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**TO: ALL PUBLIC AGENCIES**

**SUBJECT: *ARNETT, et al. v. PUBLIC EMPLOYEES' RETIREMENT SYSTEM, et al., UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, NO. C-95-3022 CRB***

In this federal court case which began several years ago, individual plaintiffs challenged Government Code section 21417 in the Public Employees' Retirement Law (PERL) as allegedly violating provisions of the federal Age Discrimination In Employment Act (ADEA). While only a handful of local contracting public agencies have been named in the lawsuit to date, the ultimate conclusion of the case could potentially affect all local employers. Also, local employers will soon receive formal notices from the court regarding the case and their participation in it. The purpose of this circular letter is to summarize the status of the case and its potential effect on employers.

#### GOVERNMENT CODE SECTION 21417

When Section 21417 applies to an industrial disability retirement allowance (IDR), it limits the amount of IDR retirement allowance to the amount that the member would have received had the member continued working until normal retirement age (for example, age 55 for most safety members). That amount may be less than the 50% of final compensation that IDR retirees would receive if the statute did not apply.

#### ARNETT CASE

In addition to naming CalPERS as a defendant, plaintiffs in the lawsuit named the State of California and a handful of other state and local agencies as defendants.

In 1999 the Ninth Circuit Court of appeals ruled that plaintiffs stated a cause of action under the ADEA. (*Arnett et al v. CalPERS, et al.*, 179 F.3d 690 (9<sup>th</sup> Cir. 1999.)) In January, 2000 the U.S. Supreme Court granted the State of California's petition for certiorari, vacated the Ninth Circuit Court's decision, and remanded the case to the Ninth Circuit. However, the Supreme Court's decision was not based on the merits of the ADEA allegations. Instead, the Supreme Court instructed the Circuit Court to reconsider its decision in light of the U.S. Supreme Court's week-earlier decision in *Kimel v.*

*Florida Board of Regents*. The U.S. Supreme Court held in the *Kimel* case that states are immune from liability in suits by private individuals under the ADEA by virtue of the Eleventh Amendment to the U.S. Constitution. In April, 2000, the Ninth Circuit Court of Appeals remanded the case to the District Court for decision consistent with the *Kimel* decision.

In July, 2000, the federal Equal Employment Opportunity Commission (EEOC) intervened as a party plaintiff in the action.

Accordingly, in the case's current posture, the federal government (not just individual retired employees) is suing the state and its agencies and the named local agency employers for violation of the ADEA. Historically, a state may be sued without its consent where suit is brought by the United States government.

The District Court ordered a mandatory settlement conference, and extensive settlement discussions occurred over several months. A partial settlement has resulted, and was approved by the District Court on August 6, 2001.

**PRINCIPAL TERMS OF THE PARTIAL SETTLEMENT RELATIVE TO LOCAL AGENCY EMPLOYERS:**

Under the terms adopted by the District Court, a permanent injunction prohibits the enforcement of Government Code § 21417 from July 1, 2001 forward and will remove all § 21417 limitations as to current and future recipients of IDR. These prospective changes are to take effect as of July 1, 2001.

The plaintiffs may proceed to litigate entitlement to retrospective relief. Defendants retain the right to contest the plaintiffs' claims. Defendants agreed not to assert a constitutional defense; however, defendants retain the right to assert any other defense to defendants' actions in the past and to contest the amount of any retrospective relief. Additionally, even if the court ultimately grants retroactive relief, no retroactive relief will be granted prior to October 16, 1992. So the applicable time period for the calculation and determination of retroactive benefits has been limited. Further, interest accrued on retroactive benefits will not be granted prior to July 2000, another benefit of the settlement agreement. Following certification of the defendant class, discussed below, the parties shall submit briefs to the Court, including documentary evidence, on the issue of whether or not section 21417 violated the Age Discrimination in Employment Act (ADEA) during the time period of October 16, 1992 to July 1, 2001 and the damages, if any, which accrued during that period.

The court will certify a defendant class which will consist of local public entities that have retirement benefit contracts with defendant CalPERS. The court seeks certification of a defendant class regarding the issues of 1) uniform coverage of injunctive relief and 2) retrospective and prospective relief applied to contracting agencies.

Each of the defendants in the class shall have the right to "opt out" of the class to be certified. However, if there are any local contracting agencies who elect to opt out of the class, the court has the power and will join them as individual defendants under federal court rules.

NEXT ACTIONS:

Within the next several weeks, local agencies will receive a notice from the court of the pending class action. At that time, agencies will be entitled to file to appear in court regarding the formation of the defendant class. The notice will identify the specific options that apply.

Each contracting public agency should take the opportunity to review the issues raised in the case and to evaluate their response to the notice from the court. We urge you to have your counsel review the notices.

If you have questions regarding the notices, please contact:

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