



Return to Service Guidelines and Clarification

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Disclaimer

The Public School Employees’ Retirement System (PSERS) provides this document for educational and informational purposes. Information in this document is general in nature, does not cover all factual circumstances and is not a complete statement of the law or administrative rules. The statements in this document are not binding. In any conflict between the statements in this document and applicable law or administrative rules, the law and administrative rules will prevail.

This document is designed solely to provide an overview of the return to service rules applicable to PSERS retirees and is not intended to serve as advice or a final determination.

Employers and members often seek clarification regarding the ability of a Public School Employees' Retirement System's (PSERS) retiree to be employed by a public school employer, including charter schools, community colleges, or public universities while receiving an annuity from PSERS.

The Retirement Code vests PSERS with the responsibility for administering a mandatory retirement system for public school employees. Some important principles to remember:

- Membership in PSERS is required for all “school employees.”
- Under the Retirement Code, “school service” is defined as service rendered as a “school employee.”
- A “school employee” is any person working for a “public school.” A “public school” is any school district, charter school, vocational-technical school, technical institute, intermediate unit, the State Board of Education, the Department of Education, State-owned educational institutions, community colleges, and the Pennsylvania State University.

The Retirement Code prohibits retirees from returning to “school service” for a “public school” in any capacity, full-time or part-time, qualifying or non-qualifying service, while receiving a PSERS retirement benefit. The Pennsylvania General Assembly has made the policy decision that a member will not be permitted to “double dip.” The rationale is that retirement benefits are designed to provide income for a retiree, not for someone who continues to work. If a retiree renders “school service” for a “public school” (or a multiple service retiree returns to state service with a state employer), the retiree’s retirement benefit ceases immediately and the retiree is re-enrolled as an active member of PSERS. 24 Pa.C.S. § 8346(a). A retiree may, however, work at any time in private employment for a private employer and still receive a PSERS annuity.

A retiree may be permitted to perform service for a “public school” without a loss of annuity under extremely limited exceptions, subject to review by PSERS at any time. The return to work exceptions, as discussed more fully in this publication, are:

1. Shortage of Personnel;
2. Emergency Creating an Increase in Workload;
3. Extracurricular Contract;
4. Independent Contractor;
5. Employment with a Third Party Employer; or
6. Enrollment in Alternate Retirement Plan.

Before any retiree may return to service, however, he/she must first experience a bona fide break from “school service.”

Break in Service

"Good Faith Termination"

PSERS is maintained as a qualified governmental plan under the Internal Revenue Code § 401(a). To protect that status and provide favorable tax treatment for members' benefits, PSERS must ensure that a member experiences a bona fide break in service before beginning to receive a distribution from the retirement plan. A break in service occurs when a member terminates service from *all public school employers*.

The Retirement Code defines "date of termination of service" in pertinent part as: "the effective date of his resignation or the date his employment is formally discontinued by his employer or two years following the last day of service for which contributions were made, whichever is earliest." 24 Pa.C.S. § 8102. An employee must cease to render paid services without any expectation by the employee or the employer that the employee will be rendering any future service. Regardless of the length of time between leaving employment, submitting an application for retirement, and returning to service, PSERS reserves the right to review the facts and circumstances surrounding the member's termination of service to determine whether the member experienced a true break in service.

PSERS will consider the following factors when determining whether there has been a bona fide break in service:

- i. whether the change in the employment relationship is more than a technical change, requiring the true severing of the employment connection with the employer;
- ii. whether there has been a reasonable anticipation or prearranged agreement between the member and the employer that a return to school service will occur;
- iii. the amount of time that has elapsed from the date the member becomes a retiree and the return to school service;
- iv. whether the services are a continuation of the retiree's previous service with the same employer; and
- v. any other factors that PSERS deems appropriate.

Whether an employee severs the employment connection with the employer is a question of fact. PSERS will closely examine the individual facts to determine if a member experiences a bona fide break in service, when necessary.

“Emergency” Exceptions:

Shortage of Personnel / Emergency Creating an Increase in Work Load

A member can return to service and continue to receive a pension from PSERS if: (1) there is a shortage of personnel, or (2) an emergency creates a serious impairment of service. Both “Emergency” exceptions extend only for the length of the school year or until the emergency no longer exists. 24 Pa.C.S. §8346(b).

Shortage of Personnel:

A shortage of personnel does not exist until the employer attempts to hire somebody and is unsuccessful. Thus, a lack of a pool of candidates must be established before the PSERS retiree is hired for a shortage. This requires that the employer promptly undertake an *Adequate and Good Faith Search* to find an immediate replacement after notification of a resignation. PSERS will not allow an employer to claim a continuing shortage for the same position year after year without a continued bona fide effort each year to fill the position with someone who is not a PSERS retiree.

If the employer did not have prior notice of a resignation and promptly began the hiring process after notification of the resignation, a retiree is permitted to return to service under the *Shortage of Personnel* exception while the employer is conducting an *Adequate and Good Faith Search*, so the position can be filled during the hiring process. Please refer to the section titled *Adequate and Good Faith Search* for more information.

Short-Term Substitute Position

- Short-term substitute assignments will generally qualify under the *Shortage of Personnel* exception.
- PSERS understands “short-term substitute assignment” to mean an assignment that is not to extend longer than one week.
- A school employer in need of short-term substitutes for a particular school year may request preapproval from PSERS to employ PSERS retirees due to a shortage of personnel throughout the requested school year as needed, i.e. “School Year Approval.”
- To submit a request to PSERS for a “School Year Approval,” a school employer must:
 - Maintain a current substitute list that distinguishes between those who are PSERS retirees and those who are not.
 - Confirm that, when the need for a short-term substitute assignment arises, it will first notify and exhaust a candidate pool of those who are not PSERS retirees and will not employ a PSERS retiree unless someone who is not a PSERS retiree is not available or does not accept the assignment within a reasonable period of time.
 - Make available to any PSERS retiree who will be employed in a short-term substitute assignment a copy of the request and PSERS’ response.

Note: If a short-term substitute assignment is expected to extend beyond one week, then the employer must submit a separate request to employ the individual for a long term substitute assignment.

- An employer may use a subject-certified retiree before employing someone who is not a retiree who is not certified in the particular subject or a “guest teacher,” e.g., Spanish teacher.

PSERS will review an exceptional case permit requested from the Pennsylvania Department of Education (“PDE”) that addresses potential staffing problems due to the lack of a qualified applicant. 22 Pa. Code § 49.32. Under this regulation, a person who does not have all the qualifications for the position, but whom the employer believes can fill the position on an emergency basis, may receive an emergency permit that will remain in place through the end of the school year (including summer school) which follows the date of issuance. 22 Pa. Code § 49.33.

Emergency Creating an Increase in the Workload

The essential elements of an *Emergency Creating an Increase in the Workload* exception are:

- (1) There is an *emergency*;
 - (2) There is an *increase in the workload* created by the emergency; and
 - (3) There is a *serious impairment of service to the public*.
- An “emergency” refers to a situation that is sudden, unexpected, unforeseen, and requires immediate action. The term “emergency” does not refer to a voluntary act of retirement where the retiree is able to return to work and, in fact, returns to fill the vacancy the retiree created.
 - The emergency must **create** the increase in workload. Thus, an increase in workload is a *required* consequence of an emergency under the Retirement Code. *The existing workload does not create an emergency*. In other words, the retirement of an employee does not result in an increase in workload that creates an emergency for an employer. A retirement may, however, create a shortage of personnel that may permit the hiring of a retiree as discussed more fully under the Shortage of Personnel section.
 - The scope and immediacy of the workload will be considered when determining whether the “increased workload” creates a “serious impairment of service to the public.”

Thus, a workload increase must be unexpected, temporary, and above and beyond the normal responsibilities of any existing position.

The termination, resignation, or retirement of an employee is not an “emergency.” It may create a shortage of personnel, but it does not create an increase in the normal workload. Training a replacement after retirement also is not an emergency that increases the workload. The workload remains the same; what changes is who is available to complete it.

Requesting Approval Under the “Emergency” Exceptions

To request approval under one of the *Emergency* exceptions to employ a retiree, except for a “School Year Approval,” the employer must provide the following:

1. If the retiree retired within the last school year from the same employer, the employer must provide when and how the employee first notified the employer that he or she intended to terminate service and receive a retirement benefit. Provide any documentation of the date of notification, e.g., a resignation letter, internal memo, board minute documenting the notice, etc. Specifically, provide how long the notice of termination/retirement was given before the actual termination/retirement date.
2. Copies of the first and any subsequent formal notice of the termination/retirement.
3. Copies and explanations of all relevant employment contracts and severance agreements (both oral and written).
4. An explanation of how and when the position became vacant.
5. An explanation of the *Adequate and Good Faith Search* taken by the employer to find someone who is not a PSERS retiree and the dates of each step in the process. Please refer to the section titled *Adequate and Good Faith Search* for more information.
6. Documentation for each step in the process, including copies of all advertisements placed in any media (e.g., newspapers, trade papers, web posting, emails, direct correspondence, etc.), copy of employment consultant or other agreement to perform a search for someone who is not a PSERS retiree. Include chronological documentation of these events such as when these steps began and when the retiree terminated.
7. A written list of the candidates who applied for the position and the reason(s) why each did not meet the written requirements for the position.
8. Information pertaining to who made the hiring decision.
9. Documentation of when the employer made the decision to hire the retiree.
10. If the date of the return to service is before or shortly after the date of termination or retirement of the PSERS retiree being requested to fulfill the same position, provide justification for the *Shortage of Personnel* accompanied by an explanation of why the PSERS retiree could not have simply remained in his/her position instead of retiring.
11. A written description of the means by which the retiree indicated his or her interest and became a candidate for the position. Include in the description facts such as whether the retiree responded to a posting for the vacant position, or if the employer first contacted the retiree regarding the vacancy.

12. For an *Emergency Creating an Increase in the Workload*, identify what created the emergency, how long you expect the workload to be at the increased level, and why the increase in duties cannot be performed by existing staff.

If the employer does not provide sufficient information and/or documentation to satisfy one of the *Emergency* exceptions, the request will be denied and, if the retiree renders service, may result in the retiree being reenrolled in PSERS and the retiree's benefit being stopped retroactive to the date the retiree first began service. Please refer to the section titled *Frozen Annuity* for more information.

Adequate and Good Faith Search:

- An advertisement cannot be geared at hiring only retirees and cannot be so specific to the employer that only the retiree, who previously performed the work, would qualify.
- The advertisement must be placed in a common and public location easily accessible to a pool of candidates beyond the employees of the employer.
- A shortage of personnel may exist if someone who is not a PSERS retiree does not apply for the position, but will not exist if the employer chooses to hire a PSERS retiree over a non-retiree candidate based on suitability.
- PSERS will consider whether there is a qualified replacement not whether there is a better replacement than the PSERS retiree.
- If only a PSERS retiree replies to the advertisement, then the advertisement must remain open and the employer must continue to actively recruit for the position. The employer should also review the advertisement to determine whether it should be revised to attract the appropriate candidate.
- Critical vacancies must be filled on a permanent basis as quickly as possible.

Note, however, that the *Emergency* exceptions at a college or public university are not common because there are generally many qualified people to fill the vacancy. The college or public university may also choose not to offer the course that semester.

“Extracurricular” Exception

A retiree can return to service without loss of annuity if the retiree is employed under a separate contract in an extracurricular position, which is performed primarily outside the regular instructional hours and not part of the mandated curriculum. This type of employment is permitted in all public school entities, including community colleges and public universities. There is no requirement that an “Emergency” exist to return under the *Extracurricular* exception. Unlike the *Emergency* exceptions, there is no limitation on the amount of time a retiree can return under the *Extracurricular* exception.

To meet the *Extracurricular* exception, a retiree must:

- (1) Have a written, separate contract with the public school employer; and
- (2) perform the duties primarily outside regular instructional hours and not as part of the mandated educational curriculum.

The contract need not identify the retiree as an independent contractor but must contain the following:

1. The terms and conditions of the extracurricular employment to adequately identify that the duties are performed primarily outside regular instructional hours and are not part of the mandated curriculum. This means that more than half of the extracurricular employment hours must be performed outside the school’s regularly scheduled class hours. Note, however, that the *Extracurricular* exception at a college or public university is not common because the regular instructional hours span morning through night; and the college or public university may choose not to offer the course that semester.
2. A waiver of any potential retirement benefits and a release of the employer and PSERS from any liability related to the waiver. The following is sample contract waiver language:

By entering into this contract, Retiree agrees that neither the Retiree, nor the public school employer, shall make any contributions to the Public School Employees’ Retirement System (PSERS) on account of any service performed under this contract. Retiree further agrees to waive all retirement benefits (including, but not limited to, benefits from a Multiple Service election) from PSERS that could arise from service performed under this contract, and shall release and hold harmless both the public school employer and PSERS from any liability for the payment of retirement benefits that could arise from service performed under this contract.

To ensure that the retiree is validly providing service under the *Extracurricular* exception, a copy of the contract and the circumstances surrounding the contract should be submitted to PSERS for review.

If an active member is being reported and contributing to PSERS for service that is primarily outside regular instructional hours and not part of the mandated educational curriculum, the active member must experience a bona fide break in service from all school service before retiring and returning under the Extracurricular exception. For example, an active member reported to PSERS for a coaching position that is approved by the employer for only *one season* at a time may be permitted to terminate school service, retire, and enter into an extracurricular contract for the next coaching season if the member terminates all school service before entering into the contract and beginning the next season.

“Independent Contractor” Exception

A retiree will be exempt from the return to service rules if the retiree is validly employed as an independent contractor.

To determine whether a person is an “independent contractor,” PSERS must review *all the circumstances surrounding the employment* of the person. Factors to be considered are: control of manner of work that is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one is engaged in a distinct occupation or business; which party supplied the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer; the right to terminate employment at any time; presence at the school employer’s site; and whether wages, working conditions, and fringe benefits are comparative to other employees of the school employer.

Although all of the factors are to be examined and analyzed, no single factor is dispositive of a person’s status as an independent contractor and each case must be decided according to its facts. **The mere existence of a contract, the terms of the contract, and the intent of the parties are not determinative factors.** PSERS is not bound by the terms of an agreement to which it is not a party. Rather, the Retirement Code requires PSERS to look beyond the characterization of employment in a contract to determine whether a person is a “school employee” for retirement purposes. **A member’s position cannot be reclassified or outsourced simply by signing a contract or creating a third party employer through a shell company.**

Break in Service: *The factor test contemplates a member establishing an independent contractor relationship after first formally terminating an existing employment relationship with the same employer. If a member terminates employment and returns to service shortly thereafter as an “independent contractor,” or as an employee of an independent entity that the member holds a controlling interest in, with essentially the same job duties as before, PSERS will examine whether the member experienced a bona fide break in service. A break in service will not exist simply because the parties entered into a contract.*

“Third Party Employer” Exception

A retiree providing services to a school employer will not be subject to the return to service requirements; provided the retiree is *validly* employed by a *legitimate* third party employer that is not a reporting unit of PSERS. The retiree must show that he or she is compensated, controlled, and engaged in work relating to a private, third party entity and not a school employer.

A legitimate third party employer is a private entity retained by a school employer to provide personnel, perform duties, or perform services. An employee of a legitimate third party employer is not a school employee merely because he or she renders service *similar or related* to public schools or for a school employer.

A school employer, or reporting unit, under the Retirement Code is a “governmental entity [that is] directly responsible for the employment and payment of the school employee and charged with the responsibility of providing public education within this Commonwealth.” A “governmental entity” consists of a “[b]oard of school directors, board of public education, intermediate unit board of directors, area vocational-technical board, any governing board of any agency or authority created by them, and the Commonwealth.”

If the third party employer was established or is controlled by a retiree, PSERS will look through the third party employer to determine whether the company is a valid company or a phantom company created to allow the retiree to return to service. PSERS will consider such factors as: (1) when the company was established; (2) whether there are other employees who also provide service on behalf of the company; and (3) whether the company provides service to other entities.

Some examples of legitimate third party employers are: transportation (bus drivers); substitute teaching services; and cafeteria services.

“Alternate Retirement Plan” Exception

A retiree who becomes employed by any of the state’s community colleges, Penn State University, or the 14 state-owned universities following retirement may be eligible to elect membership into an alternate retirement plan without a suspension of PSERS annuity payments. For a retiree to elect an alternate retirement plan, a bona fide break in service is required from all employers. This means the retiree must experience a bona fide break in service from the college or university prior to retirement if the retiree is currently employed by the college or university.

Approved post-retirement employment with one of these employers is generally based on the member’s eligibility to elect an alternate retirement plan. Generally, a college or public university employee may select a retirement plan from among three choices:

1. PSERS
2. SERS (State Employees’ Retirement System)
3. Alternate retirement plan

PSERS benefits will be suspended if the retiree chooses not to or is not eligible to select SERS or an alternate retirement plan. To determine the minimum membership requirements for other retirement plans, retirees should contact those plans or their proposed employer.

If a retiree does not elect an alternate retirement plan or SERS, then the same return to service exceptions apply.

Special rules apply for a multiple service retiree that returns to work in a college or university. Please refer to the section titled *Returning to Service for Multiple Service Retirees* for more information.

Returning to Service at a Pennsylvania Charter School

A retiree is subject to the return to service rules when returning to service in a state approved charter school. The same exceptions apply to charter schools that apply to regular public schools.

The most common exception used is enrollment in an *Alternate Retirement Plan*. The Charter School Law (CSL) requires employees of a charter school to be enrolled in PSERS unless the employer provides an alternate retirement plan. The charter schools may also offer membership in PSERS to some of their employees and provide an alternate plan to other employees.

The suspension of annuity in the event of a return applies regardless of whether the charter school is participating or non-participating in PSERS. For example, if a charter school only offers an alternate retirement plan, then a retiree's annuity will not be stopped if the retiree is enrolled in the alternate retirement plan. *If, however, the retiree is not eligible for membership in the alternate retirement plan, then, regardless of whether the charter school is a participating charter school with PSERS, the retiree must be enrolled in PSERS as an active member if the return does not qualify under any of the other exceptions.*

Returning to Service for Multiple Service Retirees

"Multiple service" is the combining of school and state service into a single pension upon retirement for those eligible retirees who previously worked for the Commonwealth of Pennsylvania or had credited service with the State Employees' Retirement System (SERS).

Generally, a multiple service retiree is subject to the same return to service rules as a PSERS retiree, except that the rules governing the post-retirement employment may differ depending on the employer.

If a multiple service retiree is employed by a public school district, charter school, intermediate unit, or any employer that offers only PSERS as a retirement plan, then the retiree is subject to PSERS' rules for return to service.

If a multiple service retiree is employed by a state-owned university, community college, Penn State University, or any employer that offers the State Employees' Retirement System (SERS) as a retirement plan, then the retiree is subject to SERS' rules for return to service.

Returning to Service for Disability Retirees

Generally, a disability retiree is not permitted to work for any public school in Pennsylvania. PSERS considers a public school to be any government entity directly responsible for the employment and payment of the school employee and charged with the responsibility of providing public education within this Commonwealth, including but not limited to: State-owned colleges and universities, the Pennsylvania State University, community colleges, area vocational-technical schools, intermediate units, the State Board of Education, Scotland School for Veterans' Children, Thaddeus Stevens School of Technology, and the Western Pennsylvania State School for the Deaf.

A disability retiree may be employed in other situations, including public school service outside of Pennsylvania. Such employment, however, raises the question of medical eligibility. Employment rendered with a legitimate third party employer is also not considered to be public school employment, but once again may raise eligibility questions.

If a disability retiree becomes employed with a Pennsylvania state-owned university or community college and elects membership in either SERS (provided they have never elected multiple service) or an alternate retirement plan, this employment would not be considered employment in a public school under the *Enrollment in Alternate Retirement Plan* exception. The member must, however, elect and qualify to participate in the alternate retirement plan within the first year of employment. If the amount of service rendered does not allow them to participate, they will default back to PSERS and be treated as having returned to active employment which includes stopping their monthly annuity. Even if the employee qualifies and participates in an alternate retirement plan, this employment again may raise eligibility questions.

Exceptions to Return to Service:

An employer may request to hire a disability retiree under one of the exceptions to return to service, provided the employment meets the criteria for such exception. Such employment, under any of the exceptions, will raise the question of medical eligibility. Staff, therefore, will require a job description and updated medical documentation for submission to PSERS' medical examiners to confirm continued disability. If the new position requires the disability retiree to perform the same or similar duties as the position for which the disability retiree was deemed disabled, the disability supplement portion of the benefit, retroactive to the date the employment began, will be terminated and the retiree will be paid a regular retirement benefit.

All earnings are subject to limitations. If the member's earnings exceed the limitation, the disability benefit is reduced by the amount of earnings that exceed the limitation for the preceding year.

Frozen Annuity

If a retiree returns to service and an exception does not apply, then the value of the annuity will be “frozen.” This means that the monthly retirement benefit stops as of the day the retiree returns to service. The former retiree will again start making contributions to PSERS and earn additional service credit as an active member.

Upon retirement, the new retirement benefit is calculated using both periods of active service, but each period is calculated separately. First, PSERS calculates an annual retirement benefit based only on the salaries received and the service rendered since the return to school employment. Next, the annual retirement benefit from the first retirement (the frozen portion) is added to the annual retirement benefit from the second period of employment. The sum of the two annual retirement benefits becomes the new annual retirement benefit.

Elimination of the Frozen Annuity

If a retiree returns to service and earns three or more years of additional credited service, the retiree becomes eligible for an alternate way of calculating the annual retirement benefit known as the “elimination method.” This method eliminates the negative effects of the frozen annuity but requires a repayment or acceptance of the debt against the account equaling *all benefits* paid to the retiree during the entire period of the previous retirement, plus interest.

The “elimination method” combines the years of service from the previous employment with the years of service earned for the new period of employment. Advantages of using the “elimination method” include:

- Converting Class T-C school service to Class T-D service.
- Using all periods of employment to calculate the final average salary (FAS).
- Reducing or eliminating early retirement penalties applied during the first retirement.

Although the retiree must repay the frozen annuity debt, the “elimination method” usually results in a higher annual retirement benefit. If the “elimination method” does not result in a higher annual retirement benefit, PSERS will calculate the second retirement as a frozen annuity.

The debt can be paid by:

- Making a lump-sum payment.
- Making installment payments through the school employer.
- Having a permanent adjustment applied to the monthly benefit at the time of the member’s next retirement.
- Depositing rollover money into PSERS as payment towards the debt.
- Some combination of the above.

The unpaid debt accrues interest until the member retires the second time. The rate of interest is reviewed on an annual basis by the PSERS Board of Trustees. Any unpaid balance will be recovered based on the amount owed and an annuity factor based on the retiree’s life expectancy, resulting in a permanent reduction to the monthly benefit at the time of the second retirement.

If the retiree chooses to make payments on the debt, PSERS allocates the money received as follows:

- Member account - This is an amount equal to the contributions and interest. The retiree can withdraw this amount upon the second retirement.

- State account - This account includes both the Commonwealth of Pennsylvania and the school employer contributions. This money cannot be withdrawn.

If the retiree chooses a permanent reduction, PSERS recovers the debt based on the amount owed and an annuity factor based on the retiree's life expectancy.

If the retiree makes any payments on the debt following a return to service but the retirement benefit is calculated as a frozen annuity upon a subsequent retirement because it provides a higher benefit, PSERS will reimburse the payment(s) to the retiree.