

November 30, 2022

To: Renne Public Policy Group Clients
From: Dane Hutchings, Managing Director
Renne Public Policy Group

Re: Assessment: CalPERS Proposed Regulation for the Definition of Limited Duration Employment + 15 Day Comment Period Commencing December 1, 2022

Good evening:

We have been informed that CalPERS will be opening up its **final** 15-day comment period with respect to defining “limited duration” employment for retired annuitants and temporary upgraded positions. **This comment period will likely commence tomorrow at 9:30am, December 1, 2022—likely closing at 11:59pm on Thursday December 15.**

Below we have provided the following:

- General concerns with the Initial Regulations
 - An assessment if said concern was addressed
- Outstanding concerns with revised regulations
- Potential Flexibility with Collective Bargaining Agreements

A link to the revised regulations can be found [HERE](#)

This analysis should not be construed as legal advice. Please consult your city attorney and/or outside legal counsel for guidance.

General Concern with Initial Regulations

1. **The proposed regulation’s time restrictions for retired annuitant appointments – 24 consecutive months with two conditional 12-month extensions – are too short given ongoing staffing needs.**
Concern Addressed: CalPERS provided employers the flexibility to request an exemption to the 48-month limitation as long as certain conditions are met, which could allow cities to rehire retired persons either for an additional 12 consecutive months **or** to perform 120 hours of work per fiscal year on an ongoing basis.
2. **The proposed regulation prohibited cities from relying on staff retired from city service to perform work that is similar to their work prior to retirement.** This would be an issue because, given retirees’ special skills and knowledge, this is the very work that a city would most need these employees to perform.
Concern Addressed: CalPERS **removed the subdivision that appeared to create this issue.** Now, nothing precludes a retired person from being appointed into a post-retirement position to perform work similar to work performed prior to retirement for the same employer. However, duties between two or more post-retirement positions with the same employer cannot overlap.

3. **The proposed regulation required cities wishing to extend retired annuitant appointments beyond 48 consecutive months to demonstrate that the city has undertaken unsuccessful recruitment efforts for the position at issue within the last year.** This would be an issue because cities rely on retired annuitants to perform duties for which it makes little sense to recruit new employees to perform, like seasonal positions with fluctuating staffing needs.
Concern Addressed: CalPERS removed the requirement that employers conduct a recruitment by including an option whereby an employer can alternatively explain why a recruitment would not be justified or reasonable under the circumstances.
4. **The proposed regulation prohibited cities from extending retired annuitant appointments beyond 24 consecutive months if they failed to certify the appointment by the time the 24-month limitation expired, effectively requiring cities to predict future reliance on retired annuitants. Moreover, the “Running Clock” provisions remain problematic.**
Concern Partially Addressed: CalPERS removed the requirement that employers request extensions before the 24-month limitation expires. The revised proposed regulation allows employers to extend appointments at any time before the end of the second extension period (48 months after the initial appointment).
Running Clock Provisions: However, for purposes of calculating the length of extensions, the day after the end date of the 24-month limitation or 12-month extension must be considered the start date of the new extension. **For example, if an employee’s appointment ends April 1, 2024, and the employer authorizes a 12-month extension three months later, that extension is only effective for nine more months — until January 1, 2025.** Note, however, that for 12-month extensions beyond the 48-month limitation, CalPERS must receive the extension request **before** the expiration of the previous extension (**Note:** See “new addition” section of this memo for potential alternatives”).

General Concerns That Still Remain in Revised Regulations:

- 1) **New Administrative Costs:** The proposed regulation still imposes some administrative costs. Even with the new exceptions to the timing requirements, the proposed regulation would still limit reliance on retired annuitants in at least some instances.
- 2) **New Bureaucracy Could Make it Challenging for Employers to Comply:** These regulations creates new bureaucratic layers to the retired annuitant appointment process, especially for appointments beyond 48 months (e.g., public agency resolutions to be submitted to CalPERS for appointment extensions beyond 48 months cannot be placed on the consent calendar, and CalPERS has 60 days to consider written requests for extensions beyond 48 months, during which the retired annuitant is not permitted to work beyond an existing extension). This may cause confusion and make an inherently complex compliance structure for employers that much more challenging.
- 3) **Clarity Still Needed for Overlapping Duties:** The standard for discerning duties between two or more post-retirement positions with the same employer not overlapping is confusing at best. CalPERS opines on this issue in the proposed regulations as follows:

“For purposes of this subdivision, an appointment is defined as either a post-retirement position *under which no duties overlap* with the duties of another post-retirement position subject to this regulation with the same CalPERS-covered public employer that

the retired person performed after retirement, or a post-retirement position for a different CalPERS-covered public employer from any previous CalPERS-covered public employer the retired person performed duties for after retirement while in a position subject to this regulation.”

In our assessment it is not clear what it means for duties to “overlap.” For example, can an engineer be appointed to advise on a sea wall, and later on sewage drainage systems? Can an attorney be appointed to provide advice on an employment litigation matter, and later on a ballot measure? This may even become more convoluted for other types of employees (e.g., those who work on public safety risk management and information technology systems). In [attachment 3a](#), CalPERS tries to clarify: Stating that “duties shall not overlap between two or more post-retirement appointments for the same employer does not preclude the retired person from utilizing their specialized skills in more than one post-retirement appointment for the same employer, only that the duties between the post-retirement positions cannot overlap.” However, we believe that more clarity is needed on this issue.

New Addition | Running “Clock” Vs. Collective Bargaining Agreements—But with Strings Attached:

CalPERS revised the proposed regulations to specify if the terms of a collective bargaining agreement (CBA) 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. However, 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.

Moreover, appointments pursuant to a CBA in effect prior to the effective date of the regulation remain undisturbed. Here is a summary of the process under a CBA:

- (1) The first day the retired person serves any hours in the appointment shall be the appointment start date and initiates time counted towards the duration limit defined in the applicable collective bargaining agreement or sixty consecutive months, whichever is less.
- (2) A CalPERS-covered public employer must notify CalPERS of an appointment end date not to exceed the duration defined in the applicable collective bargaining agreement or sixty consecutive months from the appointment start date, whichever is less, and provide CalPERS a copy of the applicable collective bargaining agreement specifying the duration of that post-retirement appointment.
- (3) Notwithstanding paragraphs (1) and (2) of this subdivision, for post-retirement appointments in effect prior to the effective date of this subdivision, the appointment start and end dates shall be the start and end dates established in accordance with the collective bargaining agreement prior to the effective date of this subdivision.

(4) A retired person serving in a post-retirement appointment in accordance with this subdivision cannot serve in another post-retirement appointment with the same CalPERS-covered public employer subject to this regulation.

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

How to Submit Comments:

The Regulation Coordinator must receive all written comments by the close of the comment period. Comments may be submitted by e-mail to: Regulation_Coordinator@calpers.ca.gov

or mailed to the following address:

Andrew White, Regulation Coordinator
California Public Employees' Retirement System
P.O. Box 942720
Sacramento, CA 94229-2720
Telephone: (916) 795-3038

The backup contact person for the proposed action is:

Andrea Peters, Regulation Coordinator
California Public Employees' Retirement System
P.O. Box 942720
Sacramento, CA 94229-2720
Telephone: (916) 795-3038
Regulations_Coordinator@calpers.ca.gov

If you have any questions or need further assistance, please contact the RPPG team.

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