



Pension & Health Benefits Committee

Agenda Item 6a

April 18, 2022

Item Name: Proposed Regulation for the Definition of Limited Duration Employment

Program: Employer Account Management Division

Item Type: Action

Recommendation

Approve staff's recommendation to pursue the proposed regulation defining limited duration employment.

Executive Summary

The attached proposed regulation is necessary to clarify what is considered "limited duration" employment as stated in Government Code (GC) sections 7522.56, 21224, and 21229 for retired persons serving after retirement and section 571(a)(3) of Title 2 of the California Code of Regulations (CCR) for employees required by their employer or governing board or body to work in an upgraded position or classification. The California Public Employees' Retirement Law (PERL) and the California Public Employees' Pension Reform Act of 2013 (PEPRA) do not explicitly define "limited duration" employment for either situation. By proposing this regulation, California Public Employees' Retirement System (CalPERS) seeks to explicitly define "limited duration" employment and provide clarity and uniformity for CalPERS, its members, CalPERS-covered employers, and other stakeholders by ensuring the consistent use of the term "limited duration."

Strategic Plan

This agenda item supports the 2017-22 CalPERS Strategic Plan, Risk Management Goal to cultivate a risk-intelligent organization and the objective to enhance compliance and risk functions throughout the enterprise.

Background

Working after retirement statutes were first introduced in 1955. In 1969, the Legislature passed Assembly Bill (AB) 258 which introduced the phrase "limited duration." AB 258 did not define "limited duration" employment and the AB 258 bill analysis did not indicate the legislative intent of the phrase "limited duration." Subsequently, there have been several amendments to the working after retirement statutes, and currently, three statutes in the PERL and PEPRA address "limited duration" employment after retirement – GC sections 7522.56, 21224, and 21229.

Separately, in 1994, CalPERS promulgated CCR section 571 to delineate an all-inclusive list of special compensation to be reported to CalPERS to comply with Senate Bill 53 (Stats. 1993, ch. 1297). CCR section 571(a)(3) identifies Temporary Upgrade Pay as reportable special compensation paid to employees “who are required by their employer or governing board or body to work in an upgraded position/classification of limited duration.” CCR section 571(a)(3) does not define “limited duration” employment and the rulemaking file does not indicate the intent of the phrase “limited duration.”

On September 14, 2021, staff presented a proposed regulation to this Committee. This Committee did not take action on the item and instead directed the team to meet with the California Department of Human Resources (CalHR) to discuss and provide background for the proposed regulation. The CalPERS team met with CalHR and provided the background needed to understand the purpose of this proposed regulation.

On March 15, 2022, staff presented the same proposed regulation as that presented on September 14, 2021 to this Committee. This Committee did not take action on the item and instead directed the team to amend the regulation to allow retired persons, in rare circumstances, to work beyond the initial appointment of 24 consecutive months and maximum of two extensions of 12 consecutive months each as prescribed in the previous version of the proposed regulation. This revised proposed regulation considers those rare circumstances identified by the CalPERS-covered employer and provides for a process by which the CalPERS-covered employer can request an exemption. In addition, this revised proposed regulation streamlines the process for the CalPERS-covered employer to extend the appointment twice following the initial 24 consecutive month appointment without requiring CalPERS’ approval.

Analysis

The proposed regulation would define “limited duration” as a limit of 24 consecutive months per appointment for retired persons serving after retirement, with an option of two extensions of 12 consecutive months per extension upon the CalPERS-covered employers’ satisfaction of specified conditions.

Based on CalPERS’ data, between fiscal year (FY) 2009-10 through FY 2018-19, 53% of retired persons concluded their appointment within 24 months. An additional 22% of retired persons concluded their appointment between 24 and 48 months. The proposed regulation further defines a working after retirement appointment of limited duration as:

- A position involving work that is substantially different from work that the retired person performs after retirement in another position for the same CalPERS-covered employer, or
- A position for a different CalPERS-covered employer from any previous CalPERS-covered employer the retired person performed work for after retirement.

As a result, the proposed regulation does not limit the number of all “limited duration” appointments a retired person may serve in, it eliminates the ambiguity in how long a retired person may serve in a “limited duration” appointment, and it defines what a working after retirement appointment of limited duration is. The proposed regulation also requires CalPERS-covered employers to notify CalPERS of the appointment end date, which shall not exceed 24 consecutive months from the appointment start date, and any changes to the appointment end date. For current working after retirement appointments, time served prior to the effective date

of this proposed regulation would not count towards the time limit. The appointment end date for current working after retirement appointments shall not exceed 24 consecutive months from the effective date of this proposed regulation. This end-date reporting requirement is in addition to CalPERS-covered employers' already existing obligation to report working after retirement appointments to CalPERS.

To meet the business needs of CalPERS-covered employers, the proposed regulation includes an option of two extensions of 12 consecutive months per extension, after the conclusion of the initial appointment of 24 consecutive months. A CalPERS-covered employer may extend the appointment no more than twice, up to 12 consecutive months per extension, if, by the end date of the initial appointment or the end date of the first extension, as applicable:

- its governing body (for contracting agencies and school employers) or Trustees (for the California State University) certifies, by resolution at a public meeting and not on a consent calendar, the approval of the appointment extension and the reason the work required under the appointment cannot be performed satisfactorily by a non-retired employee, or
- the Department of Human Resources (for state employers) certifies, by memorandum, the approval of the appointment extension and the reason the work required under the appointment cannot be performed satisfactorily by a non-retired employee.

In addition, the CalPERS-covered employer would be required to retain records reflecting these certifications and the duty statements for the position. The CalPERS-covered employer would be required to provide this information to CalPERS upon request during the subsequent exemption request process or any future investigations or audits.

In the rare circumstances when a CalPERS-covered employer determines it needs to employ a retired person beyond both the initial limit of 24 consecutive months and additional limit of two 12 consecutive month extensions, CalPERS-covered employers may request one of the following two options for an exemption to the extension limit:

- An unlimited extension if the appointment does not exceed 120 hours per fiscal year, or
- An extension of 12 consecutive months.

The exemption for an unlimited extension up to 120 hours per fiscal year must be only requested once while each additional extension of 12 consecutive months must be requested separately by the end date of the previous extension.

CalPERS will grant one of the requested exemptions per appointment if the following conditions are met:

- The CalPERS-covered employer completes the same certification process required to extend the initial appointment of 24 consecutive months no more than twice, up to 12 consecutive months per extension.
- CalPERS receives the exemption request for review by the end date of the second extension, or the end date of any subsequent extension of 12 consecutive months granted pursuant to an approved exemption, as applicable.
- The CalPERS-covered employer completed a recruitment for the work required under the appointment within the 12 consecutive months prior to the date of the exemption request and certifies that it was unable to fill the position with that recruitment.

In addition, staff will provide an annual report to the CalPERS Board, which will also be publicly available, listing all exemptions granted.

Furthermore, the retired person cannot continue to serve in the same working after retirement appointment beyond the initial appointment of 24 consecutive months until an appointment is extended per this proposed regulation.

The proposed regulation would also define “limited duration” for temporary upgrade pay appointments as a limit of 24 consecutive months per appointment. Based on CalPERS’ data, between July 2011 and September 2020, 99% of temporary upgrade pay appointments concluded within 24 months. The proposed regulation further defines a temporary upgrade pay appointment as an appointment that must be immediately subsequent to a permanent appointment held by an individual for the same upgraded position or classification. This definition clarifies that the temporary upgrade pay appointment only pertains to an employee who is temporarily appointed to an upgraded position or classification that was vacated by the previous incumbent. As a result, the proposed regulation does not limit the number of temporary upgrade pay appointments an employee may serve in, it eliminates the ambiguity in how long temporary upgrade pay can be reported to CalPERS for pension purposes for each appointment, and it defines what a temporary upgrade pay appointment is.

Budget and Fiscal Impacts

The proposed regulatory action is technical. CalPERS does not anticipate that it will impose any direct budget or fiscal impacts to the State. CalPERS expects to absorb the administrative costs related to reviewing and approving exemption requests for working after retirement appointments within the existing budget and resources.

Benefits and Risks

The proposed regulation is necessary to explicitly define “limited duration” employment. Adoption of this regulation will benefit CalPERS-covered employers by providing clear definitions of “limited duration” employment when referring to retired persons serving after retirement and temporary upgrade pay appointees.

Adopting this regulation would clarify the meaning of “limited duration” employment and provide uniformity for CalPERS, its members, CalPERS-covered employers, and other stakeholders by ensuring consistent use of the term.

Attachments

Attachment 1 – Text of Proposed Regulation

Renee Ostrander, Chief
Employer Account Management Division

Anthony Suine
Deputy Executive Officer
Customer Services & Support