2013-044

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April 11, 2013

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SEE ACT 2014-297, WHICH AMENDS SECTIONS 16-25-26 AND 36-27-8.2 OF THE CODE OF ALABAMA.

Retirement Systems – Retirement Benefits – Employees, Employers, Employment – Independent Contractors – Administrative Interpretation

The Boards of Control ("Boards") of the Employees' Retirement System ("ERS") and Teachers' Retirement System ("TRS") may promulgate rules setting forth guidelines to determine whether retirees who provide services to participating ERS and TRS employers through a contract are independent contractors or employees subject to the limitations of sections 36-27-8.2(a) and 16-25-26(a) of the Code of Alabama.

Under sections 36-27-8.2(c) and 16-25-26(c) of the Code, it is the duty and responsibility of the participating employer to report to RSA the name of any ERS or TRS retiree who performs work for it so that the Retirement Systems of Alabama ("RSA") can comply with the law and exercise its duty to apply the pension-suspension provisions appropriately.

Dear Dr. Bronner:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

(1) May a person retired under the Teachers' Retirement System or the Employees' Retirement System, functioning as an independent contractor, perform services for an employer participating in the TRS or ERS ("participant") without regard to the prohibition of permanent, full-time employment and earnings limitations of sections 16-25-26(a) and 36-27-8.2(a) of the Code of Alabama?

(2)(a) What standard does the Retirement Systems of Alabama apply to determine whether a retiree qualifies as an independent contractor?

(b) Where the facts of the employment are such that the retiree does not meet the standard for a finding that he or she is an independent contractor, is the participating employer's use of a contract with a third party to compensate the retiree alone enough to make the prohibition of permanent, full-time employment and earnings limitations of sections 16-25-26(a) and 36-27-8.2(a) inapplicable?

(c) Do sections 16-25-26(c) and 36-27-8.2(c) require that the employing participant bear the burden of providing information to the RSA sufficient to prove that the retiree is an independent contractor under the applicable standard?

FACTS AND ANALYSIS

In your request, you stated that it has come to the attention of RSA that there are a number of TRS and ERS retirees performing services for RSA-participating employers. A question has arisen concerning the circumstances under which those retirees' benefits should be suspended and whether, and under what circumstances, those retirees are subject to limitations on their post-retirement employment with participating employers.

You have submitted several questions concerning the application of sections 16-25-26(a) and 36-27-8.2(a) of the Code. Those Code sections create

exceptions to the general rule of sections 16-25-14(k) and 36-27-16(e), which provide that retirement benefits of a TRS or ERS retiree must be suspended in the event that the retiree is reemployed by either a TRS- or ERS-participating employer.

With respect to TRS employees, section 16-25-14(k) 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 . . . ." ALA. CODE § 16-25-14(k) (2012). Section 16-25-1(10) defines "service" as "[s]ervice as a teacher." ALA. CODE § 16-25-1(10) (2012). "Teacher" is defined in section 16-25-1(3) as any one of several specified positions that are "employed" by qualified entities. ALA. CODE § 16-25-1(3) (2012).

As an exception to this rule, section 16-25-26(a) of the Code provides that a TRS retiree "may perform duties in any capacity" [ALA. CODE § 16-25-26(a) (2012)] for an employer who is a member of TRS or ERS without suspension of his or her pension payments, provided that: (1) "the person is not employed in a permanent full-time capacity" [*id.*], and (2) in 2013, the person's compensation from the employer does not exceed $23,000 per calendar year. (Pursuant to the provisions of sections 16-25-26(a) and 36-27-8.2(a), the annual earnings limit is to be increased each year by a percentage based on the percentage increase in the Consumer Price Index.)

Similarly, the ERS regulatory scheme in section 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 active service . . . ." ALA. CODE § 36-27-16(e) (Supp. 2012). Section 36-27-1(7) defines "service" as "[s]ervice as an employee paid for by an employer." ALA. CODE § 36-27-1(7) (Supp. 2012). Section 36-27-8.2(a) provides for the same exception to the suspension of benefits when a retired ERS employee "perform[s] duties in any capacity" [ALA. CODE § 36-27-8.2(a) (Supp. 2012)] for a TRS- or ERS-participating employer. Sections 16-25-26(b) and 36-27-8.2(b) provide for a special exception to the suspension-of-benefits rule for retirees who receive compensation as an elected official. The questions submitted in this request do not seek an opinion regarding that exception.

You have asked whether a TRS or ERS retiree who performs work as an independent contractor for a participating employer is subject to suspension of his or her retirement benefits if he or she does not adhere to the limitations imposed by sections 16-25-26(a) and 36-27-8.2(a). These sections make no mention of independent contractors, and the language used is ambiguous as applied to independent-contractor relationships.

The Alabama Legislature, however, has delegated the administration of the Retirement Systems to the ERS and TRS Boards of Control. ALA. CODE § 16-25-19(h) (2012); ALA. CODE § 36-27-23(g) (Supp. 2012). The authorizing statutes permit the Boards to promulgate rules and regulations to that end, and accordingly, the Boards are the proper authorities to interpret the ambiguous language and provide guidance to participating employers and retirees.

Moreover, whether an independent contractor is "employed in a permanent full-time capacity" of a participating employer is a factual determination that the Alabama Legislature has delegated to the Boards of Control. *See* ALA. CODE § 36-27-1(2) (Supp. 2012) ("[i]n all cases of doubt the Board of Control shall determine who is an employee within the meaning of this article"); ALA. CODE § 16-25-1(3) (2012) ("[i]n all cases of doubt, the Board of Control shall determine whether any person is a teacher as defined in this chapter").

As a general rule, the Alabama Supreme Court will defer to a state agency's regulations, provided that the agency complies with the Alabama Administrative Procedure Act and that the regulations are not "plainly erroneous." ALA. CODE §§ 41-22-1 to 41-22-27 (2000, Supp. 2012); *Roberts Health Care, Inc. v. State Health Planning & Dev. Agency*, 698 So. 2d 106, 109 (Ala. 1997); *Brunson Constr. & Envtl. Servs., Inc. v. City of Prichard*, 664 So. 2d 885 (Ala. 1995).

Although the Boards of Control have not issued rules or regulations on this issue, you have informed this Office that RSA has generally taken the position that an independent contractor is not an employee. Accordingly, RSA has determined that a retiree who provides services for a TRS or ERS employer as an independent contractor is not subject to the suspension-of-benefits provisions. As support for this position, you reference the case of *Laidlaw Transit, Inc. v. Alabama Educ. Ass'n*, 769 So. 2d 872, 879-80 (Ala. 2000), holding that employees of an independent contractor who provided services to a local school board are not entitled to benefits accorded by statute to employees of the board.

This Office understands that it has been a longstanding practice of RSA that the pension-suspension limitations of sections 16-25-26(a) and 36-27-8.2(a) are not applicable to retirees who enter into independent-contractor business relationships with participating employers. Although this practice is not binding, "[t]he interpretation placed on a statute by the executive or administrative agency charged with its enforcement is given great weight and deference by a reviewing court." *McCullar v. Universal Underwriters Life Ins. Co.*, 687 So. 2d 156, 163 (Ala. 1996).

You have also asked what standard RSA should apply to determine whether a retiree qualifies as an independent contractor. You specifically mention that the Internal Revenue Service ("IRS") has distilled the common-law rules into a "twenty-factor" test to aid in distinguishing between an employee and an independent contractor. *See In re Rasbury*, 24 F.3d 159, 162 (11th Cir. 1994) (twenty-factor test used by IRS to determine employment status derived from common law).

Although the relevant statutes do not refer to independent contractors, the ERS and TRS Boards of Control have the authority to promulgate rules listing the relevant factors to be considered in determining whether a retiree who provides services for a TRS- or ERS-participating employer is an "employee" or "teacher" for the purposes of the statute. *See* ALA. CODE § 36-27-23(g) (Supp. 2012); ALA. CODE § 16-25-19(h) (2012). To that end, the Boards have the authority to include the IRS twenty-factor test in its rules.

Your request also noted that RSA has learned that some retirees who are providing services for participating employers have their compensation paid pursuant to a personal services contract or a contract between the employer and a third party. As previously stated, whether a retiree who is providing services for participating employers is an employee or a teacher of a participating ERS or TRS employer is a factual determination that, by law, is delegated to the ERS and TRS Boards of Control. In all cases of doubt, the Boards shall make this determination. ALA. CODE § 36-27-1(2) (Supp. 2012); ALA. CODE § 16-25-1(3) (2012). Again, the Boards have the authority to adopt rules for making these determinations.

Finally, you have asked whether sections 16-25-26(c) and 36-27-8.2(c) require that the participating employer bear the burden of providing sufficient information to RSA to prove that the retiree is not subject to the pension-suspension provisions of sections 16-25-14(i) and 36-27-16(e). Sections 16-25-26(c) and 36-27-8.2(c) are almost identical.

Section 16-25-26(c) provides that "[t]he responsibility for compliance with this section is placed upon the employing authority, and each person employed under this section shall certify to the employer any information required in order to carry out this section." ALA. CODE § 16-25-26(c) (2012). 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." ALA. CODE § 36-27-8.2(c) (Supp. 2012).

"The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute." *IMED Corp. v. Systems Eng'g Assocs. Corp.*, 602 So. 2d 344, 346 (Ala. 1992). Where the language in a statute is unambiguous, there is no room for judicial construction and the "clearly expressed intent of the legislature must be given effect." *Ex Parte Cove Properties, Inc.*, 796 So. 2d 331, 334 (2000) (citation omitted).

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). ALA. CODE § 16-25-26(c) (2012); ALA. CODE § 36-27-8.2(c) (Supp. 2012). As previously stated, the determination of who is an "employee" (or "teacher" in the case of the TRS) of a participating employer is, by law, delegated to the ERS and TRS Boards of Control. *See* ALA. CODE § 36-27-1(2) (Supp. 2012); ALA. CODE § 16-25-1(3) (2012).

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.

CONCLUSION

The Boards of Control of the Employees' Retirement System and Teachers' Retirement System may promulgate rules setting forth guidelines to determine whether retirees who provide services to participating ERS and TRS employers through a contract are independent contractors or employees subject to the limitations of sections 36-27-8.2(a) and 16-25-26(a) of the Code.

Under sections 36-27-8.2(c) and 16-25-26(c), it is the duty and responsibility of the participating employer to report to RSA the name of any ERS or TRS retiree who performs work for it so that RSA can comply with the

law and exercise its duty to apply the pension-suspension provisions appropriately.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

LUTHER STRANGE
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By:

BRENDA F. SMITH
Chief, Opinions Division

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