

# The FISCAL REPORT an informational update

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## Ask SSC . . . Questions and Answers About Working After Retirement

We have received a number of specific questions with regard to the rules for school agency retirees returning to work. We have separated the questions and answers that apply to all retirees, and then those specific to California State Teachers' Retirement System (CalSTRS) members and California Public Employees' Retirement System (CalPERS) members into three sections below.

### Both CalSTRS and CalPERS Retirees

**Q1.** Can a CalPERS or CalSTRS retiree be paid as a consultant or must they be paid as an employee?

**A1.** They can be paid as an employee, an employee of a third party, or as an independent contractor. The recent changes to statutes caused by Assembly Bill (AB) 178 (Chapter 135/2012), AB 1028 (Chapter 440/2011), and Senate Bill (SB) 1021 (Chapter 41/2012) have no effect on the Internal Revenue Service (IRS) rules that govern employee versus independent contractor determinations. Visit the IRS website at <http://www.irs.gov/charities/article/0,,id=128602,00.html> for more information on how to determine whether an individual can appropriately be classified as an independent contractor. If, after looking at the guidelines, there is still doubt, we recommend that you err on the side of caution and pay the person as an employee.

**Q2.** We have heard that there are limitations on the type of work that school agency retirees can come back and perform. Can you please clarify this?

**A2.** Separate and apart from the earnings and hours limitations specific to CalSTRS and CalPERS discussed in the questions that follow, there are some limitations on the type of work that can actually be performed by retirees when they return to work in a local educational agency (LEA) without reinstating to active service.

Education Code Section (E.C.) 45134 specifies that anyone receiving a retirement allowance under any school retirement system cannot be employed in a classified position unless expressly provided for in statute. CalSTRS retirees are allowed only to return as instructional assistants and only if needed in a class "with a high pupil-teacher ratio," needed to provide remedial instruction, or needed to provide instruction for underprivileged students.

CalPERS retirees are allowed to return to work in various capacities, as specified in Government Code Section 21220 et seq., a couple of which are addressed more specifically in questions #5 and #6, below. CalPERS retirees can also work as instructional assistants under the same circumstances as for CalSTRS retirees.

E.C. 24214 specifies that CalSTRS retirees returning to perform activities that would normally be counted as creditable service are subject to the earnings limitation of \$40,011 for 2012-13. Activities that would not count as creditable service are not subject to the earnings limitation, but remember the restrictions in E.C. 45134 when it comes to performing duties in the classified service. CalSTRS retirees may perform activities for a school agency without limitation if those activities would not be counted as creditable service and are not part of the classified service.

## CalSTRS Retirees Only

**Q3.** How much latitude do county superintendents have in authorizing retired administrators to serve in emergency administrative positions at the local district level and remain exempt from the CalSTRS earnings limitation?

**A3.** E.C. 42127 and 42127.6 allow a county superintendent of schools to appoint a fiscal advisor to a school district that will be unable to meet its financial obligations for the current or subsequent fiscal year (has a negative budget certification). AB 178 modified E.C. 24214 to allow a CalSTRS retiree appointed as a fiscal advisor to qualify for an exemption from the earnings limitation as long as certain requirements are met. This is effective only for the 2012-13 fiscal year, as it is intended to bridge the gap until the Legislature and the Governor enact pension reform.

The earnings limitation for CalSTRS retirees for 2012-13 is \$40,011, so the retiree appointed as a fiscal advisor would be subject to the limitation unless the appointing authority is able to substantiate to CalSTRS the retired member's eligibility for an exemption. Based on the changes made by AB 178, to be eligible for an exemption, the appointing authority must:

Certify that the position was advertised to active or inactive CalSTRS members and no qualified person was available

Demonstrate that they made a good faith effort to hire a retiree who was willing to reinstate to active service at the salary that was advertised

Verify that the salary being paid to the CalSTRS retiree that chose not to reinstate does not exceed what was advertised and that the appointment will terminate on or before June 30, 2013, when the exemption from the earnings limitation will expire

All of the above must be demonstrated to CalSTRS before the retiree can begin working as a fiscal advisor.

CalSTRS has just published a "*Working After Retirement*" Fact Sheet that addresses frequently asked questions related to the passage of AB 178. It extended the earnings limitation exemptions under very limited circumstances for one year, changed the method of calculating the postretirement earnings limitation, and relaxed some provisions governing reinstatement to active service. The CalSTRS fact sheet can be found [here](#).

To be clear, most of the exemptions from the CalSTRS earnings limitation have now expired. If your district has any CalSTRS retirees performing creditable service, they will be subject to the earnings limitation unless they reinstate to active service or are appointed by another authority under these very narrow exemptions provided for in AB 178.

**Q4.** Are there reporting requirements that districts must adhere to when they contract with a third party that employs a CalSTRS retiree? Should we be reporting to CalSTRS, and if so, how?

**A4.** E.C. 22461, which addresses the reporting of postretirement earnings and the liability of the employer related to the earnings limitation, remains unchanged. It specifies that, upon retaining the services of a retired member either as an employee, an employee of a third party, or an independent contractor, the employer is required to notify the retired member of the current earnings limitation, maintain accurate records of the retired member's earnings, and make monthly reports of those earnings within 45 days to the retired member and to CalSTRS. No matter how the payment is made or the source of funding, the earnings must be reported to CalSTRS using Member Code 2 and Assignment Code 61 through your normal reporting process.

## **CalPERS Retirees Only**

**Q5.** For many years, our district has hired back people that have retired from CalPERS to work on an interim basis. One of our retirees says that there are new rules that further restrict the ability of retirees to work. Is this true, and can you clarify?

**A5.** Yes, there are two bills that were signed into law that have recently changed the statutes governing CalPERS retirees returning to work: AB 1028 and SB 1021. These bills implemented the following major changes that further restrict employment of CalPERS retirees by LEAs:

Appointments can only be made on an interim basis into a vacant position and only during recruitment for a permanent employee (AB 1028)

The compensation for the interim appointment cannot exceed the maximum of the published pay schedule for the position (AB 1028), calculated as an hourly rate (SB 1021)

Further, a retiree appointed to a vacant position shall not receive any additional compensation or benefits beyond the hourly rate (SB 1021)

The ability for an employer to request an extension of the appointment beyond the 960-hour per-year limit has been eliminated (SB 1021)

The provisions above related to AB 1028 became effective January 1, 2012. The provisions related to SB 1021 became effective when the bill was signed on June 27, 2012, as it is a Budget trailer bill.

**Q6.** Following a recent retirement by a classified manager, the position was eliminated and the duties reorganized. The retiree is coming back to train a new clerk who will be performing some of the duties at a substantially lower rate of pay. Can the retiree be paid at his/her former rate of pay while providing this training?

**A6.** The retiree may serve without reinstatement from retirement or loss or interruption of benefits if they possess specialized skills, the work is limited in duration, they do not work more than 960 hours, and the compensation they receive does not exceed the maximum hourly amount paid for other employees performing comparable duties. You will need to identify current positions within the organization that are comparable based on the specific duties the retiree will be performing. Depending on the duties and other positions in the district, compensation at the retiree's former hourly rate of pay may be allowed. But that determination will need to be made by the district based on the totality of the circumstances.

—*Suzanne Speck, Sheila G. Vickers, and Kathleen O'Sullivan*

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