

Public Comments Received

This section provides a copy of all of the comments received.



CHRISTOPHER ONSTOTT
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July 27, 2022

VIA E-MAIL AND U.S. MAIL

Andrew White, Regulation Coordinator
California Public Employees' Retirement System
P.O. Box 942720
Sacramento, CA 94229-2720
Regulation_Coordinator@calpers.ca.gov

RE: CALPERS BOARD OF ADMINISTRATION CONSIDERATION OF REGULATIONS ON "DEFINITION OF LIMITED DURATION EMPLOYMENT"

To Whom It May Concern:

The following public comments are submitted to the Board of Administration ("Board") of the California Public Employees' Retirement System ("CalPERS") on behalf of my client regarding the Board's consideration of Section 574.1.1, "Definition of Limited Duration Employment", of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of title 2 of the California Code of Regulations ("Proposed Regulation").

As a preliminary matter, I request notice of all public hearings on the Proposed Regulations so I may monitor it for my clients. Please send any hearing notices to me at constott@kmtg.com

The comments on the Proposed Regulation are as follow:

1. The Proposed Regulation defines "limited duration" in part as "... a limit of twenty-four consecutive months..." and references the same timeline in various subsections. Limited duration employment arrangements can involve natural pauses in work flow and demands. Some engagements go in phases, with downtime between phases when departments review the work performed. The Board should consider revising the Proposed Regulation to read "... a limit of twenty-four consecutive months *or twenty-four months worked...*" to account for such situations. 1
2. The Proposed Regulation defines "limited duration" in part as "...a limit of twenty-four consecutive months..." and references the same timeline in various subsections. It is unclear how the Regulation would apply if a limited duration employee concludes an 2



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appointment in less than twenty-four months and is asked shortly after to return for another appointment. We ask that the Board provide guidance on if that would be a new appointment, thereby restarting the twenty-four month timeline, or a continued appointment.

3. The Proposed Regulation, at subsection (a)(1), provides an appointment includes "...work that is *substantially different* from work that the retired person performs after retirement in another position for the same CalPERS-covered employer..." It is unclear what "substantially different" means and the criteria that is to be used to make such a determination. We ask that the Board clarify what "substantially different" means and how it will be interpreted in order to avoid confusion on who is subject to the Proposed Regulation once it goes into effect. 3

4. We request the Board confirm that a limited duration employee, under the Proposed Regulation, may perform the same work he or she did prior to retirement for a CalPERS-covered employer after retirement for a *different* CalPERS-covered employer. Are there any limitations to the tasks he or she can perform for the second employer? 4

5. Can the Board confirm that a limited duration employee, under the Proposed Regulation, may be appointed to a CalPERS-covered employer for twenty-four months then, after, be appointed to a different CalPERS-covered employer for another twenty-four months? 5

6. The Proposed Regulation, at subsection (a)(7), provides a CalPERS-covered employer may request an exemption to the two-extension limit. It is unclear under what requirements or conditions such extensions will be permitted. Can the Board provide examples of situations where an exemption would be appropriate and criteria that the Board will use when considering such an exemption? 6

7. Existing regulations provide a retired annuitant may only work 960 hours a year. How are exemptions to be granted to this limit? Do the protocols that an annuitant can only work nine months and then have to take three months off still apply? How will the Proposed Regulation impact these requirements? Is there any mandatory "break" period between appointments? Are reporting requirements per Government Code section 21220 impacted by the Proposed Regulation? 7

8. The Proposed Regulation, at subsection (a)(2), provides "the appointment start date initiates time counted towards the twenty-four consecutive month limit." As drafted, the Regulation also fails to contemplate situations where a limited duration employee works separate but consecutive appointments. Can the Board clarify, via modification to the Proposed Regulation or other guidance, how the Proposed Regulation impacts this situation? For instance, could a limited duration employee accept four separate but consecutive seven-month appointments? What about non-consecutive? 8



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- 9. The Proposed Regulation, at subsection (a)(4), permits a CalPERS-covered employer to extend an appointment up to twice and up to twelve consecutive months per extension if the employer's governing body certifies by resolution that the work done by the limited duration employee "cannot be performed satisfactorily by non-retired employees." Can the Board clarify what "cannot be performed satisfactorily by non-retired employees" means and how it will be interpreted? For instance, is this left to the discretion of the governing body or are there criteria the Board will apply? Are there limits to the pool of "non-retired employees" and does it include potential contractors? 9

- 10. The Proposed Regulation, at subsection (a)(2), provides "employment by a retired person prior to the effective date of this [Proposed Regulation] will not count towards the limit of twenty-four consecutive months." Can the Board clarify that this means a limited duration employee's hours and time worked in retirement will both reset to zero on the date the Proposed Regulation becomes effective? 10

Thank you for your consideration.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD



CHRISTOPHER ONSTOTT



From: [Schmidt, Rhonda](#)
To: [Regulation Coordinator](#)
Subject: Proposed Definition of Limited Duration Employment
Date: Monday, August 1, 2022 2:57:16 PM

[External Email Caution]

Dear Andrew,

We reviewed the proposed definition of limited duration employment and have the following questions.

1. If employment is limited to 24 consecutive months, can an appointment terminate after a period of less than 24 months and a new appointment start after a break of one day or more? Would the clock restart for the 24 consecutive months in this case? 1
2. If the appointment is for work that is the same or similar to work the retired person performed before becoming retired from the CalPERS-covered employer, does the 24 consecutive month rule not apply? I'm a little confused by the definition of "appointment" in paragraph (1) under (a). 2

Thanks!

Rhonda

Rhonda Schmidt

Employee Benefits Director

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August 1, 2022

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Submitted via electronic mail to: Regulation_Coordinator@calpers.ca.gov

Comments to proposed adoption of section 574.1 defining "limited duration"

Dear Mr. White:

California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment ("CASE"), the exclusive representative for State Bargaining Unit 2 ("BU2"), offers the following comments to the proposed adoption of regulations to define and purportedly limit the length of time retired annuitants can continue to work for CalPERS-covered employers after retirement. The proposed regulation does not nearly go far enough and must be substantially revised to limit the ability of employers to use retired annuitants for years on end.

In many departments where CASE has members, the appointing powers have for years employed retired annuitants for years on end. These retired annuitants deprive CASE members of the opportunity for professional growth, career advancement, and promotional opportunities. It is well-known that retired annuitants are a financial benefit to the employer because they no longer have to pay for the employer share of health benefits, retirement contributions, and other state and federal withholdings. However, it is also the case that the use of retired annuitants allows a not-so-subtle form of nepotism to subvert the civil service system, as management is able to reward its cronies with an indefinite supplemental income stream by allowing retired annuitants to collect a paycheck with little or no oversight as to the justification for using non-civil service personnel to perform the work.

CASE represents approximately 4,200 lawyers, judges, and other legal professionals in more than 100 different state departments, agencies, boards, and commissions. Of the 21 state bargaining units, CASE is one of the smallest in terms of membership, and any artificial restriction on the ability of CASE to recruit new members is of vital importance. This is even more true today than in years prior, due to the Supreme Court's decision in *Jamus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31* (2018) 138 S. Ct. 2448, 2461, 201 L. Ed. 2d 924. In that case, the Supreme Court reversed decades of precedent and did away with "fair share" fees assessed upon nonmembers by public employee unions. The result was to deprive unions of a substantial revenue stream upon which they relied and for which the fair share payers enjoyed salary raises, contractual protections, and other benefits of collective bargaining despite not being full members of the union. Many public employee unions had their annual revenue instantly reduced in half. In the wake of that ruling, it is imperative that civil service positions be filled with active, permanent employees who have an incentive to join the union, rather than retired persons who have already

worked a full career, are enjoying a substantial pension, and are supplementing their income with retired annuitant pay, the vast majority of whom do not feel the need to join the union.

Overview of Current Law

Three nearly identical provisions of the Government Code provide that a retired person may work for a public employer without loss of pension benefits “either during an emergency to prevent stoppage of public business or because the retired person has skills needed to perform work of limited duration.” (Govt. Code §§ 7522.56, 21224, subd. (a), 21229, subd. (a).) The statutory framework does not define the term “limited duration” and there is no decisional law shedding light on that term. However, there are several important contextual clues that aid in deciphering the meaning of the phrase.

It is noteworthy that all three statutory mentions of the phrase “limited duration” are paired directly with the phrase “either during an emergency to prevent stoppage of public business.” In other words, there are only two contexts in which a retired person may work for a public employer without reinstatement or loss of benefits. The first one is during an emergency, and not just any kind of emergency. Rather, it must be the kind of emergency that threatens to stop public business. The second situation is when the person “has skills needed to perform work of limited duration.” Barring one of these condition precedents, retired persons are not permitted to work without reinstatement or loss of benefits. Accordingly, these two situations are properly viewed as very limited exceptions to the general rule.

In addition, Government Code section 19144 expressly references section 21224 and 21229 and notes that “a person who has retired from state civil service may be employed temporarily in a civil service position” Thus, whether working during an emergency, or for a limited duration, the period of employment is statutorily required to be “temporary.” In ascertaining the meaning of words in a statute, it is a customary canon of statutory construction to consult the dictionary definitions of the words used by the Legislature. (*People v. Santos* (2020) 53 Cal. App. 5th 467, 473.) According to dictionary.com, the definition of “temporary” is “lasting, existing, serving, or effective for a time only; not permanent.”¹

Accordingly, the phrase “limited duration” must be interpreted to mean a short period of time, something far short of permanent, for a length of time akin to the duration of an emergency.

The Proposed Regulation Allows Retired Annuitants to Work for Years on End

1

Notwithstanding the statutory command that retired persons tenure should be “temporary,” the proposed regulation actually allows retired persons to continue to work indefinitely. The proposed regulation begins by purporting to define “limited duration” as setting a hard limit of twenty-four consecutive months. However, this limit is really no limit at all, both because the definition is structurally flawed itself, and because it is subject to numerous exceptions that effectively swallow the rule.

The proposed regulation states in section 574.1 as follows

- (a) For purposes of clarifying Government Code sections 7522.56, 21224, and 21229, “limited duration” is defined as a limit of twenty-four consecutive months per appointment of a retired person in the employ of a CalPERS-covered employer.

¹ See <https://www.dictionary.com/browse/temporary>

By defining “limited duration” as twenty-four consecutive months, the regulation on its face allows retired persons to work after retirement indefinitely, by the simple artifice of taking one month off every twenty-three months, and then returning to work for another twenty-three months, et cetera, ad infinitum. Thus, before even reviewing the various exceptions to this supposed limit, it is patent that it is in fact no limit at all. The use of the term “consecutive” allows employers and retirees to manipulate work schedules so that the twenty-four-month barrier is never reached.

But there is yet another flaw in the definition. The twenty-four consecutive month limit is only applicable “per appointment.” Thus, a retiree could be repeatedly appointed to multiple successive twenty-four-month appointments indefinitely. There is nothing in the regulation that purports to limit the number of appointments. In paragraph (a)(1) of the proposed regulation, the language attempts to define “appointment” and appears intended to limit the number of appointments, but it is singularly ineffective in achieving that intended purpose. The language states that an appointment must be either “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 with a different CalPERS-covered employer. The problem here is that the phrase “involving work that is substantially different” is vague and undefined. No standards are provided regarding how different the work must be, nor how much of the work must be different than the prior work. Nor is there any articulation as to who decided whether the work is sufficiently different, and there are no avenues to challenge that determination once it is made. In other words, there is no meaningful obstacle to an employer making repeated appointments of the same retired person and simply giving them an occasional new assignment to justify the requirement that it “involves different work.” The better course is to simply limit employers to a single appointment.

2

Having shown that the initial definition is really no limitation whatsoever, the analysis of the various exceptions is perhaps somewhat superfluous, but it is also illustrative of exactly how and why the fatal flaws discuss above will likely be abused.

Paragraph (a)(4) of section 574.1 allows the employer to extend the appointment for two periods of 12 consecutive months each, so long as the respective governing body or authority certifies “its approval of the appointment extension and the reason the work required under the appointment cannot be performed satisfactorily by non-retired employees.”² The proposed regulations do not articulate any standards to be used by the governing body in issuing the required certifications, no reasons to guide the decision whether to grant approval, and no limitations on the types of reasons that will justify a finding that the work cannot be performed by non-retired persons. Rather, it gives the governing body completely unbridled discretion to grant the two 12-month extensions. In other words, the “hard cap” of twenty-four consecutive months (which as previously established is really no cap at all) can effectively be doubled for any reason or for no reason at all.

3

But the exceptions do not end there. Even after the two 12-month extensions (which are likely to be nearly automatic), an employer may seek an exemption to the limit of two extensions by filing a written request with the CalPERS Board. Pursuant to paragraph (a)(7)(A) of proposed section 574.1, there are only three conditions that must be met, and if they are met, the Board “will grant one of the exemptions described in subparagraph (B) per appointment.” Thus, so long as the three conditions are met, CalPERS has no discretion, and must grant the exemption.

4

The three conditions are extraordinarily easy to meet. First, the employer or governing body must make the same certification as is required for the first two automatic 12-month extensions. (See proposed section 574.1, paragraph (a)(7)(A)(i).) Since there would be no reason to request an exemption from the

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² For school employers or local government agencies, the certifying entity is the school district or governing body; for the California State University System, it is the CSU Trustees; for state employers, it is the Department of Human Resources (“CalHR”).

limit of two such automatic extensions prior to utilizing the exemption process, it must be recognized that any employer making a request for exemption with CalPERS will have already obtained such certification once, if not twice. Thus, the first condition is almost by definition going to be met in every case. 5
cont

The second condition is not really a substantive condition, but rather a procedural requirement, in that the request for exemption must be received by CalPERS “by the end date of the second extension, or the end date of any subsequent extension of twelve consecutive months granted pursuant to a previously approved exemption, as applicable.” (See proposed section 574.1, paragraph (a)(7)(A)(ii).) Thus, the employer does not need to demonstrate anything to satisfy this condition. It merely needs to ensure delivery of the exemption request by a certain date. It can therefore be presumed that this condition imposes no substantive barrier. It is, however, noteworthy for a separate reason, in that it expressly contemplates there may be multiple successive exemption requests. By specifically allowing an exemption request to be received by the end of any extension granted pursuant to a previous extension, the rule makes clear that there is no limit on the number of exemption requests an employer may make. This is confirmed later in proposed section 574.1, paragraph (a)(7)(B)(ii), which states that “[a] CalPERS-covered employer may request this exemption more than once.” Thus, the rule expressly contemplates multiple and unlimited exemption requests. 6

The third condition is the only one of the three that actually imposes any additional obligation on the employers. It requires the employer to show that it 7

completed a recruitment for the work required under the appointment within the twelve consecutive months prior to the date of the exemption request and certifies that it was unable to fill the position with that recruitment.

(See proposed section 574.1, paragraph (a)(7)(A)(iii).) Presumably, this subparagraph is intended to require the employer to actually attempt to hire a permanent civil service employee to do the work of the retired person. Unfortunately, the proposed language is hopelessly vague. The phrase “completed a recruitment” is entirely undefined, and thus the exact amount of effort an employer is required to put into trying to recruit workers is entirely unknown. Moreover, this merely requires the employer to certify that it was unable to fill the retiree’s position, with no requirement of documentation or any degree of proof whatsoever. Thus, this is yet another standardless assertion that cannot possibly be verified. If the employer conducted interviews but just didn’t quite feel right about the applicants, would that be a sufficient basis to certify that it was “unable” to fill the position? Would the employer even have to conduct interviews at all, or could it simply review applications and determine that there were no suitable candidates? This requirement does not put any obligation on the employer to provide documentation supporting its decision not to hire someone, let alone specify the reasons for failing to do so. It is left completely to the subjective and unstated preferences of each employer. As such, other than requiring some bureaucratic effort to at least go through the motions by advertising the position and collecting applications, this condition imposes no real burden on the employer, and does not allow for any independent third party to verify the accuracy or sincerity of the employer’s certification.

Once those three “conditions” are met, CalPERS must grant an exemption to the employer to allow them to continue to employ the retired person for either yet another 12 consecutive months, or indefinitely if the appointment does not exceed 120 hours per fiscal year. (See proposed section 574.1, paragraph (a)(7)(B)(i) and (ii).) Moreover, as previously mentioned, the employer can continue to request successive 12-month exemption/extensions indefinitely so long as it meets the three conditions discussed above.

What emerges from the review of the proposed regulation is a definition of “limited duration” that is, in fact, no limit whatsoever. Rather than being “temporary,” (i.e., not permanent) it can in fact be exactly

that. The CalPERS Board has express authority to grant a permanent exemption if the hours worked fall below a certain threshold (120 hours per fiscal year), and has the de facto authority to grant repeated exemptions to continuously extend the appointment indefinitely. Thus, the regulation that purports to define “limited duration” in fact turns the notion of “temporary” on its head. The language so strains any common sense interpretation of “limited duration” that it quite likely is ultra vires in that the proposed regulation exceeds and contradicts the statutory language. 7
cont

Proposed Modifications to the Language

CASE is proposing two options for CalPERS to consider in revising the draft regulation.

Option 1

The first option would delete the entirety of the draft regulation and replace it with the following language: 8

§ 574.1. Definition of Limited Duration Employment

- (a) For purposes of clarifying Government Code sections 7522.56, 21224, and 21229, “limited duration” is defined as a limit of six months per appointment of a retired person in the employ of a CalPERS-covered employer.
- (b) A CalPERS employer may not appoint a retired employee to any position more than one time, for the period specified in subdivision (a), without reinstatement.

The foregoing language offers several obvious advantages to the draft regulation. First, it is clear and easy to understand, without a litany of overlapping exceptions. Second, unlike the draft regulation which would permit retired persons to work for years on end, this definition honors the statutory text and actually gives a meaning to “limited duration” that is consistent with the concept of temporary. Third, and finally, it eliminates the need for CalPERS to get entangled in adjudicating all of the exceptions and requests for extensions, and reviewing what is likely to be extensive documentation from hundreds if not thousands of CalPERS-covered employers applying for extensions or exemptions.

Option 2

In the event CalPERS opts to try to fix the draft regulation, CASE respectfully suggests the following modifications to the proposed language to ensure that the term “limited duration” is actually a meaningful limitation on the extended and in some cases indefinite use of retired annuitants.³ The changes which follow are intended to address the various deficiencies identified above.

Proposed Change #1 – Making the definition a true hard cap 9

- (a) For purposes of clarifying Government Code sections 7522.56, 21224, and 21229, “limited duration” is defined as a *single appointment limit* of twenty-four consecutive or *non-consecutive months per appointment of employment* of a retired person ~~in the employ of~~ *by* a CalPERS-covered employer.

Explanation for Proposed Change #1

The changes are to make clear that retired persons may only work a total of twenty-four months, regardless of whether that time is consecutive or not, as some retired annuitants will occasionally not work

³ Original proposed language is shown in normal font. Proposed additions are shown in italics, and proposed deletions are shown in strikethrough.

any hours during a given month. It thus imposes a true hard cap and therefore actually operates as a limit. 9
The proposed change also deletes the phrase “per appointment” and expressly limits retired persons to a cont
single appointment to ensure that the limit is not completely undermined by allowing employers to simply
make multiple appointments. As discussed above, there are absolutely no obstacles to employers making
repeated consecutive appointments of the same retired person. As rewritten, the regulation would allow
only one post-retirement appointment, and the retired person could work no more than 24 months total.
Other changes are grammatical and stylistic.

Proposed Change #2 – Eliminate definition of “appointment” in subdivision (a)(1) 10

~~(1) For purposes of this subdivision, an appointment is defined as either, 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.~~

Explanation for Proposed Change #2

Because Proposed Change #1 eliminated the phrase “per appointment” there is no need to define that term. Subsequent proposed changes will delete the “per appointment” language from other subdivisions and subparagraphs.

Proposed Change #3 – Renumbering of paragraphs A

~~(2)(1)~~ The appointment start date initiates time counted towards the twenty-four consecutive month limit. Employment by a retired person prior to the effective date of this subdivision will not count towards the limit of twenty-four consecutive months.
~~(3)(2)~~ A CalPERS-covered employer must notify CalPERS of an appointment end date not to exceed twenty-four consecutive months from the appointment start date or the effective date of this subdivision, whichever date is later, and any changes to the appointment end date.

Explanation for Proposed Change #3

Because Proposed Change #2 deleted the first paragraph in this subdivision, subsequent paragraphs would need to be renumbered.

Proposed Change #4 – Reduce the number of extensions from two to one 11

~~(4)(3)~~ A CalPERS-covered employer may extend the appointment no more than ~~twice,~~ once for up to twelve consecutive months per extension, beyond the initial limit of twenty-four consecutive months, if by the end date of the initial appointment ~~and the end date of the first extension,~~ the applicable condition below is met:

Explanation for Proposed Change #4

This change ensures that an employer is only permitted to utilize a single, 12-month extension. Consistent with earlier proposed changes above, the reference to “consecutive” months deleted to allow for situations in which the retired person may not work any hours in a given month. The change also renumbers this paragraph consistent with earlier renumbering.

Proposed Change #5 – Ensure the certifications justifying an extension are meaningful and reliable, and are made under penalty of perjury by the presiding officer of the respective government body. 12

(A) For an appointment with a CalPERS-covered contracting agency or school employer, the employer’s governing body certifies, by resolution at a public meeting, its approval of the appointment extension and the reason the work required under the appointment cannot be performed satisfactorily by non-retired employees. *The certification shall be signed under penalty of perjury by the chair or presiding officer of the governing body, or their designee, and shall attest that the signatory has conducted a diligent investigation and review of the facts supporting the certification.* The appointment extension may not be placed on a consent calendar.

(B) For an appointment with the California State University, the Trustees of the California State University certifies, by resolution at a public meeting, its approval of the appointment extension and the reason the work required under the appointment cannot be performed satisfactorily by nonretired employees. *The certification shall be signed under penalty of perjury by the chair of the Trustees, or their designee, and shall attest that the signatory has conducted a diligent investigation and review of the facts supporting the certification.* The appointment extension may not be placed on a consent calendar.

(C) For an appointment with the state, the Department of Human Resources certifies, by memorandum, its approval of the appointment extension and the reason the work required under the appointment cannot be performed satisfactorily by non-retired employees. *The certification shall be signed under penalty of perjury by the Director of the Department of Human Resources, or their designee, and shall attest that the signatory has conducted a diligent investigation and review of the facts supporting the certification.*

Explanation for Proposed Change #5

As to each subparagraph dealing with the certifications required to justify an extension, the proposed new language ensures that a responsible individual will sign, under penalty of perjury, an attestation they have investigated and review the factual basis for concluding that the work cannot be performed by non-retired employees. This will ensure that certifications are not simply approved anonymously by non-corporeal entities and will instead make an actual person responsible for ensuring the truth and accuracy of the certification.

Proposed Change #6 – Reconciling the language in light of the limit of one extension 13

~~(5)~~(4) The first day following the end of the initial limit of twenty-four ~~consecutive~~ months ~~or the first extension limit of twelve consecutive months~~ initiates time counted towards the limit of twelve ~~consecutive~~ months for the ~~first or second~~ extension, ~~as applicable.~~

Explanation for Proposed Change #6

Proposed change #4 reduced the number of extensions from two to one, and the changes above merely incorporate that limitation and delete language relevant to the second extension. The paragraph is also renumbered consistent with earlier renumbering.

Proposed Change #7 – Renumbering A

~~(6)~~(5) The CalPERS-covered employer shall retain the records reflecting the certifications required in paragraph ~~(4)~~(3) of this subdivision and the duty statements for the position. The CalPERS-covered employer shall provide this information to CalPERS upon request

during the exemption request process described in paragraph ~~(7)~~(6) of this subdivision or during any future investigations or audits.

Explanation for Proposed Change #7

The changes to this paragraph simply make three different renumbering changes consistent with earlier renumbering and to correct cross-references.

Proposed Change #8 – Renumbering and reconciling language in light of only one permissible extension

A

~~(7)~~(6) A CalPERS-covered employer may request an exemption to the limit of ~~two~~ one extensions prescribed in paragraph ~~(4)~~(3) of this subdivision by filing a written request with the board.

Explanation for Proposed Change #8

In light of prior changes renumbering paragraphs and limiting the number of extensions from two to one, the foregoing changes merely make the necessary corresponding changes for consistency

Proposed Change #9 – Making the Exemption Process More Rigorous and Transparent

14

- (A) The board ~~will~~ *may* grant one of the exemptions described in subparagraph (B) ~~per appointment~~, if the board determines that each of the following conditions are met:
- (i) The conditions set forth in subparagraphs (A) through (C) of paragraph ~~(4)~~(3) of this subdivision ~~for each subsequent exemption request, as applicable.~~
 - (ii) CalPERS receives the exemption request for review *at least thirty days prior to the end of the extension period.* ~~by the end date of the second extension, or the end date of any subsequent extension of twelve consecutive months granted pursuant to a previously approved exemption, as applicable.~~ *Upon receipt of the request, CalPERS shall place the matter on the agenda for its next public meeting.*
 - (iii) The CalPERS-covered employer completed a recruitment for the work required under the appointment within the twelve consecutive months prior to the date of the exemption request and *a responsible officer of the employer certifies under penalty of perjury that it was unable to fill the position with that recruitment.*
 - (iv) *The CalPERS-covered employer attaches to its exemption request copies of the position advertisement(s) issued pursuant to the recruitment, as well as copies of all employment applications received pursuant to the recruitment. Personal identifying information of applicants shall be redacted by the CalPERS-covered employer.*
 - (v) *The CalPERS-covered employer serves a copy of the exemption request and all required certifications and documentation on the exclusive representative of the bargaining unit whose members would otherwise occupy the position for which an exemption is being sought, along with a notice of the expected date and time of the CalPERS Board Meeting at which the exemption request will be heard.*
 - (vi) *The CalPERS-covered employer attaches a proof of service to the exemption request filed with the CalPERS Board indicating that service of all required documents and notices was completed upon the exclusive representative.*

Explanation for Proposed Change #9

All of the changes above are designed to make the exemption request meaningful, reliable, and open to public scrutiny for accuracy. First, the new language changes “will” to “may” to ensure CalPERS has

discretion to grant or deny an exemption request after review of the material offered in justification of the request, and after public comment at a board meeting. Specifically, the changes ensure that an exemption request must be received by CalPERS in advance of the expiration of the appointment or extension. It also requires CalPERS to set the matter for public hearing at its next public meeting, giving the public and interested stakeholders an opportunity to weigh in on the proposed exemption. The new language also includes penalty of perjury language analogous to that inserted earlier in connection with the extension process. Significantly, the new language adds several requirements, including that the employer “show its work” in connection with the recruitment process by providing copies of the advertisements released and applications received. The new language also ensures that the impacted exclusive representative of the position subject to the exemption will be given notice of the exemption request and a copy of all the material justifying the request, so that they may review the material and appear at the CalPERS Board Meeting if they desire. The new language also corrects cross-references with renumbering as appropriate to confirm to prior changes and renumbering.

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Proposed Change #10 – Ensuring that all appointments are actually of “limited duration”

15

(B) An exemption granted pursuant to paragraph ~~(7)~~(6) of this subdivision shall be for either:

- (i) An ~~unlimited~~ extension of ~~twenty-four months~~ if the appointment does not exceed 120 hours per fiscal year, or
- (ii) An extension of twelve ~~consecutive~~ months. The date on which the exemption request is granted by the board or the first day following the end of the *appointment or extension period*, ~~prior extension limit of twelve consecutive months for which the exemption request is granted by the board~~, whichever is later, initiates time counted towards the limit of twelve ~~consecutive~~ months for the subsequent extension. A CalPERS-covered employer may request this exemption more than once, *but the CalPERS Board shall not grant more than one exemption per retired person.*

Explanation for Proposed Change #10

These changes are necessary to ensure that there is an actual “limit” on appointments such that the statutory phrase “limited duration” actually has meaning. Specifically, it ensures that exemptions can only be granted once, rather than indefinitely. Moreover, it incorporates confirming changes based on earlier proposed changes regarding the use of “consecutive,” the number of extensions permitted, and makes conforming renumbering changes.

Proposed Change #11 – Renumbering and other conforming changes

A

~~(8)~~(7) A report of the exemptions granted pursuant to paragraph ~~(7)~~(6) of this subdivision will be provided to the board annually and publicly available.

~~(9)~~(8) A retired person who has served in an appointment for twenty-four ~~consecutive~~ months must not continue to serve in that appointment until the appointment is extended in accordance with this subdivision.

~~(10)~~(9) Retired persons and CalPERS-covered employers in violation of this subdivision will be subject to Government Code sections 21202, 21220, and 7522.56, as applicable.

Explanation for Proposed Change #11 – Renumbering and other conforming changes

These changes merely incorporate language and renumbering consistent with earlier proposed changes.

Conclusion

Adoption of the forgoing proposed changes will convert a proposed regulation which includes virtually no limitation on the employment of retired persons, into a regulation that actually imbues meaning into the term “limited duration” consistent with the statutory context in which that phrase is used. It will ensure that the 24-month cap is a real hard cap, and will ensure that the extension and exemption process cannot be abused so that no retired person will work for a CalPERS-covered employer for more than four years. It also ensures that the extension and exemption process is subject to public scrutiny, and requires the employer to provide documentation justifying the basis for any exemption request.

For the foregoing reasons, CASE respectfully requests the foregoing changes to the proposed regulation be adopted.

Sincerely,

A solid black rectangular redaction box covering the signature area.

Patrick Whalen
CASE General Counsel



July 28, 2022

Mr. Andrew White, Regulation Coordinator
California Public Employees' Retirement System (CalPERS)
P.O. Box 942720
Sacramento, CA 94229-2720

Sent Via Email: Regulation_Coordinator@calpers.ca.gov

RE: Comments on Proposed Rulemaking - Office of Administrative Law File Number Z-2022-0607-10; Section 574.1, "Definition of Limited Duration Employment," of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of Title 2 of the California Code of Regulations

Dear Mr. White:

The Town of Yountville respectfully requests consideration of the following comments regarding the above referenced rulemaking, which seeks to define "limited duration" employment as used in Government Code sections 7522.56, 21224, and 21229.

Proposed regulation 574.1(a) substantially alters cities' longstanding practice of hiring CalPERS retirees in "extra help positions" by defining "limited duration" as a limit of twenty-four consecutive months per appointment of a retired person in the employ of a CalPERS-covered employer, with certain exceptions. Unless modified, the definition will hinder cities' ability to fill critical positions that are relied upon intermittently for the provision of public services, including, for example, first responders or seasonal employees who possess specialized skills. Such a change is particularly alarming at a time when cities are facing significant labor disruptions and hiring challenges at all levels.

This proposed regulation is particularly taxing on small and rural agencies which do not have immediate access to a wide and varied employee pool to fill positions. This change will make it even more incredibly challenging to find a willing and capable workforce. The Town does not understand the need for a twenty-four consecutive month limitation, even with extensions. What public policy benefit or CalPERS objective is served by this twenty-four month limitation?

The Town of Yountville currently uses extra help retired annuitants on a part-time basis to help in delivering community-based parks and recreation programs and for summer seasonal help for our parks and public works crews' maintenance of parks and public facilities.

To avoid disruptions in public services provided to Californians statewide, The Town of Yountville urges CalPERS to amend proposed Regulation 574.1 as follows:

- 1.e Amend proposed section 574.1(a)(1) to clarify that retirees may be appointed to extra help positions by their former employers to perform work that is substantially similar to work they performed for that employer before retirement.e
- 2.e Clarify the process by which the CalPERS board will grant an exemption under proposed section 547.1(a)(7).e
- 3.e Amend proposed subdivisions(a)(3), (a)(4), (a)(5) and (a)(7) to allow the appointment extensions and exemptions contemplated by proposed section 574.1(a) to be made or requested after the initial twenty-four consecutive month limited duration period has expired; and e
4. Allow local agencies to place appointment extensions on their consent calendar.

A. The Town of Yountville urges CalPERS to make the following amendments for clarity and consistency.

- 1. Proposed section 574.1(a)(1) should be amended to clarify that retirees may be appointed to extra help positions by their former employers to perform work that is substantially similar to work they performed for that employer before retirement.**

2

Proposed section 574.1(a)(1) is difficult to parse and may be interpreted to mean a retiree is prohibited from being appointed by the city from which they retired to an extra help position if they would be performing work that is substantially similar to work they performed before retirement. This interpretation would run contrary to the purpose of hiring retired annuitants by not allowing for the retiree to use their expertise and years of experience at the local agency.

As an example, a retired public works maintenance worker would not be able to continue to perform maintenance work they have previously done such as mowing lawns, but the Town Manager could be hired to mow the lawns as that is not similar work to what they had worked previously. On the surface this regulation just doesn't make any sense. Why is PERS interested in defining what work it is that an extra help employee may perform? A retiree could go to work for Home Depot and there would be no CalPERS consideration as to what work they were performing. ***I do not understand the public policy objective behind this proposed language. Perhaps CalPERS could explain its objective and public agencies and CalPERS could work collaboratively to find a mutually beneficial solution for all parties. However, this language is not that solution.***

The Town of Yountville urges CalPERS to clarify the regulations by substituting the following for proposed section 574.1(a)(1):

(1) For purposes of this subdivision, an appointment occurs when a retired person performs work for a CalPERS-covered employer. A retired person may not be appointed to perform work under Government Code sections 7522.56, 21224, and 21229 that is substantially similar to work performed for the same CalPERS-covered employer in a previous appointment, unless it is within twenty-four consecutive months of that appointment, or any applicable extension described in this subdivision, or is otherwise allowed by this subdivision.

2. Proposed section 547.1(a)(7) should be amended to clarify the process by which the CalPERS Board will grant an exemption.

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While the Town of Yountville applauds CalPERS' foresight in allowing cities to request an exemption under proposed section 547.1(a)(7), the proposed regulation lacks critical details: Will the CalPERS Board itself or will CalPERS staff be charged with granting such exemptions? Will CalPERS respond to extension requests within a set amount of time? Will a city need to wait until the next CalPERS board meeting for an extension to be granted? If staff is charged with granting extension will there be a mechanism for the CalPERS board to rescind staff's decision? Without understanding these critical details, it is impossible to comment on the impacts or effectiveness of this regulation. Given the critical role local agencies play in the delivery of public services, the answers to these questions could significantly impact the regulated community and Californians at large.

B. The Town of Yountville urges CalPERS to make the following amendment to proposed regulation 547.1(a) because the proposed regulation is not reasonably necessary to effectuate the purposes of Government Code section 21224.

3. Proposed subdivisions (a)(3), (a)(4), (a)(5), and (a)(7) should be amended to allow appointment extensions and exemptions to be requested after the initial twenty-four consecutive month limited duration period, or any applicable extension, has expired.

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By requiring that extensions or exemptions be requested by the end date of an appointment or extension, as applicable, proposed regulation 547.1 excludes appointments of limited duration that happen to begin after the expiration of the initial twenty-four month period or any applicable extension. This requirement does not find support in the plain text of Government Code section 21224.

To conform to the intent of the law, Town of Yountville respectfully requests that proposed subdivisions (a)(3), (a)(4), (a)(5), and (a)(7) be amended to allow appointment extensions and exemptions to be requested after the initial twenty-four consecutive month limited duration period, or any applicable extension, has expired. These clarifications would retain the existing extension structure but allow for reasonable flexibility in extensions consistent with the real-world staffing demands of cities. These changes are critical because they would allow for the needed flexibility local agencies require to adequately serve their community.

As an illustration, the Town of Yountville utilizes retired annuitants for seasonal work such as a recreation assistant and seasonal parks maintenance where they work for a brief period and then may return the next year in the same capacity.

C. The Town of Yountville urges CalPERS to make the following amendments to proposed regulation 574.1(a) because they would be as effective in carrying out the purpose of the proposed action, but less burdensome.¹

- 4. Proposed section 574.1(a)(3) should be amended to allow local agencies to place appointment extensions on their consent calendar.**

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The mandate under proposed section 574.1(a)(4)(A), which prohibits an appointment extension from being placed on a public agency's consent calendar would be administratively burdensome. The use of retired annuitants is a widespread practice and as a general matter, routine appointments for positions, just like nearly all other personnel matters, do not go through the process of being placed on a non-consent portion of the city council meeting agenda. Determining which agenda items get assigned to the consent calendar should be left to the governing body, not CalPERS.

The Town of Yountville therefore requests that the prohibition be removed from the regulations.

Conclusion

The Town of Yountville sincerely appreciates the opportunity to provide comments on this proposed rulemaking action.

Sincerely,

Steven R. Rogers
Town Manager
Town of Yountville

cc: Nancy Hall Bennett, North Bay Regional Public Affairs Manager (via email)
League of California Cities, (via email: cityletters@calcities.org)

¹ Gov. Code § 11346.5(a)(13).



From: Robinson, Dave <Dave.Robinson@co.kings.ca.us>
Sent: Thursday, June 30, 2022 9:56 AM
To: Regulation Coordinator <Regulation_Coordinator@CalPERS.CA.GOV>
Subject: Public comment

[External Email Caution]

The retired annuitant shouldn't be limited by years it should be by hours. 2,3 or 4 years at 960 hours is way different than one who does 200 hours per year, but is then limited to the "years" definition.
Thanks Sheriff Robinson. Kings County.

Get [Outlook for iOS](#)

From: [Danae Harris](#)
To: [Regulation Coordinator](#)
Cc: [Shelley Forbes](#); [Monica Fugitt](#); [Kari Kibler](#); [Melissa Mansfield](#); [Leslie Saelee](#); [Debra Edwards](#); [Jennifer Lamprecht](#)
Subject: Written Comment - Proposed Regulatory Action (§574.1 Title 2)
Date: Monday, August 1, 2022 12:13:10 PM
Attachments: [image001.jpg](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)

[External Email Caution]

Dear Mr. Andrew White,

Please consider the following comments by Shasta County regarding proposed adoption of section 574.1, "Definition of Limited Duration Employment," of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of Title 2 of the California Code of Regulations (CCR).

We understand the need to clarify and define the term "limited duration employment", however, we have the following concerns with the proposed regulatory action:

- Although the term "limited duration" is used in section 571 of Title 2, California Code of Regulations, it should not be included or regulated by the proposed regulatory action. Employees working in an upgraded classification where compensation is being reported as temporary upgrade pay (TUP) pursuant to CCR §571(a)(3) should not be limited or defined by the same regulation used to define "limited duration" of an Extra Help Retiree appointment. Our suggestion is to remove §574.1(b), §574.1(b)(1), and §574.1(b)(2) from the proposed regulatory action and define "limited duration employment" only for purposes of all other sections which pertain to retired annuitants (GC §7522.56, §21224, §21229). 1
- Section 574.1 also defines an "appointment" for purposes of this subdivision, which was not previously restricted or defined. The definition of "appointment" is more restrictive than the definition of limited duration itself. By including §574.1(a) employers will be extremely limited as to what classification/duties they can place a retired annuitant in. Many times, the annuitants specialized skills fit the same classification/duties that may be used multiple times for different special projects or across different departments. Although each separate project is not for a different employer and may consist of similar duties, they should be designated as separate "appointments" and not be counted jointly toward the limit of twenty-four consecutive months. Our suggestion is to remove §574.1(a) from the proposed regulatory action. 2
- Using consecutive months to define limited duration is not consistent with the 960-hour limitation for retirees. A special assignment may take more time if the retiree is only able to work a minimum number of hours per day or week. We suggest the term of limited duration be set at 1,920 hours, which would be the hours equivalent of 24 months. 3
- To request an exemption to the limit of two initial extensions, §574.1(a)(7)(A)(iii) requires a recruitment within twelve consecutive months prior to the date of exemption request. If a retiree is already qualified and performing the duties efficiently and according to the criteria of the proposed regulation, it would not be good use of taxpayer dollars to conduct a recruitment to try and replace the Extra Help Retiree, if the project is not an ongoing job duty. Our suggestion is to remove §574.1(a)(7)(A)(iii). 4

Thank you in advance for your review and consideration of our comments to the proposed

adoption of section 574.1, "Definition of Limited Duration Employment".

Dena Harris

Agency Staff Services Analyst II - Confidential

Shasta County Department of Support Services

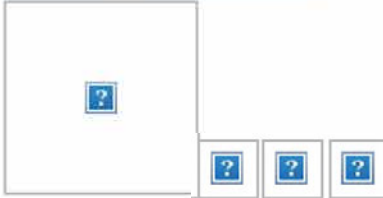
1450 Court Street, Suite 348

Redding, CA 96001

530-229-8277 Phone

530-225-5345 Fax

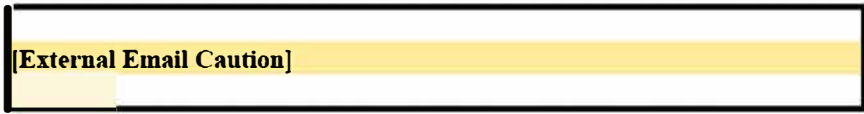
dxharris@co.shasta.ca.us



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From: [Anonymousemail](#)
To: [Regulation Coordinator](#)
Subject: Comment on Proposed "Limited Duration" Regulations
Date: Monday, August 1, 2022 9:23:59 AM



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Dear CalPERS,

Thank you for turning your attention to the longstanding and widespread misuse of retired annuitant authority by public entities engaging them far beyond what the statutory authorization for use of a "limited duration" in special circumstances. Unfortunately, as currently drafted the regulation is inconsistent with the underlying statutes and creates new pathways for unlawful unlimited engagement of annuitants without reinstatement.

574.1(a)

The definition of "limited duration" as initially 24 months is inappropriate and unnecessary. In provisions authorizing a contracting agency to engage a retired annuitant to a position available due to leave of absence of an employee, that leave may not exceed one year and the annuitant engagement must end. This exemplifies a public policy that retired annuitant employees should not be engaged continuously in excess of 1 year and that there are bona justifications for engaging annuitants over non-retired workers in excess of one year.

1

574.1(a)(1)

Defining an appointment as a position involving work that is substantially different from the work the annuitant performs after retirement in another position for the same or different CalPERS-covered employer creates an immediate workaround enabling annuitants to continue engagements indefinitely. Agencies that inappropriate seek to engage a particular annuitant indefinitely will continue to engage in the documented practice of shifting annuitants from one position to another. The Sacramento Bee reported on this inappropriate subterfuge in the article, "Retired State Execs fill part-time high-pay jobs" (Ortiz, April 21, 2013), in which it found an annuitant appointed as a CEA head of new program, the program ceased to exist, and the annuitant was retained in another capacity. The article also details an annuitant CEA chief counsel who appears to have work continuously for the agency in the years following the article. Creating a new 24-month "limited duration" period for each change of position will incentivize the practice of enabling an annuitant to be engaged indefinitely following retirement, provided there is a purported change of duties and position. This is inappropriate and conflicts with the public policy against double dipping.

2

574.1(a)(2)

Commencing the 24-month period on the effective date of the regulations for annuitants who have already been improperly continuously employed for over 5, 10, and even over 15 years is inappropriate and in conflict with State law and policy. Though violations are widespread and overlooked, existing law prohibits engaging retired annuitants for longer than limited durations and creates sanctions for this practice through the penalty of reinstatement, disgorgement of the improperly paid pension compensation and payment to CalPERS of the

3

owed contributions. This provision attempts to create an ultra vires, de facto safe harbor for all current violations of the limited duration annuitant conditions, regardless of how flagrant and longstanding. However, the statutory restriction on limited duration appointments cannot be reset via regulation. Appointing authorities and annuitants who have already knowingly violated this restriction by perpetually working without reinstatement for over a decade on matters that have no defined intended end date cannot be shielded from accountability for this malfeasance via regulatory fiat, commencing a new initial 24-month approval. This intended washing away of existing flagrant violations conflicts with existing law, strongly established state policy prohibiting double dipping, harms pension fund through the cost of preventing recapture of contributions to the fund that should have been made, and harms the state civil service through circumvention of the merit principle in appointments. Moreover, the regulations have failed to specifically estimate and account the fiscal impact of creating a de facto safe harbor, preventing recapture of contributions that should have been made in egregious situations such as perpetually working without reinstatement for over a decade.

3 Cont.

574.1(a)(4)

This provision allows for two 1-year extensions of the initial 24-month period. This is unnecessary, inappropriate, and as indicated previously conflicts with other provisions permitting engagement for only 1 year. Allowing for a 4 year appointment of an annuitant (and as indicated above, for annuitants who have already improperly worked over a decade) is excessive and conflicts with the State's policy against double dipping. Authorizing the Department of Human Resources to approve this extension under stated conditions is insufficient to protect the public policy as CalHR has previously endorsed long-term/indefinite appointments of retired annuitants and has failed to actively monitor and prevent its misuse. Moreover, the provision also does not prohibit CalHR from delegating this approval authority to departments as it does other types of approvals, leading to the potential for violating departments and annuitants to self-monitor notwithstanding their conflicts of interest. Therefore, aside from CalHR's longstanding failure to monitor and prevent misuse, a delegation to a department will fully eliminate all semblance of oversight.

4

574.1(a)(7)

This provision creates two categories of exemptions from the potential two-year limitation on extending annuitant's employment following the initial 24-month period. The first is an "unlimited extension" provided the annuitant works no more than 120 hours per fiscal year. An "unlimited" extension directly and fundamentally contradicts the statutory requirement that the appointment be for "limited duration". This statutory provision contains no exception based on the number hours worked by the annuitant. Maximum hours are governed by the 960 hour limitation. The statute affords no authority to eliminate the separate and distinct temporal condition that an appointment must be of limited duration in the even that the hours worked is an amount less than 960 the maximum permitted. Regulations in conflict with their underlying statutes are ultra vires and can neither be approved nor be legally enforceable. An unlimited annuitant appointed cannot be approved under existing law. To the extent CalPERS wishes to authorize this, to allow for annuitants who work only 120 years in perpetuity without reinstatement, it must seek a legislative change.

5

The second category of exemption to the two-year extension to the two-year appointment allows yearly exemptions. The regulation provides that this exemption may be requested and granted more than once without any limitation. Therefore, the regulation authorizes an annuitant to remain engaged in a position in perpetuity so long as it is approved by the Board.

A regulation cannot provide authority to the Board that is withheld by the statute. The statutory requirement that annuitants may only be appointed for limited duration without reinstatement cannot be nullified through Board or regulatory fiat. Arrogating this authority to the Board is ultra vires and cannot be approved under the standards governing the Office of Administrative Law's review of the legal authority for the proposed regulations.

5 Cont.

Thank you for your review of these comments. I encourage the Board re-evaluate the practical application of these regulations because, as currently drafted, they directly conflict with existing law and do not promote the fundamental public policies of the statutory limitations governing the use of retired annuitants. The Board has correctly identified this widespread misuse as an area of concern. However, rather than curtail the practice, this proposal sanctions longstanding abuses by double dippers by attempting to start the clock anew for their appointment as of the effective date of the regulations (regardless of whether they have been improperly engaged for 10 or more years). The proposed regulations creates improper and unsupportable basis to extend the annuitant appointments for multiple years and their initial or existing longstanding appointment, and creates new workarounds and loopholes to the limited duration temporal restriction on use of annuitants. This is not in keeping with the Board's duty to enforce existing pension laws and the State's strong policy against double dipping.



Dane Hutchings
dhutchings@publicpolicygroup.com
(916) 230-6935

August 1, 2022

Via E-mail and U.S. Mail

Regulation_Coordinator@calpers.ca.gov

Andrew White
Regulation Coordinator, California Public Employees' Retirement System
P.O. Box 942720
Sacramento, CA 94229-2720

Re: Proposed Adoption of Section 574.1 of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of Title 2 of the California Code of Regulations

To whoever it may concern:

This letter is submitted on behalf of the City of Mountain View (“City” or “Mountain View”) regarding the proposed adoption of Section 574.1 of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of Title 2 of the California Code of Regulations (“Proposed Regulation”).¹ CalPERS should revise the Proposed Regulation for several reasons, all of which share a common thread: at a time when municipal staffing flexibility is more important than ever, the Proposed Regulation would severely curtail Mountain View’s ability to adjust its staffing to meet the City’s needs. The City and the services it maintains will suffer as a result.

When Mountain View employs retired annuitants, it is most often to perform essential work. The City does not have a practice of hiring retired annuitants in lieu of full-time, permanent staff (unless it is to fill vacant positions during recruitment, pursuant to Gov. Code § 21221(h)). Instead, the City depends on retired annuitants to supplement the work that regular employees perform—even in fully staffed sections. For example, because many new hires are unable to immediately manage the full workload of a tenured employee, retired annuitants often perform tasks while new employees are onboarded and trained. While retired annuitants are not a permanent staffing solution, they are also a necessary fallback option for unforeseen leaves of absence; this is perhaps especially useful during the COVID-19 pandemic, as the highly contagious disease regularly keeps employees out of the workplace for weeks on end without warning. Retired annuitants are, in other words, an essential staffing tool to maintain the City’s operations.

While further limiting the City’s reliance on retired annuitants would be detrimental under any circumstances, this is a particularly unfavorable time to do so. As we enter the third year of the COVID-19 pandemic, Mountain View—like many public agencies—continues to grapple with the implications of the public health emergency. The City has approached its

¹ The comments and recommendations regarding the Proposed Regulation set forth in this letter represent the views of Mountain View only. They do not represent the official position of Renne Public Policy Group.



recruitment and staffing cautiously throughout the pandemic, as the virus cast uncertainty on the City's budget and intermittently halted some in-person municipal operations. Staffing needs remain especially unpredictable. To make matters worse, public employees are departing public service in droves, and are projected to continue doing so.² Finally, the pandemic has catalyzed a shift in expectations for working arrangements, making hiring qualified candidates more difficult.³ CalPERS should not curtail the City's staffing flexibility under these circumstances.

Timing aside, the Proposed Regulation is flawed for at least three reasons: (1) it severely limits the City's reliance on its own retirees; (2) it requires the City to predict and approve future staffing needs before they arise; and (3) its primary time limitations, and exceptions thereto, are insufficient to meet the City's needs.

First, the proposed limitation on hiring retirees from City service is overly restrictive. In the majority of instances in which Mountain View has relied on retired annuitants, they have been retirees from the City, since those employees have acquired skills and knowledge during their service to the City critical to its long-term initiatives. This includes retirees familiar with ongoing litigation, municipal finance related to specific projects, real property management and long-term development projects, engineering projects (e.g., those concerning sea level rise on the City's shores), public safety risk management and worker's compensation processes, and public safety information technology systems. Yet, absent an emergency halting municipal operations, the Proposed Regulation prohibits the City from relying on staff retired from City service to perform work that is similar to their work prior to retirement.⁴ Given their special skills and knowledge, this is the very work that the City most needs these employees to perform. Any regulation pertaining to retired annuitants must not put such essential staff resources outside of the City's reach.

Second, the proposed appointment extension certification requirements are not responsive to the reality of municipal staffing needs. The Proposed Regulation would prohibit the City from extending retired annuitant appointments beyond 24 consecutive months if it fails to certify the appointment by the time the 24-month limitation expires.⁵ That is, the Proposed

² See generally Liz Farmer, *The Great Resignation's Impact on Local Government*, ROCKEFELLER INST. GOV. (Jan. 20, 2022), <https://rockinst.org/blog/the-great-resignations-impact-on-local-government>; MISSIONSQUARE RES. INST., *THE GREAT RESIGNATION AND COVID-19: IMPACT ON PUBLIC SECTOR EMPLOYMENT AND HOW EMPLOYERS CAN HELP* (Mar. 10, 2022), available at <https://slge.org/wp-content/uploads/2022/01/greatresignationinfographic.pdf>.

³ See generally Alana Semuels, *No Clean Water, Unplowed Streets: What the Public Sector's Hiring Problem Means for All of Us*, TIME (Apr. 8, 2022), <https://time.com/6165374/public-sector-job-vacancies>.

⁴ See Gov. Code § 7522.56(c) (establishing that retired annuitants are only eligible to serve "during an emergency to prevent stoppage of public business" or if they have skills "needed to perform work of limited duration"); Proposed Cal. Code Regs. § 574(a)(1) (defining limited duration appointments as those "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.").

⁵ See Proposed Cal. Code Regs. §§ 574(a)(4)–(a)(4)(A) ("A CalPERS-covered employer may extend the appointment no more than twice, up to twelve consecutive months per extension . . . if by the end date of the initial appointment and the end date of the first extension . . . the employer's governing body certifies [the extension]" [emphasis added].)



Regulation would require the City to predict its future reliance on retired annuitants. But many ongoing City initiatives, like litigation, are inherently unpredictable. As to those matters, the Proposed Regulation would in practice limit many retired annuitant appointments to merely 24 consecutive months, even in instances in which a retiree has worked few hours or only intermittently during that period. According to CalPERS' own data, this could prematurely end nearly *half* of all retired annuitant appointments at public agencies like Mountain View.⁶

Third, the proposed conditions on retired annuitant appointments beyond 48 consecutive months are impracticable. Under the Proposed Regulation, extensions beyond 48 consecutive months would require the City to demonstrate that it has undertaken unsuccessful recruitment efforts for the position at issue within the last year.⁷ CalPERS' own data shows that public agencies like Mountain View would be forced to satisfy this condition to maintain *one quarter* of all retired annuitant appointments.⁸ But such recruitment efforts would often prove futile, unnecessary, or a waste of the City's resources. It makes little sense to hire additional full-time staff to fill minor gaps in the City's full-time staffing, especially for seasonal positions with fluctuating staffing needs. Moreover, as described above, the City sometimes relies on retired annuitants precisely because it has *already* hired full-time staff that require significant training, while someone must perform essential tasks in the interim. For example, it takes the City up to 18 months to train 9-1-1 dispatchers, and 18–24 months to train new police officers. If the City's ability to rely on retired annuitants is restricted as proposed, it is not only the City's budget that will suffer—public health and safety will, too.

All told, the Proposed Regulation is not tailored to meet the needs of public agencies like Mountain View and would impose unworkable constraints on the City at a time when municipal flexibility is more important than ever.

The existing regulations are sufficient to satisfy the Proposed Regulation's purposes and are consistent with regulations in parallel retirement systems. Two factors already limit retired annuitant appointments: the 180-day waiting period⁹ and the 960 annual working hour limitation.¹⁰ The waiting period ensures that organizations plan to meet future operational needs without the retiree, authorizing immediate reliance upon them only in limited circumstances.¹¹ Furthermore, just like the income limits for Social Security benefits

⁶ CalPERS Pension & Health Benefits Committee Meeting Agenda, Agenda Item 6a (Apr. 18, 2022), available at https://www.calpers.ca.gov/docs/board-agendas/202204/pension/item-6a_a.pdf (showing that between fiscal year 2009–10 through fiscal year 2018–19, 53% of retired annuitants concluded their appointment within 24 months).

⁷ See Proposed Cal. Code Regs. § 574(a) (limiting retired annuitant appointments to 24 months), § 574(a)(4) (allowing two 12-month extensions), § 574(a)(7)(A)(iii) (requiring an employer to show, in order to receive an exemption from the regulation's other time limitations, that it "completed a recruitment for the work required under the appointment within the twelve consecutive months prior to the date of the exemption request and certifies that it was unable to fill the position with that recruitment.").

⁸ CalPERS Pension & Health Benefits Committee, *supra* note 6 (showing that between fiscal year 2009–10 through fiscal year 2018–19, 75% of retired annuitants concluded their appointment between 24 and 48 months).

⁹ See Gov. Code § 7522.56(f).

¹⁰ *Id.* § 7522.56(d).

¹¹ *Id.* §§ 7522.56(f)(1)–(4).



deductions,¹² the 960-hour limitation prevents retirees from receiving a windfall by unduly multiplying sources of income. The 960-hour limitation also ensures that work performed by a retired annuitant is distinct from full-time work and is not relied upon in lieu of filling staffing vacancies or adding contributory full-time staff. Accordingly, the existing regulations are sufficiently limiting.

4 cont

Even if CalPERS is compelled to clarify the scope of “limited duration” employment under the Government Code, less onerous alternatives to the Proposed Regulation are available. CalPERS could provide that retired annuitants are eligible for appointment to positions at the public agency from which they retired to perform whatever work is most needed of their special skills; that no time limitations or certification requirements apply to retired annuitants relied upon only for a limited number of hours on an as-needed basis; and that a less restrictive time limitation applies by default, allowing retired annuitant appointments of 48 months or more with optional extensions. While Mountain View firmly believes that CalPERS should leave the retired annuitant regulations unchanged, these minor revisions would at least mitigate the most damaging of the Proposed Regulation’s sweeping impacts.

5

Thank you for your consideration. Please do not hesitate to contact me if I can answer any questions about the subject of this letter.

Sincerely,



Dane Hutchings
Managing Director, Renne Public Policy Group

¹² See generally Social Security Administration, Receiving Benefits While Working, <https://www.ssa.gov/benefits/retirement/planner/whileworking.html#:~:text=If%20you%20will%20reach%20full,an d%20still%20receive%20your%20benefits.>

DEPARTMENT OF WATER RESOURCES

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Via Email: Regulation_Coordinator@calpers.ca.gov

August 1, 2022

Andrew White, Regulation Coordinator
California Public Employees Retirement System
P.O. Box 94229-2720
Sacramento, CA 94229-2720

RE: California Department of Water Resources Comments to Working After Retirement Regulations

The Department of Water Resources (DWR or Department) appreciates the need to define “limited duration” employment for those retirees hired after retirement by a state entity due to the need for their specific skills, as provided for under Government Code (GC) §§ 7522.56, 21224 and 21229. DWR submits the following comments for consideration by the California Public Employees Retirement System’s (CalPERS) for those 2 CCR § 574.1 draft regulations.

2 CCR § 574.1(a)

1

“Limited duration” is defined as a limit of twenty-four consecutive months per appointment. However, under GC §§ 21224 and 21229, “[t]hese appointments shall not exceed a combined total of 960 hours for all employers each fiscal year.” And under GC § 7522.56, these appointments shall not exceed a combined total of “960 hours or other equivalent limit, in a calendar or fiscal year, depending on the administrator of the system.” DWR adheres to a cap of 960 work hours during a fiscal year. By these regulations, under 2 CCR § 574.1(a)(2) “appointment start date” starts the clock for the two-year appointment period as a calendar year, separate from the cap of 960 work hours during a fiscal year. Therefore, DWR wants to confirm that a retiree whose “appointment start date” does not coincide with the fiscal year would still be entitled to work 960 hours during each portion of a fiscal year included in that two-year calendar appointment, should that be needed by the appointing authority.

2 CCR § 574.1 (a)(1)

2

Under GC §§ 21224 and 21229, a retired person can “serve without reinstatement from retirement... because the retired person has specialized skills needed in performing work of limited duration.” GC § 7522.56 provides that the retired person “may serve without reinstatement...because the retired person has skills needed to perform work of limited duration.” GC §§ 21224, 21229 and 7522.56 have no language to restrict the limited duration appointment from having substantially similar work from what was done before retirement. Rather the ongoing need for those “skills” implies that the work may be

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substantially similar, since the “skills” may be specific to the prior employment. 2 CCR § 574.1’s stated intent is to define what is meant by “limited duration...per appointment,” which could be for a first position after retirement, should there be a need for that person’s “skills.” However, 2 CCR § 574.1(1) defines “appointment” as only referring to successive positions post retirement with the same CalPERS-covered employer or with a different CalPERS-covered employer than the retiree had already worked for after retirement. Neither of those definitions covers an initial appointment after retirement – which is should. DWR suggests that this section be amended to also include initial appointments post retirement and perhaps subdivide the different definitions for “appointment” into three separate subsections to make this distinction clearer.

2 cont

~~2 CCR § 574.1(a)(1)~~

3

For the purposes of clarity, according to this section a retired person may have one appointment for 24 months, which does not need an extension and then be appointed to a position with “substantially different” work for the same CalPERS-covered employer the next day. Or the next day assume a position with a different CalPERS-covered employer. And in either of those successive appointments, once the regulations are effective, that appointment term would be a two-year cap unless extended. DWR would like to confirm this is accurate.

2 CCR § 574.1 (2)

4

DWR seeks clarity if the “appointment start date” is the date of the appointment and not the start date of actual work, or whether this could be clarified.¹ DWR suggests that the “start date” be the date that actual work starts under the appointment. This same concern is incorporated into comments for 574(b)(2) below. DWR suggests the follow for consideration as revised text for subsection 574.1(2).

(2) Any current appointment of a retired person by a CalPERS-covered employer will be subject to a twenty-four consecutive month limit which starts when this regulation becomes effective. The prior appointment time will not count towards this limit. Any appointment of a retired person by a CalPERS-covered employer after this regulation becomes effective will have a twenty-four consecutive month limit from the date the retired

¹ On or around April 22, 2022, California Department of Human Resources (CalHR) issued a Memorandum, “Timely Voiding of an Unlawful Appointment,” referencing a recent Third District Court of Appeal decision in Nancy Michaels v. State Personnel Board (March 21, 2022), 2022 WL 831202. This Michaels decision relied on the plain language of the definition of civil service “appointment” in GC § 18525 as the “offer to and acceptance by a person of a position in the State civil service” as relating to the applicable time for the “voiding” of the appointment. As pointed out in this memo, since a job offer can be typically accepted weeks before an actual start date, there may be a need to distinguish when the two-year appointment starts for a retired person who is employed to distinguish that the start date is tied to the date the person actually starts work and not the appointment date. This background is provided as context for it comment and suggested alternate language for the regulation. DWR is including copies of the CalHR memorandum and GC § 18525 to its comments for reference.

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person starts work in the position.

2 CCR § 574.1 (a)(4)(C)

5

Under 2 CCR § 574.1 (a)(4), the two-year appointment can be extended twice for two separate twelve-month periods. DWR suggests this sentence this be revised to state:

A CalPERS-covered employer may extend the appointment two times for a maximum period of twelve-months per extension. For any extension, the employer must comply with the following condition before the end of the current appointment period.

2 CCR § 574.1 (a)(4)(C)

6

2 CCR § 574.1 (a)(4)(C) provides that the California Department of Human Resources (CalHR) must issue a memorandum “approval” for an extension of an appointment before expiration of the current appointment (original date or revised per extension) (2 CCR § 574.1 (a)(4)). However, there is no guidance for when the appointing authority must submit anything to CalHR for the memorandum to issue. Whereas DWR understands that CalHR is responsible for drafting its own regulations to implement this section, it is difficult for DWR to know what will be necessary to satisfy CalHR to approve the extension as work that “cannot be performed satisfactorily by non-retired employees” when the retiree has been brought back for skills which are specific to that individual. Rather, it seems the standard should perhaps focus on how the skills of that person are specifically needed for the work that the person is performing and an estimate of the duration that skillset is needed (or for transfer of knowledge) to perform that work effectively. For CalHR, it seems the concern would be that the CalPERS-covered employer had some plan in place for the skill set and knowledge to be transferred or for the work to transition at some point to non-retired employees, rather than the focus on a work description itself. Therefore, DWR suggests that this language be revised to incorporate those concerns. DWR provides the following language for consideration, which seems to harmonize with the intent of the Government Code statutes exceptions which allow for retired employees to perform work without reinstatement.

For an appointment with the state, the Department of Human Resources certifies, by memorandum, its approval of the appointment extension based on information provided by the appointing authority that the specific skills and knowledge of the retired employee are necessary for the continuing work and justify the extension of time.

2 CCR § 574.1 (a)(5)

7

This language is inconsistent. This subsection assumes the extension is twelve months, but it may not be. The language of subsection (a)(4) provides for an extension time

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period “up to” twelve months. Also, if CalHR has not issued its memorandum approving an extension, but there is a pending extension request, there would be a separation from employment, since it is not authorized nor submitted to CalPERS as required under subsection (a)(3). Further, if CalHR lags in its approval for any reason, this should not count towards the time which is approved for the extension, unless the retired employee with a pending request for an extension is allowed to continue to work and that is clearly stated. If that is the intent, DWR suggests that this be amended to allow an appointing authority to submit evidence to CalPERS for its pending request to CalHR for an exception and that CalPERS regulations provide for approval of any additional time period during which the retired employee continues to work while waiting for CalHR’s approval of the extension request. Also, in the event the extension is denied, any work that is performed should still have approval during the time that an extension is pending. DWR suggests the following language be considered for this paragraph as subparagraphs A and B.

7 cont

(A) The date on which an extension request is approved pursuant to paragraph (4) above, or the first day after the end of any prior extension, whichever is later, initiates the time counted towards a current requested extension timeframe.

(B) A retired person in the employ of a CalPERS-covered employer may continue to work for the CalPERS-covered employer after the end date of the initial appointment or after the end date of a prior approved extension during the time that a pending request for an extension is being considered pursuant to paragraph (4) above. Should the extension request be denied, the appointment ends on the date that the CalPERS-covered employer receives notice of that denial.

2 CCR § 574.1 (a)(5)

8

DWR recognizes that CalHR may need to make its own regulations regarding these extension requests to clarify when they must be submitted or other details. However, should CalPERS regulations take effect and there be an absence of direction for administration of this process by CalHR, that will create confusion. Providing for this CalPERS approval of “hold over” employment status for retired employees whose extensions requests have not yet been approved by CalHR would be in the best interests of both employers and those retired employees.

2 CCR § 574.1 (a)(6)

9

In this section, the regulations language refers to retaining “*certifications* as required in paragraph (4) of this subsection.” However, paragraph (4) refers to resolutions or approval but does not require any *certification* of such approvals. DWR suggests the first sentence of this section be changed to “...shall retain the approval records required in

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paragraph (4).”

2 CCR § 574.1 (a)(7)

10

This language is unclear. This sub-section provides that a CalPERS-covered employer can request a third extension – this time to the CalPERS Board. This is separate and additional to the extension requests to CalHR. Therefore, DWR suggests the language be changed to state:

A CalPERS-covered employer may request a third extension of the appointment period by filing a written request with the CalPERS Board.

2 CCR § 574.1 (a)(7)(A)

11

Both A and B are subparts to (a)(7). Therefore, the reference to two extensions in (a)(7)(B) is not needed in (a)(7)(A). It would be more succinct and clearer to say, “[t] Board will grant an extension if it determines the following conditions are met.” Then subpart (B) would stand on its own for the different extensions possible under (a)(7).

2 CCR § 574.1 (a)(7)(A)(i)

12

The cross-reference language used in this subsection is confusing and unnecessary. The extension (for extensions) pursuant to (a)(4) are a pre-requisite to asking the CalPERS Board for a further extension under (a)(7). If this subpart’s intent is for CalPERS to verify what was submitted by the appointing authority for those prior approvals before considering a further extension by the CalPERS Board, this could be more simply stated. If this is the intent, DWR suggests the following language for subsection (a)(7)(A)(i).

The CalPERS-covered employer provides copies of all records documenting its request for and approval of prior exceptions under paragraph (a)(4) above.

2 CCR § 574.1 (a)(7)(A)(ii)

13

Under this section, the language refers to the extension process under (a)(4) and the extension process under (a)(7)(B)(ii). Since the terminology of extension is used in both cases, referencing those subsections in the text would make this section clearer. DWR suggests revising this for the following text.

CalPERS receives the extension request before the end date of the second extension approval pursuant to (a)(4) above, or before the end date of any subsequent extension granted by CalPERS pursuant to (a)(7)(B)(ii) below.

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2 CCR § 574.1 (a)(7)(A)(iii)

GC §§ 21224 and 21229 and 7522.56, all basically provide that a retired person can serve without reinstatement from retirement because they have specialized skills needed in performing work of limited duration. As written, section (a)(7)(A)(iii) implies that the retired person is a placeholder for a recruitment position. That may be but is not always the case. The retired person could be needed for their knowledge and judgment that only years of experience have honed – in essence mentoring others or to a specific person already hired, or for program advice or performance skills. (a)(7)(A) requires that all conditions of (A)(i-iii) be met. But, if there is no intent to fill this position, because it has a limited duration, DWR cannot satisfy that condition. There are programs of limited duration, or those which are being phased out, for which expertise is needed but there are no plans for recruitment because those programs are ending. Retired annuitants are often very valuable for shepherding those DWR projects/programs to closure – which is often delayed. It makes no sense to have a job recruitment in those circumstances, given a short duration for the program's life. The Electric Power Fund program is a good example. It was created during the California energy crisis in 2001 and is now winding down – contingent on completing all aspects of that program. This includes litigation which involves a substantial amount of money. There is no way to duplicate the expertise and knowledge of individuals who have worked on this unique program for more than twenty years who are crucial not only to winding down all aspects of the program but also litigation preparation and strategy. Similarly, other programs have a statutorily mandated lifespan – such as the Wildfire Charge Fund program, for which DWR is responsible. It was established in 2019 for a fifteen-year term. These CalPERS regulations will be in effect for years and could have an effect on the ability to competently manage that program as it approaches a wind down phase and program closure. Staff with the specialized expertise may retire and need to be brought back to assist in the wind down and subsequent litigation, should that ensue. Other examples can be provided, not only by DWR but other state entities.

14a

Another concern DWR has identified is the need to have an exception for emergency appointments. For DWR this could relate to a variety of water, climate, infrastructure, safety or energy needs and the expertise of retired employees can be critical for swift action and response. GC 21224 provides for emergency appointments of retired annuitants “to prevent stoppage of public business” and many emergencies are identified under the GC 8558 definitions section which are applicable to these appointments. However, they would still potentially be subject to this regulatory scheme. If that is not the intent, CalPERS should amend the regulations to specifically exclude such emergency appointments from these time limits and other regulation provisions. At a minimum, they should be an exception to any requirements for justification that the appointing authority has advertised and is unable to fill the position or has tried to do so.

14b

Therefore, DWR suggests that this regulation be amended to allow for alternate situations when recruitment is not feasible, justified or possible. DWR suggests consideration to

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amend this subsection to the following language due to these concerns.

14 a & b

The CalPERS-covered employer either certifies that it was unable to fill the position with a recruitment completed within the twelve consecutive months prior to the date of the extension request, or it certifies that a recruitment would not be justified due to the temporary nature of the position or related program for which the work is being performed, emergency authority for the position, or the need for specialized skills or knowledge for litigation.

2 CCR § 574.1 (a)(7)(B)(ii)

15

This language presumes that an extension of twelve months was granted under (a)(4) above, however, the language of section (a)(4) provides for an extension “up to” twelve consecutive months per extension. Subsection (a)(7)(B)(ii) also seems to assume a prior extension was granted by the board, which is not consistent with (a)(4) above or subsection (a)(7), which indicates this section applies when the two exceptions under section (a)(4) have been exhausted.

DWR suggests that this language be revised as follows to make it consistent with (a)(4) above.

An extension up to twelve consecutive months. The date on which the extension request is granted by the board or the first day after the end of any prior extension, whichever is later, initiates the time counted towards the current requested extension timeframe. A CalPERS-covered employer may request an extension more than once, after complying with the conditions under subparagraph (A) above.

2 CCR § 574.1 (a)(7)(B)(ii)

16

DWR also has the same concerns as explained for 2 CCR § 574.1 (a)(5) above, that if a prior extension period ends while there is a pending extension request submitted to the CalPERS Board there would be a separation from employment – and approval of the extension cannot be guaranteed. Therefore, there should be a provision that during the pendency of an extension request either under (a)(4) or under (a)(7) that the retired employee can continue to work until such time as informed that the extension is not approved. DWR suggests the following language be added as subpart (C) which would allow for continued work during the “gap” between the end of an approved appointment extension which there is a pending request to CalPERS for a subsequent extension.

(C) A retired person in the employ of a CalPERS-covered employer may continue to work for the CalPERS-covered employer after the end date for a prior extension during the time that a pending request for an extension is

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being considered by the board. Should the extension request be denied, the appointment ends on the date that the CalPERS-covered employer receives notice of that denial.

16 cont

2 CCR § 574.1 (a)(9)

17

This paragraph should be deleted if the above suggested “gap” language for subsections (a)(5)(B) and (a)(7)(C), as proposed above, is incorporated. DWR urges CalPERS incorporate this suggested language and delete current subsection (a)(9) since it would result in a separation from the appointment, even if there is a pending request for an extension which will be approved.

2 CCR § 574.1 (a)(10)

18

Retired persons and CalPERS-covered employers are already subject to these Government Code sections for post-retirement service. Since the stated purpose of this regulation is to define what is mean by “limited duration” under relevant statutes, it is not necessary to reference what a violation of that definition would be. The statutes already provide for potential monetary losses should a retiree or CalPERS-covered employer not abide by the rules for post-retirement employment. Therefore, this paragraph should be deleted as unnecessary and not serving the purpose of the regulation.

2 CCR § 574.1 (b)

19

DWR suggests that it would be clearer to cite to 2 CCR section 571(a)(3) as an internal cross reference for a clearer cross-citation reference.

2 CCR § 574.1 (b)(1)

Since (b)(1) is specific to this regulation subsection (b), DWR suggests the reference language “[f]or purposes of this subdivision” be deleted.

2 CCR § 574.1 (b)(2)

20

DWR has the same concerns with using the terminology of “start date” as included in comments above to 574.1(a). Further, this section seems to imply that as of the regulations becoming effective, a new appointment must be made for the position. However, that does not seem to be the intent. Rather the intent seems to be to limit the appointment to 24 months after the regulations are effective. DWR suggest the following revisions for clarity and consistency with the rest of the regulatory scheme, including adding subsection (3).

(2) Any current appointment of a retired person to an upgraded position/classification by a CalPERS-covered employer will be subject to a twenty-four consecutive month limit which starts when this regulation

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becomes effective. The prior appointment time will not count towards this limit.

20 cont

(3) Any appointment of a retired person to an upgraded position/classification by a CalPERS-covered employer after this regulation becomes effective will have a twenty-four consecutive month limit from the date the retired person starts work in the position.

DWR appreciates your consideration of the above comments. If you, or your staff, have any questions about the above concerns, please contact me at (916) 920-7478, or at Melinda.williams@water.ca.gov.

Your consideration of this matter is appreciated.



Melinda L. Williams
Attorney III
California Department of Water Resources

Attachments:

4-22-2022 CalHR Memorandum re Timely Voiding of Appointments
GC § 18525



801 Capitol Mall Sacramento, CA 95814 | www.spb.ca.gov

Governor Gavin C. Newsom

MEMORANDUM

DATE: April 22, 2022

TO: Personnel Officers

FROM: **/s/ LORI GILLIHAN**
Lori Gillihan
Chief, Policy Division

SUBJECT: TIMELY VOIDING OF AN UNLAWFUL APPOINTMENT

This memorandum is to make appointing authorities aware of a recent court decision significantly affecting the processing of a voided civil service appointment.

Government Code section 19257.5 imposes a one-year limitation on the voiding of an unlawful civil service appointment that has been made and accepted in good faith. Specifically, section 19257.5 provides that an appointment may be voided "*if the action is taken within one year after the appointment.*" (Italics added.) Recently, the Third District Court of Appeal in *Nancy Michaels v. State Personnel Board* (March 21, 2022) 2022 WL 831202 interpreted the definition of a state employee's "appointment" date for purposes of voiding a good faith unlawful appointment under Government Code section 19257.5 as the date an employee *accepts* a job offer. The court applied the plain language of the definition of civil service "appointment" in Government Code section 18525 as "the offer to and acceptance by a person of a position in the State civil service".

The court's decision changes the SPB's historical practice of voiding good faith unlawful appointments within one year of the employee's first day of work.

Therefore, effective immediately, in light of the court's holding, when voiding a good faith unlawful appointment, the void must be effective no later than one year from the date the employee *accepted the job offer*, and *not* from the date the employee began performing the duties of the position. Since the job offer is typically accepted weeks before the actual start date, appointing authorities must be mindful of this difference to ensure timely processing of a voided appointment.

While SPB is considering a legislative change, the court's holding applies until further notice.

State of California

GOVERNMENT CODE

Section 18525

18525. "Appointment" means the offer to and acceptance by a person of a position in the State civil service in accordance with this part.

(Added by Stats. 1945, Ch. 123.)

California State Association of Counties®



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July 21, 2022

Mr. Andrew White, Regulation Coordinator
California Public Employees' Retirement System (CalPERS)
P.O. Box 942720
Sacramento, CA 94229-2720

RE: Proposed adoption of section 574.1, "Definition of Limited Duration Employment," of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of Title 2 of the California Code of Regulations (CCR).

Dear Mr. White:

On behalf of the California State Association of Counties (CSAC), representing all 58 counties in the state, I would like to thank you for the opportunity to provide comments and feedback on this proposed rulemaking action, which seeks to define "limited duration" employment and provide clarity and uniformity for CalPERS-covered employers.

This substantive and non-technical rulemaking action would substantially alter the longstanding requirement that a retired person may be temporarily employed for up to 960 hours in any given fiscal year without reinstatement by defining "limited duration" as a limit of 24 consecutive months per appointment of a retired person in the employ of a CalPERS-covered employer. This rulemaking action would have a significant impact on critical and difficult to fill positions, such as first responders, health care professionals (including critically impacted behavioral health positions), and other positions that are relied upon intermittently, such as certain positions within the voting and elections workforce.

These new regulations come at a time of significant labor disruption and difficulty hiring at all levels. Some counties are reporting 20 and even 30 percent vacancy rates, not just for traditionally hard-to-fill positions, but for positions at all levels. Their ability to respond is hampered in most cases because nearly 3 out of 4 counties have less general fund revenue per capita now than they did before the Great Recession, in real dollars. This alarming and little-noticed fact is even more daunting as we seem to approach another recession. Layering on these new restrictions and administrative requirements will lead to greater disruptions in county services.

With that context, we offer the following comments.

Proposed section 574.1(a)(1) is unclear.

The definition of an appointment is unclear and may be subject to varied interpretations. We recommend that the following language be used to clarify the definition of an appointment.

"For purposes of this subdivision, an appointment occurs when a retired person performs work for a CalPERS-covered employer. A retired person may not be appointed to perform work under Government Code sections 7522.56, 21224, and 21229 that is substantially similar to work performed for the same CalPERS-covered employer in a previous appointment, unless it is within twenty-four consecutive months of that appointment, or any applicable extension described in this subdivision, or is otherwise allowed by this subdivision."

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Extension requests made after the end of a twenty-four or twelve consecutive month period.

2

The regulations as drafted exclude appointments of temporary duration that happen to begin more than two years after an initial appointment, even though they are clearly within the scope of statutory authority. We request this be fixed by removing from paragraph (4) the phrase “by the end date of the initial appointment and the end date of the first extension,” and amending paragraph (5) so that it parallels the language in (7)(B)(ii), so that paragraph (5) reads “The date on which the extension is granted by the board or the first day following the end of the prior twenty-four or twelve consecutive month period for which the extension is granted by the board, whichever is later, initiates time counted towards the limit of twelve consecutive months for the extension.”

The particular difficulties faced by elections and public safety.

3

The headwinds described in our opening remarks above are even more acute for certain departments. You are in receipt of comments submitted by Sutter County Sheriff Brandon Barnes, which outlines his department’s difficulties in meeting the needs of his residents and which are representative of those faced by other small sheriff departments around the state.

County elections departments are also likely to be adversely affected by the proposed regulations. These departments require very few staff for most of the year, but significantly more in the months before and after an election. The election department in a small county increase its permanent staff of 2 or 3 to several times that number for those couple of months. While some of the positions can be and are filled by temporary employees, some of the work must be performed by experienced employees and retired annuitants are particularly well suited to the task. Even if a county extends the appointment of a retired person for the full 48 months currently allowed by the regulations, that amounts to only two election cycles.

Due to these difficulties, and due to the fundamental importance of secure, professionally managed elections to our democratic form of government, we request that the regulations exempt from its application all appointments to perform work related to elections, including but not limited to planning and preparation, candidate services, signature verification, ballot distribution, polling places, ballot counting, and all other activities related to the conduct of elections.

Administrative burden for counties due to notification requirements.

4

Under proposed section 574.1(a)(3), a CalPERS covered employer is required to notify CalPERS of an appointment date not to exceed 24 consecutive months from the appointment start date or the effective date of this subdivision. Upon enactment of these proposed regulations, it would require all 58 counties to notify CalPERS of an appointment end date for their respective retired annuitants, which is administratively burdensome. This would likely require hundreds, if not thousands, of notifications to be sent from the counties to CalPERS.

Additionally, the requirement that a CalPERS covered employer notify CalPERS of an appointment end date is not administratively feasible due to the temporary nature of some of the appointments. For example, if the retired annuitant was appointed to a position that was part of a project with a six-month timeframe and the project ultimately took nine months, would the appointment authority have to temporarily prohibit the employee from working at the end of six months? Is there a mechanism for re-noticing CalPERS if the appointment was needed beyond its initial end date but under the 24-month period? Therefore, we request language under section 574.1(a)(3) clarifying that “A CalPERS-covered employer must notify CalPERS of an appointment start date, which will be used for establishing the twenty-four consecutive month timeline, as described in this subdivision.”

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There is no administrative flexibility to suspend these regulations during a local or state disaster emergency, public health crisis, or other emergency

5

On March 12, 2020, Governor Newsom issued Executive Order N-25-20, which suspended the work hour limitations for retired annuitants. As the COVID-19 global pandemic has illustrated, during a local or state emergency, many critical positions may be needed as part of the response. For example, first responders play a critical role in responding to emergencies as well as health professionals and other critically needed positions. The Board of Administration should include a mechanism for a CalPERS-covered employer to petition CalPERS to waive some or all of the requirements of proposed section 574.1 during a declared local or state disaster emergency, public health crisis, or another emergency.

The prohibition on placing appointment extensions on the consent calendar is not administratively feasible.

6

The mandate under proposed section 574.1(a)(4)(A), which requires the governing body of a CalPERS-covered contracting agency to certify, by resolution at a public meeting, its approval of the appointment extension and the reason the work required under the appointment cannot be performed satisfactory by non-retired employees is anticipated to create a substantial workload across the 58 counties. Specifically, this would require hours of staff time for each county to develop the mandated resolution and required findings and subsequently place the resolution on the agenda for a vote.

Furthermore, prohibiting an appointment extension from being placed on a consent calendar is not administratively feasible, especially for some of the larger counties that could have many retired annuitants working in their county at any given time. The use of retired annuitants is a widespread practice and as a general matter, routine appointments for positions, just like nearly all other personnel matters, do not go through the process of being placed on a board of supervisors' non-consent portion of the agenda. The mandate that prohibits extensions from being on the consent calendar has the potential to have a significant impact on the county's business. This may potentially require several hundred, and potentially thousands, of hours of board staff time across all CalPERS employers. This would likely create a notable aggregate fiscal and administrative impact on the counties, schools, cities, and special districts.

We therefore request that the prohibition be removed from the regulations.

The petition process described under proposed section 574.1(a)(7) would impact county operations.

7

Although counties would have the ability to request an exemption past the two 12-month consecutive appointments, there is no mechanism within the regulations specifying how long it will take for CalPERS to respond to the counties. This could impact the counties if CalPERS is slow to respond. The regulations ought to include clear timelines detailing when CalPERS is required to respond to the petitioning agency. Given the critical nature counties play in the delivery of services, including public safety and health services, it is imperative that clear timelines are developed for CalPERS to respond to CalPERS-covered employers.

Again, CSAC appreciates the opportunity to provide comments on this proposed rulemaking action. Please do not hesitate to contact me at gneill@counties.org with any questions about our comments.

Respectfully,



Geoffrey Neill
Legislative Representative



**California Special
Districts Association**
Districts Stronger Together

July 22, 2022

Mr. Andrew White, Regulation Coordinator
California Public Employees' Retirement System
P.O. Box 942720
Sacramento, CA 94229-2720

RE: Comment on Proposed Rulemaking - Office of Administrative Law (OAL) File Number Z-2022-0607-10; Section 574.1, "Definition of Limited Duration Employment," of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of Title 2 of the California Code of Regulations (CCR).

Dear Mr. White:

The California Special Districts Association (CSDA), representing nearly 1,000 independent special districts throughout the state, respectfully provides the following comments in connection with the above proposed CalPERS Rulemaking pertaining to the definition of "Limited Duration Employment." CSDA represents all types of special districts, which provide millions of Californians with essential local services such as fire protection, water, healthcare, recreation and parks, and more. Many CSDA members contract with CalPERS to provide competitive retirement benefits to current and future employees.

The draft proposed regulation pertaining to the definition of Limited Duration Employment (Proposed Regulation) was posted on June 17, 2022.

CSDA provides the following two substantive comments to the Proposed Regulation:

1. Request for clarifying revised language defining "appointment."

1

Section 574.1(a)(1) of the Proposed Regulation defines "appointment" for purposes of the regulation of Limited Duration Employment as follows:

(a) For purposes of clarifying Government Code sections 7522.56, 21224, and 21229, "limited duration" is defined as a limit of twenty-four consecutive months per appointment of a retired person in the employ of a CalPERS-covered employer.

(1) For purposes of this subdivision, an appointment is defined as either, 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 written, subsection (a)(1) is confusing in its structure and its application is not clear. Moreover, the subsection does not contain clear language addressing similar post-retirement work with the same CalPERS-covered employer as engaged in by the retired person prior to retirement. We do not believe that was the intention of CalPERS in drafting the Proposed Regulation.

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California Special Districts Association



Districts Stronger Together

To avoid confusion created by subsection (a)(1) of the Proposed Regulation, and to clarify the intention of the Proposed Regulation, CSDA requests that part (1) of subsection (a) be rewritten as follows:

(1) For purposes of this subdivision, an appointment occurs when a retired person performs work for a CalPERS-covered employer. A retired person may not be appointed to perform work under Government Code sections 7522.56, 21224, and 21229 that is substantially similar to work performed for the same CalPERS-covered employer in a previous appointment, unless it is within twenty-four consecutive months of that appointment, or any applicable extension described in this subdivision, or is otherwise allowed by this subdivision.

~~(1) For purposes of this subdivision, an appointment is defined as either, 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.~~

2. Request for clarifying revised procedural language pertaining to extension of appointments.

2

Section 574.1(a)(4) of the Proposed Regulation requires that the appointment end date may be extended if specified conditions are met, provided such extensions are made prior to the end of the initial appointment or first extension:

(4) A CalPERS-covered employer may extend the appointment no more than twice, up to twelve consecutive months per extension, beyond the initial limit of twenty-four consecutive months, **if by the end date of the initial appointment and the end date of the first extension**, the applicable condition below is met:

This requirement is carried through to requests for exemptions/extensions made to the CalPERS Board of Administration pursuant to current subsection (a)(7). As written, the timeline for making or requesting extensions is too restrictive and may adversely impact special districts' ability to fill seasonal jobs or roles for which staffing needs cannot be forecast into the future with great precision. For example, a recreation and park district may only require appointments to fill summer program positions such as staffing day camps for children. At the end of the summer, it may not be clear how many appointments, if any, will be needed the following summer. For appointments at the end of 24 months, or extension, a special district may not be able to forecast its need for the following summer, and may simply not be in a position to seek an extension of the appointments. This would preclude seeking extensions the following summer when the need becomes clear. Similarly, for any appointment, a special district may hire a retired person to perform a specific task or role and, at the conclusion of that task or role, not see a need to seek an extension of the appointment. Should unforeseen circumstances arise in the future which support re-hiring the retired person after the expiration of the appointment, the Proposed Regulation provides no mechanism to seek to extend the appointment.

To address these realistic scenarios, we respectfully request that current subsections (a)(3), (a)(4), (a)(5), and (a)(7) of the Proposed Regulation be revised to permit and allow for the appointment extensions contemplated by the Proposed Regulation to be made or requested at any time in connection with a single appointment. To be clear, we are not requesting changes to the substance of the extensions (i.e., the extension increments and durations will remain the same). This clarification will retain the existing



**California Special
Districts Association**

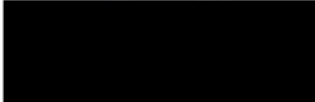
CSDA

Districts Stronger Together

extension structure but allow for reasonable flexibility in extensions consistent with the real-world staffing demands of special districts.

We appreciate the Board of Administration's consideration of our clarification requests. Should you have any questions, please do not hesitate to contact me at aarona@csda.net.

Sincerely,



Aaron Avery
Legislative Representative

CC: Mr. Andrew White (via email to: andrew.white@calpers.ca.gov)
Regulation_Coordinator@calpers.ca.gov



July 27, 2022

Mr. Andrew White, Regulation Coordinator
California Public Employees' Retirement System (CalPERS)
P.O. Box 942720
Sacramento, CA 94229-2720

Sent Via Email: Regulation_Coordinator@calpers.ca.gov

RE: Comments on Proposed Rulemaking - Office of Administrative Law File Number Z-2022-0607-10; Section 574.1, "Definition of Limited Duration Employment," of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of Title 2 of the California Code of Regulations

Dear Mr. White:

The League of California Cities (Cal Cities)¹ respectfully requests consideration of the following comments regarding the above referenced rulemaking, which seeks to define "limited duration" employment as used in Government Code sections 7522.56, 21224, and 21229.

Proposed regulation 574.1(a) substantially alters cities' longstanding practice of hiring CalPERS retirees in "extra help positions" by defining "limited duration" as a limit of twenty-four consecutive months per appointment of a retired person in the employ of a CalPERS-covered employer, with certain exceptions. Unless modified, the definition will hinder cities' ability to fill critical positions that are relied upon intermittently for the provision of public services, including, for example, first responders or seasonal employees who possess specialized skills. Such a change is particularly alarming at a time when cities are facing significant labor disruptions and hiring challenges at all levels.

To avoid disruptions in public services provided to Californians statewide, and for the reasons stated below and in the letters submitted by the California State Association of Counties and California Special Districts Association, Cal Cities urges CalPERS to amend proposed Regulation 574.1 as follows:

1. Amend proposed section 574.1(a)(1) to clarify that retirees may be appointed to extra help positions by their former employers to perform work that is substantially similar to work they performed for that employer before retirement;

¹ Cal Cities is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities monitors state and federal legislation of concern to cities and identifies legislation, including proposed rules and regulations, that have statewide significance.



2. Clarify the process by which the CalPERS board will grant an exemption under proposed section 547.1 (a)(7);
3. Amend proposed subdivisions (a)(3), (a)(4), (a)(5) and (a)(7) to allow the appointment extensions and exemptions contemplated by proposed section 574.1 (a) to be made or requested after the initial twenty-four consecutive month limited duration period has expired; and
4. Allow local agencies to place appointment extensions on their consent calendar.

A. Cal Cities urges CalPERS to make the following amendments for clarity and consistency.

Administrative regulations must be both clear and consistent with existing law.² Unfortunately, proposed regulation 574.1 (a) fails to meet these requirements on two counts: first, proposed section 574.1 (a) is not easily understood by the regulated community and potentially conflicts with existing law; second, proposed section 574.1 (a)(7) fails to inform the regulated community how the regulation will be applied.

1. **Proposed section 574.1(a)(1) should be amended to clarify that retirees may be appointed to extra help positions by their former employers to perform work that is substantially similar to work they performed for that employer before retirement.**

1

Proposed section 574.1 (a)(1) is difficult to parse. It is, therefore, subject to multiple interpretations. One interpretation prohibits a retiree from being appointed by the city from which they retired to an extra help position if they would be performing work that is substantially similar to work they performed before retirement (Interpretation 1). An equally plausible interpretation allows such an appointment for one limited duration period (Interpretation 2).

If Interpretation 1 accurately represents the intent of CalPERS in adopting the proposed regulation, the regulation is inconsistent with Government Code section 21224, which provides “a retired person may serve” in such a position for a limited duration if the statutory requirements are met. This interpretation would run contrary to the purpose of hiring retired annuitants by not allowing for the retiree to use their expertise and years of experience at the local agency. This would be detrimental to cities, inconsistent with the law, and generally bad public policy.

If Interpretation 2 accurately represents the intent of CalPERS in adopting the proposed regulation, Cal Cities urges CalPERS to clarify this intent by substituting the following for proposed section 574.1 (a)(1):

(1) For purposes of this subdivision, an appointment occurs when a retired person performs work for a CalPERS-covered employer. A retired person may not be appointed to perform work under Government Code sections 7522.56, 21224,

² Gov. Code § 11349.1, subs. (a)(3) and (a)(4).



and 21229 that is substantially similar to work performed for the same CalPERS-covered employer in a previous appointment, unless it is within twenty-four consecutive months of that appointment, or any applicable extension described in this subdivision, or is otherwise allowed by this subdivision.

2. Proposed section 547.1(a)(7) should be amended to clarify the process by which the CalPERS Board will grant an exemption.

2

While Cal Cities applauds CalPERS' foresight in allowing cities to request an exemption under proposed section 547.1(a)(7), the proposed regulation lacks critical details: Will the CalPERS Board itself or will CalPERS staff be charged with granting such exemptions? Will CalPERS respond to extension requests within a set amount of time? Will a city need to wait until the next CalPERS board meeting for an extension to be granted? If staff is charged with granting extension will there be a mechanism for the CalPERS board to rescind staff's decision? Without understanding these critical details, it is impossible for Cal Cities to comment on the impacts or effectiveness of this regulation. Given the critical role local agencies play in the delivery of public services, the answers to these questions could significantly impact the regulated community and Californians at large.

B. Cal Cities urges CalPERS to make the following amendment to proposed regulation 574.1(a) because the proposed regulation is not reasonably necessary to effectuate the purposes of Government Code section 21224.

3. Proposed subdivisions (a)(3), (a)(4), (a)(5), and (a)(7) should be amended to allow appointment extensions and exemptions to be requested after the initial twenty-four consecutive month limited duration period, or any applicable extension, has expired.

3

Government Code section 21224 states in relevant part that:

“(a) A retired person may serve without reinstatement from retirement or loss or interruption of benefits provided by this system upon appointment by the appointing power of a state agency or public agency employer either during an emergency to prevent stoppage of public business or because the retired person has specialized skills needed in performing work of limited duration.”

Nothing in the text of the statute indicates an intent to limit when such appointments may occur, only that such appointments may not occur for more than a “limited duration.” However, by requiring that extensions or exemptions be requested by the end date of an appointment or extension, as applicable, proposed regulation 574.1 excludes appointments of limited duration that happen to begin after the expiration of the initial twenty-four month period or any applicable extension. This requirement does not find support in the plain text of Government Code section 21224, and the record fails to identify what public purpose such a requirement would serve.³

³ Gov. Code § 11349.1, subd. (a)(1).



To conform to the intent of Government Code section 21224, Cal Cities respectfully requests that proposed subdivisions (a)(3), (a)(4), (a)(5), and (a)(7) be amended to allow appointment extensions and exemptions to be requested after the initial twenty-four consecutive month limited duration period, or any applicable extension, has expired. These clarifications would retain the existing extension structure but allow for reasonable flexibility in extensions consistent with the real-world staffing demands of cities. These changes are critical because they would allow for the needed flexibility local agencies require to adequately serve their community.

C. Cal Cities urges CalPERS to make the following amendments to proposed regulation 574.1(a) because they would be as effective in carrying out the purpose of the proposed action, but less burdensome.⁴

4. Proposed section 574.1(a)(3) should be amended to allow local agencies to place appointment extensions on their consent calendar.

4

The mandate under proposed section 574.1(a)(4)(A), which prohibits an appointment extension from being placed on a public agency's consent calendar would be administratively burdensome, especially for some cities that could have many retired annuitants working in their city at any given time. The use of retired annuitants is a widespread practice and as a general matter, routine appointments for positions, just like nearly all other personnel matters, do not go through the process of being placed on a non-consent portion of the city council meeting agenda. Determining which agenda items get assigned to the consent calendar should be left to the governing body, not CalPERS.

We therefore request that the prohibition be removed from the regulations.

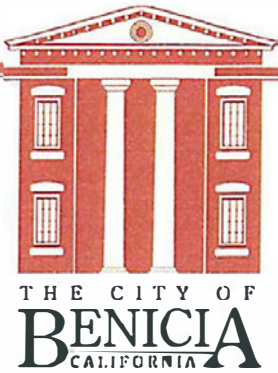
Conclusion

Cal Cities appreciates the opportunity to provide comments on this proposed rulemaking action. Please do not hesitate to contact me at jpina@calcities.org with any questions about Cal Cities comments.

Respectfully,

Johnnie Pina
Legislative Affairs, Lobbyist
League of California Cities

⁴ Gov. Code § 11346.5(a)(13).



CITY HALL • 250 EAST L STREET • BENICIA, CA 94510 • (707) 746-4200 • FAX (707) 747-8120

ERIK UPSON
City Manager

August 1, 2022

Mr. Andrew White, Regulation Coordinator
California Public Employees' Retirement System (CalPERS)
P.O. Box 942720
Sacramento, CA 94229 2720

Sent Via Email: Regulation_Coordinator@calpers.ca.gov

RE: Comments on Proposed Rulemaking - Office of Administrative Law File Number Z-2022-0607-10; Section 574.1, "Definition of Limited Duration Employment," of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of Title 2 of the California Code of Regulations

Dear Mr. White:

The City of Benicia respectfully requests consideration of the following comments regarding the above referenced rulemaking, which seeks to define "limited duration" employment as used in Government Code sections 7522.56, 21224, and 21229.

Proposed regulation 574.1 (a) substantially alters cities' longstanding practice of hiring CalPERS retirees in "extra help positions" by defining "limited duration" as a limit of twenty four consecutive months per appointment of a retired person in the employ of a CalPERS-covered employer, with certain exceptions. Unless modified, the definition will hinder cities' ability to fill critical positions that are relied upon intermittently for the provision of public services, including, for example, first responders or seasonal employees who possess specialized skills, and staffing for emergencies or unique situations such as COVID or wildfires. Such a change is particularly alarming at a time when cities are facing significant labor disruptions and hiring challenges at all levels.

To avoid disruptions in public services provided to Californians statewide, The City of Benicia urges CalPERS to amend proposed Regulation 574.1 as follows:

1. Amend proposed section 574.1(a)(1) to clarify that retirees may be appointed to extra help positions by their former, or other, employers to perform work that is substantially similar to work they performed for an employer before retirement;
2. Clarify the process by which the CalPERS board will grant an exemption under proposed section 574.1(a)(7);

STEVE YOUNG, *Mayor*
Members of the City Council
TOM CAMPBELL · LIONEL LARGAESPADA · TREVOR MACENSKI · CHRISTINA STRAWBRIDGE

ERIK UPSON, *City Manager*
LISA WOLFE, *City Clerk*
KENNETH C. PAULK, *City Treasurer*

Mr. Andrew White, Regulation Coordinator
California Public Employees' Retirement System (CalPERS)
Page 2

3. Amend proposed subdivisions(a)(3), (a)(4), (a)(5) and (a)(7) to allow the appointment extensions and exemptions contemplated by proposed section 574.1(a) to be made or requested after the initial twenty-four consecutive month limited duration period has expired; and
4. Allow local agencies to place appointment extensions on their consent calendar.

A. The City of Benicia urges CalPERS to make the following amendments for clarity and consistency.

- 1. Proposed section 574.1(a)(1) should be amended to clarify that retirees may be appointed to extra help positions by their former, or other, employers to perform work that is substantially similar to work they performed for an employer before retirement.**

1

Proposed section 574.1(a)(1) is difficult to parse and may be interpreted to mean a retiree is prohibited from being appointed by the city from which they retired to an extra help position if they would be performing work that is substantially similar to work they performed before retirement. This interpretation would run contrary to the purpose of hiring retired annuitants by not allowing for the retiree to use their expertise and years of experience at the local agency. Employees frequently retire without much notice. Recruitment processes are lengthy, especially in current times. If an agency would be prohibited from hiring a retired annuitant to perform substantially similar work during the recruitment process, agencies risk critical tasks not being completed.

City of Benicia urges CalPERS to clarify the regulations by substituting the following for proposed section 574.1(a)(1):

(1) For purposes of this subdivision, an appointment occurs when a retired person performs work for a CalPERS-covered employer. A retired person may not be appointed to perform work under Government Code sections 7522.56, 21224, and 21229 that is substantially similar to work performed for the same CalPERS-covered employer in a previous appointment, unless it is within twenty-four consecutive months of that appointment, or any applicable extension described in this subdivision, or is otherwise allowed by this subdivision.

- 2. Proposed section 547.1(a)(7) should be amended to clarify the process by which the CalPERS Board will grant an exemption.**

2

While City of Benicia applauds CalPERS' foresight in allowing cities to request an exemption under proposed section 547.1(a)(7), the proposed regulation lacks critical details: Will the CalPERS Board itself or will CalPERS staff be charged with granting such exemptions? Will CalPERS respond to extension requests within a set amount of time? Currently, agencies are experiencing a delayed response from CalPERS on these requests, resulting in critical vacancies if an agency cannot fill the void with a retired annuitant. Will a city need to wait until the next CalPERS board meeting for an

Mr. Andrew White, Regulation Coordinator
California Public Employees' Retirement System (CalPERS)
Page 3

extension to be granted? If staff is charged with granting extension will there be a mechanism for the CalPERS board to rescind staff's decision? Without understanding these critical details, it is impossible to comment on the impacts or effectiveness of this regulation. Given the critical role local agencies play in the delivery of public services, the answers to these questions could significantly impact the regulated community and Californians at large.

B. City of Benicia urges CalPERS to make the following amendment to proposed regulation 574.1(a) because the proposed regulation is not reasonably necessary to effectuate the purposes of Government Code section 21224.

- 3. Proposed subdivisions (a)(3), (a)(4), (a)(5), and (a)(7) should be amended to allow appointment extensions and exemptions to be requested after the initial twenty-four consecutive month limited duration period, or any applicable extension, has expired.**

3

By requiring that extensions or exemptions be requested by the end date of an appointment or extension, as applicable, proposed regulation 574.1 excludes appointments of limited duration that happen to begin after the expiration of the initial twenty-four month period or any applicable extension. This requirement does not find support in the plain text of Government Code section 21224.

To conform to the intent of the law, City of Benicia respectfully requests that proposed subdivisions (a)(3), (a)(4), (a)(5), and (a)(7) be amended to allow appointment extensions and exemptions to be requested after the initial twenty-four consecutive month limited duration period, or any applicable extension, has expired. These clarifications would retain the existing extension structure but allow for reasonable flexibility in extensions consistent with the real-world staffing demands of cities. These changes are critical because they would allow for the needed flexibility local agencies require to adequately serve their community.

C. City of Benicia urges CalPERS to make the following amendments to proposed regulation 574.1(a) because they would be as effective in carrying out the purpose of the proposed action, but less burdensome.¹

- 4. Proposed section 574.1(a)(3) should be amended to allow local agencies to place appointment extensions on their consent calendar.**

4

The mandate under proposed section 574.1(a)(4)(A), which prohibits an appointment extension from being placed on a public agency's consent calendar would be administratively burdensome. The use of retired annuitants is a widespread practice and as a general matter, routine appointments for positions, just like nearly all other personnel matters, do not go through the process of being placed on a non-consent

¹ Gov. Code § 11346.5(a)(13).

Mr. Andrew White, Regulation Coordinator
California Public Employees' Retirement System (CalPERS)
Page 4

portion of the city council meeting agenda. Determining which agenda items get assigned to the consent calendar should be left to the governing body, not CalPERS.

4 cont

City of Benicia therefore requests that the prohibition be removed from the regulations.

D. City of Benicia urges CalPERS to form a subcommittee made up of employees and board members of CalPERS along with staff of member agencies to discuss and explore ideas for proposed amendments. It is important to preserve the integrity and fiscal sustainability of CalPERS but it is essential that member agencies continue to serve the community. Critical staffing vacancies will negatively impact service to the community. Most City Managers and Human Resource Directors would welcome the opportunity to serve on such a subcommittee to collectively partner with CalPERS in the ongoing efforts to maintain CalPERS' sustainability into the future.

5

Conclusion

City of Benicia appreciates the opportunity to provide comments on this proposed rulemaking action.

Sincerely,



Erik Upson
City Manager
City of Benicia

cc: Nancy Hall Bennett, Public Affairs Manager, North Bay Division, League of California Cities (via email: nbennett@calcities.org)
League of California Cities, (via email: cityletters@calcities.org)
Kim Imboden, Human Resources Manager
City Council of the City of Benicia



CITY OF FAIRFIELD

Founded 1856 - Incorporated December 12, 1903

Comment 14

Agenda Item 5a, Attachment 3b
Page 80 of 147

CITY MANAGER'S OFFICE

July 29, 2022

Mr. Andrew White, Regulation Coordinator
California Public Employees' Retirement System (CalPERS)
P.O. Box 942720
Sacramento, CA 94229-2720

RE: Proposed Regulation for the Definition of Limited Duration Employment

Dear Mr. White:

On behalf of the City of Fairfield City Council, I write to express our concerns with the proposed rulemaking pertaining to the definition of "limited duration" employment as used in Government Code sections 7522.56, 21224, and 21229.

The proposed regulation 574.1(a) would hinder the City of Fairfield's ability to fill critical positions that are relied upon intermittently for the provision of public services, including dispatchers and weed abatement. With the tight labor market and the high turnover for our dispatchers, it is crucial for the safety of our community to be able to use annuitants to fill these gaps. The ability to hire retirees is one of many tools in our toolbox to address the labor disruptions and hiring challenges local government has faced in recent years.

For these reasons, the City of Fairfield supports Cal Cities recommendation in their letter dated July 27, 2022, to amend the proposed 574.1 as follows:

1. Amend proposed section 574.1(a)(1) to clarify that retirees may be appointed to extra help positions by their former employers to perform work that is substantially similar to what they performed for that employer before retirement;
2. Clarify the process by which the CalPERS board will grant an exemption under proposed section 547.1(a)(7);

Letter to Andrew White

Re: Proposed Regulation for the Definition of Limited Duration Employment

July 29, 2022

Page 2

3. Amend proposed subdivisions(a)(3), (a)(4), (a)(5) and (a)(7) to allow the appointment extensions and exemptions contemplated by proposed section 574.1(a) to be made or requested after the initial twenty-four consecutive month limited duration period has expired; and 3
4. Allow local agencies to place appointment extensions on their consent calendar. 4

The City of Fairfield appreciates the opportunity to provide comments on this proposed rulemaking and how the changes would impact our organization.

Sincerely,

A black rectangular redaction box covering the signature of Harry T. Price.

HARRY T. PRICE

Mayor

**cc: Joe A. Gonsalves and Sons
League of California Cities**



August 1, 2022

Mr. Andrew White, Regulation Coordinator
California Public Employees' Retirement System (CalPERS)
P.O. Box 942720
Sacramento, CA 94229 2720

Sent Via Email: Regulation_Coordinator@calpers.ca.gov

RE: Comments on Proposed Rulemaking - Office of Administrative Law File Number Z-2022-0607-10; Section 574.1, "Definition of Limited Duration Employment," of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of Title 2 of the California Code of Regulations

Dear Mr. White:

The City of Napa respectfully requests consideration of the following comments regarding the above referenced rulemaking, which seeks to define "limited duration" employment as used in Government Code sections 7522.56, 21224, and 21229.

Proposed regulation 574.1(a) substantially alters cities' longstanding practice of hiring CalPERS retirees in "extra help positions" by defining "limited duration" as a limit of twenty-four consecutive months per appointment of a retired person in the employ of a CalPERS-covered employer, with certain exceptions. Unless modified, the definition will hinder cities' ability to fill critical positions that are relied upon intermittently for the provision of public services, including, for example, first responders or seasonal employees who possess specialized skills. Such a change is particularly alarming at a time when cities are facing significant labor disruptions and hiring challenges at all levels.

For example, the City of Napa experienced severe staffing shortages during the pandemic, as the City held a significant number of positions vacant due to an alarming decline in revenues in the first year of COVID. The City is now beginning to recover and fill vacant positions, but like many public agencies, we are struggling to fill them as quickly as we need them, and thus require the assistance of retired annuitants for the interim. Particularly for positions that require a specific public sector skill set, it is nearly impossible to fill such interim vacancies without utilizing retired annuitants.

To avoid disruptions in public services provided to Californians statewide, the City of Napa urges CalPERS to amend proposed Regulation 574.1 as follows:

1. Amend proposed section 574.1(a)(1) to clarify that retirees may be appointed to extra help positions by their former employers to perform work that is substantially similar to work they performed for that employer before retirement;
2. Clarify the process by which the CalPERS board will grant an exemption under proposed section 547.1(a)(7);
3. Amend proposed subdivisions(a)(3), (a)(4), (a)(5) and (a)(7) to allow the appointment extensions and exemptions contemplated by proposed section 574.1(a) to be made or requested after the initial twenty-four consecutive month limited duration period has expired; and
4. Allow local agencies to place appointment extensions on their consent calendar.

A. The City of Napa urges CalPERS to make the following amendments for clarity and consistency.

1. **Proposed section 574.1(a)(1) should be amended to clarify that retirees may be appointed to extra help positions by their former employers to perform work that is substantially similar to work they performed for that employer before retirement.**

1

Proposed section 574.1(a)(1) is difficult to parse and may be interpreted to mean a retiree is prohibited from being appointed by the city from which they retired to an extra help position if they would be performing work that is substantially similar to work they performed before retirement. This interpretation would run contrary to the purpose of hiring retired annuitants by not allowing for the retiree to use their expertise and years of experience at the local agency.

The City of Napa urges CalPERS to clarify the regulations by substituting the following for proposed section 574.1(a)(1):

(1) For purposes of this subdivision, an appointment occurs when a retired person performs work for a CalPERS-covered employer. A retired person may not be appointed to perform work under Government Code sections 7522.56, 21224, and 21229 that is substantially similar to work performed for the same CalPERS-covered employer in a previous appointment, unless it is within twenty-four consecutive months of that appointment, or any applicable extension described in this subdivision, or is otherwise allowed by this subdivision.

2. **Proposed section 547.1(a)(7) should be amended to clarify the process by which the CalPERS Board will grant an exemption.**

2

While the City of Napa applauds CalPERS' foresight in allowing cities to request an exemption under proposed section 547.1(a)(7), the proposed regulation lacks critical details: Will the CalPERS Board itself or will CalPERS staff be charged with granting such exemptions? Will CalPERS respond to extension requests within a set amount of time?

Will a city need to wait until the next CalPERS board meeting for an extension to be granted? If staff is charged with granting extension will there be a mechanism for the CalPERS board to rescind staff's decision? Without understanding these critical details, it is impossible to comment on the impacts or effectiveness of this regulation. Given the critical role local agencies play in the delivery of public services, the answers to these questions could significantly impact the regulated community and Californians at large.

B. The City of Napa urges CalPERS to make the following amendment to proposed regulation 574.1(a) because the proposed regulation is not reasonably necessary to effectuate the purposes of Government Code section 21224.

- 3. Proposed subdivisions (a)(3), (a)(4), (a)(5), and (a)(7) should be amended to allow appointment extensions and exemptions to be requested after the initial twenty-four consecutive month limited duration period, or any applicable extension, has expired.**

3

By requiring that extensions or exemptions be requested by the end date of an appointment or extension, as applicable, proposed regulation 574.1 excludes appointments of limited duration that happen to begin after the expiration of the initial twenty-four month period or any applicable extension. This requirement does not find support in the plain text of Government Code section 21224.

To conform to the intent of the law, the City of Napa respectfully requests that proposed subdivisions (a)(3), (a)(4), (a)(5), and (a)(7) be amended to allow appointment extensions and exemptions to be requested after the initial twenty-four consecutive month limited duration period, or any applicable extension, has expired. These clarifications would retain the existing extension structure but allow for reasonable flexibility in extensions consistent with the real-world staffing demands of cities. These changes are critical because they would allow for the needed flexibility local agencies require to adequately serve their community.

C. The City of Napa urges CalPERS to make the following amendments to proposed regulation 574.1(a) because they would be as effective in carrying out the purpose of the proposed action, but less burdensome.¹

- 4. Proposed section 574.1(a)(3) should be amended to allow local agencies to place appointment extensions on their consent calendar.**

4

The mandate under proposed section 574.1(a)(4)(A), which prohibits an appointment extension from being placed on a public agency's consent calendar would be administratively burdensome. The use of retired annuitants is a widespread practice and as a general matter, routine appointments for positions, just like nearly all other personnel matters, do not go through the process of being placed on a non-consent portion of the city council meeting agenda. Determining which agenda items get assigned to the consent calendar should be left to the governing body, not CalPERS.

¹ Gov. Code § 11346.5(a)(13).

The City of Napa therefore requests that the prohibition be removed from the regulations.

Conclusion

The City of Napa appreciates the opportunity to provide comments on this proposed rulemaking action.

Sincerely,



Steve Potter
City Manager
City of Napa

cc: Nancy Hall Bennett, League of California Cities, North Bay Division (via email: nbennett@calcities.org)
League of California Cities, (via email: cityletters@calcities.org)



City Council
311 Vernon Street
Roseville, California 95678

August 1, 2022

Mr. Andrew White, Regulation Coordinator
California Public Employees' Retirement System (CalPERS)
P.O. Box 942720
Sacramento, CA 94229-2720

Sent Via Email: Regulation_Coordinator@calpers.ca.gov

RE: Comments on Proposed Rulemaking - Office of Administrative Law File Number Z-2022-0607-10; Section 574.1, "Definition of Limited Duration Employment," of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of Title 2 of the California Code of Regulations

Dear Mr. White:

The City of Roseville respectfully requests consideration of the following comments regarding the above referenced rulemaking, which seeks to define "limited duration" employment as used in Government Code sections 7522.56, 21224, and 21229.

Proposed regulation 574.1(a) substantially alters cities' longstanding practice of hiring CalPERS retirees in "extra help positions" by defining "limited duration" as a limit of twenty-four consecutive months per appointment of a retired person in the employ of a CalPERS-covered employer, with certain exceptions. Unless modified, the definition will hinder cities' ability to fill critical positions that are relied upon intermittently for the provision of public services, including, for example, first responders or seasonal employees who possess specialized skills. Such a change is particularly alarming at a time when cities are facing significant labor disruptions and hiring challenges at all levels.

The City of Roseville utilizes retired annuitants in a variety of capacities, although we do not use them extensively. We currently have six retired annuitants, out of a work force totaling 1791 employees. We employ them for time-limited projects that require their expertise. It allows them to mentor and train unseasoned staff. We also utilize them when workload has peaked and we need someone to assist that is already skilled. With difficulties in filling vacancies in today's job market, retired annuitants have also helped us to continue to meet the City's goals. Most recently, we are in the process of hiring a retired Police Officer to conduct background checks to help expedite the hiring in our Police Department since it has become challenging to fill positions. We may have the need over the next few years to utilize this trained individual to support this critical hiring process without delay.

To avoid disruptions in public services provided to Californians statewide, City of Roseville urges CalPERS to amend proposed Regulation 574.1 as follows:

1. Amend proposed section 574.1(a)(1) to clarify that retirees may be appointed to extra help positions by their former employers to perform work that is substantially similar to work they performed for that employer before retirement;
2. Clarify the process by which the CalPERS board will grant an exemption under proposed section 547.1(a)(7);
3. Amend proposed subdivisions(a)(3), (a)(4), (a)(5) and (a)(7) to allow the appointment extensions and exemptions contemplated by proposed section 574.1(a) to be made or requested after the initial twenty-four consecutive month limited duration period has expired; and

4. Allow the Executive Officer of the local agencies to approve appointment extensions, with a documented justification for the assignment extension.

A. The City of Roseville urges CalPERS to make the following amendments for clarity and consistency.

- 1. Proposed section 574.1(a)(1) should be amended to clarify that retirees may be appointed to extra help positions by their former employers to perform work that is substantially similar to work they performed for that employer before retirement.**

1

Proposed section 574.1(a)(1) is difficult to parse and may be interpreted to mean a retiree is prohibited from being appointed by the city from which they retired to an extra help position if they would be performing work that is substantially similar to work they performed before retirement. This interpretation would run contrary to the purpose of hiring retired annuitants by not allowing for the retiree to use their expertise and years of experience at the local agency.

The City of Roseville urges CalPERS to clarify the regulations by substituting the following for proposed section 574.1(a)(1):

(1) For purposes of this subdivision, an appointment occurs when a retired person performs work for a CalPERS-covered employer. A retired person may not be appointed to perform work under Government Code sections 7522.56, 21224, and 21229 that is substantially similar to work performed for the same CalPERS-covered employer in a previous appointment, unless it is within twenty-four consecutive months of that appointment, or any applicable extension described in this subdivision, or is otherwise allowed by this subdivision.

- 2. Proposed section 547.1(a)(7) should be amended to clarify the process by which the CalPERS Board will grant an exemption.**

2

While the City of Roseville applauds CalPERS' foresight in allowing cities to request an exemption under proposed section 547.1(a)(7), the proposed regulation lacks critical details: Will the CalPERS Board itself or will CalPERS staff be charged with granting such exemptions? Will CalPERS respond to extension requests within a set amount of time? Will a city need to wait until the next CalPERS board meeting for an extension to be granted? If staff is charged with granting extension will there be a mechanism for the CalPERS board to rescind staff's decision? Without understanding these critical details, it is impossible to comment on the impacts or effectiveness of this regulation. Given the critical role local agencies play in the delivery of public services, the answers to these questions could significantly impact the regulated community and Californians at large.

B. City of Roseville urges CalPERS to make the following amendment to proposed regulation 574.1(a) because the proposed regulation is not reasonably necessary to effectuate the purposes of Government Code section 21224.

- 3. Proposed subdivisions (a)(3), (a)(4), (a)(5), and (a)(7) should be amended to allow appointment extensions and exemptions to be requested after the initial twenty-four consecutive month limited duration period, or any applicable extension, has expired.**

3

By requiring that extensions or exemptions be requested by the end date of an appointment or extension, as applicable, proposed regulation 574.1 excludes appointments of limited duration that happen to begin after the expiration of the initial twenty-four month period or any applicable extension. This requirement does not find support in the plain text of Government Code section 21224.

To conform to the intent of the law, the City of Roseville respectfully requests that proposed

subdivisions (a)(3), (a)(4), (a)(5), and (a)(7) be amended to allow appointment extensions and exemptions to be requested after the initial twenty-four consecutive month limited duration period, or any applicable extension, has expired. These clarifications would retain the existing extension structure but allow for reasonable flexibility in extensions consistent with the real-world staffing demands of cities. These changes are critical because they would allow for the needed flexibility local agencies require to adequately serve their community.

While the City of Roseville has not needed to rehire retired annuitants after a break in service recently, it is anticipated that this could be a need for the retired annuitant Police Officer performing background checks to assist with backlogs so we will not lose candidates due to extended delays. With the current job market, we are needing to be more nimble than ever to ensure services to the public. We are discussing further outreach to local retirees to try to supplement staffing in our Child Care Centers. It has become increasingly difficult to keep these critical services staffed, so having processes that allow flexibility in staffing with retired annuitants and the ability to make extensions when needed for seasonal support may help keep the doors open.

C. City of Roseville urges CalPERS to make the following amendments to proposed regulation 574.1(a) because they would be as effective in carrying out the purpose of the proposed action, but less burdensome.¹

- 4. Proposed section 574.1(a)(3) should be amended to allow the Executive Officer to approve a documented justification of a need for appointment extension.**

4

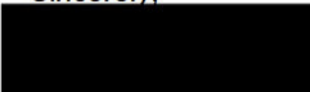
The mandate under proposed section 574.1(a)(4)(A) would be administratively burdensome. The use of retired annuitants is a widespread practice and as a general matter, routine appointments for positions, just like nearly all other personnel matters, do not go through the process of being placed on council or board meeting agenda. Determining the appropriateness of filling positions with reasonable documentation to justify an extension of a retired annuitant appointment should be left to the Executive Officer, not CalPERS.

The City of Roseville therefore requests that the provision be amended in the regulation.

Conclusion

The City of Roseville appreciates the opportunity to provide comments on this proposed rulemaking action. Please contact Mark Wolinski, Government Relations Administrator at (916) 774-5179 or mwolinski@roseville.ca.us if you have any questions.

Sincerely,



Krista Bernasconi,
Mayor
City of Roseville

Cc: Charles Anderson, Cal Cities Regional Public Affairs Manager (via email)
League of California Cities, (via email: cityletters@calcities.org)
Jason Gonsalves, Joe A. Gonsalves and Son

¹ Gov. Code § 11346.5(a)(13).



City Manager's Office
Telephone (909) 931-4106
Facsimile (909) 931-4107

July 28, 2022

Mr. Andrew White, Regulation Coordinator
 California Public Employees' Retirement System (CalPERS)
 P.O. Box 942720
 Sacramento, CA 94229-2720

Sent Via Email: Regulation_Coordinator@calpers.ca.gov

RE: Comments on Proposed Rulemaking - Office of Administrative Law File Number Z-2022-0607-10; Section 574.1, "Definition of Limited Duration Employment," of Article 4 of Subchapter 1 of Chapter 2 of Division 1 of Title 2 of the California Code of Regulations

Dear Mr. White:

The City of Upland respectfully requests consideration of the following comments regarding the above referenced rulemaking, which seeks to define "limited duration" employment as used in Government Code sections 7522.56, 21224, and 21229.

Proposed regulation 574.1(a) substantially alters cities' longstanding practice of hiring CalPERS retirees in "extra help positions" by defining "limited duration" as a limit of twenty-four consecutive months per appointment of a retired person in the employ of a CalPERS-covered employer, with certain exceptions. Unless modified, the definition will hinder cities' ability to fill critical positions that are relied upon intermittently for the provision of public services, including, for example, first responders or seasonal employees who possess specialized skills. Such a change is particularly alarming at a time when cities are facing significant labor disruptions and hiring challenges at all levels.

To avoid disruptions in public services provided to Californians statewide, City of Upland urges CalPERS to amend proposed Regulation 574.1 as follows:

1. Amend proposed section 574.1(a)(1) to clarify that retirees may be appointed to extra help positions by their former employers to perform work that is substantially similar to work they performed for that employer before retirement;
2. Clarify the process by which the CalPERS board will grant an exemption under proposed section 547.1(a)(7);
3. Amend proposed subdivisions(a)(3), (a)(4), (a)(5) and (a)(7) to allow the appointment extensions and exemptions contemplated by proposed section 574.1(a) to be made or requested after the initial twenty-four consecutive month limited duration period has expired; and

4. Allow local agencies to place appointment extensions on their consent calendar.

A. City of Upland urges CalPERS to make the following amendments for clarity and consistency.

- 1. Proposed section 574.1(a)(1) should be amended to clarify that retirees may be appointed to extra help positions by their former employers to perform work that is substantially similar to work they performed for that employer before retirement.**

1

Proposed section 574.1(a)(1) is difficult to parse and may be interpreted to mean a retiree is prohibited from being appointed by the city from which they retired to an extra help position if they would be performing work that is substantially similar to work they performed before retirement. This interpretation would run contrary to the purpose of hiring retired annuitants by not allowing for the retiree to use their expertise and years of experience at the local agency.

City of Upland urges CalPERS to clarify the regulations by substituting the following for proposed section 574.1(a)(1):

(1) For purposes of this subdivision, an appointment occurs when a retired person performs work for a CalPERS-covered employer. A retired person may not be appointed to perform work under Government Code sections 7522.56, 21224, and 21229 that is substantially similar to work performed for the same CalPERS-covered employer in a previous appointment, unless it is within twenty-four consecutive months of that appointment, or any applicable extension described in this subdivision, or is otherwise allowed by this subdivision.

- 2. Proposed section 547.1(a)(7) should be amended to clarify the process by which the CalPERS Board will grant an exemption.**

2

While City of Upland applauds CalPERS' foresight in allowing cities to request an exemption under proposed section 547.1(a)(7), the proposed regulation lacks critical details: Will the CalPERS Board itself or will CalPERS staff be charged with granting such exemptions? Will CalPERS respond to extension requests within a set amount of time? Will a city need to wait until the next CalPERS board meeting for an extension to be granted? If staff is charged with granting extension will there be a mechanism for the CalPERS board to rescind staff's decision? Without understanding these critical details, it is impossible to comment on the impacts or effectiveness of this regulation. Given the critical role local agencies play in the delivery of public services, the answers to these questions could significantly impact the regulated community and Californians at large.

B. City of Upland urges CalPERS to make the following amendment to proposed regulation 574.1(a) because the proposed regulation is not reasonably necessary to effectuate the purposes of Government Code section 21224.

- 3. Proposed subdivisions (a)(3), (a)(4), (a)(5), and (a)(7) should be amended to allow appointment extensions and exemptions to be requested after the initial twenty-four consecutive month limited duration period, or any applicable extension, has expired.**

3

By requiring that extensions or exemptions be requested by the end date of an appointment or extension, as applicable, proposed regulation 574.1 excludes appointments of limited duration that happen to begin after the expiration of the initial twenty-four month period or any

applicable extension. This requirement does not find support in the plain text of Government Code section 21224.

To conform to the intent of the law, City of Upland respectfully requests that proposed subdivisions (a)(3), (a)(4), (a)(5), and (a)(7) be amended to allow appointment extensions and exemptions to be requested after the initial twenty-four consecutive month limited duration period, or any applicable extension, has expired. These clarifications would retain the existing extension structure but allow for reasonable flexibility in extensions consistent with the real-world staffing demands of cities. These changes are critical because they would allow for the needed flexibility local agencies require to adequately serve their community.

C. City of Upland urges CalPERS to make the following amendments to proposed regulation 574.1(a) because they would be as effective in carrying out the purpose of the proposed action, but less burdensome.¹

4. Proposed section 574.1(a)(3) should be amended to allow local agencies to place appointment extensions on their consent calendar.


4

The mandate under proposed section 574.1(a)(4)(A), which prohibits an appointment extension from being placed on a public agency’s consent calendar would be administratively burdensome. The use of retired annuitants is a widespread practice and as a general matter, routine appointments for positions, just like nearly all other personnel matters, do not go through the process of being placed on a non-consent portion of the city council meeting agenda. Determining which agenda items get assigned to the consent calendar should be left to the governing body, not CalPERS.

City of Upland therefore requests that the prohibition be removed from the regulations.

Conclusion

City of Upland appreciates the opportunity to provide comments on this proposed rulemaking action.

Sincerely, 

MICHAEL BLAY
City Manager
City of Upland

cc: Laura Morales, Regional Public Affairs Manager, (via email: Lmorales@calcities.org)
League of California Cities, (via email: cityletters@calcities.org)

¹ Gov. Code § 11346.5(a)(13).



August 1, 2022

Mr. Andrew White, Regulation Coordinator
California Public Employee's Retirement System (CalPERS)
P.O. Box 942720
Sacramento, CA 94229-2720

Transmittal Via E-Mail: Regulation_Coordinator@calpers.ca.gov

RE: Proposed adoption of section 574.1, "Definition of Limited Duration Employment," of Article 4 of Subchapter 1 of Chapter 2 Division 1 of Title 2 of the California Code of Regulations (CCR)

Dear Mr. White:

On behalf of the Rural County Representatives of California (RCRC), thank you for the opportunity to provide comments on the proposed rulemaking action, which seeks to define "limited duration" employment and provide clarity and uniformity for CalPERS-covered employers. RCRC is an association of thirty-nine rural California counties, and the RCRC Board of Directors is comprised of elected supervisors from each of those member counties.

This substantive and non-technical rulemaking action would substantially alter the longstanding requirement that a retired person may be temporarily employed for up to 960 hours in any given fiscal year without reinstatement by defining "limited duration" as a limit of 24 consecutive months per appointment of a retired person in the employ of a CalPERS-covered employer. This rulemaking action would significantly impact critical and difficult-to-fill positions, such as first responders, health care professionals (including critically impacted behavioral health positions), and other positions that are relied upon intermittently, such as certain positions within the voting and elections workforce.

These new regulations come at a time counties are grappling with a nationwide workforce shortage and high vacancy rates, not just for traditionally hard-to-fill positions but for positions at all levels. Their ability to respond is hampered in most cases because nearly 3 out of 4 counties now have less general fund revenue per capita than before the Great Recession in real dollars. This alarming fact is even more daunting as we seem to approach another recession. Layering on these new restrictions and administrative

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requirements will lead to greater disruptions in county services. With that context, we provide the following comments and recommendations on the proposed rulemaking.

Section 574.1

The definition of an appointment is unclear and may be subject to varied interpretations. We recommend that the following language be used to clarify the definition of an appointment.

“For purposes of this subdivision, an appointment occurs when a retired person performs work for a CalPERS-covered employer. A retired person may not be appointed to perform work under Government Code sections 7522.56, 21224, and 21229 that is substantially similar to work performed for the same CalPERS-covered employer in a previous appointment, unless it is within twenty-four consecutive months of that appointment, or any applicable extension described in this subdivision, or is otherwise allowed by this subdivision.”

Extension request

The regulations as drafted exclude appointments of temporary duration that happen to begin more than two years after an initial appointment, even though they are clearly within the scope of statutory authority. As written, the timeline for making or requesting extensions is too restrictive and may adversely impact a county’s ability to fill seasonal jobs or roles for which staffing needs cannot be forecast into the future with great precision. For example, a county may require a planner or engineer appointment for a special project and, at the conclusion of that task or role, not see a need to seek an extension of the appointment. Should unforeseen circumstances arise in the future that support rehiring the retired person after the expiration of the appointment, the Proposed Regulation provides no mechanism to seek to extend the appointment.

We request this be fixed by removing from paragraph (4) the phrase *“by the end date of the initial appointment and the end date of the first extension.”* and amending paragraph (5) so that it parallels the language in (7)(B)(ii), so that paragraph (5) reads *“The date on which the extension is granted by the board or the first day following the end of the prior twenty-four or twelve consecutive month period for which the extension is granted by the board, whichever is later, initiates time counted towards the limit of twelve consecutive months for the extension.”*

Public safety staffing concerns

The proposed regulations place difficult restrictions on already limited public safety workforce in rural areas. You are in receipt of comments submitted by Sutter County Sheriff Brandon Barnes, which outlines his department’s difficulties in meeting the needs of his residents and which are representative of those faced by other small sheriff departments around the state. Many rural law enforcement agencies utilize retired annuitants to supplement services in boat patrol, court security, cold case investigations and background investigations. Many of these assignments require a certified “Peace

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Officer” and specialized training further restricting access to qualified applicants. RCRC recommends CalPERS consider changes to address the concerns outlined in the Sutter County Sheriff’s letter.

Changes to Address Impacts to Hard to Fill Elections Positions

4

County elections departments are also likely to be adversely affected by the proposed regulations. These departments require very few staff for most of the year, but significantly more in the months before and after an election. The election department in a small county increases its permanent staff of 2 or 3 to several times that number for those couple of months. While some of the positions can be and are filled by temporary employees, some of the work must be performed by experienced employees and retired annuitants are particularly well suited to the task. Even if a county extends the appointment of a retired person for the full 48 months currently allowed by the regulations, that amounts to only two election cycles.

Due to these difficulties, and due to the fundamental importance of secure, professionally managed elections to our democratic form of government, we request the ability for counties to apply for an exemption for appointments to perform work related to elections, including but not limited to planning and preparation, candidate services, signature verification, ballot distribution, polling places, ballot counting, and all other activities related to the conduct of elections.

In order to address this unique circumstance, we recommend that the following language be used.

“(c) Appointments by a CalPERS-covered employer for positions which perform work related to elections, including but not limited to election planning and preparation, candidate services, signature verification, ballot distribution, polling place staffing, ballot counting, and all other activities related to the conduct of elections, shall not be subject to the limited extensions above and shall be granted extensions on an annual as needed basis.”

Flexibility to suspend these regulations during a local or state disaster emergency, public health crisis, or other emergency

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On March 12, 2020, Governor Newsom issued Executive Order N-25-20, which suspended the work hour limitations for retired annuitants. As the COVID-19 global pandemic has illustrated, during a local or state emergency, many critical positions may be needed as part of the response. For example, first responders play a critical role in responding to emergencies as well as health professionals and other critically needed positions. The Board of Administration should include a mechanism for a CalPERS-covered employer to petition CalPERS to waive some or all of the requirements of proposed section 574.1 during a declared local or state disaster emergency, public health crisis, or another emergency.

Mr. Andrew White
Proposed adoption of section 574.1
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We recommend that the following language be used to address such circumstances

5 cont

“(d) During a declared state or local emergency CalPERS shall grant additional extensions beyond those described above for the appointment of employees working as emergency or first responders in public health, law enforcement, or other disaster relief positions. Such additional extensions shall end upon the conclusion of the declared state or local emergency.”

Appointment extensions on the consent calendar are not administratively feasible

6

The mandate under proposed section 574.1(a)(4)(A), which requires the governing body of a CalPERS-covered contracting agency to certify, by resolution at a public meeting, its approval of the appointment extension and the reason the work required under the appointment cannot be performed satisfactory by non-retired employees is anticipated to create a substantial workload across our 39 rural counties. Specifically, this would require hours of staff time for each county to develop the mandated resolution and required findings and subsequently place the resolution on the agenda for a vote.

Furthermore, prohibiting an appointment extension from being placed on a consent calendar is not administratively feasible, given a county could have many retired annuitants working at any given time across many departments. The use of retired annuitants is a widespread practice, and as a general matter, routine appointments for positions, just like nearly all other personnel matters, do not go through the process of being placed on a board of supervisors’ non-consent portion of the agenda. The mandate that prohibits extensions from being on the consent calendar has the potential to have a significant impact on the county’s business. This may require several hundred, and thousands, of hours of board staff time across all CalPERS employers. This would likely create a notable aggregate fiscal and administrative impact on the counties, schools, cities, and special districts. We, therefore, request that the prohibition be removed from the regulations.

Section 574.1(a)(7) petition process will impact county operations

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Although counties would have the ability to request an exemption past the two 12-month consecutive appointments, there is no mechanism within the regulations specifying how long it will take for CalPERS to respond to the counties. This could impact the counties if CalPERS is slow to respond. The regulations ought to include clear timelines detailing when CalPERS is required to respond to the petitioning agency. Given the critical nature counties play in the delivery of services, including public safety and health services, it is imperative that clear timelines are developed for CalPERS to respond to CalPERS-covered employers. To that end, we request that CalPERS adopt a thirty (30) day response period and that the extension be deemed granted in the event no response is received prior to the end of the response period.

Mr. Andrew White
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Page 5

Thank you for your consideration of our comments. If you have any questions, please contact me at sdukett@rcrcnet.org or (916) 447-4806.

Sincerely,



SARAH DUKETT
Policy Advocate

July 27, 2022

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Comment 19

Andres White, Regulation Coordinator
California Public Employees' Retirement System (CalPERS)
P.O. Box 942720
Sacramento, CA 94229
Transmitted via email to: Regulation_Coordinator@calpers.ca.gov

RE: Public Comment on the Adoption of Proposed Regulations for Limited Duration Employment

Dear CalPERS Board of Administration:

On behalf of the City of Long Beach, I write in response to the proposed regulations regarding the definition of Limited Duration Employment for annuitants in the California Code of Regulations (Section 574.1, Article 4, Subchapter 1, Chapter 2, Division 1, Title 2). While the City welcomes CalPERS' efforts to clarify certain regulations for limited duration employment, the proposed restrictions will negatively impact how public agencies utilize retired annuitants for essential services and projects.

The City employs a couple-dozen retired annuitants each year, on average. Annuitants work in limited duration roles to help eliminate backlogs, work on special projects, and complete tasks that regular staff cannot do. Retired annuitants offer unique skillsets, institutional expertise, and knowledge of City systems and services necessary to ensure consistency in the delivery of projects. In compliance with existing regulations, the City has established four retired annuitant classifications to clarify the scope of work they perform as retirees, including administrative, management, special projects, and specialized supports.

Although in most situations retired annuitants are utilized on a short-term basis (i.e., 1-2 years), we recognize that rare circumstances may require more time for annuitants than would be allowed under the proposed regulations. The City requests CalPERS to provide an exception process beyond the proposed timeline for annuitants in these cases.

1

Furthermore, the proposed language is unclear whether it applies to an employee providing work that is substantially the same as the work the retired person performed before retirement. This definition should be clarified with respect to the proposed language. The City needs to retain the ability for retired annuitants to perform work that may be similar but a different classification, since they provide irreplaceable expertise on specific projects and services.

2

I would ask that the Board of Administration consider allowing more time for annuitants to serve in extenuating circumstances and clarify that annuitants can continue to perform work that may be similar to what they were doing prior to retirement. While clearer definitions for annuitants would be beneficial, the City asks for more flexibility in administering this program.

Thank you for your consideration. If you have any questions, please do not hesitate to contact Tyler Bonanno-Curley, Manager of Government Affairs, at tyler.curley@longbeach.gov.

Sincerely,



THOMAS B. MODICA
City Manager

