



Hot Topics

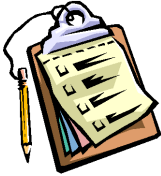
In Nebraska School Retirements

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Agenda


- Eligibility & Enrollment Webinar Reminder
- Repayment of Refunds Timetable
- Work After Retirement (Sham Terminations)



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Eligibility & Enrollment Webinar Reminder

- On December 15, 2015, NPERS & NCSA put on a webinar to discuss eligibility & enrollment
- The video, slides and Retirement Eligibility Calculator are on the School Employer Reporting page on the NPERS website.



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Repayment of Refunds

- These are important because:
 - They restore service credit which helps increase your retirement benefit;
 - May return you to Tier 1 status; &
 - May allow members to retire sooner via the Rule of 85
- You must be actively employed in a NE public school & contributing to the School Plan

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Repayment of Refunds (continued)

- You must submit your application & repay within 5 years of reemployment & prior to termination
- **Members reemployed prior to April 17, 2014, must apply & repay prior to April 16, 2020**
- Contact NPERS or visit the website for info:
<http://npers.ne.gov/SelfService/public/planInformation/school/schoolPlanInfo.jsp>

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Reemployment/Work After Retirement

(Sham Terminations)

- Retirement accounts generally cannot be accessed while an employee is still working for an employer covered by the plan (a.k.a. "in-service distribution")
- "In-service distributions" are generally prohibited
 - IRC §§ 401(a)(36) & 409A;
 - Treas. Reg. § 1.401(a)-1(a)(2);
 - Treas. Reg. § 1.401-1(b)(1)(i); &
 - PLR 201147038



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Reemployment/Work After Retirement

(Sham Terminations)

- To access a retirement account, a person must have a **“bona fide separation from service”** (a.k.a. **“bona fide termination”**)
- These terms are not defined in the Internal Revenue Code (IRC)
- **The IRS says it will look at all the facts & circumstances on a case-by-case basis to determine whether a “bona fide termination” occurred**

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Reemployment/Work After Retirement

(Sham Terminations)

- The IRS considers many things, including, but not limited to:
 - Plan documents (a.k.a. State law, Regs., etc.);
 - Whether the employer followed its normal administrative termination of employment procedures;
 - Whether the employer followed its normal hiring procedures for the employee’s new position, employee’s old position, or letting of a contract;

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Reemployment/Work After Retirement

(Sham Terminations)

- The IRS also considers:
 - How similar the employee’s “new” position is to the employee’s “old” position by reviewing: duties, shifts/hours, compensation, management structure, autonomy, access to employer provided equipment & space, etc.;
 - The length of time between termination & reemployment; &
 - Whether there is evidence employer &/or employee prearranged a return to work



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Reemployment/Work After Retirement

(Sham Terminations)

- Depending upon the facts, the IRS could find that a “sham termination” occurred
- A “sham termination” is a term used by the IRS to describe a termination and “sudden” re-hire for the purposes of accessing retirement account balances without a bona fide separation from service
 - No specific tax reg. defines the term

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Reemployment/Work After Retirement

(Sham Terminations)

- So, if the IRS doesn’t define the term, how do we know what it is?
- The IRS’s position on “sham terminations” was best articulated in Private Letter Ruling (PLR) 201147038
 - The next few slides have quotes from PLR 201147038

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Reemployment/Work After Retirement

(Sham Terminations)

“[W]hen an employee legitimately retires, he separates from service with the employer. Accordingly, **if both the employer and employee know at the time of ‘retirement’ that the employee will, with reasonable certainty, continue to perform services for the employer, a termination of employment has not occurred** upon ‘retirement’ and the employee has not legitimately retired.”

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Reemployment/Work After Retirement (Sham Terminations)

“Such ‘retirements’ will **violate section 401(a)** of the Code and **result in disqualification of the plan** under Section 401(a) of the Code.”



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Reemployment/Work After Retirement (Sham Terminations)

“Whether a termination of employment has occurred is based upon **whether the facts and circumstances indicate that the employer and employee reasonably anticipated that no further services would be performed after a certain date.**” Citing to Treas. Reg. § 1.408A-1(h)(1)(ii)

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Reemployment/Work After Retirement (Sham Terminations)

- The IRS has communicated this position since at least the 1950s
- For example:
 - Fry v. Comm., 19 T.C. 461 (1952), aff’d 205 F.2d 517 (3rd Cir. 1953);
 - Rev. Rul. 55-695 (1955);
 - Rev. Rul. 56-214 (1956);
 - Rev. Rul. 56-693 (1956);
 - PLR 8440085;
 - Wilkins v. Comm., 54 T.C. 365 (1970);
 - Lauinger v. Comm., T.C. Memo 1963-155;
 - General Counsel Memorandum TR-58-46-89 (1990); &
 - IRS INFO 2000-0245, released 9/30/2000, to Senator Paul Sarbanes

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Reemployment/Work After Retirement

(Sham Terminations)

- Nebraska law requires retirees to take a **180 day break** after retiring
- This is a critical factor when determining whether a “sham termination” occurred
- **Problems arise if a 180 day break is not taken, or it appears there was a prearranged return to work shortly after 180 days**

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Reemployment/Work After Retirement

(Sham Terminations)

- If the IRS finds that a 180 day break did not occur, or there was a prearranged return to work it could do many things, including:
 - Require the Employee to repay distributions, plus penalties, fines, & interest;
 - Require the employee &/or employer to make-up contributions;
 - Revoke the plan’s qualified status (a.k.a. remove the plan’s favorable tax treatment)

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Reemployment/Work After Retirement

(Sham Terminations)

- Nebraska law requires the PERB/NPERS to operate the plan in a manner that maintains its tax qualified status, and correct any violations or mistakes
- Thus, the PERB/NPERS must conduct a “sham termination” analysis in the same manner as the IRS

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Reemployment/Work After Retirement (Sham Terminations)



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Reemployment/Work After Retirement (Sham Terminations)

- The PERB/NPERS have previously published bulletins & newsletters about the 180 day waiting period
 - See Retirement Roundup, Vol. 17, No. 4, Spring 2002, which discussed the dangers of returning to work in even a **voluntary** capacity during the 180 days after retirement
 - See, also, the Plan Handbook



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Reemployment/Work After Retirement (Sham Terminations)

- But what about subbing after retirement?
- Nebraska law allows retirees to provide substitute service “on an intermittent basis.” However, it does not define “intermittent.”
- Courts have said to apply a word’s common meaning if it is not defined in the law

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Reemployment/Work After Retirement (Sham Terminations)

- Common definitions of “intermittent” include:
 - “Starting, stopping, and starting again; not constant or steady”
 - (<http://www.merriam-webster.com/dictionary/intermittent>)
 - “Stopping or ceasing for a time; alternately ceasing and beginning again”
 - (<http://dictionary.reference.com/browse/intermittent>)
 - “Stopping and starting at irregular intervals ... Periodic ... Sporadic ... Irregular ... Discontinuous”
 - <http://www.thefreedictionary.com/intermittent>

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Reemployment/Work After Retirement (Sham Terminations)

- An aggregation of these definitions indicates that “intermittent” means “irregular (i.e., unscheduled), infrequent (i.e., not often), and discontinuous (i.e., of short duration).”
- Admittedly, these terms are not binding, but they offer guidance on how employers and employees should proceed.

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Reemployment/Work After Retirement (Sham Terminations)



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Questions



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