CalPERS

Board of Administration

Agenda Item 9c

June 17, 2020

Item Name: Assembly Bill 2365 (Rodriguez) – Revision of Working After Retirement Sanctions

Program: Legislation

Item Type: Action

Recommendation

Adopt a **SUPPORT** position on Assembly Bill (AB) 2365 (Rodriguez), as amended May 4, 2020, because it reduces complexity to the California Public Employees' Retirement System (CalPERS).

Executive Summary

AB 2365 revises the penalties for violations of the working after retirement laws by removing the requirement to reinstate a retired member and makes other conforming changes to cross references relating to working after retirement law. These changes will allow CalPERS team members to work with retired members and employers to resolve working after retirement violations more efficiently and expeditiously.

Strategic Plan

This bill supports the CalPERS Strategic Plan goal to reduce complexity across the enterprise by allowing CalPERS to streamline its operations, processes, and procedures.

Background

<u>Post-Retirement Employment Restrictions</u>

Existing law allows CalPERS members to retire and return to employment with a CalPERS employer while continuing to receive a retirement allowance, subject to the following restrictions specified in statutes and regulations:

- The employment is limited to 960 hours in a fiscal year (July 1 through June 30).
- The retired member has skills needed to perform work of limited duration or the employment is needed during an emergency to prevent stoppage of public business.
- The payrate the retired member receives is not less than the minimum, nor exceeds the maximum, paid by the employer to other employees performing comparable duties, divided by 173.33 to equal an hourly rate.

- The retired member cannot receive any benefit, incentive, compensation in lieu of benefits, or other form of compensation in addition to the hourly payrate.
- The retired member must wait 180 days after the member's retirement date before beginning post-retirement employment with a CalPERS employer, unless one of the following conditions applies:
  - The individual is a firefighter or public safety officer hired to perform those functions regularly performed by a firefighter or public safety officer.
  - A state agency, public agency or school employer certifies the nature of the employment and that the appointment is necessary to fill a critically needed position.
  - The individual is eligible to participate in the California State University Faculty Early Retirement Program.

Under the California Public Employees' Pension Reform Act of 2013 (PEPRA) and the Public Employees' Retirement Law (PERL), when a retired member violates these restrictions, the retired member must be reinstated to active service. Under the PERL, the retired member must reimburse the system for any retirement allowance received during the period of violation, pay active member contributions and interest on those contributions for that period, and, in certain cases, pay for various administrative expenses. In addition, an employer must pay employer contributions and interest on those contributions for the period of violation and, in certain cases, various administrative expenses.

Requirements for a Bona Fide Separation from Employment

In order to ensure the tax-qualified status of CalPERS, it is necessary to prohibit in-service distributions to the extent required by the United States Internal Revenue Code and associated Internal Revenue Service guidance. If a CalPERS retired member is under normal retirement age at the time of retirement as defined by the California Code of Regulations (CCR) section 586.1 (the member's highest benefit formula age, e.g. age 55 for the 2% at 55 formula), the member cannot be hired for post-retirement employment without a bona fide separation from employment as defined in the CCR section 586.2. A bona fide separation in service must meet both of the following conditions:

- There is no pre-determined agreement: Prior to retirement, there was no agreement between the employer and the member to work for that employer after retirement.
- There is a 60-day separation from employment: There is a period of 60 calendar days, beginning the day after retirement, and the post-retirement employment date.

If a retired member is subject to the above-noted 180-day waiting period and the required 60-day bona fide separation period, these timeframes can be met concurrently.

Notification of Violation and Appeals

CalPERS administers laws and programs for retirement and health benefits, and occasionally, disputes may arise over an action taken by CalPERS. The CalPERS Board of Administration (Board) resolves these disputes in accordance with the Administrative Procedures Act, which includes an appeals process. Therefore, in case of an appeal, the dispute must be heard by an administrative law judge of the State Office of Administrative Hearings. If CalPERS finds that a retired member has potentially violated the working after retirement statutes, CalPERS will contact the retired member and employer through a pre-deprivation letter to notify them of the finding and provide them the option to present information that the violation did not take place. If the retired member and employer do not respond to the initial correspondence or provide additional information that establishes CalPERS must amend its violation determination, CalPERS will send a second letter reiterating the violation, as well as the penalty associated with the violation. Any member or retiree may appeal to the Board by filing a written notice within the prescribed timeframe.

Analysis

Bill Summary

Specifically, AB 2365:

- Provides administrative flexibility by allowing CalPERS to pursue financial sanctions for working after retirement violations in lieu of mandatory reinstatement of the retired member. CalPERS will retain the authority to require reinstatement.
- Makes a technical update to the working after retirement law adding cross-references to PEPRA.

Consequences for Working after Retirement Violations

CalPERS pursues approximately 50 cases a year for violations of the working after retirement laws. The number of cases may vary if a public employer has employed large numbers of retired annuitants without proper reporting, pay rates, or tracking of hours worked. For many violations, the penalty for the retired member may be around $10,000, but in cases involving these smaller violations that occurred across a span of years, the resulting penalty due to a retroactive reinstatement back to the date of the unlawful employment may exceed $100,000.

Current law requires the retired member to be reinstated and to pay back to CalPERS the benefits received during the period(s) of unlawful employment. Reinstatements for unlawful employment are generally retroactive, requiring contributions by both the retiree and the employer for that service credit. Along with reinstatement and the return of any benefits received during the violation period(s), there is the potential for additional impacts to the retired member including the loss of benefits (such as the Golden Handshake, other retirement incentives, and health benefits) and the loss of any accrued cost-of-living allowance (COLA) increases.

The alternatives authorized by this bill would not apply to violations of the bona fide separation requirement, because the bona fide separation is a federal law requirement to which California law conforms.

This bill creates the opportunity for administrative streamlining by allowing CalPERS team members to resolve working after retirement violations more efficiently and expeditiously.

Budget and Fiscal Impacts

Administrative Impacts

This bill would likely reduce CalPERS' administrative costs. CalPERS incurs administrative costs of approximately $4,700 in base costs for each administrative hearing and between $750-

$1,250 for staff travel if the hearing is in southern California and whether a CalPERS witness, often the subject matter expert, must accompany the CalPERS attorney. If there are 50 violations in a given year, this cost could be approximately $235,000 in base administrative costs and potentially another $38,000 to $62,500 in travel costs.

The above costs do not include potentially hundreds of hours of CalPERS team member workload for preparation and multiple levels of review, for each case.

Benefits Costs Impacts

For individual retirees, penalty amounts can vary widely, from around $10,000 for many violations to more than $100,000 for violations going back years. Reinstatement may include adding multiple years of service credit. This additional service credit will cost both the retired member and the employer contributions. With the combination of retroactive contributions, penalty reimbursement, loss of a retired member's COLA, and changed base pension amount, the costs and liabilities associated with reinstatement are not always practical.

Benefits and Risks

Benefits:

- Streamline CalPERS processes by allowing CalPERS team members to work with retired members and employers to identify alternative resolutions to working after retirement violations other than reinstatement, particularly when reinstatement is not workable.
- Allow reinstatement to be used when necessary.

Risks:

- No identified risks if the bill is enacted.

Attachments

Attachment 1 – Legislative History

Attachment 2 – Support and Opposition

Danny Brown, Chief
Legislative Affairs Division

Brad W. Pacheco
Deputy Executive Officer
Communication and Stakeholder Relations

Marcie Frost
Chief Executive Officer