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King County EMT Study

INITIAL CONSIDERATION

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ISSUE STATEMENT

Are Emergency Medical Technicians (EMTs) who provided services from 1978 to 2003, in King County through intergovernmental consortiums, eligible for retirement service credit in the Public Employees Retirement System (PERS)?

OVERVIEW

King County was a pioneer in EMT services:

In 1970, the Seattle Fire Department, in cooperation with Harborview Medical Center and the University of Washington, trained the first class of firefighters as paramedics. The program was quite a success, and later classes soon followed. In 1977, the first paramedics came to work in King County.

The prehospital emergency medical care pioneered in Seattle has become famous around the world. The expression that "Seattle is the best place in the world to have a heart attack" was coined after a 1974 60 Minutes story that featured the fledgling paramedic program. King County Medic One continues this tradition. The Medic One programs throughout King County are considered models for much of the world.¹

In addition to having the first firefighter paramedics, King County, and other local governments, formed intergovernmental consortiums, also known as provider groups. These consortiums consist of counties, cities, and hospitals. They provide emergency medical services over their shared geographic area. The EMTs funded by the consortiums provide services to the citizens of all the consortium members. Some of the employees working for these consortiums did not receive service credit in a state retirement plan, while others did. This inconsistency has resulted in piece-meal legislation to provide retirement benefits to these EMTs on an employer by employer basis.

¹ <https://www.kingcounty.gov/depts/health/emergency-medical-services/medic-one/history.aspx>

The 2020 Supplemental Budget included a proviso of \$50,000 for the LEOFF Plan 2 Board to complete a:

study of the pension benefits provided to emergency medical technicians providing services in King county between October 1, 1978 and January 1, 2003. The board shall examine the legal and fiscal implications of extending membership in the plan for these periods, including King county employers that might be included, the benefits that would be paid to members on a prospective and retroactive basis, and the contribution requirements and plan liability that would be created for employers, employees, and the state.

BACKGROUND AND POLICY ISSUES

EMT LEOFF Plan 2 History

As described above, starting with King County, some local government EMTs had their jobs moved from various local government entities to fire departments. Upon meeting requirements to become firefighters, such as training and applicable examinations, these EMTs employed at fire departments become members of LEOFF Plan 2.²

In 2005, Substitute House Bill 1936, was enacted amending the definition of "fire fighter" in LEOFF to include any person employed on a full-time, fully compensated basis as an emergency medical technician by a city, town, county or district. Prior to 2005, EMTs employed by local governments in health departments or other divisions of local governments were members of PERS if their employer opted into PERS membership.

Members of PERS 2 employed as EMTs were transferred to LEOFF 2 for purposes of future service. An EMT transferred to LEOFF 2 could also elect to transfer past service earned as an EMT in PERS into LEOFF 2.³

² In 2003, House Bill 1202 was enacted, permitting members of LEOFF whose jobs as EMT's were moved into fire departments the opportunity to transfer past service credit from PERS into LEOFF. The LEOFF members who elect to transfer service credit earned as an EMT in PERS are required to pay the difference between the contributions they paid into PERS, and the contributions that they would have paid into LEOFF, plus interest.

³ For the period of past service a member transferred, the member was required to pay the difference between the employee contributions made to PERS, and the contributions that would have been made had the service been performed in LEOFF 2, plus interest. The employee was required to complete this payment within five years. Upon completing the required payment, the member's service credit and accumulated contributions, and an equal amount of employer contributions would be transferred from PERS 2 to LEOFF 2. Within five years of the completing payment for the transfer of service credit, the employer is required to pay into LEOFF 2 an amount sufficient to ensure that the contribution rates for LEOFF 2 plan will not increase due to the transfer of service.

After 2005, there remained a question of whether Public Hospital Districts met the definition of “employer” in LEOFF. In 2017, Substitute House Bill 2202 was enacted to clarify that Public Hospital Districts are LEOFF 2 employers and that their EMTs were eligible for past service credit retroactive to 2005, when they would have been made eligible under Substitute House Bill 1936 (2005). However, these EMTs would still not have been eligible for service credit in PERS prior to 2005 for their employment at the Public Hospital District, if the Public Hospital District had not opted into PERS.

Legislation regarding EMTs working for consortiums

In 2016, Senate Bill 6423, was enacted which provided that an employee providing emergency medical services to a consortium of local governments may choose to establish service credit in PERS for service performed prior to July 23, 2003, if the service was performed in Snohomish County.⁴

In 2020, Senate Bill 6616 sought to provide a similar benefit to a group of EMTs who had worked in King County. This group of EMTs worked for a consortium that included King County and Evergreen Public Hospital District. Evergreen Public Hospital District was not a PERS employer, while King County was a PERS employer. The consortium believed the EMTs were employees of Evergreen Public Hospital District and therefore, did not report them as PERS members.

During the legislative session legal concerns were raised regarding whether these EMTs were eligible to be allowed PERS membership. These legal concerns included whether the EMTs could receive service credit in PERS, if their employer was not a PERS employer. This raised the question of whether the EMTs’ employer, for purposes of determining eligibility in PERS, was Evergreen Public Hospital District or King County.

After this legal issue was raised, a second bill, House Bill 2902, was introduced. This bill sought to provide the same group of EMTs membership in LEOFF Plan 2, instead of PERS. Similar legal concerns were also raised regarding this bill. The legal concerns raised regarding these two bills and the ongoing issues that have been raised regarding EMTs in similar situations resulted in the legislature funding this LEOFF 2 Board Study.

⁴ The employee must pay both the employer and employee contribution, as calculated by DRS, within five years of making the election to establish service credit.

Determining Employer

The IRS and DRS use a “scope of control test” to determine whether someone is an employee of an organization or an independent contractor. In situations where there is an intergovernmental consortium, DRS and the IRS may rely on a similar scope of control test to determine who the employer is for purposes of eligibility in PERS or LEOFF Plan 2.

The general rule of the scope of control test is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work, not what will be done and how it will be done.⁵ To help determine this the IRS looks at the following three areas: Behavioral Control, Financial Control and Relationship of the Parties.

- **Behavioral Control:** A worker is an employee when the business has the right to direct and control the work performed by the worker, even if that right is not exercised. Behavioral control categories are:
 - Type of instructions given, such as when and where to work, what tools to use or where to purchase supplies and services. Receiving the types of instructions in these examples may indicate a worker is an employee.
 - Degree of instruction, more detailed instructions may indicate that the worker is an employee. Less detailed instructions reflects less control, indicating that the worker is more likely an independent contractor.
 - Evaluation systems to measure the details of how the work is done points to an employee. Evaluation systems measuring just the end result point to either an independent contractor or an employee.
 - Training a worker on how to do the job -- or periodic or on-going training about procedures and methods -- is strong evidence that the worker is an employee. Independent contractors ordinarily use their own methods.
- **Financial Control:** Does the business have a right to direct or control the financial and business aspects of the worker's job? Consider:
 - Significant investment in the equipment the worker uses in working for someone else.
 - Unreimbursed expenses, independent contractors are more likely to incur unreimbursed expenses than employees.
 - Opportunity for profit or loss is often an indicator of an independent contractor.
 - Services available to the market. Independent contractors are generally free to seek out business opportunities.

⁵ <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation>

- Method of payment. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time even when supplemented by a commission. However, independent contractors are most often paid for the job by a flat fee.
- Relationship: The type of relationship depends upon how the worker and business perceive their interaction with one another. This includes:
 - Written contracts which describe the relationship the parties intend to create. Although a contract stating the worker is an employee or an independent contractor is not sufficient to determine the worker's status.
 - Benefits. Businesses providing employee-type benefits, such as insurance, a pension plan, vacation pay or sick pay have employees. Businesses generally do not grant these benefits to independent contractors.
 - The permanency of the relationship is important. An expectation that the relationship will continue indefinitely, rather than for a specific project or period, is generally seen as evidence that the intent was to create an employer-employee relationship.
 - Services provided which are a key activity of the business. The extent to which services performed by the worker are seen as a key aspect of the regular business of the company.⁶

The Washington State Supreme Court addressed the issue of independent contractors being eligible for membership in PERS in *Dolan vs. King County*. In *Dolan*:

King County sought ways to provide legal defense services to indigent criminal defendants. The County settled on a system of using nonprofit corporations to provide services funded through and monitored by the County's Office of the Public Defender. Over time, the County took steps to improve and make these nonprofit organizations more accountable to the County. In so doing, it asserted more control over the groups that provided defender services. Respondents are employees of the defender organizations who sued the County for state employee benefits. They argued the County's funding and control over their "independent" organizations essentially made them state employees for the purposes of participating in [PERS]. Applying the pertinent statutes and common law principles, the Supreme Court agreed that employees of the defender organizations are "employees" under state law, and, as such, are entitled to be enrolled in the PERS.⁷

⁶ <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation>

⁷ <https://law.justia.com/cases/washington/supreme-court/2011/828423-opn.html#:~:text=King%20County,-Annotate%20this%20Case&text=King%20County%20sought%20ways%20to,services%20to%20indigent%20criminal>

After the Supreme Court’s decision in *Dolan*, the legislature passed Engrossed House Bill 2771 (2012). This bill clarified that a governmental contractor legal entity is not an employer for purposes of the Washington State Retirement Systems, and that employees of governmental contractors are not eligible for state retirement system membership. It also limited the determination of whether an employer-employee relationship exists solely to the relationship between a government contractor's employee and a retirement system employer, and not the relationship between a government contractor and a retirement system employer.

Unlike *Dolan*, the intergovernmental consortiums providing EMT services in King County were all public entities. Therefore, it is unclear what, if any, impact *Dolan* and Engrossed House Bill 2771 (2012) would have on the retirement system eligibility of the EMTs employed by these intergovernmental consortiums.

The AGO issued an opinion in 2007 (AGO 2007 No. 6⁸) regarding determining employer status for retirement system purposes of nonprofit corporations formed by cities and fire protection districts to carry out cooperative functions under the interlocal cooperation act. This opinion held that:

Cities and fire districts can qualify as “employers” under each of the retirement systems [...]. A nonprofit corporation formed by qualifying employers also would qualify as an “employer” under the retirement systems [...], if the agreement creating the nonprofit corporation delegates to the nonprofit, the retirement system obligations of the employers that form it. The nonprofit corporation must timely and fully satisfy those obligations. To the extent that either of these requirements is not satisfied, the cities and fire districts forming the nonprofit corporation would remain liable to fulfill the employers’ obligations under the relevant retirement system.

%20defendants.&text=They%20argued%20the%20County's%20funding,Employees%20Retirement%20System%20(PERS).

⁸ <https://www.atg.wa.gov/ago-opinions/employer-status-retirement-system-purposes-nonprofit-corporation-formed-cities-and-fire>



King County EMT Study

Initial Consideration
September 23, 2020

Issue

- Are Emergency Medical Technicians (EMTs) who provided services from 1978 to 2003, in King County through intergovernmental consortiums, eligible for retirement service credit in the Public Employees Retirement System (PERS)?

Overview

- **King County was a pioneer in EMT services**
 - "Seattle is the best place in the world to have a heart attack" - 60 Minutes story from 1974
- **King County, and other local governments, formed intergovernmental consortiums providing emergency medical services over their shared area**
 - Consists of counties, cities, and hospitals
 - Not all of these EMTs were enrolled in a state retirement system
 - This inconsistency has resulted in piece-meal legislation to provide retirement benefits to these EMTs on an employer by employer basis

Study

- The 2020 budget included a proviso of \$50,000 for the LEOFF Plan 2 Board to complete a study of the pension benefits provided to emergency medical technicians providing services in King county between October 1, 1978 and January 1, 2003
- The board shall examine the legal and fiscal implications of extending membership in the plan for these periods, including:
 - King county employers that might be included
 - the benefits that would be paid to members on a prospective and retroactive basis, and
 - the contribution requirements and plan liability that would be created for employers, employees, and the state

EMT LEOFF Plan 2 History

- In 2005, definition of "fire fighter" in LEOFF was amended to include EMTs employed by a city, town, county or district.
 - Prior to 2005, EMTs employed by local governments in health departments or other divisions of local governments were members of PERS if their employer was either mandated or opted into PERS membership
- In 2017, a bill passed clarifying that Public Hospital Districts are LEOFF 2 employers and that their EMTs were eligible for past service credit retroactive to 2005

Legislation regarding EMTs working for consortiums

- In 2016, a bill was passed which provided that an employee providing emergency medical services to a consortium of local governments may choose to establish service credit in PERS for service performed prior to July 23, 2003, if the service was performed in Snohomish County
- In 2020, SB6616 sought to provide a similar benefit to a group of EMTs who had worked in King County for a consortium that included King County and Evergreen Public Hospital District
 - During the legislative session legal concerns were raised regarding whether the EMTs' employer, for purposes of determining eligibility in PERS, was Evergreen Public Hospital District or King County

Legislation, continued

- In 2020, a second bill, House Bill 2902, sought to provide the same group of EMTs membership in LEOFF Plan 2, instead of PERS
- The legal concerns raised regarding these two bills and the ongoing issues that have been raised regarding EMTs in similar situations resulted in the legislature funding this LEOFF 2 Board Study

Determining Employer

- “Scope of control test” - The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work, not what will be done and how it will be done
- To help determine the IRS looks at:
 - Behavioral Control
 - Financial Control
 - Relationship of the Parties

Dolan vs. King County

- The Supreme Court found that employees of the public defender organizations hired by King County are "employees" under state law, and are entitled to be enrolled in the PERS
 - Supreme Court utilized a scope of control test
- After the Supreme Court's decision in *Dolan*, the legislature passed a bill in 2012 seeking to prevent situations like Dolan from occurring again

Next Steps

- The LEOFF 2 Board is working with tax counsel, Ice Miller, on completing the study
 - Ice Miller is currently working on their analysis and should have that completed before the Board's November Meeting
- The LEOFF 2 Board is also working with OSA and DRS on a fiscal analysis



Thank You

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