



Pension & Health Benefits Committee

Agenda Item 5a

November 15, 2022

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

Program: Employer Account Management Division

Item Type: Action

Recommendation

Approve the revised proposed regulation to define limited duration employment with a 15-day public comment period, followed by submission of the final rulemaking package to the Office of Administrative Law (OAL) upon conclusion of the comment period, if no public comments are received.

Executive Summary

CalPERS drafted this proposed regulation to explicitly define limited duration to allow retired persons to provide services using the skills and experience they earned over their active career, while balancing the CalPERS-covered public employers' (hereinafter referred to as employers) need for flexibility in managing their budgets and workload by utilizing those resources best suited to fit the role and the public's need for transparency and oversight to ensure post-retirement appointments that extend beyond the definition are reviewed, justified, and necessary. CalPERS also drafted this proposed regulation to explicitly define limited duration for active classic members serving in upgraded positions/classifications. Once published, this proposed regulation is intended to provide clarity and uniformity for CalPERS, its members, employers, and other stakeholders.

CalPERS received comments from 20 public agencies¹, 11 employee or employer associations, three law firms, two individuals, one state department, and one anonymous commenter. In response to the comments and following further analysis, CalPERS amended the proposed regulation (Attachments 1 and 2) to clarify the following:

- Working after retirement appointments
 - How time is counted towards twenty-four consecutive months
 - Collective bargaining agreements
 - Definition of appointment
 - Definition of start date

¹ City of Sunnyvale submitted two separate comments.

- Employer governing body includes the Senate Committee on Rules or the Assembly Rules Committee for post-retirement legislative appointments, and
- Extension and exemption processes and criteria.
- Temporary upgrade pay appointments
 - Circumstances for serving in an upgraded position/classification
 - Definition of twenty-four consecutive months
 - Initiating a new limited duration period, and
 - Definition of start date.

CalPERS believes this revised proposed regulation reflects the feedback it received, balancing the comments received from all parties. CalPERS intends to educate and communicate with stakeholders throughout the proposed regulation process, and ensure employers understand the processes and procedures that will be implemented and are prepared for the upcoming changes and responsibilities.

Strategic Plan

This agenda item supports the 2022-27 CalPERS Strategic Plan, Organizational Excellence Goal through the objective of cultivating compliance and risk functions throughout the enterprise.

Background

On April 18, 2022, the Board of Administration (Board) approved the proposed regulatory action to clarify what is considered “limited duration” employment as stated in Government Code (GC) sections 7522.56, 21224, and 21229 for retired persons serving after retirement and section 571(a)(3) of Title 2 of the California Code of Regulations (CCR) for employees required by their employer or governing board or body to work in an upgraded position or classification. The Notice of Proposed Regulatory Action was published in the California Regulatory Notice Register (File Number Z-2022-0607-10) on June 17, 2022. The 45-day comment period commenced on June 17, 2022 and closed on August 1, 2022. CalPERS received public comments from 37 submitters during this period, and two additional submitters after the comment period closed.

The proposed regulation explicitly defines “limited duration” as a limit of 24 consecutive months per appointment for retired persons serving after retirement, with an employer’s option to extend the post-retirement appointment no more than twice, up to 12 consecutive months per extension, beyond the initial limit of 24 consecutive months, but not exceeding a total of 48 consecutive months upon satisfaction of specified conditions. In addition, to meet the business needs of employers, the proposed regulation provides employers an option to request an exemption to extend the retired person’s appointment beyond the initial 24 consecutive months and the two 12 consecutive month extensions upon satisfaction of specified conditions. CalPERS will either grant or deny the employer’s request for exemption based on the documents received within 60 days of receiving the request.

The proposed regulation also explicitly defines “limited duration” as a limit of 24 consecutive months for active classic members to serve in an upgraded position/classification for purposes of reporting temporary upgrade pay to CalPERS as reportable compensation.

Analysis

CalPERS reviewed all comments, and this agenda item summarizes the relevant comments for defining limited duration as described below. Please see Attachment 3 for a comprehensive summary and CalPERS' proposed response to all comments received.

Working After Retirement Appointments

How Time is Counted Towards Twenty-four Consecutive Months

The limit of 24 consecutive months in the proposed definition of "limited duration" has not changed. However, CalPERS amended the proposed regulation to clarify how time is counted towards the 24 consecutive months. Nine commenters submitted comments requesting CalPERS to remove the definition stating that it was too restrictive, change the definition to be a maximum of 1,920 hours instead of 24 consecutive months, reduce the time period to either six months or one year as 24 consecutive months is too long, or remove the term "consecutive" or change "consecutive" to "non-consecutive" as consecutive is too restrictive when some appointments have cyclical breaks in work.

Since there is currently no explicit definition of the term "limited duration," it is necessary to define limited duration to establish a uniform definition for consistency. CalPERS did not adopt any suggested changes to the definition of "limited duration." Defining by hours instead of years or removing the term "consecutive" from the time period would be more administratively burdensome for the employers to monitor, increasing the risk the employer may violate the timeframe, and would also be more administratively burdensome for CalPERS to track and administer.

One commenter interpreted that the 24 consecutive month period restarted if the retired person worked 23 consecutive months, did not work the 24th month, and then worked in the appointment again the 25th month. CalPERS added clarifying language to state the 24 consecutive month period is continuous regardless of how many months or hours in those months the retired person served in the appointment. The clarifying language is necessary to make clear that if a retired person does not work in each month of the 24 consecutive month period, the 24 consecutive month period does not restart.

Collective Bargaining Agreements

After additional analysis, CalPERS revised the proposed regulations to specify if the terms of a collective bargaining agreement explicitly provide the duration of permissible employment for the retired person, then the definition of 24 consecutive months would not apply. Instead, the duration provided in the applicable collective bargaining agreement, not to exceed sixty consecutive months, would be the set duration for the post-retirement appointment for the retired person in the employ of that CalPERS-covered public employer. In addition, the post-retirement appointment cannot be extended beyond the duration specified in the applicable collective bargaining agreement or sixty months, whichever is less. A retired person serving in a post-retirement appointment in accordance with the duration specified in the applicable collective bargaining agreement cannot serve in another post-retirement appointment with that same CalPERS-covered public employer. The initial proposed regulation did not account for collective bargaining agreements and CalPERS did not intend to impact duration provisions that were negotiated between employers and the applicable labor association.

Definition of “Appointment”

Twenty-one commenters submitted comments stating that the definition of appointment is unclear and that a retired person should be able to work in a post-retirement appointment doing work that is substantially similar to the work the retired person performed prior to retirement, as well as asking for clarification to what is meant by “substantially different.” CalPERS also received one comment stating that the definition of appointment was unnecessary.

Defining appointment for purposes of this regulation is necessary to determine time counted toward the limited duration of the post-retirement appointment. Nothing in the definition was intended to preclude a retired person from being appointed into a post-retirement position performing similar work to work performed prior to retirement for the same employer the retired person retired from. CalPERS amended the proposed regulation to clarify that the comparison of duties is for post-retirement positions with the same employer.

The phrase “substantially different” was vague and unclear; therefore, CalPERS also amended the proposed regulation to explicitly state that duties between two or more post-retirement positions with the same employer cannot overlap. This amendment is necessary to ensure employers understand what constitutes a new appointment and mitigates potential violations of extending a retired person’s appointment without going through the extension and exemption processes by appointing the retired person into a different post-retirement position with overlapping duties. Potential violations could result in a significant cost to the retired person, including paying CalPERS the total pension benefit received and employee contributions owed during the violation period and if reinstated, the retired person’s pension benefit would not include any cost-of-living adjustments accumulated prior to reinstatement and would not receive any cost-of-living adjustments for two calendar years following re-retirement. The employer would also be responsible for paying CalPERS the employer contributions owed during the violation period.

One commenter appeared to suggest that the definition of an appointment “is not consistent with past legislative intent.” The commenter noted that prior legislation increased the number of hours per fiscal year that certain retired persons were permitted to work after retirement and that existing limitations at that time were perceived as too restrictive. The legislative history the commenter noted addresses the number of hours per fiscal year certain retired persons are permitted to work after retirement, not the duration of those appointments across multiple years. The proposed regulation does not impact the limitation under Government Code sections 7522.56, 21224, and 21229 that a retired person appointed pursuant to those sections cannot work more than 960 hours per fiscal year regardless of the number of employers the retired person works for.

Definition of “Start Date”

Two commenters asked what constitutes the start date, the date of the appointment or the first day the retired person performs work. CalPERS amended the proposed regulation to clarify that “the first day the retired person serves any hours in the appointment or the effective date of this subdivision, whichever is later, shall be the appointment start date...” The amended language was necessary to ensure employers, retired persons, other stakeholders, and CalPERS are clear on when the post-retirement appointment duration starts and mitigate potential violations of a retired person working beyond the 24 consecutive month period.

Employer Governing Body

After additional analysis, CalPERS revised the proposed regulations to specify the Senate Committee on Rules or the Assembly Rules Committee, as applicable, is the governing body certifying and approving a retired person's legislative appointment extension beyond the initial 24 consecutive month period or certifying a retired person's legislative appointment exemption prior to submitting the request to CalPERS for review and approval. This language is consistent with Government Code section 7522.56, subdivision (f)(2)(B) specifying the Senate Committee on Rules or the Assembly Rules Committee is the governing body certifying and approving exceptions to the 180-day waiting period for legislative post-retirement appointments.

Extension and Exemption Process and Criteria

Twenty-one commenters submitted comments related to the post-retirement appointment extension and exemption processes and criteria. Some comments stated the processes and criteria were too restrictive, while other comments stated they were not restrictive enough. Two comments stated that the two exemptions are unnecessary and exceed and contradict the statutory language of "limited duration." Fifteen commenters requested clarification on the processes and criteria. Table 1 provides some examples of the comments.

Table 1: Examples of Comments Related to Post-Retirement Appointment Extension and Exemption Processes and Criteria

Too restrictive	Not restrictive enough	Needs clarification
<ul style="list-style-type: none">• Employers need flexibility on timing of extension approvals or exemption requests• Administrative burden of not being able to place on a consent calendar• Not having formal "duty statements" for post-retirement appointments• Administrative burden and inability to conduct a recruitment for non-full-time positions prior to an exemption request	<ul style="list-style-type: none">• Extension is "an auto-approval"• Suggestion to reduce the number of extensions• Suggestion to restrict CalPERS to grant one exemption per retired person• Suggestion to restrict continuous extension to 24 months if hours do not exceed 120 hours per fiscal year	<ul style="list-style-type: none">• Criterion of "the reason the work required under the appointment cannot be performed satisfactorily by non-retired employees"• CalPERS exemption approval process, including how soon a determination would be made and how CalPERS will evaluate the criteria

To balance the comments from all submitters, CalPERS revised the processes and criteria for the extension and exemption requests. The proposed amendments to the criteria increase transparency and clarify what the employer's governing body will be certifying via resolution, and the Department of Human Resources for state post-retirement appointments via memorandum. The employer is in the best position to determine whether the appointment extensions are necessary and/or exigent circumstances exist necessitating the retired person's appointment to continue beyond the 48 consecutive month period. The employer's governing body or the Department of Human Resources' certifications via resolution or memorandum increase transparency by certifying that they reviewed the justifications and determined whether those extensions and exemptions are necessary. In addition, the proposed amendments reduce the administrative burden and provide the employers flexibility for their governing bodies to approve extension requests, while providing the administrative rigor necessary for exemption requests. In regard to the comments stating that the exemption options are unnecessary and

exceed and contradict the statutory language of “limited duration,” the minimal hours under the continuous exemption option are limiting in nature and the timeframe for requesting an exemption limits the employer from extending the post-retirement appointment indefinitely. Table 2 provides a summary comparison of the proposed amendments.

Table 2: Summary Comparison of Original and Amended Extension and Exemption Processes and Criteria.

	Extension, original	Extension, amended	Exemption, original	Exemption, amended
Approver	Employer	Employer	CalPERS	CalPERS
Timing of the extension or exemption	By prior end date	Any time ²	By prior end date	Within one year ³
Anticipated end date ⁴		Included		Included
Position titles and duties	Duty statement	List of duties	Duty statement	List of duties
Necessity of extension		Included		Included
Reason for not using non-retiree	Included	Included	Included	Included
Reason for not using another retiree				Included
Recruitment			Unsuccessful	Inability to recruit
Knowledge Transfer Plan		Plan in place		Unsuccessful
Public meeting	Included	Included	Included	Included
Not on consent calendar	Included		Included	Included

² Employers can approve the extension any time during the respective extension period. Regardless of whether or when the employer approves the extension, the first extension period starts the day after the end of the 24 consecutive month period and the second extension period starts the day after the end of the first extension period (36 consecutive months from the appointment start date). Retired persons may not continue to serve in the post-retirement appointment until the extension request is approved.

³ Employers can submit a written request for an exemption after the 48 consecutive month period, but the written request for must be received by CalPERS for review no later than 12 consecutive months following the end of the second extension period. Any written exemption request for a subsequent extension of 12 consecutive months must be received by CalPERS for review no later than 12 consecutive months following the end of the most recent extension limit of 12 consecutive months. CalPERS will grant or deny exemption requests within 60 days of receiving the request and all required information from the employer. Retired persons may not continue to serve in the post-retirement appointment until the exemption request is approved.

⁴ For first and second extensions, the end date cannot exceed the respective extension period. For annual exemptions, the end date cannot exceed the exemption period. For perpetual exemptions, the end date must be specified.

Temporary Upgrade Pay Appointments

Circumstances for Serving in an Upgraded Position/Classification

Two commenters identified situations that would result in an individual's temporary upgrade pay to not be reportable compensation. One example is when a position is vacant for a period of time before an employee is appointed to an upgraded position/classification due to various circumstances, including but not limited to recruitment challenges. In this example, under the proposed regulation, the employee's temporary upgrade pay would not be reportable compensation because the employee's appointment to the upgraded position/classification was not "immediately subsequent to" a permanent appointment held by another individual.

Another example is when an employer needs to rotate out of class appointments between two or more employees for various reasons, including but not limited to recruitment challenges. In this example, the first employee (Employee A) appointed to an upgraded position/classification immediately subsequent to a permanent appointment held by another individual would qualify to have his or her temporary upgrade pay reported to CalPERS as reportable compensation. If a second employee (Employee B) is appointed to the same upgraded position/classification immediately subsequent to Employee A's appointment, Employee B's temporary upgrade pay would not be reportable compensation because Employee B's appointment was not immediately subsequent to a permanent appointment held by another individual.

The initial proposed regulation did not account for either of these situations and CalPERS did not intend to exclude these situations. As a result, CalPERS amended the proposed regulation to state that the first day the individual serves any hours in the upgraded position/classification initiates time counted towards the 24 consecutive month period, removing the requirement that the appointment must be subsequent to a permanent appointment. In addition, CalPERS amended the proposed regulation to remove the term "immediately" to account for potential periods of vacancy before an individual is temporarily appointed to an upgraded position/classification. These amendments are necessary to meet the employer's business needs as there are circumstances where employers need to rotate individuals serving temporarily in upgraded positions/classifications.

Definition of Twenty-four Consecutive Months

After additional analysis, CalPERS added clarifying language to state the 24 consecutive month period is continuous regardless of how many months or hours in those months the individual served in the upgraded position/classification during that 24 consecutive month period. The clarifying language is necessary to make clear that if the individual does not work in each month of the 24 consecutive month period, the 24 consecutive month period does not restart, and to account for situations where an individual may rotate back into the upgraded position/classification within the 24 consecutive month period and before the employer permanently appoints someone to the position.

Initiating a New Limited Duration Period

After additional analysis, CalPERS amended the proposed regulation to clarify that an individual may serve in the same upgraded position/classification more than once and initiate a new 24 consecutive month period if the appointment to the upgraded position/classification is:

- The individual's first appointment subsequent to a permanent appointment held by a different individual for the same upgraded position/classification, or

- The individual's first appointment subsequent to a different individual that retained the permanent appointment for the same upgraded position/classification returning to the permanent appointment from an approved leave.

The clarifying language is necessary to specify when a new 24 consecutive month period would begin.

Definition of "Start Date"

One commenter asked what constitutes the start date, the date of the appointment or the first day the individual performs work in the upgraded position/classification. As a result, CalPERS amended the proposed regulation to clarify that "the first day the individual serves any hours in the upgraded position/classification or the effective date of this subdivision, whichever is later, initiates time counted toward the twenty-four consecutive month limit." Adding this clarifying language was necessary to clarify when the duration of the upgraded position/classification appointment started.

Other Comments

Other comments that were not relevant to defining limited duration or were not actionable are included and summarized in Attachment 3.

Budget and Fiscal Impacts

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

Benefits and Risks

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

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

Attachments

Attachment 1 – Text of Revised Proposed Regulation – Redlined

Attachment 2 – Text of Revised Proposed Regulation – Clean

Attachment 3 – Public Comments Received During the 45-day Comment Period

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