

LCW LIEBERT CASSIDY WHITMORE

Hot Topics and Emerging Issues with CalPERS & CalSTRS

Association of Chief Human Resources Officers/Equal Employment Officers (ACHRO/EEO) 2022 Fall Institute
October 27, 2022

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Agenda

- CalPERS
 - Legislation
 - Statute of Limitations
 - Circular Letters
 - Limited Duration Regulation
 - Out of Class Appointments
- CalSTRS
 - Legislation
 - Statute of Limitations
 - Incorrect Reporting Guidance
 - Hiring Retirees
 - Audits

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CalPERS



CalPERS: Senate Bill 278

Legislation

- Requires employers to bear the cost when CalPERS determines that an employer incorrectly reported non-reportable compensation
- Protects retirees from “claw-back” of retirement benefits
- Would apply retroactively to decisions made on or after January 1, 2017, if appeal was filed and applicable remedies have not been exhausted

For active members:

- Agency refunds member for excess employee contributions
- CalPERS does not refund agency excess contributions, but credits them against agency’s future contributions



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Senate Bill 278 (cont.)

For retirees:

- CalPERS permanently adjusts retiree's future benefits to eliminate the excluded benefit
- Agency pays CalPERS for overpaid retirement benefits made to the retiree
- Agency pays penalty to make member whole:
 - 20% of lump-sum present value of difference in benefits
 - 90% of penalty goes to member, 10% goes to CalPERS
- Agency receives credit for excess contributions (but not for the penalty payment)



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Senate Bill 278 (cont.)

- Circular Letter No. 200-076-21
 - The following are not within the scope of SB 278:
 - Lump-sum reporting of reportable compensation
 - Reporting compensation above the limit defined in the labor policies and/or agreements
 - Misreporting of payroll such as, but not limited to:
 - Misreported pay rates such as \$10.00 versus \$100.00
 - Misreported pay rate types such as monthly as an hourly pay rate
 - Misidentified special compensation category and type



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Senate Bill 278 (cont.)

Issues that may be litigated:

- Whether administrative and legal remedies are exhausted
- Whether the statute applies to compensation reported before January 1, 2022 where CalPERS makes the decision after January 1, 2022
- Whether providing the item in a collective bargaining agreement and reporting the item to CalPERS triggers the statute without any statement that the item is included for “pension purposes”
- Whether employers can expressly state that no compensation is reported for pension purposes unless CalPERS determines it is reportable
- Whether a statute of limitations applies

CalPERS: Senate Bill 411 Retired Annuitant Reinstatement

- Currently, improperly rehiring retired annuitants will result in reinstatement, meaning:
 - Reimburse CalPERS for retirement benefits
 - Retroactive contributions, with interest
 - Payment of administrative expenses
- SB 411: CalPERS may reinstate the retiree
 - Retroactive contributions only if reinstated

CalPERS: Recovery of Excess Benefits – Statute of Limitations

- **Gov. Code § 20164(b)(1):**
“In cases where [CalPERS] makes an erroneous payment to a member ..., [CalPERS]’ right to collect shall expire three years from the date of payment.”
- CalPERS has taken the position that this only restricts recovering overpayments directly from members, and that CalPERS can recover the rest from the employer
- CalPERS claims that it can rely on other authority to collect overpayments beyond three years directly from the employer
- Issue is currently being litigated

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CalPERS: Circular Letter No. 200-019-20

- **Circular Letter No. 200-019-20**
- Common reporting errors including:
 - Lump-sum reporting
 - Top step requirements
 - Bonus pay for classic members
 - Temporary upgrade pay for classic members
 - Reporting under the wrong category
- Common errors in labor agreements including:
 - Group or class
 - Conditions for payment
 - Combination of eligibility requirements
 - Final settlement pay

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CalPERS: Circular Letter No. 200-065-21

- Lump Sum Reporting
 - CalPERS added an error message that will display on the Maintain Payroll Records page where an “excessively high” or “lump-sum payment” is reported in a single earnings period
 - Can provide the MOU or labor policy to CalPERS for review if the agency believes the item is compliant

CalPERS: Circular Letter No. 200-033-22

- Reporting Sick Leave
 - Must retire within four months from separation from employment
 - .004 years of service credit per day of sick leave (always use 8 hours for a day)
 - Cashed out or converted sick leave is not reportable
 - Only sick leave earned in the normal course of business may be reported
 - Includes sick leave transfers

CalPERS: Limited Duration Regulation - 2 CCR 574.1 (proposed)

- Defines “limited duration” for retired annuitant appointments
 - “Limited duration” means “a limit of twenty-four consecutive months per appointment of a retired person serving after retirement for a CalPERS-covered employer.”
 - CalPERS can grant up to two 12-month extensions where:
 - Governing body certifies the appointment at a public meeting, finds the required work cannot be performed satisfactorily by non-employees, and the extension is not placed on the consent calendar; and
 - CalPERS receives approved extension request before the end date of the initial appointment or end of the first approved extension
- Defines “limited duration” for temporary upgrade pay
 - “Limited duration” means “a limit of twenty-four consecutive months per
 - For the purposes of the regulation, temporary upgrade appointment must be immediately subsequent to a permanent appointment held by an individual for the same upgraded position/classification

CalPERS: Out-of-Class Appointments – Gov. Code § 20480

- Employee may not work more than 960 hours/fiscal year in an “Out of Class Appointment;” defined as
 - Limited-duration appointment
 - To a vacant position
 - In an upgraded/higher classification
- “Vacant position” means vacancy during recruitment for a permanent appointment
 - NOT temporary vacancy due to leave of absence
 - NOT the same as Temporary Upgrade Pay

CalPERS: Out-of-Class Reporting

- Employer must track hours worked in out-of-class appointment, and report within 30 days after CalPERS's fiscal year ends (i.e. by July 30)
 - CalPERS guidance: Track and report all paid hours, including paid leave and overtime hours
- Exceeding 960-hour limit will result in penalties

CalPERS: Individual Compensation Reviews

- Single Employee Review
 - When an individual retires, CalPERS may request documentation concerning certain reporting
 - CalPERS may determine that some compensation was not reportable
 - Errors found during individual retiree reviews can expand to multiple employees and retirees

CalSTRS



CalSTRS: Assembly Bill 1667

- Signed into law on September 29, 2022
- Various portions effective January 1, 2023; July 1, 2023 & July 1, 2024.
- Impacts
 - Audits
 - STRS's obligations related to guidance provided to agencies and members
 - Overpayments to retirees



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AB 1667 (cont.)

- **Changes to Audit Process** (Effective January 1, 2023)
 - STRS must provide written notice to agency and exclusive representative(s) of members affected by audit, of intent, purpose, and scope of audit, *before* commencing audit
 - Agency and exclusive representative may provide additional information relevant to the audit, to STRS
 - Between STRS's issuance of preliminary and final audit reports, agency must provide STRS and exclusive representative list of members impacted by the audit, not previously identified by STRS in preliminary report
 - **All** impacted members receive administrative appeal/due process rights, even if later identified

AB 1667 (cont.)

- **CalSTRS Guidance**
 - STRS must provide annual (at a minimum) resources that interpret or clarify applicable of creditable compensation and creditable service laws and regulations
 - New or different interpretations apply prospectively *only*, unless law/regulation expressly provide otherwise
 - Employers responsible for rules in effect at time compensation was report unless superseded by statute, or executive order
 - Advisory Letters (not effective until July 1, 2023)
 - Employers and exclusive representatives may request written determination from CalSTRS re reportable compensation
 - Certain exceptions apply, e.g. pending litigation
 - STRS has 30-day deadline to provide response, once receive relevant info
 - Reliance limited to those whom the letter relates
 - If advisory opinion turns out to be wrong, deemed error by STRS

AB 1667 (cont.)

- **Overpayments of pension benefits**

- STRS's version of SB 278
- Mistake by:
 - Member → recovery of overpayments from member
 - Cap of 15% reduction to monthly benefit allowance resulting from inaccurate or non-submission of information by member
 - Employer → recovery from employer
 - COE → recovery from COE, with exceptions
 - (Effective July 1, 2024) By STRS →
 - 85% as appropriation from General Fund to Teachers' Retirement Fund
 - 15% from employer(s)
 - Employer must make payments within 30 days of invoice; otherwise subject to penalties others
- Not generally applicable for overpayments related to disability retirement or post-retirement work

CalSTRS: Statute of Limitations

- Education Code § 22008
 - 3-year limitations period
 - AB 1667 did not amend this section
- Recent Court of Appeal decisions regarding CalSTRS' ability to collect overpayments of monthly retirement benefits paid to retirees
 - *Baxter v. State Teachers' Retirement System* (2017) 18 Cal.App.5th 340 ("*Baxter*")
 - *Blaser v. State Teachers' Retirement System* (2019) 37 Cal.App.5th 349 ("*Blaser*")
- Applicable only to retirees

Incorrect Reporting Guidance

- *Stanislaus County Office of Education*, Precedential Decision No. 19-01
- Audit finding regarding one-time off-salary schedule payments
- COE's defense: reporting error result of CalSTRS providing incorrect guidance ("equitable estoppel")
- Proposed Decision by ALJ rejected estoppel argument
 - Couldn't establish that agency relied on CalSTRS' inaccurate guidance
 - Even if COE could establish elements of estoppel, estoppel not appropriate where CalSTRS has fiduciary duty to preserve retirement fund and apply unambiguous directives under the State Teachers' Retirement Law ("STRL")
- Potential impact because of AB 1667 - TBD

CalSTRS: Hiring Retirees

- "Great Resignation" increased need to hire retirees
- Options for employment without reinstatement
 - **No** classified appointments for STRS retirees
 - Performance of "retired member activities"
 - = activities credible to STRS under EC 22119.5 and 26113
 - No exception for independent contractor or third-party employees
 - Professional services contracts (risks exist if don't comply with restrictions)
- Earnings limitations
- Benefits limitations
 - Limited "exceptions" = Paid sick leave and mandated vacation under EC 88197
 - Cuts into earnings limitations

CalSTRS: Common Audit Findings

- Full time employment
- Extra duty earnings
- Sick leave conversions
- Others
 - Lump sum payments (new members)
 - Post-retirement work



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CalSTRS Common Audit Findings: Full-Time Employment

- What Is One Year Of Service?
 - Defined by full-time faculty collective bargaining agreement
 - But, can be no less than:
 - 175 days/1050 hours: general rule for non-management
 - 190 days/1520 hours: general rule for administrators, principals, and program managers
 - 215 days/1720 hours (incl. holidays): administrators at district level or at county office of education
 - 175 days/1050 hours: counselors, librarians, and K-12 teachers of adult ed
 - 525 instruct. hours: part-time instructors
 - 875 instruct. hours: part-time adult ed instructors
 - Caveat: Part-time Faculty Office Hours Program



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CalSTRS Common Audit Findings: Extra Duty Earnings

- Extra-duty assignments in excess of one full year of service
 - Creditable to DBS, not DB account
- District's accidentally over crediting benefits credited to DB
- Release time not necessarily determinative



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CalSTRS Common Audit Findings: Sick Leave

- Sick Leave Conversions
 - # of sick days / days of service for F-T
 - Basic sick leave: 12 days per year
- Employers granting sick leave in excess of one day per four-week pay period will be charged for the "excess" sick leave converted to service credit



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Avoiding Errors

- Centralize contract process with HR/Finance
 - Particularly important in multi-college districts
- Don't make promises you can't keep
 - Take advantage of AB 1667 advisory opinions
- Conduct internal audits/reviews
- Train your employees
- Consult with legal counsel

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Questions?

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