

**REPORT/RECOMMENDATION TO THE ADMINISTRATIVE COMMITTEE
OF SAN BERNARDINO COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION**

December 16, 2014

FROM: MICHAEL CALABRESE
Chief Counsel

SUBJECT: Administrative Policy No. 15, Retirees Returning to Work

RECOMMENDATION: Action: Recommend that the Board of Retirement approve the proposed policy, Administrative Policy No. 15, Retirees Returning to Work, interpreting and implementing the provisions of section 7522.56 of the California Government Code.

BACKGROUND INFORMATION:

On January 1, 2013, the Public Employees' Pension Reform Act of 2012 (PEPRA) became law. Among PEPRA's many new provisions was Government Code section 7522.56, which imposed extensive restrictions on the ability of a retiree to work for an employer in a retirement system while also collecting a pension from that system.

Under that law, a "retired person" is prohibited, "without reinstatement" to active status (i.e. a suspension of retirement benefit payments), from working for an employer in "the same public retirement system" except in compliance with the section's restrictions. Section 7522.56's restrictions include:

- 1) The work must be of "limited duration";
- 2) The retiree must have "skills needed to perform" the work;
- 3) The work cannot exceed 960 hours in a calendar or fiscal year (depending on the administrator of the system);
- 4) The employee's pay rate can be no less than the minimum nor more than the maximum paid to other employers doing comparable work;
- 5) The working retiree can receive no service credit or retirement rights for the work performed while also receiving a pension;
- 6) No retiree may work for an employer in the same system if they have received unemployment insurance compensation arising out of that relationship in the prior 12 months;
- 7) A person who received any retirement incentive is absolutely barred, for 180 days, from returning to work while also receiving a pension;
- 8) In a CERL system, members who are not police officers or firefighters may not return to work within 180 days of retirement unless the governing body of the employer certifies, on a non-consent agenda item, that "the appointment is necessary to fill a critically needed position before 180 days have passed."

The implementation of this section has proven difficult, as staff must seek employer cooperation to monitor compliance, but no codified rules exist to guide that cooperation. In addition, some of the statute's provisions lack definition, including "limited duration." Should a retiree violate the restrictions imposed by section 7522.56, SBCERA would have a legal obligation to suspend that member's benefit payments, return the member to active status, to recover any wrongfully received benefit payments, and to collect contributions on any wages earned during that return to active status. However, no mechanism is in place to accomplish these things, and there is no provision giving staff authority to do these things.

To fill these gaps, staff is proposing the attached policy. Its principal features include:

- 1) Employers and returning retirees would be required to submit documentation of compliance with section 7522.56's various provisions at the time the retiree returns to work;
- 2) A presumption that the re-employment has commenced in compliance with the law if the employer and employee submit the required documentation and SBCERA accepts it as valid, as long as no statements therein were materially falsified;
- 3) A conclusive presumption that work of a duration of three years or less is of "limited duration" in compliance with section 7522.56, and a requirement that the employer explain how work of a duration exceeding three years is "limited" in compliance with the statute;
- 4) Provisions for SBCERA-employer cooperation in monitoring ongoing compliance, including the number of hours worked in a given fiscal year and the approach of the limit on the duration of an employee's return to work;
- 5) Notice to the employee of the possible consequences for returning to work in violation of section 7522.56;
- 6) A provision providing retirees with due process by requiring a Board of Retirement agenda item to enforce section 7522.56 by suspending a benefit, returning a retiree to active status, and/or taking any of the other actions that may be appropriate in a case of violation.

Staff intends to cooperate with and seek the input of its various employers as this policy is finalized and implemented.

BUDGET IMPACT: None

ATTACHMENTS: Yes, proposed policy

PRESENTER: Michael P. Calabrese, Chief Counsel



POLICY NO. 015
Committee Admin Comm.
Policy Category: Administration

Issue No. 1.0
Effective Date:
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Approved.

Chairman of the Board

Subject: RETIREES RETURNING TO WORK

RETIREES RETURNING TO WORK

Introduction

SBCERA is responsible for ensuring the proper payment of benefits to retirees who have earned and are legally entitled to those benefits, and also for ensuring that the benefits it pays are limited to those to which the recipients are legally entitled. Under applicable law, including the County Employees' Retirement Act of 1937 and the Public Employees' Pension Reform Act of 2012, persons receiving retirement allowances from SBCERA may work for SBCERA employers only under limited circumstances. Thus, it is necessary for SBCERA to monitor the SBCERA retirees who return to work for SBCERA's participating employers, in order to ensure that benefits are paid to such re-employed retirees when, and only when, such payments comply with the law, including but not limited to sections 7522.56 and 31680.6 of the California Government Code. Further, SBCERA must ensure that, when such re-employment violates applicable limits, proper action is taken under the law, including but not limited to reinstatement of the re-employed retiree to active membership under section 31680.7. Finally, SBCERA must ensure that implementation of these provisions remains consistent with the rights of members and beneficiaries, and with its fiduciary duties to members, beneficiaries, and plan sponsors.

Operating Criteria

When an SBCERA participating employer employs or proposes to employ an SBCERA retiree, whether as an employee or through a contract directly with the employer, but intends not to restore that retiree to active membership, the following shall apply:

1. The employer shall report the proposed re-employment to SBCERA prior to its commencement. The report shall be signed by both the employer and the employee, and shall contain at least the following information:
 - a. An acknowledgement by the employer and the employee that they are aware of, and agree to comply with the requirements of:
 - i. sections 7522.56 and 31680.6 of the Government Code, and

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- ii. this Policy.
- b. Certification that one of the following is true:
 - i. the re-employment is necessary during an emergency to prevent stoppage of public business; or
 - ii. the employee has skills needed to perform work of limited duration.
- c. An explanation of the limit or limits on the duration of the re-employment.
- d. Certification that the employee will not or did not commence re-employment within 180 days following the date of retirement, or, if re-employment commenced or will commence within 180 days of retirement, that the employee did not receive a retirement incentive upon retirement and that one or more of the following is true:
 - i. that the employee is a public safety officer or firefighter, and that the re-employment is for the performance of functions regularly performed by a public safety officer or firefighter; or
 - ii. that the re-employment is necessary to fill a critically needed position before 180 days have passed, and has been approved by the governing body of the employer in a public meeting on the non-consent calendar.
- e. Certification that the employee has not, during the twelve months prior to re-employment, received any unemployment insurance compensation arising out of the employee's prior employment with an SBCERA participating employer.
- f. That the employee will not work more than 960 hours in any fiscal year.
- g. That the employee's pay during re-employment will be not less than the minimum, nor greater than the maximum, paid to other employees performing comparable job duties.
- h. That the employee understands that while SBCERA and the employer will cooperate with the employee and with one another to facilitate compliance, compliance is ultimately the employee's responsibility, and failure to comply with the requirements of Government Code sections 7522.56 and

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31680.6, as implemented through this Policy, may, at the discretion of the Board of Retirement, result in the following, effective on the date upon which the re-employment ceased to be in compliance with those sections:

- i. Reinstatement of the employee to active membership status, with a suspension of any retirement benefit payments;
 - ii. A requirement that all retirement benefit payments received during any unlawful re-employment be returned to the retirement system, with interest;
 - iii. The collection by SBCERA from both the employee and employer, as applicable, of contributions on any pay received by the employee during any period of unlawful re-employment; and
 - iv. The employee earning a new benefit for the period of re-employment, pursuant to section 31680.7.
2. Re-employment will be presumed to be in compliance with the requirement that it be of "limited duration" if the limit on the duration of the re-employment is three years or less. Retirees who have returned to work prior to the effective date of this policy shall be treated as if their return to work commenced on the effective date of this policy, and documentation regarding such employees shall be submitted to SBCERA as soon as practicable after the effective date of this policy. If there is no specified ending date for the re-employment, or if the specified ending date is more than three years from commencement of re-employment, the employer shall submit to SBCERA a statement explaining the limit on the duration of the re-employment. Such re-employment shall be considered of limited duration if, despite having no stated ending date, it is limited to the completion of a discrete quantity of genuinely limited work that one would expect to be completed at a foreseeable time. Such re-employment shall not be considered to be of limited duration if the re-employment is the functional equivalent of a permanent part-time position, or if the stated limit on the duration is such that the re-employment is effectively unlimited.
3. SBCERA staff shall monitor compliance with this policy through methods determined by the CEO or his or her designee, which may include, but shall not be limited to, the following:

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- a. Requiring employers to report to SBCERA when any re-employed retiree has worked at least 700 hours in any fiscal year, or to provide SBCERA with access to the employer's payroll system in a manner that permits SBCERA staff to directly access such information;
 - b. Requiring employers to report when a re-employed retiree has less than six months' duration remaining on a period of re-employment that was commenced with a stated end-date, and any instance in which such an employee continues to work beyond the originally stated end-date, or in which the employer extends the originally stated end-date with an explanation of such extension;
 - c. Requiring documentation of compliance with any of the requirements of section 7522.56.
4. If genuine documentation regarding the re-employment of a retiree is submitted as required by this Policy and accepted by SBCERA as adequate at the time of the re-employment, this shall be considered conclusive evidence that the re-employment was commenced in compliance with applicable law. The CEO or his designee shall notify the employer in writing of the acceptance of the documentation required by this policy.
5. If the CEO or his designee becomes aware that any retiree's re-employment is in violation of applicable law including but not limited to sections 7522.56 and 31680.6 of the Government Code, the matter shall be presented to the Board of Retirement for a determination as to whether to suspend the re-employed retiree's retirement allowance and restore the member to active membership, the effective date of such action, the recovery of any improperly paid benefits, the collection of any contributions that may be owed, and any other appropriate action. The re-employed retiree shall be provided with a copy of all documents that form the basis of the recommendation no later than seven days prior to the Board meeting at which said action is to be taken. Action by the Board under this paragraph shall be reviewable in Superior Court as a final administrative action, pursuant to section 1094.6 of the California Code of Civil Procedure.