



LIEBERT CASSIDY WHITMORE

**LEAGUE OF CALIFORNIA CITIES:
MUNICIPAL FINANCE INSTITUTE**

**What is CalPERS Up to
Now? Discussing Legal
Trends, New Interpretations,
and Areas to Watch in
CalPERS Compliance**

12/12/2024

PRESENTED BY:

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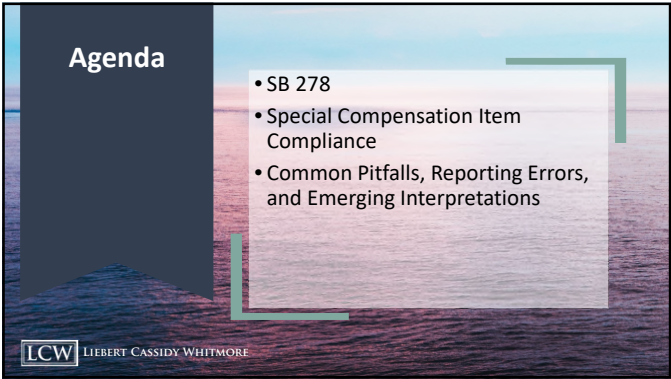
What Is CalPERS Up To Now? Discussing Legal Trends, New Interpretations, And Areas To Watch In CalPERS Compliance

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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 or the PERL

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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
 - Penalty = 20% of lump-sum present value of the difference in benefits
 - CalPERS will likely assert no statute of limitations

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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

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More Consequences of Incorrect Reporting for Retirees

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

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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)

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Special Compensation Item Compliance

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Background Information –
Special Compensation

- Limited by what is described in a labor policy or agreement
- Exclusive list in 2 C.C.R. § 571 and 571.1

MOU

Regulations

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Special Compensation

Special Compensation Considerations

- Must fit within one of the categories set forth in CalPERS Regulation (Title 2, CCR sections 571(a) or 571.1(a) for PEPPRA)

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Special Compensation

- Be set forth in a labor policy or agreement meeting the requirements of subsection (b), including:
 - Adopted by governing body in compliance with public meeting laws
 - Conditions for payment described
 - Immediately accessible by the public or posted on employer's website (preferred)
 - Indicates effective dates and revisions
 - Retained for at least five years
 - Does not refer reader to other documents

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Special Compensation

- Be available to all members of group or class, not overtime, part of normally required duties, not final settlement pay, etc.

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Excluded From Special Compensation

- Final settlement pay
- Overtime not regularly scheduled
- Not specifically listed in the regulation describing special compensation

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Common Pitfalls, Reporting Errors, and Emerging Interpretations

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Common Reporting Mistakes:
Reporting Hybrid Specialty Pays

- “Hybrid” items of special comp. are not reportable
 - Hybrid items (e.g., longevity pay that includes a merit component) are not reportable because they do not fit within the enumerated lists in the regulations
 - “Top step” requirements also problematic
- Hybrid items can be intentionally used to reduce reportable compensation
 - May allow the employer to offer a stronger base benefit in exchange for it being unreportable

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Common Reporting Mistakes:
Lump-Sum Reporting

- Lump-Sum Payments must be reported as earned, regardless of when they are paid

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Common Reporting Mistakes:
Uniform Allowances

- Value of uniforms and cost of maintenance are reportable, even where the employee does not receive any compensation
- Amount that is reported must be in the labor agreement
 - Not to exceed amount?
 - Average for group?
- Excludes items that are *solely* for health and safety
- Not reportable for new members

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Common Reporting Mistakes:
Bonus Pay Mistakes

- Bonus pay for classic members:
 - Must be for “superior” performance
 - Must be a program or system in place to identify performance goals and objectives
 - Purely discretionary bonuses are not reportable
 - Not reportable for new members
- Examples of Bonuses that can be provided but are not reportable for classic members:
 - Contract signing bonus, holiday bonus, safety award, referral bonus (for referring new applicants/employees), purely discretionary bonuses

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Common Reporting Mistakes:
Compounding Special Compensation

- If items of special compensation are compounded, it must be clearly specified in the MOU
 - For example, if holiday pay includes all items of special compensation rather than being paid at the base rate, the MOU should explain how it is calculated

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Common Reporting Mistakes:
Holiday Pay

- Holiday pay is reportable only for employees who work in a classification that is regularly scheduled without regard to holidays
 - Management and Command Employees
- Reporting rules for classic employees
- Reporting rules for PEPRA employees – CalPERS Circular Letter 200-037-24 clarified that holiday pay that can be taken as time off is not reportable for PEPRA employees

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Emerging Issues in Special Compensation

- 2 CCR 571(b)(7) provides that special compensation cannot be paid exclusively in the final compensation period
- CalPERS took the position that this provision applies to new incentives that employees become eligible for shortly before they retired
- CalPERS appears to have changed its position

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Emerging Issues – Longevity Pay

- Whether service with a prior agency in the same classification can be counted towards years of service
 - Longevity Pay – Additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum period of time exceeding five years

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Post Retirement Work Violations (SB 411)

- Amendment to statute that provides reinstatement is discretionary rather than mandatory

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Thank You!

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