

1980 WL 120838 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

August 20, 1980

\*1 Purvis W. Collins  
Chairman  
Deferred Compensation Commission  
Sol Blatt Building  
Second Floor  
Columbia, South Carolina 29201

Dear Mr. Collins:

You have asked the opinion of this Office on whether vendors, contractors and other persons performing services for the State, its agencies or its political subdivisions who are not considered employees in the usual sense may participate in the Deferred Compensation Program [hereinafter Program] established for the employees of such entities by Act 97 of the Acts and Joint Resolutions of 1977. [Codified as §§ 8-23-10, [et seq.](#), [Code of Laws of South Carolina](#), 1979 Cum.Supp.] In addition to this question, it has been asked whether persons receiving a per diem and persons providing services on a fee basis may participate in the Program.

Section 6 of Act 97 [or § 8-23-60] defines 'employees' as 'any person whether appointed or elected providing services for the State or any political subdivision thereof for which compensation is paid on a regular basis.' Whether particular types of individuals may participate in the Program will be determined by whether this definition embraces them.

By use of the word vendor, I assume you mean individuals selling tangible goods or commodities to the State, its agencies or its political subdivisions. [Webster's, Third New International Dictionary](#), pp. 2539-2540, 'vendor.' Because these persons provide goods rather than services, they do not come within the definition contained in Section 6. [Webster's](#), p. 2075, 'service'; [Fennell v. Tax Commission](#), 233 S.C. 43, 46-47 (1958).

You also inquired whether contractors may participate in the Program. By this, I assume you refer to persons providing services to the State, its agencies or its political subdivisions pursuant to a written or oral contract other than one of employment. In other words, the term used by you refers to independent contractors. See [Carter's Dependents v. Palmetto State Life Insurance Co.](#), 209 S.C. 67 (1946), which distinguished between employees and independent contractors.

As originally proposed, Section 6 included persons 'under contract,' but this phrase was deleted by an amendment containing the language that now appears in Section 6. House Bill 2286, 1977, Records of the Legislative Council; House Journal, 1977, Vol. 1, p. 1530. The addition of this amendment persuasively supports the conclusion that the General Assembly intended that Section 6 would not embrace independent contractors. Sutherland, [Statutory Construction](#), 4th Ed., Vol. 2A, § 48.18, p. 224; 73 [Am.Jur.2d](#), Statutes, § 171. Persons providing services on a fee basis would fall within the category of independent contractors with regard to the Program and the conclusion applicable thereto.

The federal statute, [26 U.S.C. § 457](#), authorizing such deferred compensation plans extends them to persons performing services to a state or local government. In its definition of performance of service, it specifically includes independent contractors. [26 U.S.C. § 456\(d\)\(2\)](#). The statute, however, does not require that if a state or local government establishes such a plan, it must allow the participation of independent contractors. See [26 U.S.C. § 467\(b\), \(d\)\(1\)](#). Decisions of this nature would remain with the governmental entity establishing and maintaining the plan. See [Wheeler v. Barrera](#), 417 U.S. 402 (1974).

\*2 It also has been asked whether persons receiving a per diem may participate in the Program. This term sometimes is used synonymously with salary and also should be embraced by the term compensation. [Scroggie v. Scarborough](#); 162 S.C. 218, 226 (1931), 62 Am.Jur.2d, Public Officers and Employees, § 375. Thus, it appears that persons receiving a per diem would come within the first portion of the language in Section 6. However, because a person entitled to a per diem usually receives this form of pay only several times a year, depending on the number of days actually served, it is necessary to consider if the requirement that the payments of compensation be 'on a regular basis' results in their exclusion.

The phrase 'for which compensation is paid on a regular basis' possibly might be construed to include persons compensated in the form of a per diem, but several factors require a contrary conclusion. The word 'regular' and phrases synonymous with a 'regular basis,' according to the research herein, often are used in legal contexts to specify an element of frequency, continuity, or constancy. [Aetna Casualty & Surety Co. v. Sessions](#), 209 S.C. 150, 154-155 (1973); [Patterson v. L. M. Parger & Co.](#), 162 S.E.2d 571, 575 (N.C. 1968); [Brown v. Bates](#), 363 F.Supp. 897 (N.D. Ohio. 1973). This meaning is also one of its ordinary usages. Webster's, 'regular,' p. 1913. Further, the original version of Section 6 did not contain the phrase 'on a regular basis.' It was added by the same amendment that deleted the term 'contract,' as discussed hereinabove. Thus, the probable inference is that by this language the General Assembly sought to add a condition that the original language omitted or did not make clear. More specifically, it sought to distinguish compensation paid on a regular basis from that paid on an irregular basis. The latter basis describes the payment of a per diem, which is infrequent and sporadic. Considering these factors, the more sound conclusion is that Section 6 was not intended by the General Assembly to embrace persons receiving compensation in the form of a per diem.

Although not authoritative, it is noteworthy that the Budget and Control Board has promulgated a rule providing that the South Carolina Retirement System shall not credit service when the payment therefor is in the form of a per diem and has interpreted § 9-1-10(4), [Code, 1976](#), which defines 'employees' for purposes of the Retirement System, accordingly. R. 111-14, Code of Laws of South Carolina, 1976, Vol. 26, pp. 460-461.

Based on the foregoing, it is the opinion of this office that vendors, independent contractors, including those paid on a fee basis, and persons compensated in the form of a per diem do not come within the definition of employees in Act 97 and, therefore, may not participate in the Deferred Compensation Program authorized thereby.

Sincerely yours,

James M. Holly  
Assistant Attorney General

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