CALPELRA Alert: New CalPERS Circular Letter Highlights Common Employer Reporting Mistakes/Penalties

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On July 28, 2020, CalPERS issued Circular Letter: 200-019-20, "Common Issues on Special Compensation Reporting and Labor Agreement Conditions."[1] In doing so, CalPERS continues to emphasize the importance of strict adherence to CalPERS' requirements and the direct, significant effect of non-compliance on employers and members. Among the key points contained in the Circular Letter are:

Reporting Issues

- Employers must pay careful attention to employees' classic or PEPRA member status, because several special compensation items (e.g., temporary upgrade pay, uniform allowance[2]) are not reportable for PEPRA employees, only classic members.
- Employers must also ensure that they use the correct category or type of special compensation when reporting special compensation items to CalPERS.
- Compensation provided as a lump sum must be broken down and reported based upon the pay period in which it was earned, regardless of when it was paid.
  - CalPERS notes that this rule takes on particular significance when the timing of lump-sum payments results in multiple payments within a member's final compensation period, such as a lump sum holiday payment.

Drafting Issues

- Employers can make otherwise reportable compensation non-reportable by adding in additional eligibility requirements beyond the regulatory standards ("Group or Class Disparities").
  - CalPERS identifies two common employer practices that create Group or Class Disparities:
    - Limiting eligibility for compensation such as longevity pay based on an employee attaining the top step of a salary range ("Top Step Requirements").
    - Limiting eligibility for compensation such as longevity pay or education incentive on attaining minimum performance standards. ("Combination of Eligibility Requirements").
- Labor agreements and other written provisions must clearly identify the manner in which special compensation items such as holiday pay are calculated.
  - For example, if an employee's longevity pay and education incentive will be included in determining the amount of holiday pay, these components must be identified in writing.
- Amounts paid by employers in connection with severance packages and "golden parachutes," or as vacation cashouts or separation bonuses fall into the category of non-reportable "final settlement pay," whether or not the parties characterize it as such.

Consequences For Errors

CalPERS emphasizes the range of potential consequences that may befall members and employers, depending on the severity and frequency of reporting errors:

Consequences For Members

- Delays to member's retirement process, pending receipt, verification and accurate re-reporting by the employer of "compliant reportable information."
- Exclusion of non-reportable compensation items from compensation earnable and pensionable compensation used to determine pension payments.
- Potential repayment of overpaid pension amounts to CalPERS.[3]

Consequences For Employers

- Notification to the employer's affected members or bargaining groups that the employer was required to make corrections, was unable to do so, and the potential impact on their retirement and/or benefits;
- Periodic administrative fees for delinquent resolution and erroneous payroll until compliance is obtained;
- Escalation of Employer Compliance Review to the CalPERS Board of Administration's Risk & Audit Committee for further action; and/or
- Revocation of the employer's contract and/or pursuing all available remedies to enforce the PERL.

Practitioners' Tips

- Remember that CalPERS defines a "group or class," based on similarities in job duties, physical work location, bargaining unit, or "other logical work-related grouping" only.
- Review CalPERS regulations carefully[4] when drafting provisions for special compensation items to avoid misreporting or miscategorizing items or creating "group or class disparities."
- Be mindful that the list of reportable special compensation items is shorter for PEPRA employees than for classic members. Also be mindful, however, that whether an item is reportable to CalPERS is a separate question from whether the item must be included in calculating the regular rate of pay for overtime compensation and ensure that payroll systems accurately register this distinction.
- Make note of resources identified in the Circular, including training provided by CalPERS and a dedicated email address for the CalPERS' Compensation Compliance & Audit Resolution team: MOU_Review@calpers.ca.gov.
- Wages are mandatory subjects of bargaining for represented employees, but compliance with mandatory provisions of the PERL and related regulations is outside the scope of bargaining. To the extent that employers have discretion regarding how wages are paid and characterized, however, the matter is subject to bargaining.

[1] Available at https://www.calpers.ca.gov/docs/circular-letters/2020/200-019-20.pdf.
[2] For a more detailed discussion of these excluded items, please see CalPERS Circular Letter "Public Employees' Pension Reform Act (PEPRA) of 2013 Adoption of Pensionable Compensation Regulations" available at: https://www.calpers.ca.gov/docs/circular-letters/2017/200-064-17.pdf
[3] CalPERS notes that repayment of overpayments must be made by the member and/or the employer.
[4] For classic members see 2 CCR § 571; for PEPRA members see 2 CCR § 571.1.