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October 2012



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*As published in Bender's California Labor & Employment Bulletin
Vol. 2012, No. 10, October 2012*

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By Genevieve Ng & Sabrina L. Thomas

Introduction

It should come as no surprise that the use of retired annuitants in state government has come under greater scrutiny in recent times. Just recently, the Orange County Register (the “Register”) reported that a retiree for the City of Stockton¹ was collecting retirement benefits for 15 months while acting as - and being compensated for - the position of interim fire chief. In a letter dated, July 18, 2012, the California Public Employees Retirement System (“CalPERS”) informed the interim fire chief, David Rudat (“Rudat”) that he would have to resign from his position, or reinstate to regular employment and reimburse CalPERS for the pension benefits received during his tenure as interim fire chief.² CalPERS also informed the interim fire chief that his effort to cloak himself as an independent contractor was contradicted by details of his job.³

According to the Register, the retiree’s response to CalPERS’ ultimatum was to resign rather than reimburse CalPERS for approximately \$216,000 in pension benefits. In a statement to the Register, Rudat asserted that he did not intend to violate any retirement law, which he described as being mostly “grey.”⁴ It is in these “grey” areas of the law that the legislature is attempting to close loopholes as employers look for ways to retain skilled workers while cutting benefits costs.

On January 1, 2012, Assembly Bill 1028 became effective and amended certain provisions of the California Public Employees’ Retirement Law (“PERL”) to clarify limits on post-retirement employment with CalPERS covered entities.⁵

Even state employee unions have pressured Governor Jerry Brown for a policy mandating that state agencies purge their payrolls of retired annuitants. The unions’ argument is simple: it is unfair to furlough rank and file workers while retirees occupy state jobs and draw both a pension and a paycheck. The largest state employee union, State Employees International Union (“SEIU”) took steps to ensure its members were protected when it entered into a side agreement with the Brown Administration that would eliminate retired annuitant positions. Specifically, the agreement provides that “the State shall eliminate all non-mission critical⁶ retired annuitants, who are performing SEIU bargaining unit work, by September 1, 2012. No retired annuitant shall be hired while the personal leave program (“PLP”) is in effect unless there is a mission critical need.”⁷

What Is a Retired Annuitant?

By definition, a retired annuitant is a retiree who receives CalPERS retirement benefits in addition to income from temporary,⁸ limited post-retirement employment with a CalPERS covered entity where such employment is necessary due to the individual’s specialized skills or an emergency to prevent stoppage of public business.⁹ While the limitations for a retired annuitant are not extensive, they are definitive with serious consequences for specific infractions. The existing law authorizes a retired member of CalPERS to work for a state agency or any other contracting

¹ The authors of this article represent the City of Stockton in labor and employment matters.

² Tony Saavedra, OC Watchdog, “To Remain Retired . . . Cease Employment Immediately,” Orange County Register, (Aug. 1, 2012), available at <http://taxdollars.ocregister.com/2012/08/01/ex-orange-city-manager-accused-of-violating-pension-law/160085/>.

³ Saavedra, *supra* note 2.

⁴ Saavedra, *supra* note 2.

⁵ Available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1001-1050/ab_1028_bill_20111003_chaptered.pdf.

⁶ “Mission critical” is defined as a disruption in normal business which may result in the failure of business operations.

⁷ See Cal. Dep’t of Human Resources, Memo to Personnel Management Liaisons (“PML”) 2012-034, *Student Assistants and Retired Annuitants* (Aug. 24, 2012), at 2-3.

⁸ The word “temporary” may be a somewhat nebulous term even with the revisions to Government Code sections 21224 and 21229, as these sections do not clarify or define the amount of time a retired person may work for a CalPERS covered entity post-retirement.

⁹ *CalPERS, A Guide to CalPERS Reinstatement from Retirement* (“Reinstatement Guide”), at 3, available at <http://www.calpers.ca.gov/eip-docs/about/pubs/member/reinstatement-retirement.pdf>.

agency for up to 960 hours in a fiscal year without reinstatement from retirement,¹⁰ or loss or interruption of retirement benefits.¹¹

At first glance, these criteria appear to be straight forward with little room for misinterpretation or confusion, yet anything dealing with public retirement is rarely that simple. One need but look at how some retired annuitants refer to themselves as “independent contractors”¹² to avoid the limitations posed when working as a retired annuitant. Take Rudat, the retiree working for the City of Stockton, a CalPERS employer, for 15 months as the interim fire chief earning \$119 an hour while, at the same time, collecting pension benefits. Reporting on this situation, the Register cited CalPERS’ letter to Rudat, which stated that the retiree’s effort to represent himself as an independent contractor for the City of Stockton was contradicted by the details of his job.¹³

Often employers and/or retirees will refer to working retirees as independent contractors should they come under a CalPERS audit since a retiree working for a CalPERS agency as an independent contractor is not subject to the 960 hour or other limits applicable to retired annuitants. But a retiree calling him or herself an “independent contractor” may still run afoul of the law.

The PERL does not define the term “independent contractor.”¹⁴ Thus, CalPERS must determine, on a case-by-case basis, whether a contractor better fits

the definition of employee. If CalPERS determines a contract is not within the guidelines for an independent contractor after the retired person has already entered into employment, the retired person may be deemed to be illegally hired and, therefore, subject to mandatory reinstatement from retirement.

New Rules Under Assembly Bill 1028

Controversy surrounding the use of retired annuitants by public entities is not new.¹⁵ The passage of Assembly Bill 1028 (“AB 1028”) at the beginning of this year is yet another step to further clarify the role of retired annuitants under the CalPERS system.

Specifically, AB 1028 amends Government Code sections 21221(h), 21224, and 21229 dealing with the

¹⁰ A retired member of the CalPERS retirement system may return to permanent employment with a CalPERS employer to earn additional service credit towards a subsequent retirement. This is known as reinstatement from retirement. When a retired member returns to active employment with a CalPERS employer, they no longer receive a retirement allowance. Reinstatement Guide, *supra* note 9, at 3.

¹¹ Cal. Gov’t Code §§ 21224, 21229.

¹² An “independent contractor” is “someone who contracts to do a piece of work according to his/her own methods, and is subject to his/her employer’s control only as to the end product or final result of work, and not as to the means and manner in which the work is performed. CalPERS, Circular Letter No. 200-154-04, Metropolitan Water District of Southern California v. Superior Court of Los Angeles (“Cargill”) (May 3, 2004), available at <http://www.calpers.ca.gov/eip-docs/employer/cir-ltrs/2004/200-154-04.pdf>.

¹³ Saavedra, *supra* note 2.

¹⁴ In *Metropolitan Water District of Southern California v. Superior Court (Cargill)*, the California Supreme Court explained that CalPERS looks to the common law definition of “employee” when determining whether an employer-employee relationship exists. 32 Cal. 4th 491, 500-01 (2004).

¹⁵ One of the most significant changes to limitations on retired annuitants occurred in 2005 with Senate Bill 1439 (“SB 1439”). SB 1439 amended Government Code section 21224 to preclude a retired annuitant from returning to state employment if, during the 12 months prior to the appointment, the retired annuitant received unemployment insurance benefits from working with a CalPERS covered entity. Before the passage of SB 1439, retirees were able to collect unemployment insurance benefits because under the Unemployment Insurance Code, a worker who loses their job due to no fault of their own is granted weekly unemployment insurance payments. Accordingly, once the retired annuitant had reached the 960 hour or 120 day maximum, the worker was entitled to collect unemployment insurance benefits. As such, a retiree could work as retired annuitant for a state agency for a period of time, then file an unemployment claim when they stopped working and receive unemployment insurance benefit payments.

This all changed once the state legislature passed SB 1439. As originally worded, SB 1439 prohibited retired annuitants from collecting unemployment insurance benefits for their prior state employment. However, there was a major hiccup in the wording of the bill. The state receives much of its unemployment insurance funding from the federal government, and federal laws prohibit treating one group of recipients differently from others with regard to eligibility for benefits. As such, California risked losing millions in federal tax dollars if it prevented retired annuitants from collecting unemployment insurance benefits. In response, the California legislature cleverly rewrote SB 1439 to prohibit any CalPERS agency from hiring a retired annuitant if, within the last 12 months prior to the proposed appointment, the retired annuitant had received any unemployment insurance benefit payments as a result of prior employment with the same employer. Thus, the bill would prevent “double dipping” instead of “triple dipping.” The retired annuitant could still collect unemployment insurance benefits, but would have to wait 12 months before he or she could work again for a CalPERS covered entity.

subsequent employment of retired annuitants. Government Code section 21224(h) applies to governing bodies of a contracting agency¹⁶ with CalPERS. Under AB 1028, the Legislature modified Government Code section 21221(h) to clarify that a retiree can be appointed to a governing body of a contracting agency as an interim appointment to a vacant position during recruitment for a permanent replacement.

The changes made under AB 1028 are significant. First, the employing agency and retiree only get one “bite at the apple” in that the retiree may only work in an interim appointment, one time for the contracting agency or school employer. Second, the compensation for the interim appointments cannot exceed the maximum published rate of compensation for the position. Third, the compensation must follow a publicly available pay schedule for the vacant position. Fourth, the interim appointment, itself, is limited to 12 months from the appointment date, notwithstanding any extension to work more than 960 hours. Lastly, the interim appointment cannot continue past the 12-month term under sections 21224 or 21229.

In January 2012, CalPERS issued a Circular Letter to clarify the impact of and significant changes under AB 1028.¹⁷ Most notably, the Circular Letter indicates that AB 1028 amended sections 21224 and 21229 to include the words “temporary,” “appointment,” “specialized” and “skills.”¹⁸ The word “specialized” is meant to clarify that retirees must have “specialized skills” to perform the job, which is generally determined by the employer.¹⁹ The word “temporary” is meant to clarify that retired annuitants are to work as temporary “extra help”²⁰ appointments during an emergency to prevent stoppage of business or to perform work of limited duration.²¹

¹⁶ “Contracting agency” means any public agency that has elected to have all or any part of its employees become members of the CalPERS system and that has contracted with the board for that purpose. Cal. Gov’t Code § 20022.

¹⁷ CalPERS, Circular Letter No. 200-002-12, *Information on AB 1028 Changes to Employment After Retirement* (Jan. 12, 2012) (“Circular Letter”), available at <http://www.calpers.ca.gov/eip-docs/employer/cir-ltrs/2012/200-002-12.pdf>.

¹⁸ Circular Letter, *supra* note 17.

¹⁹ Circular Letter, *supra* note 17.

²⁰ Circular Letter, *supra* note 17 (explaining that some examples of extra help are elimination of backlog, special projects, and work in excess of what the employer’s permanent employees can do).

²¹ See Circular Letter, *supra* note 17.

CalPERS does not place any limits on the duration of the appointment so, presumably, the retiree may work over the course of several fiscal years and not run afoul of the reinstatement provisions of the PERL. Thus, AB 1028 still presents a conundrum: it disallows a retiree from being appointed to vacant permanent part-time, permanent intermittent, or permanent full-time positions, even if the hours do not exceed 960 hours. Yet, it does not clarify at what point a temporary appointment turns into a permanent assignment.

Going Forward

On October 27, 2011, Governor Jerry Brown, issued his 12 point pension reform plan.²² Item number six on the Governor’s plan, entitled “Limit Post-Retirement Employment: All Employees,” is directly aimed at placing limits on employment after retirement with CalPERS member agencies. The plan purports to strike a balance between the invaluable benefit of institutional knowledge, expertise and experience that a retiree brings to their position as a retired annuitant, and those highly publicized abuses where retired annuitants return to full-time employment exceeding the 960 hour maximum. Under the Governor’s plan, all employees who retire from public service will be limited to working 960 hours or 120 days per year for a public employer. It also prohibits all retired employees who serve on public boards and commissions from earning any retirement benefits for that service.²³

Over the course of the next few years, the use of retired annuitants in state and local government bodies will continue to evolve as these entities look for long-term solutions to its fiscal crisis and pension reform. Governor Brown’s budget proposal includes a provision that would eliminate retired annuitants from the state payroll.²⁴ Whether eliminating all retired annuitants is fiscally sound²⁵ or even feasible given the

²² Gov. Jerry Brown, *Twelve Point Pension Reform Plan* (Oct. 27, 2011) (“Twelve Point Plan”), available at http://gov.ca.gov/docs/Twelve_Point_Pension_Reform_10.27.11.pdf.

²³ Twelve Point Plan, *supra* note 22.

²⁴ Jon Ortiz, *Jerry Brown Moves to Eliminate Retiree Workers*, Sacramento Bee (June 13, 2012), available at <http://www.sacbee.com/2012/06/13/v-print/4557862/jerry-brown-moves-to-eliminate.html> (explaining that approximately 5,800 annuitants collected \$110 million from the state in addition to their pensions).

²⁵ Ortiz, *supra* note 24 (explaining that approximately seven cents of every \$10 paid to workers during the 2011 calendar year went to returning retirees).

“specialized” expertise they bring to their employers remains to be seen. While results of these changes remains uncertain, what is clear is that in the wake of public outcry and frustration with public pension plans, at the very least, it appears that CalPERS is taking a closer look at retirees and employees who abuse the statutory exceptions for post-retirement employment.

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