

N.D.A.G. Letter to Person (July 14, 1988)

July 14, 1988

Mr. Alan Person
Executive Director
North Dakota Public Employees
Retirement System
P.O. Box 1214
Bismarck, ND 58502

Dear Mr. Person:

Thank you for your letter of May 20, 1988, in which you ask whether the employee and employer contributions made on behalf of a member are calculated on the employee's gross salary prior to any deductions made for an Internal Revenue Code § 125 Cafeteria Plan. This specific issue has arisen because the State Board of Higher Education has implemented a cafeteria plan for its employees.

Under NDPERS, both the employee and the employer contribute to the retirement fund. The employee's contribution is governed by N.D.C.C. § 54-52-05 and the employer's contribution is set forth in N.D.C.C. § 54-52-06.

N.D.C.C. § 54-52-05(2) requires each member to "pay monthly four percent of the monthly salary or wage paid to him, and such assessment shall be deducted and retained out of such salary." N.D.C.C. § 54-52-05(3) provides that the employer "shall pay these contributions by effecting an equal cash reduction in the gross salary of the employee or by an offset against future salary increases or by a contribution of a reduction in gross salary and offset against future salary increases." N.D.C.C. § 54-52-06 governs the employer's contribution to the retirement plan and states that the employer "shall contribute an amount equal to five and twelve-hundredths percent of the monthly salary or wage of a participating member." An employee's "monthly salary and wages," therefore, is the base on which contributions to the retirement fund are determined.

N.D.C.C. § 54-52-01(17) defines "wages and salaries" as "the actual dollar compensation excluding overtime paid to or for an employee for his services." This definition is not entirely clear, and the legislative history of N.D.C.C. ch. 54-52 does not clarify the definition.

However, the compensation paid an employee is generally identified as the gross income amount rather than the net dollar amount actually received after taxes and other payroll deductions. It is our understanding that in practice, the retirement contributions made on behalf of an employee have always been determined on the basis of the employee's gross salary, regardless of the amount deducted for taxes, insurance, deferred compensation, dues, and other payroll deductions available to public employees.

Similarly, employee deductions for a cafeteria benefits plan should not have an effect on the amount contributed to the retirement fund on behalf of an employee.

This conclusion is supported by the language of N.D.C.C. § 54-52-05(3) which requires that the employee's contribution be effected by a "cash reduction in the gross salary of the employee," unless this amount is "offset against future salary increases." (Emphasis supplied.) The requirement that the employee's contribution be deducted from gross salary logically suggests that the contribution base would also be the employee's gross salary.

In summary, it is my opinion that the employee and employer contributions to the retirement fund should be calculated on an employee's gross salary prior to any deductions made for a Section 125 cafeteria benefits plan. I trust that this discussion has sufficiently answered your inquiry.

Sincerely,

Nicholas J. Spaeth

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