

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

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### 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:

- (i) An H-1B, H-1B1, or E-3 status holder;
- (ii) An employee legally authorized to work in the U.S. for three years of more; or
- (iii) 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 employee 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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