



Liebert Cassidy Whitmore

# CalPERS Legal Update, Emerging Issues, and Common Compliance Problems

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# Agenda

- SB 278 and Incorrect Reporting
- Additional CalPERS Requirements for IDR Determinations
- CalPERS' Proposed Regulation to Define "Limited Duration" for Retired Annuitant Appointments and Temporary Upgrade Pay



# SB 278 and Incorrect Reporting



# Changes to Law: Senate Bill 278

- Added Government Code section 20164.5.
- Creates additional financial penalties for CalPERS agencies that incorrectly report disallowed compensation on behalf of an employee.
- Meant to address situations where a member makes excessive contributions or a retiree receives a benefits overpayment based on incorrect reporting.
  - Disallowed Compensation = Compensation reported for a member, by an employer, that CalPERS later determines to be noncompliant with PEPRA.



# SB 278 Employer Overpayment and Penalty Obligations

- Employers are now responsible to pay directly to CalPERS the full cost of any overpayments made to a retiree based on the disallowed compensation.
- Additionally, employers are responsible for paying a penalty directly to the retiree to make them whole.
  - Penalty = 20% of lump-sum present value of the difference in benefits.
  - CalPERS will likely assert no statute of limitations on penalties.

# When Overpayment and Penalty Obligations Are Required

- The overpayment and penalty is triggered if all the following conditions are met:
  - The compensation was reported and contributions were made on that compensation while the member was actively employed.
  - The compensation was agreed to in a memorandum of understanding between the employer and the recognized employee organization as compensation for pension purposes and neither party knowingly agreed to compensation that was disallowed.
  - The determination by CalPERS that the compensation was disallowed was made after retirement.
  - The member was not aware that the compensation was disallowed at the time it was reported.



# More Consequences of Incorrect Reporting for Retirees

- CalPERS permanently adjusts retiree's future medical benefits to eliminate the excluded benefit.
- Agency receives credit for excess contributions (but not penalty payment).

# Limits on SB 278 Applicability

- The following are not within the scope of SB 278
  - Payroll corrections related to errors.
  - Lump sum reporting of reportable compensation.
  - Compensation item that is reportable but cannot be used in the final compensation calculation.
  - Special Compensation reported solely in the final compensation period.
  - Payrate denials.
  - Reporting special compensation items above the limit defined in the labor policy and/or agreements.
  - Misreporting of payroll (e.g. misreported pay rates, misreported pay rate types, misidentified special compensation category and type).





# SB 278 and Incorrect Reporting

- Applies to CalPERS' determinations made on or after January 1, 2017, but only if an appeal has been filed and the member has not exhausted their administrative remedies.
- Employers may submit an MOU to CalPERS for review regarding disallowed compensation.
- Does not apply to disallowed compensation incorrectly reported for active members.
  - Here, employer refunds the member for excess employee contributions.
  - CalPERS credits employer for excess contributions.



# Additional CalPERS Requirements for IDR Determination



# Disability Determination Basics: Local Agency Determination

- Government Code section 21154 provides that a local agency's governing body is responsible for making the determination whether a local safety member is/is not incapacitated
  - Authority may be delegated to subordinate by way of resolution

# Disability vs. Industrial Disability

- Disability Retirement – the cause of disability need not be related to employment
- Industrial Disability Retirement – disability is due to a job-related injury or illness
  - Generally, only for safety members



# Who is Eligible for Disability Retirement?

- CalPERS Non-Industrial Disability Retirement:
  - Credited with *five years* of service
  - Regardless of age
  - *Substantially incapacitated* from the performance of duty as a result of non-industrial disability



# Who is Eligible for Industrial Disability Retirement?

- CalPERS Industrial Injury Disability Retirement:
  - *Substantially incapacitated* from service as a result of industrial disability
  - Regardless of age
  - Regardless of service credit
  - Applies to safety members by law
  - Applies to miscellaneous members only if adopted by CalPERS contract amendment

# Definition of “Disability” under PERL

- “Disability” and “Incapacity for performance of duty,” as a basis for retirement, means:
  - Disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death
  - Based on competent medical opinion

# Information CalPERS Previously Required in Certification for IDR

- 1) A statement certifying under penalty of perjury that the agency made the determination based on competent medical opinion.
- 2) A statement certifying under penalty of perjury that the agency did not use the determination as a substitute for the disciplinary process.
- 3) A finding indicating the member's substantial incapacitation from the performance of their usual duties.
- 4) A statement confirming whether the member filed a Workers' Compensation claim for their disabling condition(s), and if so, a statement as to whether the claim was accepted.





# Information CalPERS Previously Required in Certification for IDR

- 5) A finding by the agency as to whether the member's incapacity is industrial.
- 6) A statement documenting the member's last day on payroll.
- 7) A statement as to whether there is the possibility of third party liability.
- 8) A statement identifying the disability condition(s)/body parts.

# Information CalPERS' Previously Required in Certification for IDR

- 9) A statement supported by competent medical evidence that the duration of the disabling condition is expected to be permanent, last at least 12 consecutive months, or result in death.
- 10) A statement identifying the monthly amount and beginning date of Advanced Disability Payments, if they have been or will be paid to the member.

# CalPERS' New Requirements

- Physical Requirements of Position/Occupational Title (Local Safety) form
- Job duty statement
- Physician's Report on Disability (Local Safety) form
- Worker's Compensation Carrier Request (Local Safety) form
- All medical reports used in making the medical determination
- Determination resolution or certification (*previously required*)



# Physical Requirements of Position/ Occupational Title (Local Safety) Form



## Physical Requirements of Position/Occupational Title (Local Safety)

This form must be completed by the local safety employer based on the **usual job duties** of the member's position. Both the member and the employer must sign this form. We advise you sign this form together.

### Section 1: Member Information

Employer must fill out this section.

Member's Name (First Name, Middle Name, Last Name)

Social Security Number or CalPERS ID

Position/Occupational Title

Name of Employer

### Section 2: Usual Job Duties of Position

Employer must be familiar with the member's position as it is usually performed. Indicate with one check mark (✓) per activity the duration of each activity required to carry out the member's usual job duties. If there is not enough space to enter all the additional requirements, attach a separate sheet. Be sure to clearly write the member's name and Social Security number or CalPERS ID on each attachment.

Usual hours worked per day: \_\_\_\_\_

Has the member been through the reasonable accommodation process?  Yes  No

If yes, provide CalPERS with the documentation/reasonable accommodation form.

Activity	Never/Rarely < 5 min.	Infrequently 5-30 min.	Occasionally 31 min. – 2.5 hrs.	Frequently 2.5-5.0 hrs.	Constantly > 5 hrs.
<b>Interacting/communicating:</b>					
Face-to-face with public	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
By phone with public	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
With inmates, patients, or clients	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
With co-workers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Supervising staff	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Lifting/Carrying:</b>					
0-10 lbs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11-25 lbs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
26-50 lbs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
50+ lbs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sitting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Standing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Walking	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Running	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>



# Physician's Report of Disability (Local Safety) Form



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State of California  
California Public Employees' Retirement System  
[www.calpers.ca.gov](http://www.calpers.ca.gov)

## Physician's Report on Disability (Local Safety)

This form must be completed by a physician/medical specialist who specializes in the member's disabling condition. The following information is needed in connection with the application for disability retirement benefits under the California Public Employees' Retirement Law.

### Section 1: Employer Information

Employer must fill out this section.

Employer Name

Employer Address

City

State

Zip Code

Employer Contact Person

Job Title

Contact Person's Phone Number

Contact Person's Email

### Section 2: Member Information

Employer must fill out this section and send the form with the duty statement and physical requirements to the member's medical specialist for review and completion.

Member's Name (First Name, Middle Name, Last Name)

Social Security Number or CalPERS ID

Position/Occupation Title

Birth Date (mm/dd/yyyy)

For Kaiser Patients, Medical Record Number

### Section 3: Member History

Physician please provide history of patient's illness/injury. Patient and member are the same person.

Date of First Visit (mm/dd/yyyy)

Date of Last Examination (mm/dd/yyyy)

Date Present Illness/Injury Occurred (mm/dd/yyyy)

Date Member Unable to Perform Job Duties (mm/dd/yyyy)

Origin of injury:  Work Related  Non-Work Related

Describe How Injury Occurred

# Workers' Compensation Carrier Request (Local Safety) Form



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State of California  
California Public Employees' Retirement System  
[www.calpers.ca.gov](http://www.calpers.ca.gov)

## Workers' Compensation Carrier Request (Local Safety)

If the member has filed a workers' compensation claim for the illness or injury directly related to the application for disability or industrial disability retirement, this Workers' Compensation Carrier Request form must be completed by the employer's workers' compensation insurance carrier.

### Section 1: Employer Information

Employer must fill out this section.

Employer Name			
Employer Address	City	State	Zip Code
Employer Contact Person	Job Title		
Contact Person's Phone Number	Contact Person's Email		

### Section 2: Member Information

Employer must fill out this section and then forward the form to the workers' compensation insurance carrier for completion.

Member's Name (First Name, Middle Name, Last Name)		
Social Security Number or CalPERS ID		
Claim Number 1	Date (mm/dd/yyyy)	Body Part(s)
Claim Number 2	Date (mm/dd/yyyy)	Body Part(s)
Claim Number 3	Date (mm/dd/yyyy)	Body Part(s)
Claim Number 4	Date (mm/dd/yyyy)	Body Part(s)

### Section 3: To Be Completed By Workers' Compensation Insurance Carrier

Workers' Compensation Insurance Carrier, your help is needed in the evaluation of this member's eligibility for disability or industrial disability retirement. Be sure to send a copy of all medical reports for the claim number(s) listed to the address listed below. Include job descriptions/ job analyses, depositions, investigation reports, videotapes, and approved orders from the Worker's Compensation Appeals Board. Please use additional sheets to supply any additional background, information, or comments.

Claim Number 1	WCAB Number	Date of Injury (mm/dd/yyyy)
Body Part(s)		

Liability Accepted  No  Yes

Condition P&S  No  Yes

# Submit to CalPERS

- Once an agency makes a determination regarding a member's DR/IDR, it must submit the following documents to CalPERS:
  - Determination Resolution or Letter Granting/Denying the DR/IDR
  - Physical Requirements of Position/Occupational Title (Local Safety) form, signed by the member and agency
  - Job Duty Statement
  - Physician's Report on Disability (Local Safety) form, signed by the physician or medical specialist
  - Workers' Compensation Carrier Request (Local Safety) form, signed by Workers' Compensation Insurance Carrier
  - All medical reports used in making the medical determination for DR/IDR



# Workers' Comp. vs IDR

- Different standard for “industrial” causation
  - Labor Code presumptions do not apply to IDR
  - Industrial causation must be “real and measurable”
  - Based on competent medical evidence
  - Inconsequential connection to the job is insufficient
- Incapacity must be present and actual; No prophylactic work restrictions





# Hypothetical Case

Fire Captain Tom injures his shoulder while on the job. He eventually goes on medical leave and files for workers' compensation. His workers' compensation doctor recommends that as a precaution, Tom avoid lifting weight over 20 pounds to avoid further injury to his shoulder. Tom then files an application for IDR.

**Is he qualified?**



# Proposed Regulation: Definition of “Limited Duration”



# “Limited Duration,” 2 C.C.R. Section 574.1 (Proposed Regulation)

- Defines “limited duration” for retired annuitant appointments
  - “Limited duration” means “a limit of twenty-four consecutive months per appointment of a retired person in the employ of a CalPERS-covered public employer, regardless of how many months or hours in those months the retired person served in the appointment during that twenty-four consecutive month period.”
  - CalPERS can grant limited extensions if certain requirements are satisfied.

# Changes to Law: 2 C.C.R. Section 574.1 (cont'd)

- Defines “limited duration” for temporary upgrade pay
  - “Limited duration” means “a limit of twenty-four consecutive months for an employee to serve in an upgraded position/classification, regardless of how many months or hours in those months the employee served in the upgraded position/classification during that twenty-four consecutive month period.”
  - Limited provisions for multiple 24-month periods

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