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Reference No.:
Circular Letter No.: 200-002-14
Distribution: IV, V, VI, X, XII, XVI
Special:

Circular Letter

January 14, 2014

TO: **ALL CALPERS EMPLOYERS**

SUBJECT: **POST SERVICE RETIREMENT EMPLOYMENT REQUIREMENTS:
PUBLIC EMPLOYEES' PENSION REFORM ACT OF 2013 (PEPRA,
ASSEMBLY BILL 340), SENATE BILL 1021 & SENATE BILL 13**

The purpose of this Circular Letter is to inform you of the current requirements for post-retirement employment of CalPERS retirees on service retirement only.

These changes are the result of amendments and additions to the Government Code by Senate Bill (SB) 1021, Assembly Bill (AB) 340, the Public Employees' Pension Reform Act of 2013 (PEPRA), and Senate Bill (SB) 13.

This letter provides an overview of the laws governing post-retirement employment and the consequences of unlawful employment to retirees and employers. Attached to this letter is a quick reference guide, the **EMPLOYER CHECKLIST FOR HIRING CalPERS RETIREES**, to aid in the hiring process.

To provide some background, PEPRA added sections 7522.56 and 7522.57 to the Government Code (GC) effective January 1, 2013 which set forth post-retirement employment requirements applicable to all retirees who are employed by CalPERS employers on or after January 1, 2013. To the extent that provisions under the Public Employees' Retirement Law (PERL) dealing with employment after retirement (GC sections 21220 through 21230) are not in conflict with the aforementioned PEPRA post-retirement employment provisions, the PERL provisions also apply.

Public Agency and School employers must enroll retirees in the myCalPERS system; State employers must enroll retirees in Personnel Information Management System (PIMS). CalPERS employers have enrolled more than 13,200 retirees since the launch of the myCalPERS system. While enrolling retirees allows CalPERS to track compliance with applicable statutes, it is the responsibility of both the retiree and the employer to ensure compliance with all applicable statutes.

SUMMARY OF CURRENT REQUIREMENTS

Retirees can be hired into retired annuitant¹ positions to perform work of limited duration. Limited duration means the appointment is not for an indefinite period of time and that it is not an appointment to a part-time regular staff position. The work a retiree performs should supplement the work of regular staff (e.g., it is extra help work such as elimination of backlog, special project work, or to help with work in excess of that which regular staff can do) or should be authorized “during an emergency to prevent stoppage of public business” such as in the case of floods, earthquakes, etc.. Retired annuitants can perform this limited duration work for up to a maximum of 960 hours per fiscal year, can be paid up to the maximum hourly rate paid to employees doing similar work without any other compensation or benefits, and must have the skill set needed to perform the retired annuitant work. In sum, retired annuitants should neither be considered a permanent solution to business needs nor should retired annuitants be allowed to work indefinitely.

As previously, before beginning post-retirement work all new retirees must meet the bona fide separation in service requirement of GC section 21220.5 if the retiree is under normal retirement age. Additionally, all new retirees are now subject to a 180 day wait period before beginning post-retirement work. These two requirements, the bona fide break and the 180 day wait period, can be met concurrently. There are four exceptions (see page 4 of this Circular Letter) to the 180 day wait period, but a retiree who receives a Golden Handshake or any other retirement-related incentive is disqualified from any exception and must meet the 180 day wait period. A retiree who receives unemployment insurance payments for retired annuitant work with any public employer within the previous 12 months is barred from retired annuitant work with any CalPERS employer for 12 months. The following sections give more information about the various types of retired annuitant appointments and the specific requirements for each.

GENERAL REQUIREMENTS

Generally, if the position in which a retiree will work is one that is subject to CalPERS membership where an active employee would earn CalPERS service credit, i.e. there is an employer-employee relationship, then a retiree hired to work in that position is subject to the retirement law requirements.

The common law employment test is used by the courts and CalPERS Board of Administration to determine “employee” or “independent contractor” status under the PERL. Under this test, a position title or characterization of the services performed is not the only determining factor of employee / independent contractor status. Just because a retiree is retained for a position that is called an independent contractor, consultant or third-party employer position, does not necessarily mean employment in that position is exempt from the retired annuitant requirements. Therefore, a retiree retained to work as an “independent contractor”, “consultant”, or through a “third party employer” in any position that would meet the common law employment test may be

¹ CalPERS retirees employed by CalPERS employers are known as “retired annuitants” or “rehired annuitants”.

subject to mandatory reinstatement from retirement if the employment does not otherwise meet the retirement law requirements.

- 1) 960-Hour per Fiscal Year Limit: A retired annuitant may be employed up to a maximum of 960 hours per fiscal year for all CalPERS employers, without exception. There is no provision in the law to allow a retired annuitant to “volunteer” hours while employed. Retired annuitants who work more than the 960 hour maximum per fiscal year under any circumstances are out of compliance with statute and subject to mandatory reinstatement.

CSU retired academics, hired under Government Code section 21227, are limited to 960 hours in a fiscal year or 50 percent of the hours the member was employed during the last fiscal year of service prior to retirement, whichever is less.

- 2) Retiree Compensation: The compensation paid to retirees cannot be less than the minimum nor exceed the maximum monthly base salary paid to other employees performing comparable duties, divided by 173.333 hours per month, to equal an hourly rate. Retirees cannot receive any benefit, incentive, compensation in lieu of benefits, or other form of compensation in addition to the hourly pay rate.
- 3) Limited Duration Appointment: Retirees cannot be hired into vacant permanent or regular staff positions except as an interim appointment under GC section 21221(h) appointment (as discussed below), regardless of whether the positions are part-time or full-time. Retirees should be hired into retired annuitant-designated positions only. A retired annuitant appointment should have a beginning date and an end date. A retiree can be hired to perform work of limited duration, meaning extra help work such as the elimination of a backlog, to perform special project work, or to perform work in excess of that which regular staff can do. Limited duration work does not mean an indefinite appointment to a permanent part-time position.
- 4) Retiree Skills²: There should be some showing in the retiree’s work history that he or she has previous experience and the skill set needed to perform the desired work. Some examples include: the skill set and previous experience as a police officer to perform extra help law enforcement work, prior janitorial experience to perform similar services, or prior engineer experience, and so forth.

² Though specific retiree skills may not be a prerequisite during an emergency to prevent stoppage of public business, there must be a true emergency in order to fall within this category. Otherwise, the retiree skills are required.

**INTERIM APPOINTMENT – APPLICABLE PORTIONS OF GOVERNMENT CODE
section 21221(h)**

The governing bodies of contracting agencies are authorized by the applicable provisions of GC section 21221(h) to appoint a retiree to fill a vacant position on an interim basis during the recruitment to permanently fill the vacant position. Contracting agencies for this purpose are public agencies and county offices of education.

- 1) Interim Appointment by Governing Body: These appointments must be made by the governing body of the employer and are generally used for single or unique positions such as interim city manager, police chief, director, or other managerial and executive positions.
- 2) Open Recruitment for a Permanent Replacement Required: An open recruitment to permanently fill the vacant position is required in order to appoint a retiree. A retiree hired as an interim appointment without an open recruitment could be subject to mandatory reinstatement. A retiree hired as a permanent appointment is subject to mandatory reinstatement.
- 3) Limited Duration Appointment: A retiree can be appointed only once to the position, thus the employment terms must specify an end date and cannot be amended to extend the appointment term. A retiree appointed more than once is subject to mandatory reinstatement.

180 DAY WAIT PERIOD

GC section 7522.56 provides that a retiree is eligible for post-retirement employment 180 days following his or her retirement date. This requirement applies to retiree employment that begins after January 1, 2013. There are four exceptions to the 180 day wait period including, (a) firefighter or public safety officer (which status is determined in accordance with the definition set forth in CCR³ 579.25) hired to perform a function or functions regularly performed by a public safety officer or firefighter, (b) Public agency or school employer provides a resolution certifying the nature of the employment and that the appointment is necessary to fill a critically needed position before 180 days has passed; (c) State agency employer certifies the nature of the employment and that the appointment is necessary to fill a critically needed state employment position before 180 days has passed and submits the information to California Department of Human Resources (CalHR) to obtain approval; CalHR then provides the approval and documentation to CalPERS , and (d) the retiree participates in a qualifying California State Universities (CSU) Faculty Early Retirement Program (FERP). Additional information about these exceptions can be found in the Employer Checklist for Hiring CalPERS Retirees. However, if a retiree receives a Golden Handshake or any other retirement-related incentive, the 180 day wait period applies without exception.

Please note, if a retiree is employed without meeting the 180 day wait period and without an allowable exception, he or she is subject to immediate reinstatement from

³ California Code of Regulations

retirement. There is no provision in the retirement law to retroactively remedy a violation of the 180 day wait period.

BONA FIDE SEPARATION IN SERVICE

All service retirees must meet the bona fide separation in service requirement of GC section 21220.5 if the retiree is under normal retirement age at retirement, even if an exception to the 180 day wait period applies. This is a federal tax law requirement with which CalPERS must comply in order to maintain its tax-deferred status.

UNEMPLOYMENT INSURANCE PAYMENTS

GC section 7522.56 provides that a retiree cannot be appointed as a retired annuitant if he or she received unemployment insurance payments for retired annuitant work for any public employer within the 12 months prior to the appointment date. The retiree is required to certify to the employer, in writing, that he or she is in compliance with this requirement. If a retired annuitant is subsequently discovered to have violated this requirement, his or her employment must be terminated on the last day of the current pay period and he or she will not be eligible for reappointment by any CalPERS employer for 12 months following that last day of employment.

INDEPENDENT CONTRACTORS / CONSULTANTS / CONTRACT EMPLOYEES

Generally, retirees engaged as true independent contractors, consultants or retained through third party employers, whose employment does not meet the California common law employment test, are not subject to the retirement law requirements. If, however, the employment constitutes a California common law employment (employer-employee) relationship, the employment is subject to the retirement law requirements regardless of its characterization. As noted above, a retiree retained to work as an "independent contractor," consultant," or through a "third-party employer" in any position that would meet the common law employment test may be subject to mandatory reinstatement from retirement if the employment does not otherwise meet the retirement law requirements. It is therefore critical that employers consider the common law employment test factors when considering the use of a retired annuitant.

MANDATORY REINSTATEMENT FOR UNLAWFUL EMPLOYMENT

An unlawfully employed retiree is subject to mandatory reinstatement from retirement as follows:

- The retiree is reinstated from retirement by CalPERS. Upon appointment by the employer, he or she becomes the active employee and contributing CalPERS member of that employer, in the position in which unlawfully employed, and as of the date the unlawful employment began.
- The now active employee must pay retroactive member contributions plus interest for the period of unlawful employment and, likewise, the employer will

pay employer contributions plus interest on the employee's behalf for the period of unlawful employment via retroactive payroll reporting.

- The now active employee must reimburse CalPERS the entire amount of retirement allowance he or she received during the period of unlawful employment.
- The member and employer, to the extent each is determined to be at fault, may be required to reimburse CalPERS for administrative expenses incurred in responding to the investigation and resolution of the unlawful employment.

If you have any questions, please call our CalPERS Customer Contact Center at **888 CalPERS** (or **888-225-7377**).

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Attachment: [Employer Checklist](#)