



Via Fax and U.S. Mail

April 15, 2019

CalPERS Legal Office
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Re: Request For Comment Re Designation Of Board Decision In the Tracy C. Fuller Matter As Precedential

Dear Ms. Kaur:

The League of California Cities (“League”) along with the California Contract Cities Association (“CCCA”) submits this letter in response to CalPERS’s March 15, 2019, request for public comment regarding whether CalPERS should designate its decision in the Tracy C. Fuller matter, Case No. 2016-1277 (“Fuller Decision” or “Decision”) as precedential.

CalPERS asked for comment on the following questions:

- Does the decision contain a significant legal or policy determination of general application that is likely to recur?
- Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made, and how the law was applied?

The answer to both of these questions is no, and therefore the League and CCCA urge CalPERS *not* to make the Fuller Decision precedential for the following reasons.

The Fuller Decision involves a complex and unique factual situation that will not provide meaningful guidance to other employers in deciding whether to enroll in CalPERS workers or consultants who are engaged on a temporary or short-term basis and/or provide professional or expert services. The Decision is not based on a bright-line rule but rather on a multi-factor analysis, the results of which will vary according to the facts of a particular situation. Because this multi-factor analysis is already established in prior precedent, making the Decision precedential will not provide any additional guidance as to which factors are most relevant or should be given the most weight, if any. To the contrary, making the Decision precedential may cause confusion as CalPERS and public employers debate how the factors listed apply to various types of workers.

Issuing a precedential decision that will inject greater concern and confusion, rather than clarification of applicable rules, only makes it more difficult and uncertain for local governments to achieve their central goal of addressing the needs of the public they serve. Accordingly, for these reasons, discussed more fully below, the League and CCCA counsel *against* making the Fuller Decision precedential.

I. The Fuller Decision Does Not Contain A Significant Legal Or Policy Determination

The Fuller Decision applies the “common law” test for “employees” to distinguish workers who are subject to CalPERS enrollment from those who are not. This is not a “significant or legal policy determination” because there is existing, binding case law on this topic that was decided over a decade ago. In *Metropolitan Water District v. Superior Court* (2004) 32 Cal.4th 491, the California Supreme Court held:

“We conclude, as did the lower courts, that the PERL incorporates common law principles into its definition of a contracting agency employee and that the PERL requires contracting public agencies to enroll in CalPERS all common law employees except those excluded under a specific statutory or contractual provision.” (*Id.* at p. 496.)

As *Metropolitan Water District* makes clear, the common law test governs whether workers are “employees” subject to CalPERS enrollment. And there is already plenty of case law applying the common law employment test. (See, e.g., *S.G. Borello & Sons, Inc. v. Dept. Of Industrial Relations* (1989) 48 Cal.3d 342, 349-360; *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530-540.) Accordingly, there is no need for the unique factual scenario at issue in the Fuller Decision to be made precedential.

II. The Fuller Decision Does Not Contain A Determination of General Application That Is Likely To Recur

Rather than containing an analysis that is likely to recur, and thus guide public employers, the Fuller Decision applies a multi-factored balancing test to a unique fact pattern, noting that the factors counsel both for and against finding Fuller to be an independent contractor. The Decision also involves an exception to the statutory rules that permit employment of temporary workers without enrollment in CalPERS, thereby creating further confusion.

A. The Fuller Decision’s Analysis Is Extremely Fact Specific And Not Likely To Provide Guidance In The Future To Employers

The Fuller Decision applied a multi-factor test to analyze whether Fuller should be considered a common law employee and thus enrolled in CalPERS. Following the decision in *Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, which was cited in *Metropolitan Water District, supra*, the Decision slogged through one “principal” test and eight “secondary” factors to make its determination, and not all the factors pointed in the same direction. Accordingly, the Decision itself demonstrates that application of the “common law” test truly involves a case-by-case analysis and that reasonable minds could differ as to the application of

any particular factor. Were the Decision made precedential, it would result in unending argument and litigation regarding how one factor or the other should be applied and weighed.

1. The Decision Applied A Multi-Factor Legal Standard

First, the Decision applied the “principal test” which “is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” (Legal Conclusions, ¶ 2.)

Second, the Decision applied the “secondary factors” including: “(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of Payment, whether by the time or by the job; (g) whether or not the work is part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.” (Legal Conclusions, ¶ 3.)

As the Decision itself recognized, application of these factors is a fact-specific undertaking and results will vary on a case-by-case basis: “Generally ... the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.” (Legal Conclusions, ¶ 4, citing *S.G. Borello & Sons, Inc.*, *supra*, 48 Cal.3d at p. 352.)

2. The Decision Found That Some Factors Weighed In The Direction Of Finding Fuller To Be An Employee While Others Weighed In the Direction Of An Independent Contractor, Demonstrating That The Application Of The Common Law Test Must Occur On A Case-By-Case Basis

The Decision first applied the “principal test” and concluded that:

“The evidence established that CCSD had the right to control the manner and means by which Fuller accomplished the result desired, which is the principal test of an employment relationship. (*Tieberg, supra*, 2 Cal.3d at p. 946.) Gruber chose Fuller specifically for the assignment, and RGS lacked the authority to reassign Fuller without CCSD's consent. (Factual Finding 6.) At the same time, CCSD could end Fuller's services at any time by requesting a reassignment or terminating its agreement with RGS. (*Ibid.*)” (Legal Conclusions, ¶ 8.)

But then, the Decision went on to apply the additional tests, some of which favored employee status (Factors (a), (b), (d), (f), and (g)), others which favored independent contractor status (Factors (c), and (h)), and one factor which was “neutral” (Factor (e)):

“Reviewing the secondary factors in *Tieberg, supra*, 2 Cal.3d at p. 949, factors (a) and (b) tend to support employee status, since operating as an Interim Finance Manager for a public agency is not a distinct occupation or business, and is work usually done under the principal's direction. Factor (c) (skill) tends to support independent contractor status, while factor (d) (instrumentalities, tools, and place of work) tends to support employee status since CCSD provided those items to Fuller, although it also allowed her to perform work from outside the office. Factor (e) (length of time) would tend to support independent contractor status were it not for the month-to-month option to extend the agreement between RGS and CCSD. (Factual Finding 6.) With that option, this factor is neutral. Factors (f) (method of payment) and (g) (regular business of principal) tend to support employee status since Fuller was paid by the hour, not the job, and the work she did was part of the regular business of CCSD. (Factual Findings 6, 22.) Factor (h) (belief of the parties) tends to support independent contractor status, since CCSD and Fuller apparently believed Fuller was an employee of only RGS. (Factual Finding 22.)” (Legal Conclusions, ¶ 13.)

This analysis not only demonstrates that this “common law” test involves a case-by-case analysis, but also shows how small differences in the facts could cause the conclusion to be different.

3. The Decision Does Not Include A Clear And Complete Analysis Of The Issues In Sufficient Detail So That Interested Parties Can Understand Why The Findings Of Fact Were Made, And How The Law Was Applied

The Decision leaves open, for speculation and argument, whether different facts would have changed the result. This will cause confusion for those attempting to apply the Decision to particular situations.

For example, if the agency had not given Fuller the title of “Interim Finance Manager,” but had simply asked that she perform certain tasks, using her professional expertise, the “principal” test and factors (a) and (b) likely would have come out differently.

Factor (d) (whether the employer provides “instrumentalities, tools and place of work”) is difficult to weigh and apply because many independent contractors must necessarily work on site of the employer, and the Decision seems to have relied on a limited amount of on-site work to conclude that this factor weighed towards finding Fuller to be an employee. But the Decision also says that Fuller was permitted to work off site, and seems to consider this to be relevant too. Ultimately, the Decision does nothing to clarify how this factor should be weighed and applied, because it does not specify how much on-site as opposed to off-site work would be permitted.

Factor (e) (length of time) is also subject to confusion and disagreement regarding its interpretation. The Decision says that length of time – here eight months – favored independent contractor status, if not for the contractual option for month-to-month renewal. Does that mean a limited term contract without a renewal option is a factor in favor of independent contractor status? This creates more cause for confusion and disagreement.

According to the Decision, factor (f) (method of payment) was a factor in favor of employee status, because payment was by the hour, not by the job. But in fact, most professionals bill by the hour, such as lawyers, accountants, engineers, information technology professionals and many other independent contractors. It cannot be the case that each of these categories of professionals are more likely to be employees than independent contractors.

The Decision also found that factor (g) (principal business of employer) favored employee status, because Fuller participated in the usual business of the employer. But it is critical that public agencies – including those that contract with CalPERS – retain flexibility to fill temporary assignments while a recruitment takes place in order to prevent stoppage of important public business. Therefore, questions remain as to how much weight factor (g) should not be given in such a scenario.

In sum, there is no rule here to govern future decision-making, but a series of factors that will vary in their application based on the individual situations and point of view of the worker and employer. The Decision does not provide meaningful guidance to public employers.

B. The Decision Presents A Limited Situation Under PERL

The Fuller Decision also acknowledges that there are exceptions (Gov. Code §§ 20305, 20502) for part-time and temporary employees, but found that this case did not come within them because Fuller was a former CalPERS member. (Legal Conclusions, ¶ 1.) There is nothing new about this observation that deserves precedential treatment. Moreover, rather than providing a rule of general application, the decision requires an employer to first wade through a thicket of exceptions.

The statutory exceptions for part-time and temporary employees are complex and confusing. They contain a number of factors that may either require inclusion or permit exclusion from CalPERS. For example, the employer would probably have been able to fit Fuller within an exception, but, as stated by the Decision, she was already a member of CalPERS from prior employment. Any reader of the Decision would need to sort through this complexity, potentially causing confusion. This additional reason further demonstrates why the Decision should be not be made precedential.

III. The Correct Path Is Not To Make The Fuller Decision Precedential But Rather To Give Guidance To Employers Through A CalPERS Circular

The League and CCCA suggest that, rather than designating the Fuller Decision as precedential, it would be more appropriate for CalPERS to work with the League, CCCA, public employers and others to draft a Circular Letter to guide employer action regarding the employee vs.

independent contractor distinction. The Circular should address the modern realities of the environment in which cities now operate.

Throughout the country, the nature of the workplace has changed due to the introduction of technology, and the proliferation of more cost-effective service models. These models do not threaten traditional merit system employment; they are necessary to sustain it. Public employers in California are under great financial stress, in significant part because of CalPERS's unfunded liability and escalating rates. They are further hemmed in by Propositions 13 and 218 and have little additional capacity to raise taxes. And, they face increasing difficulty recruiting new employees in certain specialized fields.

In response to these issues and to ensure that essential public services are delivered without disruption, many public employers – often relying on statutes that authorize public agencies to outsource work under certain circumstances (see, e.g., Gov. Code § 53060, 31000, 37103) – use contract workers to fill short-term needs, temporarily supplement their services when needed, and obtain expert advice. Examples of this may include contracting with expert interim personnel when a position becomes vacant and recruitment is required, handling higher than usual demand for services by temporarily augmenting the workforce, and obtaining expert services in engineering, finance or law not obtainable by hiring an employee, among others. And significantly, many public agencies procure such services by contracting with third party “labor suppliers” – with the understanding that in doing so, they will not confer public employment status (and the attendant benefits that come with it) upon these workers. It is therefore necessary that CalPERS develops a circular that recognizes these modern realities to ensure that an employment relationship is not foisted upon public employers who entered into contracts precisely to avoid this result.

Conclusion

Based on the foregoing, the Fuller Decision does not satisfy the criteria to be designated as a precedential decision, and therefore, CalPERS should not designate it as such. The League and CCCA understand and applaud CalPERS's recognition that more guidance in this area is needed. Therefore, our organizations request that CalPERS work with the League, CCCA, public employers and others to develop a Circulate Letter to guide public employers in understanding when a worker is an employee vs. an independent contractor. Should you have any further questions regarding our position please feel free to contact Dane Hutchings (League) at (916) 658-8200 or Marcel Rodarte (CCCA) at (562) 622-5533.

Sincerely,



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