

Public Employees' Retirement System of Mississippi  
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**PERS**

**Employer Update  
March 2004**

*Distribute to all Administrative, Payroll, and Human Resource Personnel*

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## **County Election Commissioners – Not Eligible for Retirement Coverage**

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We are aware of one case where the employer reported per diem payments that were paid to a County Election Commissioner because the individual was covered for retirement through full-time employment with another covered employer. In order for earnings from a second employer to be reportable to PERS, there must be an ongoing employment relationship in the second employment where there is an expectation that the employee will be providing regular, part-time services for a second covered employer. In those cases where a member of PERS is performing services in a position that would be covered for retirement purposes except for the fact that the member works less than 80 hours per month, the additional earnings associated with regular, part-time employment with the *second* employer should be reported to PERS where the member is already covered in PERS. On the contrary, where the position, whether part-time or otherwise, is not covered at all (whether by statute or by specific exclusion in the **Joinder Agreement**), as in the case of an Election Commissioner, the payments for services provided through the second employer should not be reported to PERS.

By way of background, Election Commissioners were originally excluded from retirement coverage by regulation when the Retirement System was created in 1952. Later, the law was amended to clarify that retirement coverage was not extended to elected officials who were paid exclusively on a per diem basis. **PERS Board Regulation 6**, May 29, 1952, provides that “Members of Boards and Commissions of various state departments or agencies or commissions, who are paid solely on a per diem and expense basis, shall not be considered in state service within the meaning of this term as it applies to employment of the state. Members of such Boards or Commissions, who are paid a stipulated salary monthly for their services, shall be considered as employees in state service.” Also, **Miss. Code Ann. § 25-11-109 (2)** provides in pertinent part that “an appointed or elected official compensated on a per diem basis only shall not be allowed creditable service for terms of office.”

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## **Constables who simultaneously serve as Bailiffs**

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PERS has received questions regarding whether the compensation earned by a Constable for services rendered as a bailiff in a civil case are reportable to PERS. Constables are classified as “Fee Officials” and, where covered by the county’s **Joinder Agreement**, must make contributions to PERS. Constables are considered employees of the county for the annual \$1,000.00 “fail case” fees for which the Constable contributes 7.25% of that payment as employee contributions and the county contributes 9.75% of these payments as employer contributions. Constables are considered as self-employed for the fee portion of their earnings and must forward both

the employee and employer contributions (17%) to PERS on the fee portion of their earnings.

In the case where a Constable is already a contributing member of the Retirement System and is performing additional services for the county, as in the case of serving as bailiff in civil proceedings, such additional earnings from the county should be reported to PERS. Since the payments for services rendered as bailiff are earnings from the county and are not fee income, the county is responsible for reporting the compensation paid to Constables for services rendered as bailiffs and remitting appropriate contributions thereon.

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## Local School Board Members – Excluded from Retirement Coverage

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According to **Miss. Code Ann. § 37-6-13**, each person serving as a member of the school board of any local school district shall receive either per diem or salary for attending meetings of the school board. However, in accordance with **Miss. Code Ann. § 37-6-13**, members of the school board, whether paid per diem or salary, **are not eligible for** any fringe benefits including **retirement**. Therefore, local school districts *should not* report compensation to PERS on behalf of a local school board member where that compensation is directly attributable to service as a member of the school board, even if the school board member is already covered in PERS through employment in a covered position.

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## Elected County Surveyor – Covered for Retirement, if not excluded

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Where not specifically excluded through the **Joinder Agreement** between the County Board of Supervisors and the Retirement System, the elected County Surveyor is covered for retirement, and, as a fee paid elected official, he or she is responsible for both the employee and employer contributions on net fee income. The elected County Surveyor should submit to the County a monthly accounting of fees, net of expenses, and should remit to the County the applicable employee (7.25%) and employer (9.75%) contributions based on net fee income. The County should in turn report the applicable net fee income to PERS through the regular monthly report of wages and contributions and remit the applicable employee and employer contributions to PERS. Reference: **MS AG Op., Limerick (October 1, 1954); MS AG Op., Wolverton (February 12, 1979); MS AG Op., Lee (December 1, 1989)**.

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## Source of funds is not the basis for determining eligibility for coverage

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We have been made aware of a case where a County did not report earnings paid to certain county employees because the salaries paid to the employees were derived solely from federal funds paid to the county. Participation in PERS is, of course, predicated on the existence of an employee/employer relationship, and we acknowledge the fact that the employer has the primary responsibility for properly classifying its employees. However, the fact that the source of the funding for employees may be 100% federal would not be the determining factor in establishing whether an employee/employer relationship actually exists between the employees and the employer. On the contrary, the primary factor in determining an employee/employer relationship is whether the employer has the right, whether exercised or not, to direct and control the individual who performs the service.

In accordance with **PERS Board Regulation 36**, retirement coverage is mandatory for a regular employee of a covered employer whose regular employment is anticipated to exceed 4 and ½ months and who is subject to the control of the covered employer as defined in IRS guidelines and who:

1. is properly classified as an employee;
2. has compensation properly reported on IRS Form W-2;
3. is paid regular periodic compensation;
4. is treated as an employee for all purposes, including but not limited to eligibility for fringe benefits, payment of employment-related expenses, payroll tax withholding, etc., and
5. personally performs services and receives compensation for not less than 20 hours per week or a total of 80 hours per month.

Note that failure to comply with the reporting requirement due to misclassification (or for any other reason) will not relieve either the employee or the employer from the liability for each one's required contributions and interest that might accrue for late payment. In each specific case, a factual determination must be made as to

whether the individuals are in fact employees. However, the fact that the source of the funding is federal would not be the determining factor.

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## **Questions and Answers Regarding PERS Board Regulation 51 – Administration of Leave**

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**Q Our sick leave policy provides that up to ten (10) unused sick leave days may be carried over from one calendar year to the next and that sick leave days are allowed to accumulate to a total of not more than twenty (20) days. Based on our policy, what is the maximum number of sick leave days that we may certify to PERS for an employee upon termination of employment?**

A For reference, retirement law limits the use of accumulated leave to the standards set forth in **Miss. Code Ann. § 25-3-91 et seq.** These sections clearly provide that leave that is certifiable to PERS is leave that is accumulated and available for use. To be accumulated, such leave must be eligible to be carried forward from year to year. Where a policy provides otherwise (i.e., that leave is capped at a certain amount or that leave may not be carried forward), PERS is compelled to use those lesser limits in determining what, if any, amount of additional retirement service credit may be granted. Furthermore, to be certifiable to PERS upon termination from employment, accumulated unused, uncompensated leave must have been viable under the terms of the policy and available for use by the employee, if needed, for the intended purpose, not solely for purposes of retirement service credit. Therefore, based on the information provided, sick leave days in excess of twenty (20) days cannot be certified to PERS, as twenty (20) days is the maximum number of sick leave days that an employee may accumulate and thus use under the current sick leave policy.

**Q May our Board adopt a resolution to award leave to employees retroactively to the date of hire?**

A No. The Office of the Attorney General has previously opined that leave policies may not be adopted and/or applied retroactively as this would equate to a donation to a public employee which is prohibited by the Mississippi Constitution. Reference: MS AG Op., Ranck (August 14, 1998); MS AG Op., Davies (June 23, 2000); MS AG Op., Trapp (September 6, 2002); MS AG Op., Bryant (November 1, 2002); MS AG Op., Fortier (January 10, 2003).

**Q Our County Attorney was not re-elected for another term of office, and he has asked us to pay him for thirty (30) days of elected official leave. Do we have any such authority to pay an elected official for the statutorily provided leave days?**

A No. For reference, **Miss. Code Ann. § 25-11-109 (2)** provides in pertinent part that “[f]or the purpose of this subsection, for members of the system who are elected officers and who retire on or after July 1, 1987, the following shall govern:

- (a) For service prior to July 1, 1984, the members shall receive credit for leave (combined personal and major medical) for service as an elected official prior to that date at the rate of thirty (30) days per year.
- (b) For service on and after July 1, 1984, the member shall receive credit for personal and major medical leave beginning July 1, 1984, at the rates authorized in Sections 25-3-93 and 25-3-95, computed as a full-time employee.”

This Section only provides for additional service credit attributable to service as an elected official calculated using the referenced guidelines. Hence, there is no authority for the payment of this “elected official leave” to any elected official.

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## Election of Board Representative for Public Schools & Community Colleges

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An election is being conducted to fill the position of the Public School and Community Colleges Representative on the PERS Board of Trustees. The election is for a six-year term beginning May 1, 2004, and ending April 30, 2010. All PERS members employed by a public school district or community college are eligible to vote. The incumbent is Dr. Lee Childress, Superintendent of the Corinth Public School District.

The deadline for receipt of ballots was 5:00 p.m. on Tuesday, February 17, 2004. At its meeting on Tuesday, February 24, 2004, the Board of Trustees certified that no candidate had received a majority of the votes in the first election. Dr. Lee Childress and Mr. J. Milton Stennett of Laurel were the top two vote getters among five (5) candidates in the first election. **The run-off schedule is as follows:**

March 1, 2004	Mail run-off ballots
March 31, 2004	Deadline for receipt of runoff ballots (5:00 p.m.)
April 2, 2004	Ballots counted
April 20, 2004	Board certifies election results

Ballots were mailed to the human resource or personnel offices of the employers. It is the responsibility of human resource/personnel officials to distribute ballots in accordance with instructions and to return the ballots to PERS prior to the March 31 deadline.

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## President Signs H.R. 743, Social Security Bill, into Law

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**H.R. 743** is a Social Security bill that affects some state and local government plans. It was signed into law by President Bush on March 2, 2004, as Public Law 108-203.

First, **H.R. 743** imposes a notice requirement on individuals hired to fill non-Social Security covered positions. The individual must sign a notice that he/she understands that because his/her position is non-covered, his/her Social Security benefit may be reduced by the Government Pension Offset, the Windfall Elimination Provision, or both. The employer of the individual must send a copy of the signed notice to the retirement system that covers the individual. The Social Security Administration will prescribe the form of the notice. The

requirement is effective for individuals commencing affected employment on or after January 1, 2005.

Second, **H.R. 743** also extends the “last day” rule that determines whether someone is subject to the Government Pension Offset (GPO). The GPO may reduce or eliminate an individual’s spouse benefit from Social Security if the individual receives a pension from non-Social Security covered work. **Under current law**, if someone is in a position not covered by Social Security but moves just prior to retirement to a Social Security covered position and the position is covered by the retirement system that will provide him/her a pension, he/she is exempt from the GPO. **H.R. 743** extends the time to qualify for the exemption from one day to 60 months. A transition rule is included to mitigate the effect of the change.