PERA Membership Review

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Types of Workers at PERA Employers

- **Employees**
  - PERA Members
  - Optional Retirement Plan Members (colleges and universities)
  - Other Retirement Plans (e.g., FPPA)
  - Non-PERA Members (e.g., student workers)

- **Independent Contractors**
  - PERA Members when circumstances indicate this is correct treatment
  - PERA Retirees pay working retiree contributions
  - Non-PERA Members

- **Workers employed by third party**
  - PERA Members when circumstances indicate this is correct treatment
  - Non-PERA Members
PERA has Authority to Determine Membership

- **Colorado statute**
  - C.R.S. § 24-51-205(1): "the board shall have the authority to determine membership status within the state, school, local government, judicial, and Denver public schools divisions; exemptions from membership; . . ."

- **Caselaw**
  - *Taylor v. State Personnel Board*: “the issue of whether Taylor was an employee for purposes of receiving PERA service credits . . . is indeed within PERA’s jurisdiction.”
  - *PERA v. Stermole*: “Nothing in the [PERA] Board’s decision prevents the School from structuring payments in the manner done here; the decision by the Board addresses only the PERA benefits resulting from such compensation.”
Determining Relationship – IRS Test

Review the totality of circumstances, including:

- **Behavioral Control**
  - Subject to instructions on when, where, how to work; equipment to be used; evaluation; training

- **Financial Control**
  - Investment into equipment; expense reimbursement; opportunity for profit or loss; availability of worker’s services on open market; method of payment

- **Type of Relationship**
  - Services provided as key activity of business; benefits; permanency of the relationship; contractual relationship
Employer-employee relationship under the Fair Labor Standards Act depends on the total activity or situation. Some factors that are significant include:

- Opportunity for profit or loss (for example, ability to negotiate price of work; ability to choose order or time of work/jobs; purchase of materials);
- Investments by the worker and the potential employer (is the worker or employer, or both, investing in tools and equipment);
- Degree of permanence of the work relationship;
- Nature and degree of control (including, but not limited to, control over the performance of work, supervising the work performed, or reserving the right to control);
- Extent to which the work performed is an integral part of the potential employer’s business (is the work critical, necessary, or central to the principal business); and
- Skill and initiative (does the worker use specialized skills and business-like initiative).
PERA Staff Decision-making

What kinds of questions do staff receive?
• Questions received regularly on PERA membership, salary inclusion, and working after retirement situations

How does PERA receive questions?
• Employers submit questions to Employer Representatives, Data Research Analysts, Member Education, Customer Service Division
• Members ask questions of Customer Service, contact Benefit Services Division (BSD)
• Audit activities
After question is received from member/employer:

- Many situations are preceded and covered by existing procedures or policies - in those cases, staff generally resolve without further direction
- Legal team regularly reviews policies, procedures, law, and rules with BSD leadership
- Executive team engaged as appropriate on new/unique situations
- Communicate back to member/employer on decision; determine whether others may be impacted and further outreach is needed
- Decision may be appealed
PERA Decision-making Appeal Process

Staff Review and Decision
- Staff reviews all member and employer questions and utilizes available resources to make a decision.
- If necessary, Legal and/or Executive team is engaged for additional discussion and research.

Staff Determination Letter (SDL)
- Staff and the Legal team review the decision with any additional information provided in the challenge.
- Staff issues an SDL, which is the first step in the appeal process under Rule 2.20.

Panel Hearing
- If the EDID is appealed, a 3-member panel of Board members hears the appeal and issues a decision.

Decision Challenged
- A member or employer can question or disagree with a decision, which begins a formal appeal process.
- This escalation path allows staff, executives and the board to be part of discussions and decisions that impact members and employers, and gives consistency to the formal process.

Executive Director Initial Decision (EDID)
- Executive Director reviews staff’s decision, any other information submitted by the appealing party for review, and issues a decision.
- Any SDLs overturned by Executive Director are reported to the Board.

Full Board Hearing and/or District Court Complaint
- If the Panel decision is appealed, the next step is a full Board hearing (members of the Board who were not involved in the Panel decision), or the appealing party can go directly to District Court.
- The appealing party can go to court either after the Panel or can wait and appeal after the full Board hearing.
Information
PERA Receives

• Member information – Name, address, birthdate, SSN, salary, employer

• Employer audits – All employee information (name, tax ID, hire/term dates), information that supports various payments (e.g., leave pay policies, individual contracts), all independent contractors and vendors (names, tax ID), 1099s

• Audit attestation – Survey sent to sample of employers with questions to identify compliance with includable salary, PERA eligibility, working retiree requirements

• Annual information returns provided to PERA – All W-2s/1099s from all employers

• Census data audits – External auditor sends annual request to a sample of employers requesting actuarial-related data to validate employee data sent to PERA
Member information does not include:

- Employment status (full-time, part-time, temporary) or job title - PERA does not need this to calculate benefits and updating these data points is burdensome to employers

- Non-participating employee data (positions outside PERA-covered participation)

- Hiring, firing, and categorization of workers by employers (groups/functions of outsourced workers, temporary employees)

- Employment practices of third-party services (retirement benefits offered, non-compete clauses)
Data Points Needed to Review Membership Status

- Position and duties
- Relationship between the parties
- Type of employer
- Historical treatment of position by the employer (Was the position formerly treated as an employee? Are there others in the position who are treated as employees?)
Comparisons Among PERA Employers

PERA employer similarities/differences factor into the membership analysis

- Among similar employers, expect to see similar treatment of similar workers
- Relationships may vary pursuant to parameters defined by statute
- Comparison of employers across divisions requires additional analysis due to the unique nature of their core functions
Impact to Members of Losing PERA Membership

- No service credit towards retirement
- Loss of disability benefits
- Loss of survivor benefits
- No access to PERACare (retiree health care) without other PERA membership
- No access to PERAPlus 401(k) and/or 457
- Remaining members may see increased contributions if auto adjustment is triggered
Impact to Employers of Losing PERA Membership

- Possibility of triggering automatic adjustment increases with fewer member, employer, and working retiree contributions.
- Employers will have to pay contributions and lost interest if outsourced/contracted staff come forth later claiming eligibility for PERA membership and meets the IRS test.
Impact to PERA of Losing Members (School Division)
Key Takeaways

• This is not new to PERA or employers
• PERA has no desire or incentive to impose itself on the employment practices of employers outside of determining plan participation
• These determinations are fact-specific to each situation and vary by employer division and position
• There is no prohibition against using third parties for placement services, but it does not preclude PERA participation
Questions or Feedback?