



San Bernardino County Employees'
Retirement Association

MEMORANDUM

Date: April 15, 2021

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To: DEBORAH S. CHERNEY
Chief Executive Officer

BOARD OF TRUSTEES
San Bernardino County Employees'
Retirement Association

Subject: REVIEW OF GOVERNMENT CODE SECTION 7522.56 AND BENEFITS
POLICY NO. 032 REGARDING RETURNING RETIREES

I. INTRODUCTION:

SBCERA Trustee Harry Hatch presented a request for the SBCERA Board to support legislation to revise Government Code section 7522.56 regarding returning retirees to exempt peace officers and firefighters from the requirements outlined in the statute. Trustee Hatch's suggestion arose out of a discussion concerning an item presented to the SBCERA Board regarding the determination of continued employment of a retiree performing duties of a paid-call firefighter and whether the SBCERA Board is required to make a determination of a retiree's reemployment in this type of position.

II. QUESTION(S) PRESENTED:

1. Are peace officers and firefighters exempt from the requirements of performing work of limited duration thereby not requiring the SBCERA Board to determine the retiree's eligibility to return to work without reinstatement?

III. SHORT ANSWER:

No, section 7522.56 "shall apply to any person who is receiving a pension benefit from a public retirement system and shall supersede any other provision in conflict with this section." Section 7522.56, however, does allow a retiree who retired before the normal age of retirement to return without waiting the time required for a bona fide separation from service if returning to a peace officer or firefighter position. In all other aspects, a retiree in this type of position is subject to all the requirements set forth in Government

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Code section 7522.56, thereby requiring the SBCERA Board to determine the retiree's eligibility to return to work without reinstatement. The provisions of the Government Code section 7522.56 and Benefits Policy No. 032, specifically state the requirement that work be of "limited duration," applies to all retirees regardless of the type of work being performed as long as a retired person is receiving a pension benefit from SBCERA. (Gov. Code § 7522.56 (a).) Further, when the idea of amending section 7522.56 was presented to the SACRS Legislative Committee, the committee expressed reservations about SACRS sponsoring an amendment that would exclude safety members from the provisions of section 7522.56.

IV. BACKGROUND:

In 2013, the Public Employees' Pension Reform Act brought about sweeping changes to the administration of retirement benefits for public retirement systems. One change in particular was a change allowing retirees to return to employment without reinstatement with a participating employer in the same public retirement system. Prior to PEPRA, a retiree could return to work for 960 hours as long as the retiree was reemployed in a position requiring special skills or knowledge for not to exceed 120 working days or 960 hours, whichever was greater, in any one fiscal year. (Gov. Code § 31680.3.) Essentially, pre-PEPRA, the statute did not prescribe any other requirements for a retiree to return to reemployment without reinstatement. Now, because of PEPRA, Government Code section 7522.56 requires more than just a retiree returning to a position requiring special skill or knowledge, it requires that such work be of limited duration. In addition, the statute limits a retiree's rate of pay received for the 960 hours the retiree will work in a fiscal year. Below is a brief summary of each requirement a retired person is subject to in section 7522.56, regardless of the type of position the retired person works.

A. Emergency or Special Skills

Generally, a retiree may serve without reinstatement either:

- (1) During an emergency to prevent stoppage of public business or
- (2) Because the retired person has skills needed to perform work of *limited duration*. (Gov. Code § 7522.56 (c), emphasis added.)

Since the legislature did not go further in defining the term "limited duration," the SBCERA Board adopted Benefits Policy No. 032 setting forth the operating criteria for reemployment deemed to be work of "limited duration." Limited duration, as defined by the SBCERA Board, is equal to 18 months or less from commencement of reemployment. However, there may be circumstances under which the

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employer and/or retiree may request an extension of the reemployment beyond 18 months.

Similar to the legislature not defining the term “limited duration,” the statute does not set forth any requirement that allows for extended reemployment beyond a limited duration. Nonetheless, the SBCERA Board determined that re-employment could be extended beyond the initial 18 months if:

- (1) Reemployment is necessary to enable the employer to continue effective operations in light of genuinely extreme necessity that is unfavorable or could not have been anticipated.
- (2) Reemployment is limited to the completion of a discrete quantity of genuinely limited work that one would expect to be completed at a foreseeable time.

The SBCERA Board determined that reemployment periods are not limited duration if the reemployment is the functional equivalent of a permanent part-time position, or if the stated limit on the duration is such that the reemployment is effectively unlimited.

B. 960 Hours and Rate Of Pay

Although limited duration is 18 months or less from the commencement of reemployment under SBCERA policy, the retiree is still limited to 960 hours of work per fiscal year. In the event, a retiree exceeds 960 hours of work, regardless of the months remaining for the approved reemployment, the retiree may be required to be reinstated to active service and have his or her retirement benefit suspended.

In addition to the 960 hours, the rate of pay a retiree receives cannot be less than the minimum, nor exceed the maximum, paid by the employer to other employees performing comparable duties. Importantly, SBCERA is not concerned whether the type of pay is considered to be compensation earnable since the retiree is not acquiring service credit or retirement rights under the reemployment unless the person reinstates from retirement. In other words, whether pay is compensation earnable is not applicable.

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C. Bona Fide Separation Of Service

Pursuant to Government Code section 7522.56 (f), a retiree is not eligible to be reemployed for a period of 180 days following the date of retirement. This requirement is known as a bona fide separation of service under the Internal Revenue Service Regulations. If a retiree retired before his normal retirement age and did not have a bona fide separation from service before returning to work, the employer must terminate the employment relationship prior to paying retirement benefits. Further, an employer cannot enter into a prearrangement of post retirement employment with those retirees who have not attained normal retirement age. However, under section 7522.56(f), an SBCERA retiree may return earlier than the bona fide separation period, if he or she meets one of the following conditions:

- (1) The employer certifies the nature of the employment and that the appointment is necessary to fill a critically needed position before the bona fide separation period has passed and the appointment is approved by the governing body of the employer in a public meeting.
- (2) The retiree is a public safety officer or firefighter hired to perform a function or function regularly performed by a public safety officer or firefighter.

Regardless of the fact that a retiree is not required to wait the bona fide separation of service period under the above conditions, the retiree is not exempt from the other requirements of section 7522.56.

**V. POTENTIAL UPDATE TO STATUTE TO EXEMPT PEACE OFFICERS AND
FIREFIGHTERS:**

David Lantzer presented the suggestion to update the statute to exempt peace officer and firefighters from the requirements of section 7522.56 to the SACRS Legislative Committee. The committee's response was that this is an issue for labor and employers to present to the legislature. The committee also voiced concern that the suggested change would enhance benefits, which appears contrary to the purpose of PEPRA. The committee consensus was that a plan sponsor or labor groups is the appropriate party to introduce a bill to amend section 7522.56.

The committee also expressed some reservations about trying to amend PEPRA. PEPRA is Governor Jerry Brown's signature pension reform. Governor Brown is still very popular

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in the state. The SACRS lobbyists informed the committee that there is general hesitation in Sacramento to make substantive changes to PEPRA.

Assembly member Timothy Grayson (District 14 – Northern CA) introduced Assembly Bill 1354, which would make nonsubstantive changes to Government Code section 7522.56 deleting “he or she” with “the retired person.” There is no indication who is supporting this bill or if it is just a spot bill, awaiting further changes. The SACRS committee and staff will monitor the bill and report on changes as appropriate.

End of Memo.

BMH:ycb