



MEMORANDUM

2009-2010

To: Chief Executives, Heads of Offices, Executive Directors
From: Lawrence Becker, Chief Executive Officer Division of Human Resources
Re: New York State Law Section 211

OVERVIEW

The state legislature recently enacted a new law concerning waivers pursuant to section 211 of the retirement and social services law. Section 211 allows state agencies and local governments to obtain permission (via a so-called "211 waiver") to employ a retiree who is under 65 years of age in a capacity where he or she will earn more than \$30,000 in a calendar year while also receiving a New York State or local government pension without diminution of his or her pension benefits.

For individuals who are over 65 years of age and/or for individuals who joined the retirement system prior to May 31, 1973 (i.e. Tier I) and will be working as consultants, Section 211 does not apply.

Since this law impacts not only individuals who have retired from the DOE or another agency and returned to work as a direct consultant to the DOE but also those who return to work through an outside employment agency (the current vendor is GoodTemps), DHR is providing an update on the new law and how it may impact individuals who work for the DOE as either direct consultants or consultants through an outside agency.

As noted above, the new law, which has been extensively reviewed by both the DOE Office of Legal Services and the Office of the Corporation Counsel of the City of New York, makes no distinction between individuals who work as consultants for the DOE directly or through an outside agency. The following provisions apply to all individuals who are employed in a consultant capacity by the DOE:

- Retirees who will earn \$30,000 or less in a calendar year must file a Certification of Employment under Section 212 with their retirement system in order to notify them that they are employed by the New York City Department of Education. Retirees may obtain Certification of Employment under Section 212 forms from their retirement system.
- Any individual who is retired from the DOE or any city/state agency for less than one year cannot work on any project or activity that is the same or similar to the work they did prior to retirement.
- Any individual who is retired from the DOE or any city/state agency who returns to work as a consultant and who anticipates earning more than \$30,000 in a calendar year must request a waiver of section 211 in order to earn more than \$30,000 without facing a diminution of pension benefits. **The waiver must be requested and granted prior to reaching the \$30,000 cap.** This cap is set by law and is amended from time to time.

- No waiver is required if the person earns \$30,000 or less in a calendar year
- No waiver is required if the person is 65 years of age or over and/or if the retiree joined the retirement system prior to May 31, 1973 (i.e. Tier I) and will be working as a consultant.

Note: Currently, there is no definition in the law about the exact meaning of the terms "same or similar." In the Governor's message accompanying the law, he indicated that hiring a person to use the same skill set to perform a different job would not violate the law. So, for example, a retired police detective who returns as a consultant to work as an investigator for a district attorney would utilize the same skill set but perform a different job, and would not be prohibited from working as a consultant within a year of retirement. However, if the retired detective anticipated earning more than \$30,000 during the calendar year, a 211 waiver would need to be requested and obtained.

211 WAIVER CRITERIA

The grounds for granting a 211 waiver, as set forth in the new law, are extremely restrictive. Under the new law, waivers can be granted in only two circumstances:

1. When "an urgent need" for the retiree's services exists "as a result of an unplanned, unpredictable and unexpected vacancy where sufficient time is not available to recruit a qualified individual," and where the "hiring shall be deemed as non-permanent rather than the final filling of such position."

OR

2. When the prospective employer "has undertaken extensive recruitment efforts to fill such vacancy and as a result thereof, has determined that there are no available non-retired persons qualified to perform the duties of such positions."

Additionally, the law also states that prospective employers are now required to have "prepared a detailed recruitment plan to fill such vacancy on a permanent basis," without which approval of the 211 waiver application cannot be granted. The law now also specifies that the retiree must be "properly certified where such certification is required."

IMPACT OF 211 WAIVER LAW

Obviously the intent of the legislature was to restrict the granting of 211 waivers to circumstances where there is an unplanned and unexpected vacancy, where the hiring is temporary or where there are no available non-retired individuals qualified to perform the duties of the position. The new law is not retroactive (i.e. it does not apply to individuals who were previously granted waivers); however, it will make granting new waiver requests more difficult.

Additionally, this new law will now pertain to consultants who work through GoodTemps and have not previously been required to apply for waivers. Individuals and offices should take this into account when planning. At the present time the DOE is in the process of completing a selection pursuant to an RFP for a vendor for consultant services. The requirements of the new law will be integrated into the process of applying to become a consultant to ensure compliance.

However, the law is *effective immediately*, so please be aware that all the restrictions outlined in this memo must now be adhered to.

PROCESS FOR REQUESTING A WAIVER

The process for requesting a 211 waiver is as follows:

- Requests for waivers pursuant to section 211 for pedagogical employees to perform consulting work are to be mailed to:
Field Services
65 Court Street
Room 811
Brooklyn, NY 11201
Or
By email to Louise Lupo at LLupo@Schools.nyc.gov
- Requests for waivers pursuant to section 211 for administrative retirees to perform consulting services are to be sent to:
Sheldon Hychman
Office of Employee Relations
SHychma@schools.nyc.gov

Note: In cases of waiver requests for administrative retirees, the Department of Citywide Administrative Services (DCAS) is the final approving agency.

C: J. Klein
P: Anagnostopoulos
C: Cerf
K: Grimm
L: Smith