
    - Pensioners under age 59 ½ who are in violation will have personal penalty with the IRS equal to 10% of all pension benefits received prior to violation.

# Independent Contractor or Employee?

## IRS Rules

- Behavioral Control
  - Subject to the employer's instructions about when, where and how to work? Yes – employee
- Type of Relationship
  - Provide services that are key to the employer and thus the employer can control the work? Yes – then an employee
  - A contract stating worker is independent is not sufficient.
  - If the hire is with the expectation that the relationship will continue beyond a specific project or period – the hire is generally an employee
- Financial Control
  - Does the worker have an opportunity to lose money because of significant investment? No – then an employee

# Delaware Law

- Title 29 § 5502. Employment of pensioners (State Employees' Pension Plan)
- (a) An individual shall not receive a service or disability pension under this chapter for any month during which the individual is an employee unless the individual is:
  - (1) An official elected by popular vote at a regular state election; or
  - (2) An official appointed by the Governor;
  - (3) A temporary, casual, seasonal or substitute employee as defined by the Board of Pension Trustees.
  - (4) A substitute teacher employed by a school district in the State; or
  - (5) A temporary justice of the peace appointed pursuant to § 9211 of Title 10.
- (b) Nothing in this section shall prevent the State from employing an individual receiving a pension under this chapter as a registration or election official or as a juror. An individual so employed may receive the compensation provided by law without deduction from the individual's pension.
- (c) Nothing in this section shall prevent an employee 55 years of age or older from receiving an elected official service or disability pension

# State Employees' Plan R&R Proposed Amendments

- Temporary employee – hired for a specific project/task for a finite period of time **that will not exceed 12 months duration.**

The employer is not to use a temporary employee to perform the duties of a regular pension covered employee on an ongoing basis in lieu of hiring a regular employee. In such instances, where the employer has been found to be using a "temporary" in place of or in lieu of hiring a permanent employee, the temporary employee may be subject to repayment of all pension benefits during the time period.

- Casual/Seasonal – An employee employed by an agency under 29 Del C. §5903(17) and **works less than 30 hours per week.**
- Substitute – An employee employed by a school, is compensated on a daily basis.

The Pension Office is currently developing rules and definitions to assure that retired members of the State Employees' Pension Plan can substitute, after a six month bona fide separation from the employment if under the age of 65, without an hourly or earnings limits. However, the school is not to use a substitute to perform the duties of a regular pension covered employee on an ongoing basis in lieu of hiring a regular employee. In such instances, where the school has been found to be using a "substitute" in place of or in lieu of hiring a permanent employee, the substitute employee may be subject to repayment of all pension benefits during the time period.