



California Public Employees' Retirement System
P.O. Box 720724
Sacramento, CA 94229-0724
(888) CalPERS (or **888-225-7377**)
TTY: (877) 249-7442
www.calpers.ca.gov

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Circular Letter

November 21, 2014

TO: CALPERS CONTRACTING AGENCIES and CALIFORNIA STATE UNIVERSITIES

SUBJECT: Affordable Care Act and PEMHCA Compliance: Enrolling Variable-Hour Employees into PEMHCA; Retired Annuitant Information; Draft IRS Reporting Forms

This Circular Letter is to provide information to health benefit officers and other personnel staff on requirements contained in the Affordable Care Act (ACA) and the Public Employer Medical and Hospital Care Act (PEMHCA) program.¹

Enrolling Variable-Hour Employees

As discussed in Circular Letter 600-019-14, in 2013 CalPERS amended California Government Code (GC) section 22772, which defines an employee under PEMHCA, to include in the definition the following individuals under (a)(6)(A) and (B):

- (A) A "full-time employee" of the state or a contracting agency within the meaning of Section 4980H of Title 26 of the United States Code and applicable United States Treasury Department regulations and interpretive guidance.
- (B) Designated in writing as an employee for purposes of this section by the state or the contracting agency, as applicable.

By expanding the definition of an employee, the statute permits the enrollment of previously ineligible variable-hour employees into PEMHCA health benefits if they meet the ACA definition of a full-time employee.² Extending eligibility to this narrow group of

¹ This Circular Letter is solely informational, current as of the date shown above, and general in nature. This Circular Letter should not be acted upon without specific legal advice. CalPERS encourages you to thoroughly review the Circular Letter, and the federal regulations and corresponding guidance discussed within, with your agency's legal counsel to understand how it might specifically apply.

² The term *full-time employee* means, with respect to a calendar month, an employee who is employed an average of at least 30 hours of service per week with an employer. For this purpose, 130 hours of service in a calendar month is treated as the monthly equivalent of at least 30 hours of service per week, provided the employer applies this equivalency rule on a reasonable and consistent basis.

individuals allows applicable large employers³ to avoid potential assessable payments for failure to offer health coverage to their full-time employees and dependent children.⁴

The statute permits enrollment of these ACA-eligible employees into PEMHCA health benefits with a written designation by the employer. The written designation is separate from a contracting agency's current resolution for PEMHCA health benefits. Once an employer designates these ACA-eligible employees as PEMHCA eligible, all other PEMHCA rules apply.

CalPERS has developed a model Employer Designation template (see attachment) for employers to use if they choose. Employers may also create their own written designation template, provided it contains all of the information collected in the model template and includes information about disenrolling a variable-hour employee and any dependents from the PEMHCA program if he or she is no longer eligible for benefits.

Once an employer determines these variable-hour employees as eligible for PEMHCA under GC 22772 (a)(6)(A) and (B), it is considered a permitting event outside of open enrollment; therefore, in accordance with California Code of Regulations section 599.502(b)(3), the employee has 60 days from the notice of eligibility to enroll or register not to enroll in health benefits. Health benefit officers should refer to the guide "my|CalPERS Course 101, Health Enrollment Basics for Public Agencies and Schools," Unit 5,⁵ for enrollment information on Non-PERS health transactions. In addition, prior to enrolling these variable-hour employees, contracting agencies should check their current CalPERS resolutions to determine if these employees are covered under an existing resolution or if a new resolution is necessary.

As a reminder, contracting agencies choosing not to use the written designation option for variable-hour employees newly eligible under GC section 22772(a)(6)(A) and (B) may purchase coverage for this group and their dependents outside of CalPERS to avoid assessable payments. This option is not available for the State of California or California State Universities (CSU).

Retired Annuitants

Under the ACA, with limited exception, the large employer shared responsibility rules regarding health coverage⁶ apply to all full-time employees, including employees hired as retired annuitants who are expected to work full-time at their date of hire. In addition,

³ The term *applicable large employer* means, with respect to a calendar year, an employer that employed an average of at least 50 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year.

⁴ For more information on the Employer Shared Responsibility provisions under the ACA please visit: <http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>

⁵ Please visit <http://www.calpers.ca.gov/eip-docs/employer/mycalpers/training/training-ops/course-101.pdf> for more information.

⁶ Please see Circular Letter 600-019-14 for more information.

specific sections of the GC contain provisions regarding the employment of retired annuitants. Public agencies, schools, and CSUs employing retired annuitants should carefully review both the ACA and the GC to ensure they are not vulnerable to potential federal penalties or state violations.

Previous Circular Letters⁷ provided summary information about federal penalty assessment for not meeting the requirements contained in the ACA and its implementing regulations. State rules governing the employment of retired annuitants are found in GC sections 7522.56, 7522.57, and to the extent that provisions under the Public Employees' Retirement Law (PERL) specific to employment after retirement (GC sections 21220 through 21230) are not in conflict with GC sections 7522.56 and 7522.57, the PERL provisions also apply.

Government Code sections 21221(h), 21224(a), and 21229(a) prohibit a retired annuitant from working in excess of 960 hours, for all public employers combined, during a fiscal year. These sections also preclude a retired annuitant from receiving benefits, incentives, compensation in lieu of benefits, or other forms of compensation in addition to his or her hourly rate. Health benefits are considered a benefit for purposes of retired annuitant employment; therefore, public agencies, schools, and state agencies, including CSU, are prohibited from offering health benefits to any retired annuitant.

The consequences for violating the post-retirement employment requirements are found in GC sections 21200, 21202, and 21220(b) and include the retiree's reinstatement from retirement, and reimbursement of the retirement allowance received. Upon retroactive enrollment as an active employee, the retiree would owe payment of the employee contributions that would otherwise have been paid for the periods of unlawful employment. Similarly, the public employer would owe employer contributions that would otherwise have been paid during the time the member was unlawfully employed, plus interest, and any administrative expenses incurred.

To avoid potential penalties under both the ACA and state law, CalPERS staff recommends that public agencies, schools, and CSUs develop policies prohibiting retired annuitants from working full-time, as defined by the ACA. Such policies would likely ensure that the employer would not be in jeopardy of federal penalties for not offering coverage to a full-time employee, and consequently would not inadvertently offer health benefits to the retired annuitant in violation of provisions in the GC.

Draft IRS Reporting Forms and Instructions

As a reminder, each contracting agency that meets the large employer reporting requirements under Internal Revenue Code section 6056 must submit information to the Internal Revenue Service (IRS) and provide each "responsible individual" a form regarding his or her family's health coverage and other personal information that was

⁷ Please see Circular Letters 600-019-14 and 600-020-14 for more information.

submitted to the IRS. Please see Circular Letter 600-020-14 for information regarding reporting requirements. CalPERS or the subscriber's health plan will fulfill the separate minimum essential coverage reporting requirements (Forms 1094-B and 1095-B) under Internal Revenue Code section 6055.

The IRS recently issued draft reporting forms and instructions for large employers as they prepare to report on the coverage offered to their full-time employees under section 6056. Employers may access the IRS draft forms and instructions via the links below, current as of the date of this letter.

Draft Form 1094-C: Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns

<http://www.irs.gov/pub/irs-dft/f1094c--dft.pdf>

Draft Form 1095-C: Employer-Provided Health Insurance Offer and Coverage

<http://www.irs.gov/pub/irs-dft/f1095c--dft.pdf>

Draft 2014 Instructions for Forms 1094-C and 1095-C

<http://www.irs.gov/pub/irs-dft/i109495c--dft.pdf>

CalPERS staff continues to assess laws and regulations which may affect contracting agencies and other employers. While we make every effort to assist employers via circular letters, these letters are informational only and general in nature. Employers should not act upon this or any circular letter without obtaining legal advice specific to the individual facts and circumstances of the employer. Please visit us at CalPERS On-Line to access frequently asked questions and other regulations related to the ACA. Please contact the CalPERS Customer Contact Center at **888 CalPERS** (or 888-225-7377) if you have further questions.

DOUG P. McKEEVER, Chief
Health Policy Research Division

Attachment: Employer Designation Model Template