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Local Finance Notice

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Guidance Concerning the "Substantially Similar" Requirement of the Defined Contribution Retirement Program (N.J.S.A. 43:15C-2)

Background

Chapter 92 of the Laws of 2007 (Chapter 92) directed the Local Finance Board (Board) to adopt "guidelines or policy" to assist local units in making determinations of whether certain appointed employees are required to join the Defined Contribution Retirement Program (DCRP). This Local Finance Notice issues the guidance approved by the Board, is effective immediately, and requires governing bodies to take certain actions by June 1.

This entire Notice should be carefully and fully read by local officials involved in personnel and benefits administration. This information must be read in context of guidance from the [Division of Pensions and Benefits regarding DCRP employment](#). That information should be reviewed along with this guidance.

Determinations under the law must also take into account N.J.S.A. 43:15A-7.2. This new law restricts individuals receiving compensation under professional service resolutions from serving as employees and requires application of an Internal Revenue Service test to ensure the individual is a legitimate employee.

This Notice applies to appointed, not elected officials. A separate provision of Chapter 92 requires elected officials elected to new positions on and after July 1, 2007 to enroll in DCRP for pension purposes. In addition, the law does not affect positions eligible for membership in the Police and Firemen's Retirement System or the Teachers' Pension and Annuity Fund.

Appendix A of this Notice summarizes actions all covered local government units must take regarding the law. The following sections provide details of how to develop and implement the policy.

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General Provisions

The key section of law provides the following:

N.J.S.A. 43:15C-2 a. The following persons shall be eligible and shall participate in the Defined Contribution Retirement Program...

(3) A person who commences service on or after the effective date (July 1, 2007) of this section:

... “[Whose position] requires the specific consent or approval of the elected governing body of the political subdivision that is **substantially similar** in nature to the advice and consent of the Senate for appointments by the Governor of the State...pursuant to guidelines or policy that shall be established by the Local Finance Board in the Department of Community Affairs or the Department of Education, as appropriate to the elected governing body.”

The use of the term “elected governing body” limits the applicability of the law to actions of municipalities, counties, and fire districts, and to the extent they appoint individuals to PERS positions, boards of education. Local authorities are not covered, except that commissioners that receive salaries fall under its provisions (Section A-3 below).

The law requires “substantially similar” positions to be determined by the elected governing body based on the Board’s guidelines or policy and that the determination be memorialized in an adopted ordinance or resolution. The Board’s analysis of how the guidance was developed is detailed in Appendix B of this Notice.

Once a governing body determines which positions are subject to DCRP membership, as individuals are appointed to covered positions the circumstances of each individual would be considered to determine if the person is enrolled in the Public Employees’ Retirement System (PERS), DCRP, or is exempt from enrollment.

The local Pension Certifying Official is responsible to ensure that correct information is reported through enrollment procedures to the Division of Pensions and Benefits. Local unit auditors will be required to test compliance with the law as part of the annual audit. The Pension Certifying Officer has critical responsibility to ensure the local unit is in compliance with the law.

The following sections outline procedures to implement the law. It is followed by a summary of implementation actions.

A. Identifying Positions that are DCRP

1. Generally, positions that involve executive decision-making or are senior management of the organization whose hiring or appointment requires approval of a governing body are DCRP positions. Further,
 - The requirement for approval of the governing body shall be based on statute, local ordinance, or previously adopted resolution establishing local practice, all as authorized by law.
 - To ensure consistency in general treatment of individuals, appointments of this nature made by municipal managers under the council-manager form of the Optional

Municipal Charter Law (N.J.S.A. 40:69A-98) (regardless of title), the municipal manager form of government at N.J.S.A. 40:79-1 et seq. (1923 Manager Act), and the county manager form of county government at N.J.S.A. 40:41A-45 et seq. are deemed to be those of the elected governing body. Variations on these themes must be treated similarly.

- After due consideration, the Local Finance Board has determined that the position of Municipal Court Administrator does not meet the above stated criteria for DCRP membership, and shall be treated as a PERS position.

Determination made by the Local Finance Board on December 10, 2008.

2. To elaborate on the foregoing, the following are DCRP positions when the individuals are employed as *bona fide* legitimate employees and not employed pursuant to a professional services resolution:

- The statutory-based, untenured chief administrative officer of the organization, such as: Business Administrator; County Administrator; or Municipal or County Manager; or Municipal or County Administrator appointed under the authority of a local ordinance; or similar positions.
- Positions with principal operating responsibility of a government function(s), commonly called "department heads" or similar title, that are filled by action of the governing body and who directly report to an elected official(s) or chief administrative officer.
- Legal counsel to the organization regardless of title, i.e. municipal attorney, counsel, director of law, corporation counsel, solicitor, county counsel, etc., (N.J.S.A. 40A:9-139, and 40A:9-43 or similar).
- Municipal or County Engineer (N.J.S.A. 40A:9-140, and 40A:9-43 or similar)
- Municipal Prosecutor (N.J.S.A. 2B:25-1 et seq.).

3. Further, the following positions are deemed DCRP positions, the positions cannot be filled through a professional services agreement, and the employee receives a salary:

- Municipal Court Judge (N.J.S.A. 2B:12-4)
- Appointed members of local authority Board of Commissioners (various laws, but subject to N.J.S.A. 40A:5A-1 et seq.)
- Gubernatorial appointees who serve in county or municipal government for a fixed term, such as County Election Commissioners.

4. N.J.S.A. 43:15C-2(a)(3) exempts from DCRP membership positions that are a "routine" appointment by the governing body:

"...a person who is employed or appointed in the regular or normal course of employment or appointment procedures and consented to or approved in a general or routine manner appropriate for and followed by the political subdivision, or the agency, board, commission, authority or instrumentality of a subdivision.

This provision cannot be used to supersede specific elements of this guidance. It applies to individuals that do not meet the criteria discussed above, but are appointed by the governing body. This, for example, includes administrative support and public works rank and file staff.

Governing body appointment of "staff" often takes place in municipalities or counties operating under "traditional" forms of government, i.e., township committee or borough council. This provision is intended to ensure these employees remain eligible for PERS membership.

B. Individual Exceptions to DCRP Determinations

The law, as supplemented with Board guidance, includes exceptions from enrollment in the DCRP program for individuals. Once an individual is appointed to a position covered by DCRP membership, the circumstances of the individual must be tested to determine if the individual is eligible for PERS membership. This determination is administrative in nature and is made by the Pension Certifying Officer, using this guidance.

Notwithstanding the foregoing, if a position is DCRP and the individual meets any of the following exceptions, the individual is permitted to join or remain in PERS.

1. The individual holds a professional license or certificate to perform **and is serving** in any of the following capacities, regardless of the position held:

- Certified Health Officer
- Tax Collector
- Chief Financial Officer
- Construction Code Official
- Qualified Purchasing Agent
- Tax Assessor
- Municipal Planner
- Registered Municipal Clerk
- Licensed Uniform Subcode Inspector
- Certified Public Works Manager*

*Unlike other titles, "Certified Public Works Manager," refers to a certification, not a position. This shall be interpreted as "Principal Public Works Manager," the position cited in N.J.S.A. 40A:9-154.6a et seq.

2. Notwithstanding the provisions of Section A-2 above, the Certifying Officer may determine an individual in their organization who is already enrolled in a PERS position (i.e., career or unclassified) that is promoted to an otherwise DCRP position through a valid promotion may remain in PERS. In the event the position is not filled through a promotion, the position remains DCRP.

The circumstances surrounding the decision to determine a position as PERS are limited to those where the employees eligible for promotion serve in a legitimate subordinate capacity. Such practices, including hiring an individual in a subordinate PERS position with the purpose of immediately promoting the person to a DCRP position, cannot be used to circumvent the DCRP requirement for the position. A governing body should be prepared to document and support a decision of this nature if called upon by the Division of Pensions and Benefits.

3. If a person is appointed to a temporary or interim "acting" capacity to a DCRP position that otherwise requires a professional license or certification in the list above, the person shall be eligible to join PERS. In these cases a person who is not certified is appointed by the governing body to a limited term in order to give the person the opportunity to obtain a required certification (i.e., temporary chief financial officer or acting municipal clerk).
4. An individual who was a member of PERS prior to July 1, 2007 may continue their PERS membership when appointed to a DCRP position, if the person has "continuously" been a member since that time. For the purpose of this law, "continuously" means that a period of no more than two years has elapsed from the time the individual left employment in a PERS position to the time

the person was reemployed. Questions concerning variations to this circumstance should be submitted to the Division of Pensions and Benefits for guidance.

5. Individuals in PERS positions that are assigned to a DCRP position as additional or supplemental responsibilities require special attention. Because a person can be a member of both PERS and DCRP at the same time, governing bodies can assign salaries for both responsibilities, one with PERS and one with DCRP applicability. Membership should be treated accordingly. Any employee joining PERS or DCRP on and after July 1, 2007 is also subject to having a portion of their salary that exceeds the annual maximum wage contribution base for Social Security deposited into a DCRP account [N.J.S.A. 43:15A-6(r)(2) and 43:15C-2(a)(5)].

C. General Provisions

1. Governing Body Actions

- Upon receipt of this Notice, a governing body should commence identifying DCRP positions.
- Once the positions are identified, municipal governing bodies should pass a single ordinance, and other local units pass a single resolution establishing the policy. Copies of governing body policies, whenever adopted or modified shall be filed with the Division of Pensions and Benefits. The guidance takes effect June 1, 2008 and affects employees hired on and after July 1, 2007. Governing bodies should act expeditiously to consider their positions and act accordingly.
- PERS membership appointments are subject to the review and approval of the Division of Pensions and Benefits and the PERS Board of Trustees. All applications for membership in PERS and DCRP are subject to review to ensure compliance and consistency with this policy and State law.

2. Role of the Pension Certifying Officer: The local unit's Pensions Certifying Officer is responsible for making determinations concerning enrollment, subject to review by the Division of Pensions and Benefits. Staff from the Division of Pensions and Benefits is available to provide consultation on local circumstances upon request. The Division also performs audits on local unit accounts for compliance with law and can correct accounts.
3. Local officials should also be sure to review other provisions of Chapter 92, particularly section 20 (N.J.S.A. 43:15A-7.2) with regard to employees holding professional service positions and limits on contracts for those individuals. Guidance from the Division of Pensions and Benefits will be available on this issue.

It is important to differentiate between contracts resulting from professional services resolutions and employment agreements with employees. A contract stemming from a professional services resolution involves non-payroll compensation, i.e., voucher based payments. An employment agreement is a contract with an employee that may set forth salary, and terms and conditions of employment for employees, i.e., the employee receives a paycheck and no voucher payment. An employee can have an employee agreement but not receive compensation through a contract authorized by a professional services resolution.

4. Requests for non-binding advisory interpretations for circumstances not covered under this policy may be referred to the Board for review and determination. The Chair, as Director of the Division of Local Government Services is authorized to act on behalf of the Board or to refer the matter to the Board.
5. The Board may supplement or revise this guidance as experience and necessity requires.

Questions concerning this policy or requests for advisory interpretations can be e-mailed to dlgs@dca.state.nj.us.

Approved: Susan Jacobucci, Director

Table of Web Links

Page	Shortcut text	Internet Address
1	Division of Pensions & Benefits regarding DCRP employment	http://www.nj.gov/treasury/pensions/dcrp1.htm