



HF xxxx; SF 5197 (Pappas): MSRS General Plan; Extending authority granted in 2021 to H-1B and other visa holders to purchase service credit for excluded periods of employment

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Introduction

- Affected Plan:** Minnesota State Retirement System General State Employees Retirement Plan (MSRS General Plan)
- Law Amended:** Laws 2021, chapter 22, article 2, section 3, by adding a new subdivision 1a and amending subdivision 2
- Brief Description:** The bill extends the authority, which ended on August 31, 2021, granted to employees by a 2021 session law to purchase service credit for a prior period of employment when the employee was excluded from membership in the MSRS General Plan due to employment under an H-1b or similar visa.
- Attachments:** [Laws 2021, chapter 22, article 2, section 3 \(2021 omnibus pension bill excerpt\)](#)
[LCPR Staff memo on SF1454/HF1497](#) dated March 1, 2021

Background

2021 Change in Law regarding Membership in the MSRS General Plan

Under Minnesota Statutes, section 352.01, subdivisions 2, 2a, and 2b, state employees are required to participate immediately on the date of hire, unless the employee is an “excluded employee.” Until amended in 2021, the list of “excluded employees” in subdivision 2b included the following exclusion:

...foreign citizens who are employed under a work permit of less than three years or under an H-1b visa or a J-1 visa that is initially valid for less than three years of employment, unless notice of a visa extension which allows them to work for three or more years as of the date that the extension is granted and is supplied to the retirement plan, in which case the person is eligible for coverage from the date of the extension;...

Upon discovering that this exclusion violated the federal immigration law, the statute was amended in 2021 to include these visa holders immediately upon hire. A session law was also enacted to authorize these employees to purchase past service credit for the period of employment that they were excluded.

Federal Law

The relevant federal regulation, promulgated pursuant to the American Competitiveness and Workforce Improvement Act of 1998, and published in 2012, states:

Benefits and eligibility for benefits provided as compensation for services (e.g., cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers. (i) For purposes of this section, the offer of benefits “on the same basis, and in accordance with the same criteria” means that the employer shall offer H-1B nonimmigrants the same benefit package as it offers to U.S. workers, and may not provide more strict eligibility or participation requirements for the H-1B nonimmigrant(s) than for similarly employed U.S. workers(s) (e.g., full-time workers compared to full-time workers; professional staff compared to professional staff). H-1B nonimmigrants are not to be denied benefits on the basis that they are “temporary employees” by virtue of their nonimmigrant status.

Extension of Right to Purchase Credit for Past Service

The University of Minnesota is one of the employers whose employees were excluded from membership in the MSRS General Plan due to employment on an H-1b visa. In 2021, the U contacted 12 employees who were excluded during their first three years of employment and informed them of the right to purchase service credit for this past service. Two employees made the purchase.

Recently, the U discovered that they had missed an employee who would have been able to purchase past service credit, but now could not do so because the right expired on August 31, 2021. The U continues to review HR records to determine if there are other employees who were excluded from the MSRS General Plan under old law, and believe it is possible that other employees may be identified.

The bill extends the ability to purchase credit for past service indefinitely, but an employee has a right to make the purchase only if the employer provides notice to the employee.

General Summary

The bill is a session law that amends the session law enacted in 2021. The 2021 law, attached and linked, consists of two subdivisions:

Subdivision 1 provides definitions for terms used in subdivision 2. The terms include “eligible person,” “excluded employee,” and “lookback period.”

Subdivision 2 states that an excluded employee who becomes an included employee due to the law change is authorized to receive service credit beginning with the employee’s date of hire if the missed employee and employer contributions are paid to MSRS. The missed employee and employer contributions are the employee and employer contributions that were not made beginning with the date of hire through the date coverage begins. The employee (or employer) must pay the missed employee contributions no later than August 31, 2021. If the missed employee contributions are made, the missed

employer contributions must be made no later than September 30, 2021, and MSRS must credit the missed service upon receipt of the employee and employer contributions.

The bill adds a new subdivision 1a and amends subdivision 2, as explained in the following Section-by-Section Summary.

Section- by- Section Summary

Section 1 amends Laws 2021, chapter 22, article 2, section 3, by adding a new subdivision 1a, which describes actions that must be taken before an employee has the right to elect to purchase credit for past service under subdivision 2.

First, an employee has the right to elect the service credit purchase only if the employer notifies the employee of the right.

Second, if the employee receives the notice, the employee must forward the notice to MSRS and request a determination of the amount of the missed employee contributions, for the period the employee was excluded.

Third, upon receipt of that information from MSRS, the employee may elect to purchase the service by following the procedure in subdivision 2.

Section 2 amends Laws 2021, chapter 22, article 2, section 3, subdivision 2, which provides the process that employees, employers, and MRS must follow if the employee elects to purchase credit for past service during the period the employee was excluded from membership. The process starts with the employee making the payment of the missed employee contributions, or a portion thereof (and receive less than full credit), to MSRS no later than 90 days after receiving the notice from the employer of the right to purchase past service credit under subdivision 1a.

Paragraph (b) of subdivision 2 is amended to delete the August 31, 2021, expiration date for the right to purchase. The requirement in the 2021 session law that the employer pay the missed employer contributions remains intact in this subdivision, but the September 30, 2021, due date by which the missed employer contributions must be paid is replaced with a due date that is “no later than 60 days after the date the missed employee contributions are paid.”

Effective Date. Both sections are effective the day following final enactment.

Minnesota Session Laws - 2021, Regular Session

CHAPTER 22--S.F. No. 1712

ARTICLE 2

FEDERAL COMPLIANCE AFFECTING MSRS AND PERA ELIGIBILITY FOR CERTAIN VISA HOLDERS

Sec. 3. MSRS; SERVICE CREDIT PURCHASE PERMITTED FOR PERIOD OF EMPLOYMENT AS AN EXCLUDED EMPLOYEE.

Subdivision 1. Definitions. For purposes of this section, the following definitions shall apply, unless the context indicates a different meaning is intended:

(1) "effective date" means the effective date of section 1;

(2) "eligible person" means a person who:

(i) is employed in state service on the effective date or terminated employment in state service during the lookback period;

(ii) was an excluded employee for any period of employment before the effective date; and

(iii) before the effective date, became eligible for coverage under Minnesota Statutes 2020, section 352.01, subdivision 2b, clause (14), or, on the effective date, became a state employee under the amendment made by section 1;

(3) "excluded employee" means a person who was excluded from coverage under Minnesota Statutes 2020, section 352.01, subdivision 2b, clause (14);

(4) "executive director" means the executive director of the Minnesota State Retirement System; and

(5) "lookback period" means the period that begins twelve months before the effective date of section 1 and ends on the effective date.

Subd. 2. Authorizing the purchase of service credit. (a) Notwithstanding any law to the contrary, the executive director must credit a person with allowable service credit for any period of employment during which contributions were not made for the person because the person was considered an excluded employee, if the person is an eligible person and the executive director receives the payment described in paragraph (b) or (c), as applicable.

(b) The eligible person or the employer, on behalf of the eligible person, may, no later than August 31, 2021, pay the missed employee contributions for any period of employment during which contributions were not made for the person because the person was considered an excluded employee, by transmitting the amount of the missed employee contributions in a lump sum to the Minnesota State Retirement System.

(c) The eligible person may elect to pay missed employee contributions for less than the entire period of employment during which contributions were not made. The period of employment elected must be consecutive payroll periods and may be payroll periods during which the eligible person received the lowest salary. Upon payment of the missed employee contributions for the period of employment elected, the executive director must credit the eligible person with a proportionate amount of allowable service credit.

(d) If the missed employee contributions are paid, the eligible person's employer must, no later than September 30, 2021, pay the missed employer contributions plus interest, compounded annually, at the applicable annual rate or rates specified in Minnesota Statutes, section 356.59, subdivision 2, on both the employee contributions and the employer contributions, from the end of the year in which the contributions would have been made to the date on which the payment is made, by transmitting the amount of the missed employer contributions plus interest in a lump sum to the Minnesota State Retirement System. If the eligible person elects to pay missed employee contributions for less than the entire period of employment as permitted under paragraph (c), the employer must pay the missed employer contributions plus interest on both the employee contributions and the employer contributions for the payroll periods elected by the eligible person.

(e) The executive director shall notify the eligible person's employer regarding the amount required under paragraph (d) and the basis for determining the amount. If the employer fails to make all or any portion of the payment required by paragraph (d), the executive director shall follow the procedures in Minnesota Statutes, section 352.04, subdivision 8, paragraph (b), to collect the unpaid amount.

SF 1454 (Pappas); HF 1497 (Feist): MSRS and PERA; Amending Plan Eligibility to Require Coverage of Certain Visa Holders from Date of Hire

Prepared by: Susan Lenczewski

Date: March 1, 2021

Introduction

- Affected Plan:** Minnesota State Retirement System (MSRS)
Public Employees Retirement Association (PERA)
- Laws Amended:** Minnesota Statutes, Sections 352.01, subdivision 2b, and 353.01, subdivision 2b
- Brief Description:** The bill (1) revises eligibility for foreign citizens in the MSRS General Plan to require immediate participation of H-1B, H-1B1, and E-3 visa holders, rather than exclude such citizens for the first three years of employment, (2) clarifies eligibility for foreign citizens in the PERA General Plan, and (3) permits newly included foreign citizens in the MSRS plans to purchase credit for service dating back to October 1, 2020, by paying missed employee and employer contributions.

Background and Legal Requirements

Both MSRS and PERA require covered employees to participate immediately on the date of hire. Covered employees are defined as "state employees" for MSRS (Section 352.01, subdivision 2) and "public employees" for PERA (Section 353.01, subdivision 2), followed by a list of categories of "included employees" (subdivision 2a in each section) and "excluded employees" (subdivision 2b in each section). Both MSRS and PERA have excluded foreign citizens for the first three years of employment since 1993.

MSRS

As mentioned above, beginning with the employee's first day of employment, a state employee is required to participate in the MSRS General Plan under subdivisions 2 and 2a, unless the employee is an "excluded employee" under subdivision 2b. One category of excluded employees is foreign citizens employed under an H-1b visa or a J-1 visa that is initially valid for less than three years of employment, unless the foreign citizen's visa is extended for another three or more years, in which case participation begins on the date of the extension.

A department at the University of Minnesota employs a foreign citizen with H-1b visa status and, on behalf of that employee, requested coverage by the MSRS General Plan from the employee's first day of employment, rather than three years after the first day of employment.

After consultation with House research, it was discovered that federal immigration law and regulations require that H-1B visa holders be treated the same as other employees in terms of compensation and benefits. Specifically, 20 C.F.R. § 655.731(a) requires that employers "offer benefits and eligibility for benefits provided as compensation for services to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers." (*Also see the Immigration and Nationality Act, 8 U.S.C 1182 (n) and (t).*)

The regulations make clear that "benefits" include retirement and savings plans (*see 20 CFR § 655.731(c)(3)*). An employer must offer the same benefit package to H-1B holders as similarly situated U.S. workers and cannot require more strict eligibility or participation requirements for H-1B holders. Benefits also cannot be denied for H-1B employees who are temporary. Benefits need not be identical, so long as the same benefits are offered to the H-1B holders as U.S. workers. Under 20 CFR § 655.730(d)(1), employers must also commit to providing benefits and eligibility to H-1B nonimmigrants on the same basis as U.S. workers in their application to hire H-1B employees. Employers must also maintain documentation of their compliance with these requirements (*20 CFR § 655.731(b)(viii)*).

There are similar protections for H-1B1 (for nationals of Chile and Singapore) and E-3 (for nationals of Australia) visa holders, but not for J-1 visa holders. J-1 visas are for "exchange visitors," who come to the U.S. on an approved program for the purpose of teaching, studying, conducting research, or graduate medical training.

The H-1B visa holder employed at the University of Minnesota began employment in October 2020. The department is willing to pay both the employee and employer contributions to purchase service dating back to the employee's first day of employment.

According to Erin Leonard, Executive Director of MSRS, the state employer that most frequently has H1-B visa holders that are potentially covered by the MSRS General Plan is the University of Minnesota. The University of Minnesota is a unique employer among the MSRS-covered employers. The Regents are able to choose which positions are covered by MSRS General and which retirement plans are offered to their employees. Other state employers have that coverage determined by statutes governing MSRS. The University offers multiple retirement plans depending on the type of position of the employee: civil service employees are covered by the MSRS General Plan and the University's professional and faculty (P&F) employees are covered by the Faculty Retirement Plan (FRP).

Ms. Leonard confirmed that civil service employees who do not meet the three-year visa requirement do not have another retirement plan to replace the MSRS General Plan. Individuals that would be FRP eligible and visa holders are offered this retirement plan if they are in the United States, but not if they are located in another country.

PERA

Similar coverage requirements apply to determining coverage under the PERA General Plan. Beginning with the employee's first day of employment, a public employee, defined as a "governmental employee" or "public officer," is required to participate in the PERA General Plan under subdivisions 2 and 2a, unless the employee is an "excluded employee" under subdivision 2b. One category of excluded

employees is foreign citizens employed by a governmental subdivision, for the first three years of employment, "...except that the following foreign citizens are included employees under subdivision 2a:

- (i) employees of Hennepin County or Hennepin Healthcare System, Inc.;
- (ii) employees legally authorized to work in the U.S. for three years or more; and
- (iii) employees otherwise required to participate under federal law."

- Minn. Stat. § 353.01, Subd. 2b, Para. (a), Cl. (11)

PERA's exclusion is closer to compliance with the federal requirements, especially as applied to employees of Hennepin County or Hennepin Healthcare System. (A reference to "Hennepin County" was added to this exclusion in 2002 and a reference to "Hennepin Healthcare System, Inc." was added to this exclusion in 2005.) However, the description of this category of excluded employees provides no guidance as to which foreign citizens are required to participate under federal law on their date of hire, rather than be excluded for their first three years of employment. To provide employers with this information, the bill incorporates the language used for the MSRS foreign citizens by specifically mentioning H-1B, H-1B1, and E-3 status holders and makes other changes to clarify that a foreign citizen needs to satisfy only (i), (ii), or (iii) to be included in PERA on the employee's date of hire.

Foreign Worker Exclusion for the First Three Years of Employment

Since 1993, the covered employee definitions for MSRS and PERA have excluded foreign citizens for the first three years of employment. Although we have not been able to review the 1993 legislative history of this particular provision, it is possible that employers believed this to be in the best interest of a foreign citizen who was not expected to be employed for longer than three years. Excluding foreign citizens from coverage for the first three years of employment would almost certainly have been in the employer's best interest if the employee was not expected to be employed for longer than three years.

When the three-year exclusion for foreign workers was added to the covered employee statutes for MSRS and PERA, the vesting requirement was three years for the MSRS and PERA General Plans. Vesting was not increased to five years until 2010. If a foreign worker was not expected to be employed for at least three years, the employee would not become vested in a pension under the MSRS or PERA General Plans. This meant that, for the period of employment, employee contributions would be deducted from the employee's paycheck and would be contributed to the plan, along with employer contributions for that employee. If the employee then terminated employment before earning three years of service, the employee would not be vested and would not be entitled to a pension. As is the case under current law, the employee can request a refund of the employee contributions but is not entitled to receive payment of the related employer contributions. Employer contributions for an employee who never vests in his or her benefit are forfeited and remain in the plan to fund other employees' pension benefits.

Also, in 1993, when the statutes were amended to add the foreign worker exclusion for the first three years of employment, it appears that there was no federal law in effect that would have required H-1B visa holders to receive the same benefits as U.S. employees. The requirement first appeared in the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), five years after the foreign worker provision was added to the covered employees definitions for MSRS and PERA.

Section- by- Section Summary

Section 1: MSRS Coverage of Foreign Citizens

The section revises paragraph (14) of subdivision 2b of Section 352.01 to state that foreign citizens are excluded employees for the first three years of employment, unless the foreign citizen is in any of the following categories:

1. An H-1B, H-1B1, or E-3 status holder;
2. An employee legally authorized to work in the U.S. for three years or more; or
3. An employee otherwise required to participate under federal law.

Section 2: PERA Coverage of Foreign Citizens

Section 2 revises Section 353.01, subdivision 2b, paragraph (11), to clarify that foreign citizens are excluded for the first three years of employment, unless the foreign citizen is an H-1B, H-1B1, or E-3 status holder or is in any of the other categories currently listed in this paragraph.

Section 3: Purchase of Service Credit Beginning with Date of Hire under MSRS

Section 3 is a session law that permits, under paragraph (a), an excluded employee who becomes an included employee under section 1 of the bill to receive service credit beginning with the employee's date of hire if the missed employee and employer contributions are paid to MSRS. The missed employee and employer contributions are the employee and employer contributions that were not made beginning with the date of hire through the date coverage begins. Paragraph (b) states that the employee or the employer, on behalf of the employee, must make the payment of missed employee contributions no later than August 31, 2021. If the missed employer contributions are made, the missed employer contributions must be made no later than September 30, 2021. MSRS must credit the missed service upon receipt of the employee and employer contributions.

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