



Employment of CalPERS Annuitants

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Stacey N. Sheston, Best Best & Krieger



Indian Wells
(760) 568-2611
Irvine
(949) 263-2600
Los Angeles
(213) 617-8100
Ontario
(909) 989-8584



BEST BEST & KRIEGER
ATTORNEYS AT LAW

500 Capitol Mall, Suite 1700, Sacramento, CA 95814
Phone: (916) 325-4000 | Fax: (916) 325-4010 | www.bbklaw.com

Riverside
(951) 686-1450
San Diego
(619) 525-1300
Walnut Creek
(925) 977-3300
Washington, DC
(202) 785-0600

EMPLOYMENT OF CALPERS ANNUITANTS*¹

INTRODUCTION

As they struggle to provide effective services in increasingly-challenging economic times, California cities have often turned to employing retired public agency workers who bring a wealth of experience with them. Some of these retirees draw pensions from the California Public Employees' Retirement System ("PERS"), which refers to them as "retired annuitants." Cities that are contracting agencies with PERS can hire retired annuitants subject to various restrictions that allow the annuitants to work without being reinstated as active employees. *See* Government Code Sections 21221(h) and 21224.² There have been two rounds of amendments to Sections 21221(h) and 21224 in recent months which have clarified (and in some ways changed) the rules relating to PERS retired annuitants. This paper and the related presentation are intended to provide an update regarding these changes and some suggestions for compliance with them. Because this paper discusses two sets of legislative changes, which are helpful to review together for context, it is imperative to read the entire paper and to rely on the current statutes for accuracy and completeness.³

BACKGROUND

Section 21220(a) provides, in relevant part, that "a person who has been retired under this system . . . may not be employed in any capacity thereafter by . . . a contracting agency, . . . unless the employment, without reinstatement, is authorized by this article." A retiree whose employment without reinstatement is authorized by the Public Employees' Retirement Law ("PERL") will acquire no service credit or retirement rights under PERS with respect to that employment. However, the advantage of being employed without reinstatement is that the retiree may continue collecting his or her pension while employed.

Section 21221 identifies several types of employment that a retired annuitant may hold with a PERS contracting agency without reinstatement from retirement or loss or interruption of

* Tremendous contributions to this paper were provided by Alison Alpert (Alison.Alpert@bbklaw.com; (619) 525-1304), Laura Fowler (Laura.Fowler@bbklaw.com; (916) 551-2085), Isabel C. Safie (Isabel.Cesanto-Safie@bbklaw.com; (951) 826-8309), and John Wahlin (John.Wahlin@bbklaw.com; (951) 826-8313). Any or all of them are great contacts for future questions, concerns, or just generalized commiseration about the headaches generated when applying these rules.

¹ **DISCLAIMER:** Nothing in this paper is intended to be, nor should it be construed as, legal advice from BB&K or the authors. Specific facts and future developments may change the subjects and conclusions stated. Consult your legal counsel. Also, brush your teeth before bedtime every night. Eat all your vegetables. Play nice. Share.

² All statutory references are to the California Government Code.

³ Duh.



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retirement benefits, such as: (1) member of a board, commission or advisory committee; (2) school crossing guard; (3) juror or elections official; and (4) a position with a contracting agency that is temporarily vacant (up to a year) because of a leave of absence and involving specialized skill. Section 21221(h) relates to appointments made by a local agency governing body during an emergency or to provide specialized work of limited duration, subject to strict limitations. Section 21224 provides a separate authority pursuant to which a retiree may be employed for specialized work of limited duration. Both 21221(h) and 21224 appointments are subject to a maximum individual working hours cap of 960-hours per fiscal year for all PERS-contracting employers combined.

AB 1028

The Legislature's first foray in many years into the statutory scheme relating to employing retired annuitants was AB 1028 in 2011. Described as a "housekeeping bill" designed to "clean up" various provisions of the Public Employees' Retirement Law (PERL), AB 1028 came from PERS itself via the Committee on Public Employees, Retirement and Social Security. The bill made a number of changes to the PERL relating to issues such as campaign filings for PERS (and STERS) Board candidates, clarifying various definitions, addressing furloughs in calculating retirement allowances for trial court employees, and paying death benefits. Tucked amidst these technical changes were provisions "strengthening and clarifying rules regarding post-retirement employment" that were "identified by staff as necessary for the maintenance and good governance of CalPERS." Cal. Assembly Comm. on Appropriations, Hearing Report at p.1 (April 13, 2011). The bill summary presented at the first Senate hearing for AB 1028 stated that the requirements for employing annuitants "are not consistently spelled out in the statutes, creating potential for misinterpreting or abusing the requirements of the program," and thus "this bill aligns various provisions governing retired workers to ensure that the program requirements are consistently applied." Cal. Senate Comm. on Pub. Emp. & Ret., Bill Analysis at p.2 (June 27, 2011). As the bill wound its way through the committee process, the bill digest said the bill "makes technical and non-controversial changes" to various section of the PERL. Cal. Senate Rules Comm., Third Reading Digest at p.1 (August 15, 2011). PERS has taken the position that these changes are clarifications only and therefore declarative of existing law.

Among the most significant changes to Section 21221(h) were the following:

- This section is intended for an interim appointment to a vacant position while the City is actively recruiting for a permanent appointment.
- The appointment is one made by the governing body of the contracting agency. [Note: Some argue that appointments under Section 21221(h) are restricted to high level employees, such as the city manager, fire chief or police chief, but the language was not expressly so limited. Some may also argue that this suggests that positions that are typically appointed by the city council cannot be filled pursuant to Section 21224, but, once again, the language was not expressly so limited.]



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- The position is deemed by the governing body to require specialized skills for the work to be performed, or the appointment is during an emergency and necessary to prevent stoppage of public business.
- The appointment is a one-time appointment and cannot last longer than 12 months (no extensions beyond a year).
- The pay received by the retiree cannot exceed the maximum published pay schedule for the vacant position.

As for Section 21224, only two words were added by AB 1028 (underlined below):

A retired person may serve without reinstatement from retirement or loss or interruption of benefits provided by this system upon temporary appointment by the appointing power of a state agency or public agency employer either during an emergency to prevent stoppage of public business or because the retired employee has specialized skills needed in performing work of limited duration. These appointments shall not exceed a total for all employers of 960 hours in any fiscal year, and the rate of pay for the employment shall not be less than the minimum, nor exceed that paid by the employer to other employees performing comparable duties.

These limited additions seem to say “no big deal” to an unwary reader. The major problem is that there was no guidance provided as to what “temporary” might mean.

Some claimed the AB 1028 changes to 21221 and 21224 were simply codifying existing, implicit rules that PERS expected agencies had already been following. The reality was that many agencies were employing annuitants for extended periods of years, in a variety of positions including permanent positions, with only the general 960-hours-per-year limitation. When AB 1028 took effect, much wailing and gnashing of teeth ensued. Many agencies were left confused as to whether their arrangements were inconsistent with the law, potentially exposing them and their employees to uncertain penalties. The ambiguity of several key terms, together with the potential penalties for both the agency and the annuitant,⁴ generated additional amendments that were quietly dropped into the annual colossal budget bill in June 2012. More wailing and gnashing of teeth followed.

⁴ Retirees who run afoul of the post-retirement employment rules will be reinstated from retirement and (1) will be compelled to return any retirement allowance received during the period of unlawful employment, (2) will have to pay an amount equal to the employee contributions that should have been made during that time (plus interest), and (3) may have to pay PERS’ administrative expenses incurred in response to the retiree’s unlawful employment. Parallel penalties apply to the contracting agency that hired the annuitant, requiring payment of employer contributions that should have been made during the offending period and potentially requiring payment of PERS’ administrative expenses incurred as a result. Call me a cynic, but I’m thinking PERS would come after the contracting agencies every day and twice on Sunday before they would come after individual employees for administrative cost recovery, but that’s unsupported gut feeling.



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SB 1021 – Section 21221(h)

SB 1021, an urgency measure that took effect immediately, made some substantial changes to Section 21221(h). It now appears clearer that 21221(h) applies to permanent positions which are vacant during recruitment for a permanent appointment. The overall 960-hour limitation remains unchanged, and agencies that appoint a retiree pursuant to Section 21221(h) no longer have the option of requesting an extension to the 960-hour limitation. However, and more significantly, SB 1021 eliminated the 12-month restriction. Thus, it appears that a retiree appointed pursuant to Section 21221(h) may serve for more than a year until a permanent appointment is made, but the retiree can only be appointed once pursuant to Section 21221(h).

Additional changes to 21221(h) relate to compensation for the retiree. First, his or her compensation must be reflected as an hourly rate which is no higher than the maximum monthly base salary paid to employees performing similar duties, as listed on a publicly available pay schedule, divided by 173.333. Second, retirees may not receive any benefits or compensation in lieu of benefits.

SB 1021 – Section 21224

One of the most controversial changes made by AB 1028 was the addition of the word “temporary” in reference to appointments made pursuant to Sections 21224, the provision most often used by public agencies to employ retirees for temporary part-time work. It was unclear what “temporary” might mean in terms of an overall limitation to the length of employment under that section. According to various contacts with CalPERS staff, the word “temporary” was actually added to distinguish between permanent (i.e., positions listed on a publicly available pay schedule) and non-permanent positions. CalPERS apparently takes the position that Section 21224 cannot be used to temporarily fill vacant, permanent positions, but should be used only for “extra help” and special projects.

SB 1021 removed the word “temporary,” but we are still left with ambiguity as to how long appointments under Section 21224 may last without requiring reinstatement from retirement or incurring penalties. Keep in mind that the statute already contemplated non-permanent employment even before AB 1028, as reflected in the words “limited duration” in the prior version of Section 21224. These words remain in the statute after passage of SB 1021. The unofficial word from CalPERS is that a contracting agency may employ a 21224 retiree in a non-permanent position, subject to the 960-hour-per-fiscal-year limitation, for as long as the agency deems it necessary to employ the retiree.⁵ However, the appointment cannot be unlimited or indefinite.⁶ CalPERS is currently working on FAQs that we hope will provide further guidance, but those FAQs had not yet been released as of the time this paper was prepared. Current best estimates from unnamed insiders are that the FAQs will come out sometime in August or September.

⁵ Whew!

⁶ ???!!! Isn't that helpful?



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PRACTICE TIPS

If they haven't already done so, cities would be well served to inventory their ranks to identify all the retired annuitants on the payroll, the positions in which they are serving, and the provision under which they were appointed. We recommend that each annuitant's employment arrangement be reduced to writing (either in the form of a formal contract or signed memo) that identifies things like:

- Which section is being used for the appointment. If the position is an interim appointment to a regular, permanent position, the safest course is to assume Section 21221(h). If the position is truly "extra help," use 21224;
- What the emergency is or what specialized skills are needed for the appointment;
- If the appointment is under 21224, identify the appointment as temporary/limited duration and describe the duration of the appointment in terms as definitive as possible. Sometimes it is helpful to describe the appointment in "project" terms (e.g. "Annuitant Annie is going to work on Project X [further described in Exhibit 1], which will begin on September 1, 2012 and is expected to be completed by February 15, 2013."). If the assignment doesn't lend itself to a "project" type of description, consider a contract term for the employment (e.g. Fiscal Year 2012-13). If a successive contract term is necessary, make sure that a new contract with a new finite term is executed;
- A description of the hourly compensation to be paid;
- A statement that the city has compared the retiree's hourly compensation to the base salary (in hourly terms) paid to other employees performing comparable duties as listed on a publicly available pay schedule, and the retiree's compensation does not exceed such other employees' compensation;⁷
- A statement that no other benefit, incentive, compensation in lieu of benefits, or other forms of compensation in addition to the hourly pay rate are being provided; and
- A statement of the absolute 960-hour cap (for all PERS employers) for the fiscal year and how it will be monitored.

The new "My CalPERS" system will eventually make it much easier for PERS to track and audit the employment arrangements of its retired annuitants. Cleaning up these employment arrangements now should minimize potential audit headaches in the future.

⁷ It's even more helpful if this analysis has actually been performed and the numbers actually work.

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