

MEMORANDUM

To: ERS Participating Employers

From: Leura G. Canary
General Counsel
Retirement Systems of Alabama

William F. Kelley, Jr.
Director of Benefits
Employees' Retirement System

Date: June 26, 2013

Re: ERS Participating Employers' Reporting Requirements Pursuant to ALA. CODE § 36-27-8.2(c) and Attorney General's Opinion 2013-044

Pursuant ALA. CODE § 36-27-8.2(c), ERS participating employers have a duty to provide information so that RSA may comply with its mandate to enforce the pension suspension provisions of §§ 36-27-16(e) and 36-27-8.2(a). Recently, the Attorney General issued Attorney General's Opinion 2013-044 which clarified the scope of that duty to report to RSA. A copy of the opinion is attached.

ALA. CODE § 36-27-16(e) provides that "[s]hould any beneficiary be restored to active service, his or her retirement allowance shall be suspended until he or she again withdraws from service " Section 36-27-8.2(a) provides an exception to this general rule -- a ERS retiree may perform duties in any capacity for an employer who is a member of TRS or ERS without suspension of his pension payments provided that (1) the person is not employed in a permanent full-time capacity and (2) in 2013, the person's compensation from the employer does not exceed \$23,000 per calendar year.

The pension-suspension rules do not apply to a retiree who is an independent contractor to the participating employer. In Opinion 2013-044, the Attorney General opined that the question of whether a retiree who provides services for a participating employer functions as an employee or an independent contractor is a factual determination that, by law, is delegated to the ERS Board of Control. In all cases of doubt, the ERS Board of Control makes this determination.

RSA has the duty to determine whether a retiree who performs services for a participating employer is an independent contractor to whom the pension suspension rules do not apply or an employee to whom they do apply. If RSA determines that the retiree is in an employee relationship with the participating employer, RSA has the further duty to determine whether their employment meets the requirements of the exception provided in § 36-27-8.2(a). If the employee

is either a full-time permanent employee or if the employee makes more than \$23,000, the exception does not apply. If a retiree is working in violation of the pension-suspension rules, the law requires RSA to suspend the retiree's pension for the duration of that employment.

Attorney General Opinion 2013-044 clarifies that the participating employer has a legal duty to report to RSA that retirees are performing work for them and to provide information sufficient for RSA to make a determination of whether the pension suspension rules apply and, if so, whether the retiree's employment falls within the exceptions provided by § 36-27-8.2(a). Specifically, Opinion 2013-044 describes the participating employer's duties as follows:

Section 36-27-8.2(c) provides that "[t]he responsibility for compliance with the provision of this section is placed upon the employing authority, and each employee employed under this section shall certify to the employer any information required in order to carry out this section." ...

Here, these provisions unambiguously make the "employing authority" responsible for ensuring that retirees, upon reemployment, are in compliance with the time and income limitations of sections 16-25-26(a) and 36-27-8.2(a). ...

Thus, it is the duty and responsibility of the participating employer to report to the RSA the name of any TRS or ERS retiree who has been engaged to provide services for it, even where the retiree is hired through a personal services contract or a contract with a third party. See ALA. CODE § 16-25-26(c) (2012); ALA. CODE § 36-27-8.2(c) (Supp. 2012). In turn, the law makes it incumbent on the retiree to provide any information to the participating employer necessary to implement the law ("each person employed under this section shall certify to the employer any information required in order to carry out this section"). *Id.* **Finally, the participating employer has a further and continuing duty of providing all facts necessary to RSA's determination of the true nature of the work relationship between the retiree and the employer** so that RSA can comply with the law and exercise its duty to apply the pension-suspension provisions appropriately.

Attorney General Opinion 2013-044 (Emphasis added).

In Alabama, common law controls the definition of the business relationship between an employer and a worker. See *Birmingham Post Co. v. Sturgeon*, 149 So. 74, 76-77 (Ala. 1933). The determination of whether a worker is an employee or an independent contractor is fact specific and must be made on a case by case basis. *Reed v. Board of Trustees for Alabama State University*, 778 So.2d 791, 795 (Ala. 2000); *Hooker Construction, Inc. v. Walker*, 825 So.2d 838, 843 (Ala. Civ. App. 2001). Indeed, no one fact is controlling, but all relevant facts must be taken into consideration in defining employment status. *Reed* at 795; *Hooker Construction Co.* at 843. "The parties' characterization of their relationship is not controlling." *Alabama Power Co. v. Beam*, 472 So.2d 619, 625 (Ala. 1985).

Some retirees who provide services for RSA participating employers have their compensation paid pursuant to a personal services contract or a contract between the employer and a third party. A personal services contract or a contract with a third party alone is not enough to establish that the retiree is an independent contractor. The nature of the relationship between the retiree and the employer, regardless of whether a contract is involved, governs that determination. Thus, RSA must look beyond the existence of a contract or a provision in a contract characterizing a worker as an independent contractor to make that decision. Instead, RSA should make the determination based on the particular facts of the relationship, behavior and financial arrangements between the parties.

To give guidance on what facts are relevant and should be provided to RSA, participating employers should look to the IRS “twenty factor” test. The IRS has distilled the common law rules into a twenty factor test to aid in distinguishing between an employee and an independent contractor. *See Rev. Rul. 87-41*. An example list of the twenty factors with an explanation of their relevance is attached to aid you in deciding what information to provide.

In light of Opinion 2013-044, RSA has requested in the accompanying memorandum that the following be provided by or before **September 30, 2013**:

1. The names of all RSA retirees who perform services for your entity. If there are none, that must be reported to RSA by the deadline.
2. The annual amount of compensation paid to the retiree by the participating employer.
3. A statement of whether the retiree works full-time, part-time and/or in a permanent position.
4. Copies of any contract or employment agreement related to the retiree’s services.
5. A description of the manner in which the retiree is paid.
6. A description of the duties performed by the retiree, including how the retiree gets assignments.
7. A description of where and when the retiree performs his/her duties, including whether the retiree uses his/her own equipment or that of the participating employer.
8. Any other information which is relevant under the IRS twenty factor test.

In the future, participating agencies must provide this information as soon as possible but no more than 30 days after the retiree is engaged to perform work for the agency. Please contact Bill Kelley at 1-877-517-0020 if there are any questions concerning this matter.