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Opinion No. 00-028

Legality of Contracting With Person Receiving Tennessee Consolidated Retirement System Benefits

QUESTION

In the Legislative Branch of Government, is there any law, etc. prohibiting contracting an individual for employment (i.e. as an independent contractor) in the above branch who is receiving State teachers' retirement benefits under the Consolidated Teachers Retirement System, where no benefits will be paid to increase benefits? (The individual will continue to draw benefits while under contract.)

OPINION

An independent contractor of the State may continue drawing TCRS retirement benefits while performing contractual services. However, the State may not hire a worker who would properly be classified as an employee, in violation of the general prohibition set forth in Tenn. Code Ann. § 8-36-801 against a retired employee's receipt of retirement benefits during a period of re-employment with the state, simply by reducing the employment relationship to writing and calling the person an independent contractor.

ANALYSIS

(1)
TCRS

In general, any retired employee who is currently receiving benefits under the Tennessee Consolidated Retirement System (TCRS), or under any superseded system administered by the State or any political subdivision thereof whose employees are authorized to participate in TCRS, is prohibited from receiving retirement benefits during any period of re-employment with the state. Tenn. Code Ann. § 8-36-801. Accordingly, if a retired employee returns to state employment and is receiving a publicly funded salary in a position covered by TCRS, that employee's retirement benefits must be suspended during the period of re-employment.

An exception to this prohibition is contained in Tenn. Code Ann. § 8-36-805 which allows retired TCRS members to return to employment on a temporary basis without loss of retirement

benefits for the equivalent of one hundred (100) days or less during a twelve-month period (provided the remaining conditions set forth in the statute are met). However, the retiree may not accrue additional retirement credit in TCRS while simultaneously receiving retirement benefits. Tenn. Code Ann. § 8-36-804. There are some other exceptions contained in Title 8, Chapter 36, Part 8, but none that would appear to apply based on the limited facts stated in the request.

In addition, Tenn. Code Ann. § 8-34-101(18) excludes persons performing services on a contractual or percentage basis from the definition of "general employee," thereby rendering such persons ineligible for participation in TCRS. As a result, such persons are not employed in a position covered by TCRS for purposes of the above prohibition and may work as independent contractors for a covered employer while also drawing their TCRS retirement benefits. Accordingly, if the question is whether an independent contractor of the State may continue drawing his or her retirement benefits while performing contractual services, the answer is yes. However, if the question is whether the above prohibition may be avoided by hiring a person in what would otherwise be an employee-employer relationship with the State simply by reducing the employment relationship to writing and calling the person an independent contractor, then the answer is no.

(2)

Employee vs. Independent Contractor

The question of whether a worker is an employee or independent contractor may arise in various contexts, such as workers' compensation cases or issues of employer liability for the acts of an agent. Under federal tax law, whether an employer is required to withhold and pay employment taxes on compensation paid to a worker depends upon the appropriate classification of the worker as employee or independent contractor. The question is a matter of common law, and the case law on the issue - both state and federal - is abundant. It is clear, however, that the determination of whether a worker is an employee or independent contractor depends on the facts and circumstances of the working relationship and not on the characterization of that relationship by the parties.

A leading Tennessee case is *Stratton v. United Inter-Mountain Telephone Co.*, 695 S.W.2d 947 (Tenn. 1985). Stratton held that the factors to be considered are (1) the right to control the conduct of the work (not just the 'what' but the 'how' as well), (2) the right of termination, (3) the method of payment, (4) whether the alleged employee furnishes his own helpers, (5) whether the alleged employee furnishes his own tools, and (6) whether the alleged employee works full-time for the employer or also works for others. While no single factor is necessarily dispositive, "the importance of the right to control the conduct of the work has been repeatedly emphasized." *Id.* citing *Carver v. Sparta Electric System*, 690 S.W.2d 218 (Tenn. 1985); *Wooten Transports, Inc. v. Hunter*, 535 S.W.2d 858 (Tenn. 1976). In addition, the Internal Revenue Service has published a Revenue Ruling which sets forth the factors it deems relevant to determining whether an individual is an employee or an independent contractor. *See Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).*

A more comprehensive analysis would require knowledge of the facts of the specific case involved and is beyond the scope of this opinion. However, caution is advised in order to avoid

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treating any state worker as an independent contractor who might more properly be classified as an employee.

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