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PUBLIC AGENCY RISK MANAGERS ASSOCIATION (PARMA) 2016 ANNUAL CONFERENCE

CalPers Update/How to Prepare for and Survive a CalPERS Audit

2/24/2016

PRESENTED BY:

**Steven M. Berliner, Michael Youril &
Renee Ostrander, Division Chief,
Employer Account Manager Division,
CalPERS**

CalPERS Update/Surviving a CalPERS Audit

Public Agency Risk Managers Association 2016 Annual Conference | February 24, 2016

Presented by: Renee Ostrander & Steven M. Berliner & Michael Youril


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Leading The Way
35
Years

CalPERS Update/Surviving a CalPERS Audit

Public Agency Risk Managers Association (PARMA)
2016 Annual Conference | February 24, 2016

Presented By: Renee Ostrander, CalPERS & Steven M. Berliner and Michael Youril, Liebert Cassidy Whitmore



Agenda

1. Risk of being audited by CalPERS;
2. What happens during a CalPERS audit and after the audit;
3. Issues that CalPERS has focused on in prior audits;
4. What you can do to prepare your agency for an audit; and
5. Appeal Rights.

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Risk of Being Audited by CalPERS

Audit triggers

- Random
 - o Eventually all CalPERS agencies will be audited
- Problem Areas raised
 - o Could be triggered by publicity or reports of misconduct

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What Happens During a CalPERS Audit?

1. CalPERS auditors come to your agency for several days, review documents such as MOUs, policies, etc.
2. After visiting your agency, CalPERS auditors will likely ask for additional information and/or documents.
3. Then, nothing happens usually for several months.

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Draft Audit Report

- Usually within several months of the review at the agency
- Contains findings and recommendations
 - Findings
 - Violation of the PERL or CalPERS regulations uncovered during audit
 - Recommendations
 - How the auditors think the findings should be fixed

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Agency Response to the Draft Audit Report

- Cover letter with draft report sets response date for agency to respond to draft findings
 - Usually about two weeks

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What Should Response Look Like?

- Letter format
- Becomes part of public record and is attached to the final audit
- Puts agency position out front
- Want to be able to back position up with facts/law
- Likely going to concede on some issues
- State willingness to work with CalPERS staff to clarify issues in dispute and/or fix issues the agency is not disputing

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What Happens With Findings?

- Auditors do not enforce the findings
 - Various other CalPERS Departments/ Divisions will do that
 - Departments/Divisions will begin contacting agency regarding specific findings
- Best strategy is to be proactive and fix those issues not in dispute
 - Work with CalPERS Departments/Divisions to make corrections

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Issues CalPERS Has Focused On

1. Membership Issues
 - Common law employees
 - Independent contractors
 - Part-time and full-time employment
 - Retirees
2. Compensation Issues
 - Compensation over-reported or under-reported
 - Special compensation problems
 - Salary schedule
 - Labor policy or agreement

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Membership Issues

Common Law Employees

- Unless excluded by statute, common law employees must be enrolled in CalPERS
- *Cargill v. MWD* determined that common law employment criteria apply to the PERL
 - Common law test is multi-factor test
 - Most important factor is whether the agency controls the manner and means by which the work is performed

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Membership Issues

Common Law Employees Cont.

- Secondary Factors:
 - Is the individual or the employer supplying the tools, instrumentalities, and workspace?
 - Is the skill required in the occupation the type normally performed under the supervision of the employer or by a specialist without supervision?
 - Is the individual involved in a distinct occupation or business?
 - What level of skill is required in the occupation?
 - Is the relationship between the employer and the individual finite or ongoing?
 - Is the employee paid by the time or by the job?
 - Is the work performed part of the employer's regular business?
 - How do the parties view their relationship?

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Membership Issues

Independent Contractors

- Independent contractors do not meet the common law test
- Independent contractors are excluded from CalPERS membership
- Issue is whether the relationship is truly an independent contractor/client relationship or a common law employee/employer relationship
- Many individuals classified as "independent contractors" are determined to be "employees" under the common law employment test.

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Membership Issues

Part-Time Employment

- Most part-time employees are excluded
- Exceptions:
 - Positions require regular, part-time service equivalent to at least an average of 20 or more hours per week for one year or longer
 - The employee exceeds 1,000 hours in any one fiscal year (July 1-June 30) even if their hours never exceed 1,000 hours in a fiscal year again

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Membership Issues

Part-Time Employment

- Exceptions continued
 - The employee is already a CalPERS member when hired (even if hired into a part-time position)
- Failure to timely enroll
 - May result in a \$500 administrative fee for each employee not timely enrolled
 - Agency may have to pay agency and employee contributions.

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Membership Issues

Full-Time Employment

- Most full-time employees (including those less than full time but working between 20-40+ hours per week) are eligible immediately on hire
- Temp or other employees whose appointment is not anticipated to exceed 6 months but in fact does, enroll as of first day of seventh month

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Membership Issues

Retirees

- If post-retirement work limitations are exceeded, retirees must be reinstated.
- 960 hours per fiscal year for all employers.
- Hourly rate within range of active employees performing same or similar duties.
- Waiting periods.

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Membership Issues

Retirees Continued...

- Cannot fill permanent full or part-time vacant positions
 - Must be "extra help" work such as overflow, special projects, etc.
 - Exception – Appointments under Government Code Section 21221(h)
- "Limited duration" criteria. Has the special project lasted for years? This could still violate the post-retirement work rules even if other criteria are satisfied.

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Compensation Issues

Compensation over-reported or under-reported

- CalPERS will compare reported payrates and special compensation to salary schedules, resolutions and MOUs to determine if the reported amount is accurate.
 - If not accurate, corrected payroll reports must be submitted.

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Compensation Issues

Compensation over-reported or under-reported Continued...

- Cannot report payrate in excess of the salary schedule.
- Must update salary schedule as new MOUs are negotiated or terms imposed to ensure all is reportable.
- Cannot report special compensation unless set out in a "labor policy or agreement."
 - Individual's employment contract is not a labor policy or agreement.

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Compensation Issues

Salary Schedule

- All salaries must be set out on a publicly available pay schedule (Title 2, CCR section 570.5)
 - Including employees with individual contracts

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Compensation Issues

Salary Schedule Continued...

- Salary schedule must:
 - Be approved by governing body in compliance with public meeting laws;
 - Immediately accessible and available for public review or posted on agency website (preferred);
 - Indicate effective date and date of revisions;
 - Retained at least five years;
 - Does not reference other documents, plus, it must also:
 - Show payrate or range for each position
 - Whether that payrate is a weekly, monthly, hourly, etc. rate

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Compensation Issues

Special Compensation Problems

- No hybrids (e.g., education pay but only if you have a certain number of years of service)
- Must fit within one of the categories set forth in CalPERS Regulation (Title 2, CCR section 571(a))

AND...

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Compensation Issues

- 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

AND...

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Compensation Issues

- 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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What Can Your Agency Do To Prepare for an Audit?

Membership Issues

- Get control over independent contractors
- Know what a common law employee is
- Firm up policies re: hiring part-time employees
- Start limiting terms (6 months is good, but 3 months is better)
- Ask if the applicant is a CalPERS member

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What Can Your Agency Do To Prepare for an Audit?

Retirees

- Keep up with the rules – constantly changing
- Limit post employment work
- Do not appoint retirees to vacant regular full-time or part-time positions
- Comply with salary limitations – plus NO BENEFITS
 - Retired Annuitants are exempt from Paid Sick Leave Law (AB 1522)

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What Can Your Agency Do To Prepare for an Audit?

Compensation Issues

- Need a salary schedule that lists all positions (must be publicly available – post on website)
- Individual employment agreement is not a labor policy or agreement and is not a substitute for a salary schedule

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What Can Your Agency Do To Prepare for an Audit?

Compensation Issues Continued...

- Special compensation must be in a labor policy or agreement (i.e., MOU or resolution applying to group of employees)
- Make sure to update schedule!!

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What Can Your Agency Do To Prepare for an Audit?

- Special compensation may not be available only to an individual
- Do not create hybrid special compensation items
- Do not guarantee any item of compensation is PERSable

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What Can Your Agency Do To Prepare for an Audit?

REVIEW ALL MOUS

- Are all pay items in compliance with CalPERS' regulations on special compensation?
- Are they all posted on agency's website?

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Appeal Disputed Findings

- Agency has administrative appeal rights in the case of disputed findings
 - Hearing on an appeal subject to Administrative Procedures Act
 - Hearing conducted by ALJ from Office of Administrative Hearings
 - Issues advisory opinion to CalPERS
- CalPERS Board makes final decision
 - After Board's final decision, can challenge decision in court by way of writ of administrative mandamus

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What Does an Appeal Look Like?

- Letter format
- Sets forth legal and factual issues for appeal
- If a comprehensive response to draft report was completed, the appeal will be similar
- Hearing likely months or years later

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Conclusion

- Prepare for audit now
 - Take proactive steps to clean up MOUs, CalPERS resolutions, and practices (hiring)
- Cooperate with auditors
- Correct errors
- Respond to findings when necessary

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Questions?

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Thank You

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