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Circular Letter

TO: ALL STATE AGENCIES, CONTRACTING EMPLOYERS, CALPERS-AFFILIATED EMPLOYEE AND RETIREE ASSOCIATIONS, AGRICULTURAL DISTRICTS, STATE COLLEGES & UNIVERSITIES, COUNTY SUPERINTENDENTS OF SCHOOLS, AND INDIVIDUAL SCHOOL DISTRICTS

SUBJECT: EMPLOYMENT AFTER RETIREMENT WITH A CALPERS-COVERED EMPLOYER

This Circular Letter is to inform you that the "Normal Retirement Age" and "Bona Fide Separation in Service" regulations have been finalized and are effective September 19, 2004 (see attached).

In a previous Circular Letter (#200-143-04), you were informed that if a participant has not attained their normal retirement age, they must have a bona fide separation in service prior to returning to employment as a retired annuitant. The bona fide separation in service is a federal requirement which prohibits in-service distributions from a pension plan.

The final regulations specify that a California Public Employees' Retirement System (CalPERS) member who has **not** reached normal retirement age must have a 60 calendar-day separation in service prior to returning to employment as a retired annuitant, **and** there must be no agreement (either verbal or written) to return to employment between the member and a CalPERS employer prior to retirement.

Background:

The CalPERS Defined Benefit Plan is a tax-qualified pension plan under Section 401(a) of the Internal Revenue Code (IRC) and, as such, it must comply with the requirements of this section to maintain its tax-exempt status. Internal Revenue Service (IRS) rules do not permit the distribution of benefits to a retiree who returns to employment as a retired annuitant prior to attaining the plan's normal retirement age unless the retiree had a "bona fide" separation in service. A retiree may reinstate to active service at any time.

Chapter 519, Statutes of 2003 (AB1584) added Government Code section 21220.5 effective January 1, 2004. This section states:

A retired person who has not attained the normal retirement age shall have a bona fide separation in service to the extent required by the Internal Revenue Code, and the regulations promulgated thereunder, before working after retirement pursuant to this article. The board shall establish, by regulation, the criteria under which a bona fide separation is satisfied.

CalPERS promulgated regulations under Title 2, sections 586 – 586.2, in order to implement Government Code section 21220.5 and comply with federal requirements.

Summary of Regulations:

Normal Retirement Age – The normal retirement age is the member's benefit formula age. For example: The normal retirement age for a member with the 2% at 55 benefit formula would be age 55. The normal retirement age for a member with the 2% at 60 benefit formula would be age 60.

No Pre-Determined Agreement With Employer – For members who retire before reaching normal retirement age, there can be no agreement (either verbal or written) prior to retirement to render service to **any** CalPERS covered employer as a retired annuitant regardless of the length of the separation.

Bona Fide Separation in Service – A retired member who is under normal retirement age must have a minimum separation in service of 60 calendar-days prior to returning to any CalPERS-covered employment without reinstatement.

Emergency Hiring Exceptions – Allows for immediate employment of a retired member under normal retirement age for emergency situations as defined by Government Code section 8558.

Questions and Answers:

Question #1: *When are the regulations effective?*

Answer: The regulations are effective September 19, 2004.

Question #2: *Who is impacted by the new regulations?*

Answer: Employers and any CalPERS active member or retired member who has not reached normal retirement age.

Question #3: *What is the normal retirement age?*

Answer: The normal retirement age is the member's benefit formula age. For example: The normal retirement age for a miscellaneous member with the 2% at 55 benefit formula would be age 55. The normal retirement age for a member with the 2% at 60 benefit formula would be age 60.

Question #4: *What normal retirement age will be used if the member retires under more than one benefit formula ?*

Answer: The highest specified age applicable to the member is used. For example: If the member's retirement benefit was calculated based on two different retirement formulas, the 2% at 55 as a miscellaneous member and the 3% at 50 as a safety member, age 55 would be the normal retirement age since it is the highest age.

Question #5: *A member retires with a 2% at 55 benefit formula at age 56. Then, within 60 days, the member is offered employment with a different CalPERS covered employer with a 2% at 60 benefit formula. Does this member have to wait at least 60 days to re-employ at the new agency?*

Answer: No. The normal retirement age for the employment from which the member retires will apply. In this example, the member would not need to have a separation in service because the age at retirement (56) is older than the normal retirement age (55). On the other hand, if a 2% at 55 benefit formula applies and the member retires at age 50, at least a 60 day separation is required before returning to employment as a retired

annuitant even if the position is with an employer with a 2% at 50 benefit formula.

Question #6: *How will prospective employers know the normal retirement age of a retired annuitant?*

Answer: Employers will need to ask the job candidate. If a job candidate does not know their normal retirement age, employers should contact CalPERS at **888 CalPERS** (or **888-225-7377**).

Question #7: *Who will enforce the Bona Fide Separation in Service requirement?*

Answer: It is the employer's responsibility to verify that any person who retired under the CalPERS Defined Benefit Plan prior to attainment of the applicable normal retirement age has a "bona fide separation in service" prior to commencement of service as a retired annuitant. Also, CalPERS auditors will monitor CalPERS covered employers to assure compliance.

Question #8: *What are the consequences to the member and the employer for failing to comply with the bona fide separation in service requirements?*

Answer: The retired annuitant whose employment did not comply with the provisions of Government Code section 21220.5 could be retroactively reinstated to active membership effective the first day of employment as a retired annuitant for the CalPERS-covered employer.

There may be serious financial consequences to both the member and employer. These consequences are described in publication PERS-PUB-37 titled "*Reinstatement From Retirement*".

Question #9: *Can a member return to employment as an independent contractor without the 60-day separation in service requirement?*

Answer: Hiring a retiree as an independent contractor may be done, but it must be clear that they are not a common law employee (See Circular Letter # 200-154-04). In order to avoid possible mis-classification of the retired annuitant, it is suggested that a copy of the proposed contract or agreement be submitted to CalPERS for review.

Question #10: *Can a member go to work immediately after retirement if they have not reached their normal retirement age?*

Answer: CalPERS retirees can work for the private sector, a 1937 Act County agency, as a teacher or administrator whose retirement is with the California State Teachers' Retirement System or the University of California Retirement Plan or they can work for a public agency not covered by CalPERS without the required minimum 60 calendar-day separation in service. They can also work for any CalPERS-covered employer if they reinstate.

Question #11: *If California legislation eliminated the 960-hour limitation on retired annuitants, would a bona fide separation in service still be required?*

Answer: Yes. The bona fide separation in service requirement would still apply to retirees who have not reached their normal retirement age.

Question #12: *Can an employer and an employee who is under the normal retirement age have an agreement for the employee to return to employment as a retired annuitant?*

Answer: No. The IRS has considered a bona fide separation to be a good faith and complete termination of the employment relationship, without a predetermined agreement to continue working at a later date, to constitute a bona fide separation. If there was a side agreement or meeting of the minds that the member would render services to the employer in the future, the IRS could deem the termination a sham and find that the member had never severed employment. As such, a distribution to the participant prior to normal retirement age would, upon subsequent assignment, constitute an impermissible in-service distribution.

Question #13: *How can an employer determine if a member under normal retirement age is interested in returning to employment after the 60 calendar-day separation?*

Answer: Surveying employees regarding their interest in working after retirement without making an agreement would be permissible. Also, employers could establish a pool of retirees for future service.

Question #14: *Does the separation in service requirement apply to disability retirements?*

Answer: No. The separation in service requirement applies only to service retirements.

Question #15: *What is included in the definition of emergency?*

Answer: It is the responsibility of federal, state and local agencies to determine what constitutes an emergency. The employment must be related to the emergency. A backlog of work does not qualify as an emergency (Government Code section 8558).

Question #16: *Does the definition of Normal Retirement Age impact the catch-up provision of the CalPERS 457 Program?*

Answer: No. The normal retirement age for employment after retirement does not affect the 457 Plan.

If you have additional questions, please call the Employer Contact Center at **888 CalPERS** (or **888-225-7377**).

Kenneth W. Marzion, Chief
Actuarial & Employer Services Division

Attachment