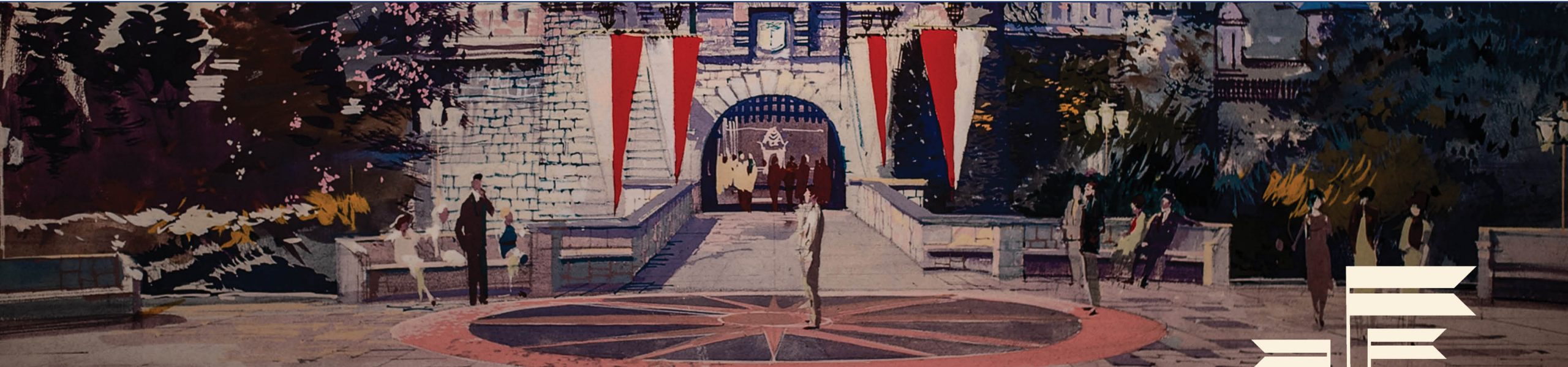




YESTERDAY, TOMORROW AND FINANCE  
2020 CSMFO ANNUAL CONFERENCE  
JANUARY 28-31, 2020  
DISNEYLAND CA



# How to Hire CalPERS Retirees the Right Way



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# Agenda

- Reinstatement
- Post-Retirement Employment Without Reinstatement
- Restrictions on Post-Retirement Employment
- Independent Contractors
- Third Party Employers
- Penalties for Unlawful Employment



# Employment After Retirement

- **Reinstatement From Service Retirement:**
- Disfavored by the employee and employer
  - Generally considered a break in service for the purposes of PEPRA
- Anyone can reinstate from service retirement
  - Employer must be willing to reinstate employee
  - Retirement allowance cancelled; COLA implications
  - Make contributions to system again
- Most employees want to be employed *without* reinstatement

# Employment After Retirement – General Principles

## Employment Without Reinstatement:

- General Rule
  - CalPERS retiree cannot be employed by a CalPERS agency without reinstatement unless a statutory exception applies
  - Law disfavors employment of retired annuitants
  - Applies to “new members” and “classics”
  - Key statutes: Government Code sections 7522.56, 21224 and 2122(h). Section 7522.56 is part of PEPPRA, but applies to Classic members also
  - All discussion in this webinar is regarding service retirees; Post Retirement work for disability retirees involves even greater limitations



# Employment Without Reinstatement

- Gov. Code Section 21224 Exception
  - Appointment by appointing power:
    - During emergency to prevent stoppage of public business OR
    - Because retiree has specialized skills needed in performing work of limited duration
  - Not appointed by governing body
  - Cannot be appointed to a vacant position
  - “Extra help” appointments
    - Elimination of backlog, special projects, work in excess of what the employer’s permanent employees can do, etc.

# Employment Without Reinstatement

- Must be for limited duration –
  - How long – as long as the extra help project lasts
  - Caveat:
    - The longer the assignment, the more likely to be scrutinized
  - Why?
    - Longer projects suggest retiree is filling a vacancy in a permanent FT or PT position

# Employment Without Reinstatement

- Do not appoint as “Interim” or “Acting” unless using section 21221(h).
- Why? – That is filling a vacancy
- Appoint as Retired Annuitant



# Employment Without Reinstatement

- Gov. Code Section 21221(h) Exception
  - Interim appointment by governing body:
    - To a vacant position during recruitment for a permanent appointee requiring “specialized skills”
    - Applies to positions subject to appointment by appointing power (e.g. Department Heads) if appointment is later ratified by resolution of governing body – to occur before the retiree begins working
    - Must be an end date in employment agreement
  - Appointment can be made only once. Appointment can not be extended
  - Recruitment must be started before retiree starts work

# Post-Retirement Work Restrictions

- 960 hour limit per fiscal year (No ability to increase beyond 960)
  - 960 hours is with ALL CalPERS employers
- Pay is no less than the minimum nor more than the maximum paid to other employees performing similar duties (divided by 173.333 to equal an hourly rate)
- No benefits in addition to the hourly rate
  - Examples:
    - Car allowance: No
    - Paid time off: No
    - Reimbursement of expenses: Maybe
      - 1) Reimbursement of expenses if incurred on behalf of employer and documented
      - 2) \$500 per month fixed amount every month for “expenses”: No
      - 3) Reimbursement of commuting costs: No. That is a personal expense

# Post-Retirement Work Restrictions (*cont'd*)

- Must have at least a 180-day break between retirement and return to work unless:
  - Public safety officer or firefighter retiree performing safety functions as a retiree; or
  - The governing body certifies that the appointment is necessary to fill a critically needed position.
    - Must occur at a public meeting and not be placed on a consent calendar.
  - Exception to 180 day exception: Employee may not have received an early retirement incentive.
- No unemployment insurance within prior 12-months for post-retirement work.



# Post-Retirement Work Restrictions

- Additional restriction if under normal retirement age
  - If under normal service retirement age, must first have a bona fide separation in service:
    - No verbal or written agreement to return to work after retirement, and
    - 60-day break in service
  - Must look at all formulas to find the highest normal retirement age

# Case Study

- Police Chief of Metro City retires on March 1, 2019 and the City promotes the Deputy Chief to Chief. City Manager for Metro City retires on April 11, 2019. Metro City begins a recruitment for a new City Manager. Can the retired Police Chief be appointed to step in on April 11, 2019 to serve as Acting City Manager in the Interim?

**What are the key issues to consider?**

# Case Study – Normal Retirement Age

Rhonda worked for the Mosquito Abatement District, which had a 2% at age 60 formula. She leaves and works for the Water District which has a 2% at 55 formula. Both districts were CalPERS agencies.

**What is Rhonda's normal retirement age?**

If Rhonda retires at age 58, how long must her separation be before she can work as a retired annuitant?

**What other information might you want to know?**



# When Post-Retirement Work Restrictions Do Not Apply

- Restrictions do not apply when:
  - The post-retirement work is for a different retirement system
    - For example, a CalPERS retiree may work for a '37 Act agency
  - The post-retirement work is for a private company
  - The individual is a **true** independent contractor

# Volunteers

- Volunteering
  - Gov. Code section 7522.56(b) states:
    - “A retired person shall not serve, be employed by,...”
  - Their salary is zero, so they are making less than other comparable employees
  - CalPERS has informally indicated that volunteering may be permissible when the individual is not otherwise working for the agency
    - i.e., not also working as a retired annuitant

# Case Study – How Many Hours?

Sarah, a CalPERS retiree, worked 600 hours for Apple City between July 1 and December 31, 2019. She worked 200 hours for Berry City between January 1 and March 1, 2020. Sarah goes to work for Cherry City on March 1, 2020. All of the cities are CalPERS agencies.

**How many hours can Sarah work before July 1, 2020?**

**How many hours can she work on or after July 1, 2020?**



# Case Study – CalPERS Retiree Works Part-Time

The City of Ricochet, a CalPERS agency, hires Kris, a CalPERS retiree from the City of Recoil to perform analyst work. Kris is not appointed by the governing body and is hired into a vacant part-time position working less than 960 hours per fiscal year.

**Does this employment violate the post-retirement work restrictions?**

# Case Study – CalPERS Retiree Works as a Department Director

Assume instead that Kris is appointed to be the Director of Public Works.

**Is this employment permitted under the post-retirement work restrictions?**

**What more might you need to know?**

# Independent Contractors

- True independent contractors are not subject to CalPERS membership
  - Post-retirement work restrictions do not apply to independent contractors
  - Cannot merely label someone a contractor or write it in an agreement
  - Analysis of whether someone is an employee or independent contractor is fact specific
  - Almost always an employer-employee relationship
    - Agency can receive feedback from CalPERS *before* the employment begins

# Independent Contractors

CalPERS uses the common law test to determine if someone is an “employee” or an “independent contractor”

— Factors:

- Control of manner (main factor)
- Distinct occupation or business
- Kind of occupation normally done by independent contractors
- Skill required
- Tools and location of work
- Length of time work is to be performed
- Method of compensation
- Work similar to that performed by employees
- Intent of the parties

# Is the Common Law Employment Test Dead?

- *Dynamex Operations West, Inc. v. Superior Court*
  - The Court rejected the application of the longstanding common law employment test in favor of the “ABC test”
  - Case involved California Wage Orders
    - “‘Employ’ means to engage, suffer, or permit to work.”
  - Reflects general trend toward finding Employer – Employee Relationship
  - AB5 codified ruling

# Is the Common Law Employment Test Dead?

- The common law employment test is still used for CalPERS purposes
  - *Metropolitan Water District of Southern California v. Superior Court of Los Angeles (Cargill)*
  - *In the Matter of Lee Neidengard* (2005) CalPERS Precedential Decision No. 05-01.
- Employees may argue that ABC test should be adopted for CalPERS as well
- Hiring retirees through an employment agency or obtaining a retiree's services via a contract with a consulting firm is NOT determinative. Common law factors still apply on case by case basis



# Case Study – Out On My Own

Linda was an Engineer for Grid City. She retires from the City. The City hires her as an independent contractor. Linda performs the same functions she performed for the City when she was an employee. She usually conducts her work on the City's premises and has no other clients. The City pays her through accounts payable.

**Is Linda an independent contractor?**

# Third Party Employers

- The same test that is used for independent contractors applies to individuals hired through a third party employer.
  - If they are a common law employee of the public agency, the post-retirement work restrictions apply.
  - In the matter of Tracy C. Fuller (2019).

# Penalties/Reinstatement

- Non-Compliance with Post-Retirement Work Restrictions May Result In:
  - Reinstatement to active membership
  - Repayment of retirement benefits by retiree during unlawful employment
    - CalPERS has taken the position that three year limitation period is inapplicable
  - Employer and employee pay employer contributions on salary during unlawful employment
  - Administrative fees may have to be paid to CalPERS
  - Reinstatement will cause retirement allowance to stop until employee re-retires
  - COLA could be impacted

# CalPERS Enforcement

- Instead of conducting agency-wide audits, CalPERS has begun auditing specific issues for several agencies.
- CalPERS did an audit on this issue in FY 2018-2019.
- It is likely that CalPERS will continue to audit issues related to the use of retired annuitants.
- High risk based on noncompliance.

# CalPERS System Updates

- Enroll retirees in myCalPERS within 30 days of effective date
- Report hours and pay on required payroll cycles
- CalPERS will assess fees if retiree hours/pay not reported timely
- CalPERS tracks retiree and sends employer(s) courtesy report when hours worked in the fiscal year hit 700 and again at 800

# CalPERS System Updates (*cont'd*)

- Errors will be identified if special compensation reported
- 180 day break requirement not satisfied
- 60 day bona fide break in service not satisfied if below retirement age
- 960 hour threshold reach





## SPEAKER PRESENTATION

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# Thank you!

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California Public Employees Retirement System

