MEMORANDUM

To: House Pensions and Benefits Committee

From: Alan D. Conroy, Executive Director

Date: February 4, 2015

Subject: Internal Revenue Service Ruling on Returning to Work after Retirement

The Kansas Public Employees Retirement System is frequently asked about state and federal rules surrounding working after retirement. Specifically, members and employers want to know whether or not it is permissible for a member to retire from the member's employer, wait the statutorily-mandated 60 days, and return to work for that same employer. KPERS has long understood that the IRS looked askance on this practice but a relatively recent Private Letter Ruling provides greater understanding to what is and is not acceptable in this scenario.

In Private Letter Ruling 201147038 (Attachment A), the IRS addresses a specific taxpayer query regarding pension plan members returning to work for their same employer post-retirement. The facts are as follows: The pension plan/taxpayer proposed a funding rehabilitation plan that included eliminating unreduced early retirement benefits for participants with 20 or more years of service. Once the rehabilitation plan was effective, a participant would no longer be able to retire after 20 years of service with an unreduced benefit. The plan proposed giving participants advance notice of the elimination, along with the ability of those affected to retire during the notice period, and then immediately return to employment. Upon reemployment, their pension benefits would be suspended, but they would have secured their eligibility for the 20-year unreduced early retirement benefit.

The question presented by the pension plan/taxpayer was "whether allowing participants . . . to 'retire' on one day in order to qualify for the early retirement subsidy, and then immediately return to work with payment of their early retirement pension benefit suspended, would result in disqualification of the Plan under section 401(a) of the Code." Priv. Ltr. Rul. 201147038. The ruling first outlined, in great detail, and citing several specific regulations, the fact that qualified pension plans are intended to "provide systematically for the payment of definitely determinable benefits over a period of years, usually for life, after retirement." I.R.C. § 1.401-1(b)(1)(i) *as quoted in* Priv. Ltr. Rul. 201147038. The point being that returning to work for one's own employer is not considered an acceptable maneuver in the retirement process. In fact, the ruling quoted a case that relied, in part, on Webster's Ninth New Collegiate Dictionary's definition of

"retire," which is "to withdraw from one's position or occupation: to conclude ones working or professional career." *Id.*

According to the ruling, "when an employee legitimately retires, he separates from service with the employer. Accordingly if both the employer and employee know at the time of 'retirement' that the employee will, with reasonably [sic] certainty, continue to perform services for the employer, a termination of employment has not occurred upon 'retirement' and the employee has not legitimately retired." *Id.* The ruling concludes as follows:

> [E]mployees who "retire" on one day in order to qualify for a benefit under the Plan, with the explicit understanding between the employee and employer that they are not separating from service with the employer, are not legitimately retired. Accordingly because these employees would not actually separate from service and cease performing services for the employer when they "retire" these "retirements" would not constitute a legitimate basis to allow participants to qualify for early retirement benefits (which are then immediately suspended). Such "retirements" will violate section 401(a) of the Code and result in disqualification of the Plan under section 401(a) of the Code.

Id. (Emphasis added.) However, the ruling also states that under section 401(a)(36) of the Code, employees who are age 62 and older may receive retirement benefits after returning to work for the same employer. In other words, the ruling only applies to those employees who have not yet reached age 62. The result is that, according to this private letter ruling, prearrangements between employers and employees are acceptable for employees age 62 and older, but unacceptable for employees younger than age 62.

Please note that private letter rulings are only applicable to the source that requested the ruling. While the ruling is persuasive and should be considered relevant guidance, it does not have the force and effect of law and may not be used or cited as precedent.

I hope this information is helpful, I would be happy to respond further to any questions the Committee may have.

Attachment

Attachment A

Significant Index No. 401.11-00

20114703S

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON D.C. 20224

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

APR 20 2010

SE:T:EP RA:A2

Re:

Plan =

Taxpayer =

Dear

This letter is in response to your ruling request, dated October 15, 20 , regarding the Taxpayer's request for a ruling regarding the payment of subsidized early retirement benefits in conjunction with the default schedule required by section 432(e)(1)(B)(ii) of the Internal Revenue Code (the "Code").

The issue raised relates to the rehabilitation plan required as a result of the Plan's actuary certifying the Plan to be in critical status effective October 1, 2009. Section 432 of the Code requires that the rehabilitation plan include a default schedule, which must assume that there are no increases in contributions under the plan other than those necessary to emerge from critical status after future benefit accruals and other benefits have been reduced by as much as the law allows.

The Taxpayer proposes to present to the collective bargaining parties a default schedule that will eliminate all subsidized early retirement benefits, including unreduced service pensions. The default schedule will eliminate the ability of participants with 20 or more years of service to retire with an unreduced pension benefit. As a result, participants who have sufficient service to retire without a reduction in benefits will no longer be able to do so once the default schedule is in place. The Taxpayer anticipates that participants who are eligible to retire and receive an unreduced service pension, over 300 participants, will elect to retire rather than wait until age 65 to receive their full pension benefit.

The Taxpayer also proposes to give participants notice 60 days prior to the date that the subsidized service pension benefit is eliminated and that as part of this default schedule, eligible participants who retire during this 60-day window may then return to employment and have their benefits suspended while working.

The subsidized service pension benefit in question is an early retirement pension benefit and the plan's normal retirement age is 65. Prior to elimination of the benefit, the Taxpayer proposes to allow employees to "retire" on one day in order to qualify for the subsidized service pension benefit, and return to work the very next day or perhaps after a week has passed. In either case, neither the employee nor the employer will plan on these "retirees" actually terminating employment and no longer performing services for the employer when they "retire" and qualify for their early retirement pension benefit.

Based on the aforementioned facts you requested a ruling as to whether allowing participants who are eligible for subsidized early retirement benefits to "retire" on one day in order to qualify for the early retirement subsidy, and then immediately return to work with payment of their early retirement pension benefit suspended, would result in disqualification of the Plan under section 401(a) of the Code.

Section 401(a)(36) of the Code provides that, for plan years beginning after December 31, 2006, a pension plan does not fail to qualify under section 401(a) solely because the plan provides that a distribution may be made to an employee who has attained age 62 and who has not separated from employment at the time of distribution.

Section 409A of the Code provides when deferred compensation under nonqualified compensation plans is included in gross income. Section 409A(a)(2)(A) provides, in pertinent part, that compensation deferred under a nonqualified deferred compensation plan may not be distributed earlier than separation from service as determined by the Secretary.

Section 432(e) of the Code requires that a rehabilitation plan must be adopted for a multiemployer plan that is in critical status.

Section 432(e)(1)(B)(i) of the Code indicates that the plan sponsor must provide to the bargaining parties 1 or more schedules showing revised benefit structures, revised contribution structures, or both, which, if adopted, may reasonably be expected to enable the multiemployer plan to emerge from critical status in accordance with the rehabilitation plan.

Flush language following section 432(e)(1)(B)(ii) of the Code provides that the schedule or schedules described in subparagraph (B)(i) shall reflect reductions in future benefit accruals and adjustable benefits (as defined in 432(e)(8)(A)(iv)(II)), and increases in contributions, that the plan sponsor determines are reasonably necessary to emerge

from critical status. One schedule shall be designated as the default schedule and such schedule shall assume that there are no increases in contributions under the plan other than the increase necessary to emerge from critical status after future benefit accruals and other benefits (other than benefits the reduction or elimination of which are not permitted under section 411(d)(6)) have been reduced to the maximum extent permitted by law.

Section 432(e)(8)(A)(iv)(II) of the Code provides that an adjustable benefit includes any early retirement benefit or retirement-type subsidiary (within the meaning of section 411(d)(6)(B)(i)) and any benefit payment option (other than the qualified joint-and survivor annuity).

Section 1.401-1(a)(2) of the Income Tax Regulations ("Regulations") provides that a qualified pension plan (i.e., a qualified defined benefit plan or money purchase pension plan) is a definite written program and arrangement that is communicated to employees and that is established and maintained by an employer to provide for the livelihood of the employees or their beneficiaries after the retirement of such employees through the payment of benefits.

Section 1.401-1(b)(1)(i) of the Regulations provides that a qualified pension plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits for employees over a period of years, usually for life, after retirement.

Section 1.401(a)-1(b)(i) of the Regulations provides that in order for a pension plan to be a qualified plan under section 401(a), the plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to its employees over a period of years, usually for life, after retirement or attainment of normal retirement age (subject to paragraph (b)(2) of this section). A plan does not fail to satisfy the requirements of this paragraph (b)(1)(i) merely because the plan provides, in accordance with section 401(a)(36), that a distribution may be made from the plan to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

Section 1.401(a)-1(b)(1)(ii) of the Regulations provides that section 1.401-1(b)(1)(i), a pre-ERISA regulation, provides rules applicable to the requirement of §1.401(a)-1(b)(i), and that regulation is applicable except as otherwise provided.

Section 1.409A-1(h)(1)(i) of the Regulations provides that in general an employee separates from service with the employer if the employee dies, retires, or otherwise has a termination of employment with the employer.

Section 1.409A-1(h)(1)(ii) of the Regulations provides that whether a termination of employment has occurred is based on whether the facts and circumstances indicate

that the employer and employee reasonably anticipated that no further services would be performed after a certain date or that the level of bona fide services the employee would perform after such date (whether as an employee or as an independent contractor) would permanently decrease to no more than 20 percent of the average level of bona fide services performed) whether as an employee or an independent contractor) over the immediately preceding 36-month period (or the full period of services to the employer if the employee has been providing services to the employer less than 36 months).

Section 1.409A-1(h)(1)(ii) of the Regulations also provides that facts and circumstances to be considered in making this determination include, but are not limited to, whether the employee continues to be treated as an employee for other purposes (such as continuation of salary and participation in employee benefit programs), whether similarly situated service providers have been treated consistently, and whether the employee is permitted, and realistically available, to perform services for other service recipients in the same line of business.

Section 1.409A-1(h)(1)(ii) of the Regulations provides the following example: An employee may demonstrate that the employer and employee reasonably anticipated that the employee would cease providing services, but that, after the original cessation of services, business circumstances such as termination of the employee's replacement caused the employee to return to employment. Although the employee's return to employment caused the employee to be presumed to have continued in employment because the employee is providing services at a rate equal to the rate at which the employee was providing services before the termination of employment, the facts and circumstance in this case would demonstrate that at the time the employee originally ceased to provide services, the employee and the service recipient reasonably anticipate that the employee would not provide services in the future.

Section 1.410(a)-7(b)(2) of the Regulations defines "severance of service date" as the earlier of the date on which an employee quits, retires, is discharged or dies, or the first anniversary of the first date of absence or for any other reason. The severance of service date is used to provide an endpoint for crediting service and to apply the statutory "break in service" rules to an elapsed time method of crediting service under 1.410(a)-7.

Section 1.410(a)-7(b)(6) of the Regulations defines "period of service" in pertinent part, generally as a period of service commencing on the employee's employment commencement date and ending on the severance from service date.

Revenue Ruling 79-336, 1979-2 C.B. 187, provides that, for purposes of the special forward averaging treatment of lump sum distributions under §402(d), an employee will be considered separated from service within the meaning of §402(e)(4)(D) (formerly 402(e)(4)(A)) of the Code only upon the employee's death, retirement, resignation, or

discharge, and not when the employee continues on the same job for a different employer as a result of the liquidation, merger, or consolidation, etc. of the former employer.

Meredith v. Allsteel, Inc., 11 F.3d 1354 (7th Cir. 1993), in deciding on what date an employee actually retired, concluded by applying common law rules of contract interpretation, that the word retire is to be given its ordinary meaning. The court opined: "In common parlance, retire means to leave employment after a period of service. See Webster's Ninth New Collegiate Dictionary 1007 (1986) (retire is "to withdraw from one's position or occupation: to conclude one's working or professional career")."

Ahng v. Allsteel,Inc. 96 F.3d 1033 (7th Cir. 1996) in reviewing Meredith v. Allsteel, Inc., 11 F.3d 1354 (7th Cir. 1993) (with regard to its earlier decision on the question of whether the anti-cutback rule of the Retirement Equality Act of 1984, Pub. L. No 98-397, 98 Stat. 1426 (1984), which amended ERISA § 204(g), should be interpreted to prohibit pension plan amendments or terminations that reduce or eliminate an employee's ability to participate in early retirement benefits) let stand the definition of the word retire provided in Meredith.

Taken together, sections 1.409A-1(h)(1)(i) and 1.409A-1(h)(1)(ii) provide that when an employee legitimately retires, he separates from service with the employer. Accordingly if both the employer and employee know at the time of "retirement" that the employee will, with reasonably certainty, continue to perform services for the employer, a termination of employment has not occurred upon "retirement" and the employee has not legitimately retired.

Section 1.410(a)-7(b)(2) defines the "severance of service date" as the earlier of the date on which an employee quits, retires, is discharged or dies, or the first anniversary of the first date of absence or for any other reason. Section 1.410(a)-7(b)(6) defines "period of service" as generally ending on an employee's severance of service date. Taken together, sections 1.410(a)-7(b)(2) and 1.410(a)-7(b)(6) provide that an employee retires on a severance of service date, when his period of service ends.

In Meredith v. Allsteel Inc., the seventh circuit court of appeals defined the word retire to have its ordinary meaning. Specifically the court provided that in common parlance, retire means to leave employment after a period of service mentioning that Webster's Ninth New Collegiate Dictionary 1007 (1986) defined retire as: "to withdraw from one's position or occupation: to conclude one's working or professional career. In Ahng v. Allsteel,Inc., while reviewing the Meredith case, the same court retained this definition of the word retire. Accordingly an employee would not legitimately retire if he did not actually leave employment upon retirement.

Although section 409A and its regulations address a nonqualified plan arrangement the definitions regarding termination and separation from service are consistent with the

definition of "severance of service date" found in 1.410(a)-7(b)(2) and both are consistent with the conclusion of Revenue Ruling 79-336. These regulations and Revenue Ruling serve to clarify that an employee legitimately retires when he stops performing service for the employer and there is not the explicit understanding between the employer and employee that upon retirement the employee will immediately return to service with the employer. That an employee severs his employment with the employer when he retires is directly expressed in the definition of the word retire found in Meredith v. Allsteel Inc.

On November 10, 2004, a notice of proposed rulemaking (REG-114726-04) under section 401 was published in the Federal Register (69 DE 65108) (the "proposed regulations"). The proposed regulations provided rules permitting distributions to be made from pension plan under a phased retirement program and set forth requirements of bona fide phased retirement program. The preamble to the proposed regulations provides that the proposed regulations: "specifically do not endorse a prearranged termination and rehire as constituting a full retirement."

In accordance with §§1.401(a)-1(b)(1)(i) and 1.401-1(b)(1)(i), because a qualified pension plan is generally not permitted to pay benefits before retirement, an employee who "retires" with the explicit understanding between the employer and employee that upon retirement the employee will immediately return to service with the employer has not legitimately retired and may not qualify for an early retirement benefit under the Plan.

We have concluded that employees who "retire" on one day in order to qualify for a benefit under the Plan, with the explicit understanding between the employee and employer that they are not separating from service with the employer, are not legitimately retired. Accordingly because these employees would not actually separate from service and cease performing services for the employer when they "retire" these "retirements" would not constitute a legitimate basis to allow participants to qualify for early retirement benefits (which are then immediately suspended.) Such "retirements" will violate section 401(a) of the Code and result in disqualification of the Plan under section 401(a) of the Code.

However, in accordance with section 401(a)(36) of the Code, employees who have attained age 62 upon benefit commencement may qualify for and receive an early retirement benefit under the Plan while they continue in employment.

Please note that this ruling does not express any other opinion regarding the suitability of the proposed default schedule or the associated rehabilitation plan.

This ruling letter is directed solely to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

If you have any questions regarding this ruling letter, please contact

Sincerely yours,

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Employee Plans Actuarial Group 2