



Board of Administration

Agenda Item 8b

February 14, 2023

Item Name: Proposed Regulation for the Definition of Limited Duration Employment

Program: Employer Account Management Division

Item Type: Action

Recommendation

Approve the submission of the final rulemaking package defining limited duration employment to the Office of Administrative Law.

Executive Summary

CalPERS drafted this proposed regulation to define the term “limited duration” for post-retirement appointments and active classic members serving in upgraded positions/classifications. CalPERS received comments from 10 public agencies, two state departments, one school employer, four employee or employer associations, one law firm, and one individual during the 15-day public comment period. CalPERS is not proposing any substantive amendments to the proposed regulation, but is proposing non-substantive changes to the proposed regulation for readability and clarity (Attachment 1).

CalPERS believes this proposed regulation reflects the feedback it has received throughout the regulation development process, balancing the comments received from all parties. CalPERS will continue to educate and communicate with stakeholders throughout the proposed regulation process, and ensure CalPERS-covered public employers (hereinafter referred to as employers) understand the processes and procedures that will be implemented and are prepared for the upcoming changes and responsibilities.

Strategic Plan

This agenda item supports the 2022-27 CalPERS Strategic Plan, Organizational Excellence Goal through the objective of cultivating compliance and risk functions throughout the enterprise.

Background

On April 18, 2022, the Board of Administration (Board) approved the proposed regulatory action to clarify what is considered “limited duration” employment as stated in Government Code (GC)

sections 7522.56, 21224, and 21229 for retired persons serving after retirement and section 571(a)(3) of Title 2 of the California Code of Regulations (CCR) for employees required by their employer or governing board or body to work in an upgraded position or classification. The Notice of Proposed Regulatory Action was published in the California Regulatory Notice Register (File Number Z-2022-0607-10) on June 17, 2022. The 45-day comment period commenced on June 17, 2022 and closed on August 1, 2022. CalPERS received public comments from 39 submitters.

Following the 45-day comment period, CalPERS amended the proposed regulation to reflect the feedback received, balancing comments received from all parties. On November 15, 2022, the Board approved the amendments to the proposed regulation and moving forward with a 15-day comment period. CalPERS initiated a 15-day comment period from December 1-16, 2022 to provide the public an opportunity to comment on the revised proposed regulation. CalPERS received public comments from 19 submitters.

The proposed regulation defines “limited duration” as a limit of 24 consecutive months per appointment for retired persons serving after retirement, with an employer’s option to extend the post-retirement appointment no more than twice, up to 12 consecutive months per extension, beyond the initial limit of 24 consecutive months, but not exceeding a total of 48 consecutive months upon satisfaction of specified conditions. In addition, to meet the business needs of employers, the proposed regulation provides employers an option to request an exemption to extend the retired person’s appointment beyond the initial 24 consecutive months and the two 12 consecutive month extensions upon satisfaction of specified conditions. CalPERS will either grant or deny the employer’s request for exemption based on the documents received within 60 days of receiving the request. A retired person may serve in more than one post-retirement appointment as follows:

- With the same employer as long as the duties for the subsequent post-retirement appointment do not overlap with the duties of any previous post-retirement appointment for that employer subject to this proposed regulation, and
- With a different employer from any previous employer the retired person performed duties for after retirement while in a position subject to this proposed regulation.

In addition, if the terms of a collective bargaining agreement 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 60 consecutive months, would be the maximum duration for the post-retirement appointment for the retired person in the employ of that employer and cannot be extended beyond the maximum duration. In addition, the retired person cannot serve in a subsequent post-retirement appointment with that same employer.

The proposed regulation also defines “limited duration” as a limit of 24 consecutive months for active classic members to serve in an upgraded position/classification for purposes of reporting temporary upgrade pay to CalPERS as reportable compensation. An active classic member may serve in the same upgraded position/classification more than once and initiate a new 24 consecutive month period if the appointment to the upgraded position/classification is:

- The active classic member’s first appointment subsequent to a permanent appointment held by a different individual for the same upgraded position/classification, or

- The active classic member's first appointment subsequent to a different individual that retained the permanent appointment for the same upgraded position/classification who returned to the permanent appointment from an approved leave.

Analysis

CalPERS reviewed all comments, and this agenda item summarizes the comments for defining limited duration as described below. Please see Attachment 2 for a comprehensive summary and CalPERS' proposed response to all comments received.

Working After Retirement Appointments

Definition of Limited Duration

One commenter stated that due to the inclusion of extensions and exemptions, and the fact that there is no upper limit of how many exemptions may be requested per appointment, an appointment of "limited duration" can be indefinite. If the employer determines that the retired person's skills are needed beyond the 48th consecutive month, the proposed regulation allows the employer to request one of the following two exemptions to further extend the appointment:

- Continuous extension if the appointment does not exceed 120 hours per fiscal year, or
- An extension of 12 consecutive months

While the proposed regulation does not specify a limit on the number of exemptions an employer may request per appointment, the proposed regulation sets standards and criteria the employer must meet to extend the post-retirement appointment. The employer must satisfy all of the criteria each time the employer extends the post-retirement appointment through the extension or exemption processes.

In regard to the definition of "limited duration," two commenters suggested changing the definition from 24 consecutive months to either 12 consecutive months or 48 consecutive months. In addition, three commenters suggested the current limit of 960 hours per fiscal year that a retired person is allowed to work is sufficient to define "limited duration" and should not change. CalPERS did not adopt any suggested changes to the definition of "limited duration." The proposed definition as a limit of 24 consecutive months per appointment aligns with Government Code section 19080.3, authorizing limited term appointments with the State of California to be up to a total duration of two years for temporary staffing needs in certain circumstances. The 960-hour limit for post-retirement appointments is a separate limitation from the requirement that the appointment be of "limited duration."

Definition of Appointment

One commenter expressed concern regarding the no overlapping duties requirement differentiating post-retirement appointments with the same employer as being overly complex, requested clarification on what would be considered overlapping duties, and provided an alternative for consideration. Prior to the 45-day comment period, the definition of appointment stated that the duties between post-retirement appointments for the same employer must be substantially different. Comments received during that comment period asked for clarification on what was meant by “substantially different.” As a result, CalPERS amended the proposed regulation to state that duties between post-retirement appointments for the same employer cannot overlap. Prohibiting overlapping duties between multiple post-retirement appointments with the same employer is intended to ensure that the employer does not circumvent the extension and exemption processes by appointing the retired person to a “new” post-retirement appointment performing the same duties.

Overlapping duties refer to specific duties that will be performed. For example, if an employer appoints a retired person with specific skills in contracts and negotiations to negotiate one bargaining contract and then appoints the same retired person to negotiate a different bargaining contract, those duties would be overlapping.

One commenter suggested to allow overlapping duties between post-retirement appointments for the same employer as long as there is a 12 month or longer break between post-retirement appointments. CalPERS did not adopt any suggested changes to the definition of appointment. CalPERS interprets the applicable statutes to mean a single post-retirement appointment utilizing the retired person’s skills to perform that specific work of limited duration for that specific employer. The suggested alternative does not limit how many post-retirement appointments the employer may initiate for the retired person or require any standards and criteria to be met to initiate a new post-retirement appointment with overlapping duties except for a 12 month or longer break. If the employer has a business need for the retired person to continue utilizing the specific skills to perform work in the post-retirement appointment, the employer must request an extension or exemption, as applicable, receive its governing body’s, and for exemptions, CalPERS’ approval, and meet all of the additional standards and criteria necessary to extend the post-retirement appointment. Allowing employers to initiate new post-retirement appointments with overlapping duties after a 12 month or longer break between post-retirement appointments would circumvent the extension and exemption processes as required by the proposed regulation.

Extension and Exemption Process and Criteria

Thirteen commenters submitted comments related to the post-retirement appointment extension and exemption processes and criteria. Some comments stated the processes and criteria were too restrictive, while other comments stated they were not restrictive enough. One commenter stated that there were no standards to allow the Department of Human Resources to determine whether a certification is warranted and the criteria are vague in the absence of any standards. The commenter also stated that based on their reading of the proposed regulation, CalPERS has no discretion to impose its own standards for evaluating certifications. Furthermore, the commenter stated that for state post-retirement appointments, the Department of Human Resources certifies by memorandum its approval of extension and exemption requests and can potentially extend an appointment indefinitely without challenge or third-party evaluation.

Following the 45-day comment period, CalPERS added criteria requiring the employer's governing body to certify the reason the appointment needs to be extended and that a plan to transition the duties to a non-retired employee or another retired person is in place. For exemptions, CalPERS added criteria requiring the employer's governing body to certify the reasons the transition plan was unsuccessful or could not be implemented, another retired person could not perform the duties required, and a recruitment was unsuccessful or could not be completed. As a result, the criteria require the employer to provide a substantive response explaining its reasoning and show a good faith effort that it tried to transition the duties or complete a recruitment. CalPERS will be reviewing each exemption request to ensure the criteria are met, including the employer's explanation, and based on its review, CalPERS will determine whether the request is approved or denied.

Ten commenters stated that the 12-month time limit following the end of the second extension or last exemption is too restrictive and requested its removal. Adding a 12-month window to request an exemption was in response to the feedback received during the 45-day comment period stating that having to submit the request by the end date of the second extension or last exemption was too restrictive. The 12-month window is a balance between providing employers more flexibility on when they can submit the exemption request and providing a time limit for when the employer can no longer extend the post-retirement appointment, ensuring the post-retirement appointment cannot resume at any time.

Nine commenters proposed amendments that would automatically approve the exemption request if the Board did not take action within 60 days of receiving the request, as well as requiring the Board to approve the exemption if the applicable certifications are made and submitted. CalPERS is not adopting these proposed amendments. The 60-day time period starts when CalPERS receives all required records that include extension and exemption certifications, as applicable. While CalPERS is aware of the employers' needs to have timely review and approval of the exemption requests, including a clause for an automatic approval after 60 days and mandating that the Board approves the exemption request if the certifications are made and submitted would not be prudent and would circumvent CalPERS' review process. CalPERS will review each exemption request along with all documents submitted to ensure all criteria and process requirements are met. CalPERS has the authority to deny an exemption request if the criteria or process requirements are not met. In addition, a report of all approved exemptions will be presented to the Board at least annually. If a clause was added to automatically approve exemption requests after 60 days, the Board and public would not be able to distinguish between which exemptions were automatically approved and which were reviewed and approved by CalPERS. The employer is responsible for ensuring the exemption request includes all of the required certifications, the process is followed correctly, and the request is submitted timely to meet their own business need.

Collective Bargaining Agreements Clarification

One commenter raised a concern that a retired person working in a post-retirement appointment subject to the duration specified in a collective bargaining agreement, that retired person would not be eligible to serve in another post-retirement appointment with that same employer. The commenter suggested amending the proposed regulation to allow a retired person to serve in subsequent post-retirement appointments that are either subject to a different collective bargaining agreement or have no overlapping duties with any previous post-retirement appointment with the same employer. CalPERS is not adopting this proposed change. The

intent of the proposed regulation was for retired persons who serve in post-retirement appointments with durations provided by collective bargaining agreements to be a single post-retirement appointment for that particular employer, unless they had previously served in a post-retirement appointment under subdivision (a) of the proposed regulation for that same employer.

Temporary Upgrade Pay Appointments

Clarification of “Position/Classification”

One commenter suggested changing the term “position/classification” to only “position” for clarity. The commenter stated that for some employers, “classification” is broad and could cover many positions. CalPERS is not adopting the proposed change. The term “position/classification” is consistent with the term used in paragraph (3) of subdivision (a) of section 571 of Title 2, California Code of Regulations. The use of “position/classification” acknowledges that employers are not uniform in the use of the terms “position” and “classification,” and some employers use those terms interchangeably.

Other Comments

Consultant Cost Concerns

One commenter expressed concerns regarding potential increase in costs to employers by utilizing consultants instead of retired annuitants. The commenter suggested that at the federal level, retired federal employees are not allowed to work as retired annuitants and often get hired by private companies for their specialized skills and knowledge. Those retired federal employees then work as consultants for the federal government using their specialized skills and knowledge, increasing costs to the federal government.

While there may be retired persons who return to work for an employer as a consultant, there are rules in place to mitigate that occurrence. If a retired person works for an employer as a consultant and performs the same or similar work to the work the retired person performed as an active employee or work performed by an active employee of that employer, an employer-employee relationship may exist. As a result, the employment may be determined to be a working after retirement appointment and subject to the working after retirement restrictions, including this proposed regulation.

General Non-substantive Language Changes

One commenter provided non-substantive language changes. CalPERS is adopting in part the proposed changes. The proposed changes are reflected in redline in Attachment 1.

Budget and Fiscal Impacts

The proposed regulatory action is technical. CalPERS does not anticipate that it will impose any direct budget or fiscal impacts to the State. CalPERS expects to absorb the administrative costs related to reviewing and approving exemption requests for post-retirement appointments within the existing budget and resources.

Benefits and Risks

The proposed regulation is necessary to define “limited duration” employment. Adopting this proposed regulation would clarify the meaning of “limited duration” employment and provide

uniformity for CalPERS, its members, employers, and other stakeholders by ensuring consistent use of the term.

Attachments

Attachment 1 – Text of Proposed Regulation

Attachment 2 – Public Comments Received During the 15-day Comment Period

Renee Ostrander, Chief
Employer Account Management Division

Anthony Suine
Deputy Executive Officer
Customer Services & Support

Marcie Frost
Chief Executive Officer