

**LETTER OPINION**  
**95-L-206**

August 30, 1995

Mr. Sparb Collins  
Executive Director  
North Dakota Public Employees  
Retirement System  
400 East Broadway, Suite 505  
PO Box 1214  
Bismarck, ND 58502

Dear Mr. Collins:

Thank you for your letter concerning the administration of the Deferred Compensation Plan for public employees under N.D.C.C. ch. 54-52.2.

Specifically, you ask whether the Public Employees Retirement Board (the "Retirement Board") may establish a PERS deferred compensation option that would be administered by a provider selected by the Retirement Board. This option would meet certain product, service, and administrative specifications of the Board. The selection of a provider would be on a competitive bid basis that would consider administrative fees as well as other variables. By analogy, the establishment of a Retirement Board selected provider would resemble the establishment of a preferred provider under the group insurance program. This option would be in addition to sixteen existing providers presently offering investment services and any other providers which may be enrolled in the future.

Under N.D.C.C. § 54-52.2-01, the state or any political subdivision may enter into a contract with any employee to defer any part of that employee's compensation to fund a deferred compensation program for the employee's benefit. N.D.C.C. § 54-52.2-01 provides:

The deferred compensation program may consist of a contract, purchase, or investment in a fixed or variable life insurance or annuity contract from any life underwriter duly licensed by this state who represents an insurance company licensed to contract business in this state, a savings account at a federally insured financial institution or the Bank of North Dakota, an account with or managed by a dealer registered under chapter 10-04, or any combination of contracts or accounts authorized by this section, as specified by the employee.

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N.D.C.C. § 54-52.2-03 places the administration of the deferred compensation program under the direction of the Retirement Board. N.D.C.C. § 54-52.2-03 directs the Retirement Board to "administer the deferred compensation program based on a plan in compliance with the appropriate provisions of the Internal Revenue Code and regulations adopted under those provisions."

The establishment of a deferred compensation plan, with respect to federal law, is governed generally under 26 U.S.C. § 457. The maximum actual deferral under a deferred compensation plan is the lesser of (1) \$7,500, or (2) 33 1/3% of the participant's includable compensation. 26 U.S.C. § 457(b)(2). Generally, amounts deferred under an eligible deferred compensation plan may not be made available to an employee before separation from service with the employer or except in an unforeseeable emergency. 26 U.S.C. § 457(d)(5).

A fair reading of the applicable federal statutes indicates that the primary emphasis of the law deals more with calculation of income, the maximum annual deferral, the availability and distribution of amounts deferred, than with the intricacies of how an eligible State deferred compensation plan is administered. Although it may appear that the state statutes contemplate a somewhat passive role for the Retirement Board to perform in the area of administering the deferred compensation plan, it is my opinion that neither federal nor state law precludes the Board from taking a more active role in this area including the implementation of a PERS provider option in addition to the provisions currently enrolled in the program as outlined in your letter. Moreover, as you indicate in your letter, implementation of this option may increase interest and participation of employees in the deferred compensation program and thus help to further the legislative purposes in establishing the program.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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