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Circular Letter

TO: ALL PUBLIC AGENCIES

SUBJECT: METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
v. SUPERIOR COURT OF LOS ANGELES ["CARGILL" (2004) 32 Cal. 4th
491]

This Circular Letter further addresses the above court case discussed in our earlier Circular Letters of 200-064 dated July 24, 2000, and 200-043 dated March 19, 2001.

The Supreme Court of California has now issued its decision in this case. With respect to California Public Employees' Retirement System (CalPERS), the Court reached the following conclusions:

- "We conclude, as did the lower courts, that the PERL incorporates common law principles into its definition of a contracting agency employee and that **the PERL requires contracting public agencies to enroll in CalPERS all common law employees** except those excluded under a specific statutory or contractual provision." (Emphasis added; "PERL" is the Public Employees' Retirement Law, Government Code Section 20000 et seq.)
- "...the PERL contains no broad exclusion for long-term, full-time workers hired through private labor suppliers."
- "Nor, of course, has the Legislature provided in the PERL for any coemployment exception to a contracting agency's duty to enroll employees in CalPERS."

The court also found that the definition of "employee" in Government Code Section 20028 does **not** require that the funds used to pay employees of a contracting agency be directly controlled by the contracting agency. Common law employees of a contracting agency must be enrolled in CalPERS regardless of the source of the funds used to pay them. Thus, unless otherwise excluded by law or by contract with CalPERS, a person deemed a common law employee of a contracting agency must be enrolled in CalPERS.

Government Code Section 20125 provides that the CalPERS' Board of Administration "shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system." The

common law rules used by CalPERS for determining employee status can be found at the following URLs:

<http://www.irs.gov/pub/irs-pdf/p15a.pdf> (starting from page 3)

<http://www.irs.gov/pub/irs-pdf/p963.pdf> (starting from page 21)

The common law rules for determining whether a worker is an employee may also be used to distinguish “independent contractors” from “employees.” In that regard, the CalPERS’ Procedures Manual defines an “independent contractor” as follows:

“An independent contractor is someone who contracts to do a piece of work according to his/her own methods, and is subject to his/her employer’s control only as to the **end product or final result** of work, and not as to the means and manner in which the work is performed.” (Page 2.6)

Factual questions may ultimately exist as to whether a person is an employee under the established common law rules. To facilitate this determination, employers should maintain documentation substantiating whether a person meets the definition of a common law employee.

QUESTIONS

Will the provisions of Government Code Section 20283 be applied to employers?

Government Code Section 20283 states: “Any employer that fails to enroll an employee into membership when he or she becomes eligible, or within 90 days thereof, when the employer knows or can reasonably be expected to have known of that eligibility shall be required to pay all arrears costs for member contributions and administrative costs of five hundred dollars (\$500) per member as a reimbursement to this system’s current year budget.”

The provisions of Government Code Section 20283 will be applied to contracting agencies on a case-by-case basis, depending on the individual circumstances relevant to each contracting agency.

Is the ruling to be applied retroactively?

CalPERS has concluded that a common law employee of a contracting agency not otherwise excluded from CalPERS enrollment by law or contract must be enrolled into membership retroactive to the original date of qualification. In cases where a person is deemed a common law employee and is no longer employed with a contracting agency, the employer must nevertheless submit a Member Action Request (AESD-1) form for the employee. This form should indicate:

- Box 10 (Effective Date of Action) – The date the employee should have qualified for CalPERS membership. (If unknown, enter the date this person was hired.)
- Box 8 (Remarks) – Enter the date the person separated from your employment.

CalPERS will determine whether any retroactive retirement contributions for the employee are necessary and will notify subsequently affected employers as necessary.

Can agencies request a contract exclusion of “leased” workers, or workers with a genuine “co-employment” relationship?

Requests for exclusions of leased or “co-employed” employees will be reviewed for compliance with the standards for contract exclusions that were approved in 1997 by the CalPERS’ Board of Administration. A copy of these standards is attached to this Circular Letter for your reference.

Kenneth W. Marzion, Chief
Actuarial and Employer Services Division

Attachment