

## **RESOLUTION #2019-05 TERMINATION OF EMPLOYMENT AND REEMPLOYMENT**

November 21, 2019

**WHEREAS**, the Utah State Retirement Board (Board) “shall ensure that the systems, plans, programs, and funds are administered according to law.” Utah Code Annotated § 49-11-203(1)(c).

**WHEREAS**, the Board shall maintain “the systems, plans, and programs on an actuarially sound basis.” Utah Code Annotated § 49-11-203(1)(g).

**WHEREAS**, the Board shall “develop broad policy for the long-term operation of the various systems, plans, and programs under broad discretion and power to perform the board’s policymaking functions, including the specific authority to interpret and define any provision or term under this title [Utah Code Annotated Title 49] when the board or office provides written documentation which demonstrates that the interpretation or definition promotes uniformity in the administration of the systems or maintains the actuarial soundness of the systems, plans, or programs.” Utah Code Annotated § 49-11-203(1)(k).

**WHEREAS**, the Board shall act “consistent with this title [Utah Code Ann. Title 49] for the administration of the systems, plans, and programs in order to carry out the purposes of this title [Utah Code Ann. Title 49].” Utah Code Annotated § 49-11-203(1)(n).

**WHEREAS**, the Board or Utah State Retirement Office “may take actions necessary to protect the tax qualified status of the systems, plans, and programs under its control . . .” Utah Code Annotated § 49-11-801(5).

**WHEREAS**, the systems, plans, and programs administered by the Utah Retirement Systems (URS) are intended to be administered as qualified systems, plans and programs under the Internal Revenue Code (IRC) and must therefore comply with requirements applicable to such systems, plans, and programs in order to maintain the qualified status that protects the resulting tax advantages of provided benefits.

**WHEREAS**, the Internal Revenue Service (IRS) enforces the IRC and has promulgated regulations and published determinations, rulings, and other guidance affecting qualified governmental systems, plans and programs, including guidance regarding requirements for termination of employment and separation from service.

**WHEREAS**, the Board shall liberally construe Utah Code Annotated Title 49 “to provide maximum benefits and protections consistent with sound fiduciary and actuarial principles.” Utah Code Annotated § 49-11-103(2).

**WHEREAS**, the Board finds that the Legislature’s enactment of certain statutory provisions in Utah Code Annotated Title 49 was based on financial and actuarial principles as described, for example, in a legislative briefing paper: “• A retirement system will be more expensive if it allows retirees to return to work for a covered employer immediately after retirement because it encourages members to retire immediately upon reaching eligibility instead of waiting until the retiree is ready to quit working permanently. • Current postretirement employment restrictions were included as a key component of the broader 2010 retirement reforms following the great recession of 2008. These reforms were effective at reducing the common practice of employees returning to work after retirement, which is believed to have helped control retirement costs.”<sup>1</sup>

**WHEREAS**, the Board finds it is necessary to define (or further define), interpret, and clarify what constitutes a “bona fide termination of employment,” “bona fide separation of service,” “bona fide severance from employment,” and “reemployment” within the meaning of Utah Code Annotated Title 49 and otherwise act as set forth herein in order to: (i) ensure that the systems, plans, programs, and funds are administered according to law; (ii) promote uniformity in the administration of the systems; (iii) maintain the actuarial soundness of the systems, plans, or programs; (iv) carry out the purposes of Utah Code Annotated Title 49; (v) provide maximum benefits and protections consistent with sound fiduciary and actuarial principles; and (vi) protect the tax qualified status of the systems, plans, and programs.

**NOW, THEREFORE, BE IT RESOLVED**, that the following rules apply to members, participants, and participating employers of URS defined benefit and defined contribution savings plans:

**I. General Rules**

1. The following definitions apply to and shall be used in and for all purposes related to Utah Code Annotated Title 49:
  - a. “Bona fide termination of employment” and “termination of employment,” which are synonymous, mean the permanent extinguishment of all of a person’s fee-for-service relationships of any kind or character with or for, directly or indirectly, the benefit of any participating employer.
  - b. “Fee-for-service relationship” is any expectation or promise of compensation, including cash, wages, payments (including payments under a written or verbal contract), stipends, vouchers, gift cards, gift certificates, pre-paid debit cards, or other cash equivalent items in consideration of the provision of any service(s) of any kind or character.
  - c. “Reemployment” means the resumption of a fee-for-service relationship of any kind or character with a participating employer after a bona fide termination of employment.

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<sup>1</sup> *Utah Postretirement Employment Restrictions*, Utah Legislature Briefing Paper, Prepared by the Office of Legislative Research and General Counsel, December 2014.

- d. “Bona fide separation of service,” “separation of service,” “bona fide severance from employment,” and “severance from employment” which are synonymous, have the same meaning as “bona fide termination of employment.”
2. When it is necessary to determine whether a member or participant has employment with a participating employer, has experienced a bona fide termination of employment, or has experienced reemployment, URS will evaluate that question.
3. URS’ evaluation and subsequent determination of alleged employment, termination of employment, or reemployment is fact specific and each situation shall be separately evaluated based on its individual, particular facts and circumstances.
4. In performing each evaluation regarding termination of employment and making its determination, URS will consider the following non-exhaustive list of relevant factors:
  - a. Whether the termination of employment is more than a technical change (i.e., URS will focus on the substance, not merely the form, of the alleged change);
  - b. Whether the member or participant has or had any prearrangement of any kind or character which anticipates a post-termination of employment fee-for-services relationship with a participating employer;
  - c. Any similarities between the services the employee performed for the participating employer prior to termination of employment and the services the person performs (or proposes to perform) for a participating employer post-termination;
  - d. The putative reason(s) for the termination of employment;
  - e. Whether the participating employer hired or hires a new employee to perform the services performed by the employee prior to the alleged termination of employment;
  - f. How much time has passed between the alleged termination of employment and any post-termination fee-for-services relationship with any participating employer; and
  - g. Any other facts or circumstances deemed relevant by URS in the course of its evaluation.
5. In performing an evaluation regarding reemployment, including for purposes of Utah Code Annotated Title 49, Chapter 11, Part 12, Postretirement Reemployment Restrictions Act, and making its determination, URS will consider the following non-exhaustive list of relevant factors:
  - a. Whether the termination of employment is more than a technical change (i.e., URS will focus on the substance, not merely the form, of the alleged change);
  - b. Whether the member or participant has or had any prearrangement of any kind or character which anticipates a post-termination of employment fee-for-services relationship with a participating employer;
  - c. Any similarities between the services the employee performed for the participating employer prior to termination of employment and the services the person performs (or proposes to perform) for a participating employer post-termination;
  - d. The putative reason(s) for the termination of employment;

- e. Whether the participating employer hired or hires a new employee to perform the services performed by the employee prior to the alleged termination of employment;
- f. How much time has passed between the alleged termination of employment and any post-termination fee-for-services relationship with any participating employer; and
- g. Any other facts or circumstances deemed relevant by URS in the course of its evaluation.

In addition to the general rules, the following rules apply to members, participants, and participating employers as indicated:

**II. Defined Benefits Rules:**

For defined benefit systems and plans administered by the Board:

- 1. Numerous statutes require a member to cease actual work for every participating employer prior to the member's retirement date, including (without limitation) Utah Code Ann. §§ 49-12-401(1)(a), 49-13-401(1)(a), 49-14-401(1)(a), 49-15-401(1)(a), 49-16-401(1)(a), 49-17-401(1)(a), 49-18-401(1)(a), 49-22-304(1)(a), 49-23-303(1)(a).
- 2. A member must have experienced a bona fide termination of employment to satisfy the requirements to cease actual work for every participating employer.

**III. Defined Contribution Savings Plan Rules:**

For defined contribution savings plans administered by the Board:

- 1. A savings plan must meet the requirements under the plan document and federal law for a distribution to be made from a plan.
- 2. If a distribution is based on a separation from service or severance from employment the member or participant must have experienced a bona fide separation of service or severance from employment.
- 3. On or after February 1, 2020, when determining whether a bona fide separation of service or bona fide severance from employment has occurred, the office shall also require a separation break of 30 or more calendar days from any participating employer. This 30-day separation break requirement does not apply to the 30 days following a member's retirement date with a URS defined benefit system or plan.
- 4. A bona fide separation of service or bona fide severance from employment is specifically not met if there is, prior to the completion of all applicable termination and separation requirements and periods:
  - a. A change of employment to another participating employer; or
  - b. A prearrangement by the member of any kind or character that anticipates a future fee-for-service relationship of any kind or character with or for, directly or indirectly, the benefit of any participating employer.

#### **IV. "Volunteer" Rules:**

1. The following definitions shall be used in and for all purposes related to these "volunteer" rules:
  - a. "Volunteer" is a person who provides services to a participating employer without a fee-for-service relationship (i.e., entirely absent of any expectation or promise of compensation).
  - b. "Compensation" includes cash, wages, stipends, vouchers, gift cards, gift certificates, pre-paid debit cards, or other cash equivalent items.
  - c. "Compensation" does not include minimal value goods or services provided by a participating employer to a "volunteer" whose total, combined value must be less than \$250 per calendar year and the value of any one good or service provided must not exceed \$100. Examples of minimal value goods or services include: a volunteer shirt; occasional snacks or drinks; the value of discounts at the employer's cafeteria, restaurant, or store such as those generally given to employees or volunteers; admission, a ticket, or pass for the volunteer's own use; occasional guest admission, tickets, or passes; occasional attendance at social events; holiday gift; and an occasional volunteer meal. These goods or services may not be disguised wages.
  - d. "Compensation" also does not include reasonable, actual out-of-pocket expenses related to the volunteer service that are reimbursed by the participating employer.
2. Volunteer service in accordance with these rules does not:
  - a. Constitute employment that must be terminated prior to the member's retirement date; or
  - b. For purposes of Title 49, Chapter 11, Part 12, Postretirement Reemployment Restrictions Act:
    - i. Constitute reemployment; or
    - ii. Affect or restart the separation period that begins on the member's retirement date.
3. A volunteer may need to decline compensation or certain benefits offered by the participating employer to that volunteer or offered to volunteers generally so that the volunteer service does not constitute employment or reemployment.
4. Volunteer service may constitute employment or reemployment if there is a prearrangement by the member with a participating employer of any kind or character that anticipates:
  - a. the volunteer service is given in exchange for or as a condition of future employment or any fee-for-service relationship with any participating employer (a quid pro quo); or
  - b. any kind of deferred compensation for the volunteer service.

This Resolution takes effect on November 21, 2019.