

Public Employees' Retirement Board
March 13, 2014

Topic: Retroactive Amendment of the term "Participant"
in Montana's 457(b) Deferred Compensation Plan Document

Board Motion:

Amend definition of the term "Participant" in the 457(b) Deferred Compensation Plan Document retroactive to January 1, 2008, the effective date of the current plan document.

Other

3/13/2014 BOARD APPROVED

Moved by

Seconded by

Vote

Discussion:

The Montana Legislative Audit Division received a call on its “fraud hot line” alleging that MPERA and Great West Financial are “competing with private investment management service providers” by allowing 457(b) plan participants to roll-in funds when they are no longer employed by a participating employer but while they still have money on account.

The complaint further alleges that these roll-ins are not permitted under the 457(b) Plan Document.

MPERA legal staff requested input from MPERA's tax counsel, Mary Beth Braitman and Terry A. M. Mumford of Ice Miller, regarding this allegation. Tax counsel have assured us that 457(b) Treasury Regulations, specifically Treas. Reg. Sec. 1.457-2(j), permit 457(b) participants to roll-in distributions from other eligible retirement plans even if the participant is no longer employed by a Plan-covered employer.

Tax Counsel confirmed legal staff's belief that these post-employment roll-ins have been allowed since July 1, 2005, when the previous 457(b) Plan Document was amended to allow roll-ins from other eligible retirement plans. They further confirmed that the Plan Document's definition of “participant”, while somewhat ambiguous, supports this practice. Specifically, the Plan Document defines a participant as someone who is employed by a covered employer and who maintains a 457(b) account. Tax counsel states that as long as the participant was an employee who deferred compensation into the plan and as long as at least a portion of that money is “maintained” on account, a participant can roll-in funds from another eligible retirement plan.

Tax Counsel has suggested that the Board retroactively amend its 457(b) Plan Document to remove any doubt regarding this practice. They suggest and MPERA staff recommends that the definition be amended to reflect the definition as stated in Treasury's Model 457(b) plan language:

1.18 "Participant" An individual who is currently deferring compensation, or who has previously deferred compensation under the Plan by salary reduction and who has not received a distribution of his or her entire Account under the Plan. Only individuals who perform services for the Employer as an Employee may defer Compensation under the Plan.

The impacted 457(b) Plan Document provisions and Treas. Reg. Sec. 1-457-2(j) follow:

ARTICLE XII - ROLLOVER TO THIS PLAN

(a) Effective January 1, 2002, at any time, a *Participant* may contribute to the Plan in cash as a Rollover Contribution a qualified rollover amount from a qualified plan under Code Section 401(a), an individual retirement account or annuity, a deferred compensation plan under Code Section 457, or a tax-sheltered annuity under Code Section 403(b), provided that the Administrator, in its discretion, determines that the contribution satisfies all applicable requirements of the Code. Before a Rollover Contribution is made, the Participant shall designate the Investment Options in which he wishes his Rollover Contribution to be invested.

The Plan shall establish and maintain for the Participant a separate account for any eligible rollover distribution or Roth Contributions paid to the Plan from any eligible retirement plan that is not an eligible governmental plan under Section 457(b) of the Code.

In addition, the Plan shall establish and maintain for the Participant a separate account for any eligible rollover distribution or any Roth Contributions paid to the Plan from any eligible retirement plan that is an eligible governmental plan under Section 457(b) of the Code.

A Rollover Contribution shall be allocated to the Rollover Account of the Participant as of the date of the contribution. The Participant's Rollover Accounts shall be distributed at the same time and in the same manner as the Participant elects for his regular account, however, the Rollover Accounts shall be subject to any applicable penalties under the Code.

(b) Notwithstanding the above, the Plan will accept a rollover contribution from another Roth Contribution Account under an applicable retirement plan described in Section 402A(e)(1) and only to the extent the rollover contribution is permitted under the rules of Section 402(c) and Section 1.402A-2 of the Treasury regulations. The Plan Administrator or other responsible party must provide the Plan with a statement indicating the first year of the five- taxable-year period and the portion of the rollover distribution that is attributable to investment in the contract under Code Section 72 or a statement that the distribution is a qualified distribution.

1.18 "**Participant**" means an Employee who participates under this Plan by signing a Participation Agreement and by maintaining an Account balance. A Participant must be an individual.

Proposed Clarifying Definition of "Participant" to be effective retroactive to the effective date of the current 457(b) Deferred Compensation plan document, January 1, 2008.

1.18 "Participant" An individual who is currently deferring compensation, or who has previously deferred compensation under the Plan by salary reduction and who has not received a distribution of his or her entire Account under the Plan. Only individuals who perform services for the Employer as an Employee may defer Compensation under the Plan.

§ 1.457-2 Definitions.

This section sets forth the definitions that are used under §§ 1.457-1 through 1.457-11.

* * *

(j) *Participant.* *Participant* in an eligible plan means an individual who is currently deferring compensation, or who has previously deferred compensation under the plan by salary reduction or by nonelective employer contribution and who has not received a distribution of his or her entire benefit under the eligible plan. Only individuals who perform services for the eligible employer, either as an employee or as an independent contractor, may defer compensation under the eligible plan.

Public Employees' Retirement Board
March 13, 2014

Topic: Retroactive Amendment of the term "Participant" in Montana's
401(a) Defined Contribution Plan Document

Board Motion:

Amend definition of the term "Participant" in the PERS Defined
Contribution Retirement Plan Document retroactive to January 1, 2008,
the effective date of the current plan document.

Other

Moved by

Seconded by

Vote

Discussion:

Although the “fraud hot line” complaint addressed only the 457(b) Deferred Compensation Plan, Ice Miller recommends that the Board make a similar change to the definition of “participant” in its Defined Contribution Retirement Plan Document.

MPERA staff recommends that the definition be amended as follows:

1.19 "Participant" An individual who is currently contributing to this Plan as a member, or who has previously contributed to this Plan as a member and who has not received a distribution of his or her entire Account[s] under the Plan.

The impacted Defined Contribution Retirement Plan Document provisions and the relevant MCA definition follow:

Section 1.19. "**Participant**" means an Eligible Employee who participates or participated under this Plan.

Section 3.05. **Rollover Contributions.** Rollovers from other permissible sources will be allowed to the extent permitted by law, subject to any conditions, proofs, or acceptance the Board or its designee deems appropriate. Permissible sources shall include a qualified plan described in section 401(a) or 403(a) of the Code, including after-tax employee contributions; an annuity contract described in section 403(b) of the Code, excluding after-tax employee contributions; or an eligible plan under section 457(b) of the Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state. The Plan will accept a *Participant* rollover contribution of the portion of a distribution from an individual retirement account or annuity described in section 408(a) or 408(b) of the Code that is eligible to be rolled over and would otherwise be includible in gross income. The Plan will accept a direct rollover of eligible distributions only to the extent permitted by the Code, including a rollover from an eligible Roth account of a retirement plan described in Code Section 402A(e)(1) but only to the extent the rollover is permitted under requirements of Code Section 402(c).

Proposed Clarifying Definition of “Participant” to be effective retroactive to the effective date of the current 457(b) Deferred Compensation plan document, January 1, 2008.

1.19 "Participant" An individual who is currently contributing to this Plan as a member, or who has previously contributed to this Plan as a member and who has not received a distribution of his or her entire Account[s] under the Plan.

19-3-2101 Definitions. Unless the context requires otherwise, as used in this part, the following definitions apply:

(1) “Member” means a person with a retirement account in the defined contribution plan.