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San Bernardino County Employees' Retirement Association

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Area Benefits
 Applicability SBCERA systemwide

Retirees Returning to Work

POLICY NO. 032

I. Introduction

A retired person, whether retired for service or disability, shall not serve, be employed by, or be employed through a contract directly by a public employer in the same public retirement system from which the retiree receives the benefit without reinstatement from retirement, except as permitted by Government Code section 7522.56. This policy does not apply to retirees who work for public agencies not covered by SBCERA such as the state or another county.

SBCERA is responsible for ensuring the proper payment of benefits to retirees who have earned and are legally entitled to those benefits, and 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 (CERL) and the Public Employees' Pension Reform Act of 2013 (PEPRA), persons receiving retirement allowances from SBCERA may work for SBCERA participating employers only under limited circumstances.

Therefore, it is necessary for SBCERA to monitor SBCERA retirees who return to work for SBCERA's participating employers so that:

1. ~~Benefits~~ Retirement 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.
2. SBCERA takes appropriate action under the law when such re-employment violates applicable limits; ~~and proper action is taken under the law~~, including but not limited to, reinstatement of the re-employed retiree to active membership under Government Code section 31680.7.
3. Implementation of these provisions remains consistent with the rights of members and beneficiaries, and with SBCERA's fiduciary duties to members, beneficiaries, and plan

sponsors.

II. Operating Criteria

When an SBCERA participating employer requests a determination regarding a return-~~to~~-to-work arrangement of an SBCERA retiree, under which the retiree will not be reinstated to active membership, the following shall apply:

A. REQUEST FOR RETURN TO WORK

1. The employer shall report the details of the return-to-work arrangement to SBCERA prior to its commencement. The report shall be signed by both the employer and the retiree, and shall contain the following information:
 - a. An ~~acknowledgement~~acknowledgment by the employer and the retiree that they are aware of, and agree to comply with the requirements of:
 - i. Sections 7522.56 ~~and~~, 31680.6, 31680.9 of the Government Code, and
 - ii. this Policy.
 - b. The employer shall report the details of the return-~~to~~-to-work arrangement as specified on the appropriate SBCERA certification form, including but not limited to the following information:
 - 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.
 - iii. The work to be performed is limited to 960 hours per fiscal year; ~~and~~.
 - iv. The work is of limited duration (18 consecutive months).
 - v. The retiree will receive compensation that is not less than the minimum or greater than the maximum paid to the other employees performing comparable duties as listed in the employer's ~~public~~publicly available pay schedule.
 - vi. Whether the retiree is receiving a disability benefit and if so, certify that the position: is not the same position from which the member retired or ~~include~~includes duties or activities the retiree ~~is~~was restricted from performing at the time of his or her disability retirement.
 - vii. Complies with the bona fide separation requirements, as well as the requirements set forth in the Government Code section 7522.56 (f)(1), (g), and (h).
 - viii. Complies with SBCERA Benefits Policy No. 021, specifically, Internal Revenue Code regulations concerning bona fide separation requirement, if the retiree retired under the applicable

normal age of retirement.

- c. If applicable, the employer shall provide the independent contractor agreement or contract ~~or agreement or contract~~ with the third-party entity.

B. LIMITED DURATION - 18 CONSECUTIVE MONTHS

1. Presumed Compliance - 18 Consecutive Months

- a. Re-employment will be presumed to comply with the requirement that it be of "limited duration" if the limit on the duration of the re-employment is 18 consecutive months or less.

2. Greater than 18 Consecutive Months

- a. If the specified ending date for re-employment is more than 18 consecutive months from commencement of re-employment, or if the employer and retiree request to extend beyond the initial 18 consecutive months, the employer shall submit to SBCERA a statement, in a form prescribed by SBCERA, explaining the limit on the duration of the re-employment.
- b. ~~If the specified ending date is more than 18 consecutive months from commencement of~~Such re-employment, ~~the employer~~ in excess of 18 consecutive months shall ~~submit to SBCERA a statement explaining the limit on the duration of the re-employment. Such re-employment in excess of 18 consecutive months shall~~ be considered of limited duration, only if all of the following are true:
 - i. Extreme Necessity - Re-employment is necessary to enable the employer to continue effective operations in light of genuinely extreme necessity that is unavoidable or could not have been anticipated. The retiree's retirement shall not, in and of itself, be considered to have given rise to the extreme necessity to which this paragraph refers;
 - ii. Completion of Work - Re-employment is limited to the completion of a discrete quantity of genuinely limited work that one would expect to be completed at a foreseeable time, or through the completion of a special project;
 - iii. Approval by the Board of Retirement - The re-employment has been approved by the Board, either prior to its commencement or, if extreme necessity requires commencement of re-employment before Board approval can be sought, at the first Board meeting after re-employment at which the matter may be considered. The Board shall determine whether the re-employment complies with all ~~of~~ the applicable requirements of section 7522.56 and this policy.
 - iv. If the Board denies the re-employment request of more than 18 consecutive months or request to extend beyond the initial 18 consecutive months, the retiree is required to immediately

cease working for the employer. In the event the employer and retiree fail to comply with the Board's determination, this shall be considered a violation and subject to violation penalties and fees stated in Section F below.

3. No Part-time Employment

- a. 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.

4. Any re-employed retiree who violates these employment duration limitations shall be subject to the violation penalties stated in Section F below.

C. HOOR LIMITATIONS

1. No re-employed retiree will be permitted to work more than 960 hours for any single or combined SBCERA covered employer. For example, a re-employed retiree shall not work 500 hours for one SBCERA covered employer and 500 hours for a second SBCERA covered employer in the same fiscal year.
2. Any re-employed retiree who violates these hour limitations shall be subject to the violation penalties stated in Section F below.

D. PAY REQUIREMENTS

1. A re-employed retiree shall be paid at a rate that is no less than the minimum and no greater than the maximum paid to the other employees performing comparable duties as listed in the employer's publicly available pay schedule.
2. For re-employed retirees whose duties are not comparable to duties of employees listed in the employer's publicly available pay schedules, the employer shall provide the pay rate and a justification for the pay rate in the Request to Work form, including certifying that no other employees are performing comparable duties. The SBCERA Chief Executive Officer (CEO) may reject the justification and send the matter to an administrative hearing pursuant to Section I below for a recommendation by a hearing officer regarding the pay rate. During the administrative hearing process, including the Board's determination based on the hearing officer's recommendation, the retiree shall not work for the employer.
3. Violation of these pay requirements shall be subject to the violation penalties stated in Section F below.

E. EMPLOYER REQUIREMENTS

1. Annual Reporting: Employers shall report the following to SBCERA not later than 10 business days after the end of each fiscal year (June 30th): ~~a list of all SBCERA retirees working in any capacity, including: direct employment or as independent contractors contracted directly with the employer, along with the total number of hours worked for each retiree during the fiscal year.~~
 - a. List of all SBCERA retirees working in any capacity, including direct employment or as independent contractors, contracted directly with the

employer during the fiscal year.

b. The total number of hours worked for each retiree during the fiscal year.

c. The pay rate for each retiree during the fiscal year.

2. Notice of Violation: An employer shall notify SBCERA within two business days of the discovery that a retiree has exceeded 960 hours worked in a fiscal year or the limited duration period. Failure to report shall be subject to the violation penalties stated in Section F below.
3. Recruitment Prior to and During the Return to Work of a Retiree: An employer shall be actively recruiting for a permanent replacement for the ~~regular~~ position being occupied by a retiree, unless the position is temporary or seasonal.
4. Substantial Compliance: If genuine documentation regarding the initial 18 consecutive months of 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 designee shall notify the employer in writing of the acceptance of the documentation required by this policy.
5. Staff may have additional questions of the employer and retiree, and both shall cooperate and respond to such questions in a timely manner. Failure to cooperate may result in the request for re-employment being delayed and/or denied as the re-employment shall no longer be presumed to be in compliance with the law, including a referral to an administrative hearing to resolve the outstanding issues. In no instance shall a retiree work, or an employer allow work to continue, during the pendency of any such determination.

F. RETURN TO WORK VIOLATIONS (CERL, PEPRA, AND BENEFITS POLICY NO. 032)

1. Retiree Violations Penalties

- a. Retiree shall Reimburse SBCERA for any retirement allowance received during the period or periods of employment that are in violation of the law. The retirement allowance that was in violation of the law shall be considered an overpayment subject to collection by SBCERA.
- b. Only if reinstated, the retiree shall pay to SBCERA an amount of money equal to the employee contributions that would otherwise have been paid during the period or periods of unlawful employment, plus interest thereon (same rate of interest established under the Board's Interest Crediting Policy).
- c. Contribute toward the reimbursement to SBCERA for reasonable administrative expenses incurred in responding to this situation, to the extent determined by SBCERA Chief Executive Officer or designee to be at fault.

2. Employer Violation Penalties and Fees

- a. Only if the retiree is reinstated, the employer shall pay to SBCERA an amount equal to employer contributions that would otherwise have been paid for the period or periods of time that the member is employed in

violation of this article, plus interest thereon. (same rate interest established under the Board's Interest Crediting Policy).

- b. The employer shall contribute towards reimbursement to SBCERA for reasonable administrative expenses incurred in responding to this situation to the extent the employer is determined by the SBCERA Chief Executive Officer to be at fault.
- c. The SBCERA Board delegates to the Chief Executive Officer collection of the required fees from an employer in violation of Government Code section 7522.56 and/or Benefits Policy No. 025:
 - i. If an employer fails to enroll a retiree employed in any capacity by completing a Request to Return to Work form and submit to SBCERA, without reinstatement within 30 days of the effective date of hire, SBCERA Chief Executive Officer shall assess the employer a fee of two hundred dollars (\$200) per retiree per month until the retiree(s) is enrolled in those administrative aspects of the system.
 - ii. If an employer fails to report the pay rate and number of hours worked of a retired member employed in any capacity, without reinstatement, within 30 days following the last day of the pay period in which the retiree worked, SBCERA Chief Executive Officer shall assess the employer a fee of two hundred dollars (\$200) per retiree per month until the information is reported.

G. TRACKING HOURS IN COMPLIANCE WITH PEPRA AND BENEFITS POLICY NO. 032

- 1. An SBCERA retiree subject to the return-to-work requirements and employer are responsible for keeping track of the number of hours worked so that the retiree does not exceed 960 hours in a fiscal year. Failure to track shall be presumed to not be in compliance with Government Code section 7522.56 and Benefits Policy No. 032, and shall be subject to violation penalties stated in Section F above.

H. ~~REINSTATEMENT TO ACTIVE SERVICE~~ CHIEF EXECUTIVE OFFICER DETERMINATION

1. ~~Reinstatement~~

- a. ~~An SBCERA retiree subject to the return-to-work requirements, and employer are responsible for keeping track of the amount of hours worked so that the retiree does not exceed 960 hours in a fiscal year and is otherwise in compliance with the law. Violation of any requirement of Government Code Section 7522.56 shall result in a reinstatement to active service.~~

2. If the CEO Determination

- a. ~~If the CEO or designee becomes aware that any retiree's return to work is in violation of applicable law including but not limited to sections 7522.56 and 31680.6 of the Government Code, the CEO shall determine:~~
 - i. ~~whether to suspend the re-employed retiree's retirement allowance and restore the member to active membership,~~

- ii. ~~the effective date of such action;~~
 - iii. ~~the recovery of any improperly paid benefits;~~
 - iv. ~~the collection of any contributions (employer and employee) that may be owed; and~~
 - v. ~~any other appropriate action.~~
- b. ~~The re-employed retiree and employer shall be provided with a copy of all documents that form the basis of the recommendation. However, if the CEO determines that the hours exceeded is de-minimus [one pay period or less] then the retiree shall not be reinstated, but will be required to stop working and shall not under any circumstances return to work for any SBCERA participating employer.~~

or designee becomes aware that any retiree's return to work is in violation of applicable law including but not limited to sections 7522.56 and 31680.6 of the Government Code, the CEO shall, in accordance with Government Code section 31680.9 and Section F above:

- a. Suspend the re-employed retiree's retirement allowance and restore the member to active membership.
- b. Establish the effective date(s) of the violation periods.
- c. Recover any improperly paid benefits.
- d. If retiree is reinstated, collect contributions (employer and employee) that are owed, and
- e. Determine the reasonable administrative expenses incurred in responding to this situation to the extent the retiree and/or employer is determined to be at fault and collect such expenses from the retiree and/or employer.
- f. Assess and collect the total employer fees, based on the specific violation cited in Section 31680.9 (d) or (e) [Section F(2)(c) of this Policy].

3. ~~Appeal Rights~~

- a. ~~In the event the CEO or designee denies the request for re-employment without suspension of benefits, the retiree or the employer shall have the opportunity to appeal that decision to the Board no later than 30 days from the date of the CEO's determination pursuant to Board Benefits Policy No. 025 (Requests and Appeals for Pension Benefits).~~

4. ~~Board Action~~

- a. ~~The Board's initial action may be appealed to an administrative hearing governed by the applicable portions of SBCERA's *Procedures for Disability Retirement Applications and Formal Hearings*.~~
- b. ~~Any further action by the Board under this paragraph shall be reviewable in Superior Court of California County of San Bernardino as a final administrative action, pursuant to section 1094.5 of the California Code of Civil Procedure.~~

5. Contributions

~~a. Employer shall be responsible for collection and payment of employer and employee contributions to SBCERA in the event the retiree is reinstated to active service.~~

6. The re-employed retiree and employer shall be provided with a copy of all documents that form the basis of the recommendation. However, if the CEO determines that the hours exceeded is de-minimus [one pay-period or less] then the retiree shall not be reinstated, but will be required to stop working and shall not under any circumstances return to work for any SBCERA participating employer.

I. APPEAL RIGHTS

1. If the re-employed retiree or employer challenge the Chief Executive Officer's determination, the CEO shall refer the matter to an administrative hearing to be conducted in accordance with the Board's adopted administrative procedures. The hearing officer conducting the hearing shall gather relevant information and documentation, and conduct an evidentiary hearing.

2. The Board shall consider the hearing officer's recommendation and take action on the recommendation pursuant to Government Code section 31534.

3. Board Action

a. Any further action by the Board under this section shall be reviewable in the Superior Court of California, County of San Bernardino as a final administrative action, pursuant to section 1094.5 of the California Code of Civil Procedure.

J. VOLUNTEER SERVICE

1. A retiree may serve without reinstatement from retirement when the retiree is performing voluntary service for a public agency and does not receive remuneration for the services. Limitations as stated in Government Code section 7522.56 are not applicable to volunteer services.

K. INDEPENDENT CONTRACTOR

1. An independent contractor or an employee of a third-party employer may not be subject to the returning retiree requirements of Government Code section 7522.56, ~~so long as if~~ there is no common law employer-employee relationship between the retiree and an SBCERA participating employer. However, if a common law employer-employee relationship exists, the employment is subject to the restrictions of Government Code section 7522.56 even if the agreement claims the retiree is an independent contractor. If the work that will be performed by the retiree is the same or similar work performed by the retiree when the retiree was an active employee, or is work performed by an active employee of that employer, and employer-employee relationship exists, ~~and~~ the employment is subject to the restrictions of Government Code section 7522.56 and subject to violation penalties in Section F above.

2. SBCERA will examine whether the retiree meets the criteria of an independent contractor by using the control test included in the Return to Work form. The control test shall review factors that are considered to determine if the independent

contractor has the right to control or direct the result of the work, or meets the requirements as a common-law employee. Only those workers who are effectively in control of their own work, and whose work is not being managed or directed by the employer will considered to independent contractors. Factors SBCERA shall consider, include, but are not limited to, on-site requirements, hiring and managing, continuity of relationship, order of work dictated by employer, provision of tools and materials, repayment of business or travel expenses, availability of services to the public or other companies, and retiree's investment in a workspace

- 3. Employers considering hiring an SBCERA retiree ~~under one of these arrangements~~as an independent contractor shall request a review and determination of the potential arrangement to determine if it is subject to the returning retiree requirements of Government Code section 7522.56. The CEO shall respond in writing to the employer and retiree regarding the determination of whether the return to work is subject to the restrictions of Government Code section 7522.56.

L. LOCAL BOARDS ~~and~~AND COMMISSIONS

- 1. Pursuant to Government Code section 31680.16 an SBCERA retiree may receive per diem payments for serving on non-salaried, part-time boards or commissions associated with a participating employer without reinstatement from retirement, or the loss or interruption of benefits. These retired members can only receive per diem payments authorized for all members of the board or commission, and they cannot acquire benefits, service credit, or retirement rights by their appointment or election.

M. PRIVATE SECTOR EMPLOYMENT

- 1. A retiree who works for a private industry employer not associated with any SBCERA employer may work without restrictions and continue to receive his/her SBCERA retirement.
- 2. Exception to Private sector employment: A person employed through a temporary agency ~~contract~~contracted with an SBCERA participating employer to ~~fill a regular~~serve in a position of the employer or a created position for a project is subject to the requirements of Government Code section 7522.56, and the employer is required to report the re-employment and submit a certification to SBCERA.

Approval Signatures

Step Description

Approver

Date

Applicability

SBCERA, SBCERA Internal