

Retirement Report

Update for Nebraska School Employer Contacts

Fall 2016

“Sham” Termination

A Reemployment After Retirement Issue

In order to maintain compliance with both state and federal laws, plan members must incur a “bona fide” termination prior to receiving retirement benefits (or a refund). If it is discovered a termination has not occurred, and benefits have been paid to a member, the member is required by law to repay those benefits to the retirement system. The amount of this repayment could reach staggering amounts depending on the duration of time during which the member received ineligible benefits.

In order to provide compliance, Nebraska requires a minimum break in service of 180 days after ceasing employment. Per the School Employer Reporting Manual:

“A retiree who returns to employment in any Nebraska public school participating in the plan (reemployment), may continue to receive retirement benefits so long as he/she has not provided service on a regular basis

to any Nebraska public school during the first 180 calendar days after “termination of employment.” Employment in private schools, Omaha Public Schools, or in any school outside of Nebraska is not considered “reemployment” and does not affect a retiree’s retirement benefits.”

One of the things the IRS will be looking for is a pre-arranged return to work. These agreements are referred

to as “sham terminations” by the IRS. The IRS takes the following position on sham terminations:

“When 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.”

If the IRS finds a “sham termination” occurred after a



member has begun receiving retirement benefits (or taken a refund), they can require repayment of distributions, require the employee and/or employer to make up contributions, require the employee and/or employer to continue to make contributions, require the employee and/or employer to pay fines and/or penalties, and/or revoke the plan’s favorable tax treatment.

While the best practice is for terminated members is to wait at least 180 days (preferably more than a year) before providing service in any capacity to a school/ESU covered by the Plan, this does not provide compliance if there was a pre-arranged agreement to return. Any member, who received a refund or retirement benefit and is reemployed shortly after the 180 day break, especially if they return to work in their prior position or duties, will certainly give the appearance of a sham termination and may result in an inquiry by NPERS and/or the IRS.

Your duty as the reporting agent is to help ensure compliance with these laws and regulations. In the event of an inquiry, be prepared to provide documentation establishing the facts and circumstances of the termination and reemployment listed above. If you require additional assistance with clarification of a sham termination or reemployment, please contact NPERS legal counsel in writing with as much information as possible.

It’s important to note a “Bona fide termination” is not defined in the tax code. The 180 day restriction is a Nebraska law. Reemployment after 180 days does not automatically guarantee compliance with the federal tax code. In the event of an inquiry, the IRS will review the facts and circumstances of the termination and subsequent reemployment including (but not limited to):

- ✓ Did the employer follow its normal administrative termination of employment procedures for the terminated member?
- ✓ Did the employer fill the position held by the terminated member?
- ✓ If so, did the employer follow their normal hiring procedures to fill the position held by the terminated member – i.e., job postings, interview process, etc.?
- ✓ If the terminated member returned to employment, did the employer follow the normal hiring procedures to rehire the terminated member – i.e., job postings, interview process, etc.?
- ✓ A comparison of the employee’s “old” and “new” position(s), duties, and compensation.
- ✓ The length of time between the termination and reemployment.

Part-Time & Temporary Employees

More Clarification on Eligibility

One of the more complicated eligibility issues is if (and when) a part-time or “temporary” employee should join the retirement plan. Below is a summary of *a few* situations you may face when determining eligibility for these employees. Please understand this is a brief summary and may not apply in every situation. Additional facts and circumstances may lead to different results. This is intended to supplement, not replace, what is in the Employer Reporting Manual, Rules and Regulations, and Nebraska Statutes.

When is a part-time employee eligible for plan participation?

Per statutes, plan participation is mandatory for an employee “hired by a public school or under contract in a regular full-time or part-time position who works a full-time or part-time schedule on an ongoing basis for twenty or more hours per week.” Two situations can complicate matters – an employee originally hired to work 20 or more hours per week who subsequently does not work that many hours, or an employee who was originally hired to work less than 20 hours per week ends up working additional hours.

All permanent full or part-time employees hired to work 20 or more hours a week must *immediately* begin plan participation *regardless of the number of actual hours worked*. Even if they work less than 20 hours and/or their employment agreement/contract is later reduced to less than 20 hours, they must remain in the plan. Plan participation at the same employer only ceases when a member terminates employment and subsequently takes a refund or begins receiving a retirement benefit from the plan.

If the part-time employee is hired to work less than 20 hours per week, but works an average of 20 hours or more per week in any 3 calendar months of a plan year (July 1 to June 30), NPERS contributions must begin the next payroll period – *regardless of when the next payroll period occurs*. For example, a part-time employee was hired to work less than 20 hours per week. However, in December 2015, February 2016, and April 2016, the employee worked an average of 20 hours or more per week. If the employee’s next payroll period is May 2016, then contributions must begin in May 2016. If the employee’s next payroll period is not until September 2016 – which falls into the next plan year, NPERS contributions must still begin in September 2016.

What about temporary employees?

Temporary employees are not eligible for plan participation but Nebraska statutes stipulate the length of temporary employment shall not exceed one year in duration. In certain circumstances an employee may still be classified as a temp and not placed into the plan after one year of employment, but the following circumstances must apply:

- The original employment agreement (contract) must have been less than one year in duration.
- There must have been no anticipation of continued employment after that time.
- The position (employment) truly ends.
- A new position is subsequently opened up for applications. Applicants must apply or reapply for the position. The employer must follow its normal hiring practices.

Proof that each period of employment is truly temporary (and not a contrivance) is required. The burden is on the school or ESU to prove to NPERS the position is truly temporary. Evidence to support this position is truly temporary includes, but is not limited to:

- An at-will contract that shows: (1) temporary employment, (2) specific contract beginning and ending dates, (3) a specifically articulated description of the purpose or task to be performed, and (4) no right of reemployment;

AND

- Evidence in the form of subsequent advertisement of the position to the public;

AND

- Evidence that the employer followed its normal hiring practices (i.e., applicant files, applicant “score” or “rating” sheets, etc.).

NOTE! *If the school or ESU cannot prove that a position is truly temporary, the school or ESU will be required to make-up missed contributions to the plan.*

When determining eligibility, be sure to utilize the eligibility “calculator” and employer reporting manual found on the NPERS website. Even with these web based tools, there may be situations when you will require “hands on” assistance. Please do not hesitate to contact our office if you need additional help.



Retirement News NEWSLETTERS FROM NPERS

Keep your staff informed!
Forward our member newsletter to staff!

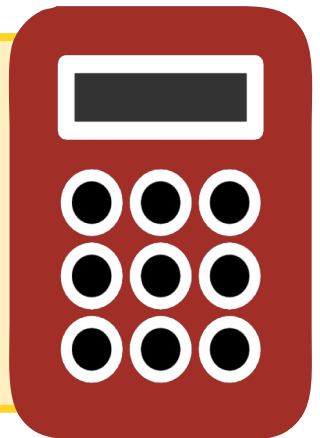
NPERS releases a bi-annual newsletter for School plan members in September and March. These newsletters contain a wide variety of valuable information including legislative updates and various benefit related topics.

All reporting agents will be notified via email when a newsletter is added to the NPERS website. **Please be sure to forward these emails to all applicable staff!**

Eligibility Calculator

The NPERS website contains a **Retirement Plan Eligibility Calculator**, designed by our Education Services department to serve as a guide for determining an employee's eligibility. Although it is intended as a guide, only, and should not be relied upon as a definitive determination of eligibility, it provides a first-step toward making a determination. If there is any confusion over eligibility of an employee, consultation with an NPERS staff member is strongly recommended.

We encourage each of you with eligibility-related questions to utilize this calculator before calling in. The Eligibility Calculator can be found on our website at npers.ne.gov. Select "School" under "Employer Reports" and then click on "Retirement Plan Eligibility Calculator."



NPERS

Nebraska Public Employees Retirement Systems

1526 K St., Ste. 400
P.O. Box 94816
Lincoln, NE 68509-4816

npers.ne.gov

CONTACT US:

1-800-245-5712
402-471-2053

Linda Turner-Minchow
(402) 471-9497

linda.turner-minchow@nebraska.gov

Caleb Taylor
(402) 471-6098

caleb.taylor@nebraska.gov

EYI FOR YOUR INFORMATION TIPS FROM THE NPERS ACCOUNTING DEPARTMENT

IF YOU CAN'T MAKE THE DEADLINE...

It is important for schools to strive to meet the 10th of the month reporting deadline. If you will be unable to make this deadline, please call Caleb and to have the situation noted in the school file. This *could possibly* help to avoid late penalties.

ACCOUNTS PAYABLE/ACCOUNTS RECEIVABLE

We would like to focus on putting AR/APs on a high-priority list. When you receive an e-mail or letter from NPERS, either because of a penalty or adjustment, please pay close attention to the amount and where to place the final figure on your next Wage and Contribution Report. If you need assistance please contact Linda.

BE SURE TO USE THE CORRECT NUMBER!

Please use your school number on all correspondence with NPERS. This number is the number you use on your monthly reporting, not the Department of Education number. If you need a reminder of what your school number is please contact Linda.