

7006 Lebrang

The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON  
ATTORNEY GENERAL

October 10, 2000

The Honorable Johnny Mack Brown  
Sheriff, Greenville County  
4 McGee Street  
Greenville, South Carolina 29601

Dear Sheriff Brown:

Thank you for your letter of September 13, 2000 which was referred to me for response. In your correspondence, you relate your intention to work as a consultant for Greenville Technical College after retiring from your current position as sheriff. You express concern in your letter over whether S.C. Code Ann. § 9-1-1790 would subject you to a possible loss of retirement benefits should your annual income as a consultant exceed the statutory limit of \$25,000.

As you know, S.C. Code Section 9-1-1790 (A) provides, in part, the following:

A retired member of the system may return to employment covered by the system and earn up to twenty-five thousand dollars a fiscal year without affecting the monthly retirement allowance he is receiving from the system. If the retired member continues in service after having earned twenty-five thousand dollars in a fiscal year, his retirement allowance must be discontinued during his period of service in the remainder of the fiscal year.

Whether this section would apply to your situation, depends upon whether as a "consultant" you would be considered an independent contractor or an employee of the system. In determining if one is an employee or an independent contractor, the test is one of control over the person doing the work. In determining control, it is not the actual control exercised by the employer but, "whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner and means of its accomplishment; the principal factors showing right of control are direct evidence of right or exercise of control, method of payment, furnishing of equipment and right to fire." Todd's Ice Cream, Inc. v. South Carolina Employment Security Commission, 315 S.E.2d 373, 375 (1984). An independent contractor is one who contracts to do a piece of work according to his or her own methods without being subject to the control of his employer except as to the result of the work performed. One who performs work for another that represents the will of the employer, not only as to the result but also to the means and method by which the result is accomplished, is not an independent contractor but an employee. See S.C. Op. Atty. Gen. November 22, 1983. Whether

Respectfully,  
Charlie Condon

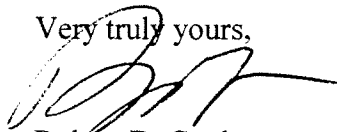
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your employer reserves the right to control not only the result of your work, but the performance of that work, should be determined by your contract of employment. If your work constitutes that of an "employee," you would be subject to the constraints of S.C. Code Ann. §9-1-1790 (A).

While we have attempted to provide you with some insight as to how the courts of this state have determined whether an individual is an independent contractor or employee in order for you to ascertain whether your situation would be one that invokes S.C. Code Ann. § 9-1-1790 (A), it is in your best interest to contact the South Carolina Retirement System to obtain a decision by that agency. The South Carolina Retirement System is the executive agency charged with the implementation and enforcement of the retirement statutes, and while we may comment on the law in this area, it is that agency's determination of your situation that controls. Both the courts and this office are constrained to defer to the administrative interpretations by the agency charged with the enforcement of certain statutory provisions and will not overturn such provisions absent cogent reasons. See S.C. Op. Atty. Gen. January 7, 1999.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

Very truly yours,



Robert D. Cook  
Senior Assistant Attorney General