

LIGHT DUTY PROGRAMS & CalPERS INDUSTRIAL DISABILITY RETIREMENT(IDR)

Dave Thomas, Office Managing Partner, Hanna Brophy -- Riverside

Rachel Shaw, Shaw HR Consulting

Dave Nunley, City of Anaheim

DeAnna Soria, City of Huntington Beach

OVERVIEW

- CalPERS Industrial Disability Retirement (IDR)
 - Legal Standard
 - CalPERS Circular Letter – March 30, 2017
 - CalPERS 2017 Audit Results
 - Take ‘em Back or Retire ‘em
- Return to Work Programs
- Permanent Light Duty (PMD) Programs
- Light Duty Programs

IDR LEGAL STANDARD

- “Incapacitated for the performance of duty as the result of an industrial disability”
- “Disability of permanent or extended and uncertain duration . . . On the basis of competent medical opinion” -- GC §20026
- “Substantial Incapacity”
Substantially unable to perform the usual duties of his/her position -- *Mansperger v. PERS*, Cal.App.3d 873 (1970)

CalPERS Retirement Benefits Circular Letter



Retirement Benefits Circular Letter

California Public Employees' Retirement System
P.O. Box 942715
Sacramento, CA 94229-2715
(888) CalPERS (or 888-225-7377)
TTY: (877) 249-7442
www.calpers.ca.gov

March 30, 2017

Circular Letter No: 200-018-17
Distribution: VI

To: All Contracting Public Agencies

Subject: Information to be included in a Resolution/Determination Document for Disability Retirement, Requirements for submitting a Disability Retirement Application, and Disability Reevaluation Procedures

The purpose of this Circular Letter is to inform employers of the requirements for:

- submitting a disability retirement application,
- information to be included in resolution/determination documents in support of an application for disability retirement,
- twelve-month disability duration requirement,
- continuous disability requirement,
- medical qualifications for disability retirement, and
- disability re-evaluation procedures.

Government Code (G.C.) section 20026 defines "Disability" and "Incapacity for Performance of Duty". G.C. section 21156(a)(2) provides that the board or governing body of the contracting agency shall make a determination on a member's disability retirement on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process. G.C. section 21192 gives authority to the board or governing body of the employer from whose employment a person was retired to require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination. G.C. section 20221 provides that each employer must provide the California Public Employees' Retirement System (CalPERS) with any information concerning any member that CalPERS requires in the administration of the System. G.C. sections 20128 and 20223 provide that CalPERS may require a member to provide information it deems necessary to determine entitlement to benefits and information affecting his or her status as a member. The information provided in this Circular Letter is necessary for CalPERS to administer the System and to determine accurate benefits.

Circular Letter: 200-018-17
March 30, 2017

Disability Retirement Application Requirements

Local Safety members are required to complete all sections in the disability retirement application, with the exception of Section 13, the Employer-Originated Application. This section is to be used only when an employer originates an application. Along with the application, Local Safety members are required to complete, sign and date the following forms:

- [Employer Information for Disability Retirement](#)
- [Authorization to Disclose Protected Health Information](#)

Local Safety members must send the completed Employer Information for Disability Retirement form directly to their employers. Employers will use this form as a cover sheet for all documents submitted to CalPERS. Local Safety members must also provide the completed Authorization to Disclose Protected Health Information form to CalPERS.

Determination of Members' Eligibility to Apply for Disability Retirement

An employer must forward all relevant personnel documents and medical records to CalPERS and obtain CalPERS' determination that the member is eligible to apply for disability retirement before an employer starts the process of a disability determination for any of the following circumstances:

- Disciplinary process underway prior to the member's separation from employment.
- The member was terminated for cause.
- The member resigned in lieu of termination.
- The member signed an agreement to waive his or her reinstatement right as part of a legal settlement (i.e., Employment Reinstatement Waiver).
- The member has been convicted of or is being investigated for a work related felony.

Twelve-Month Disability Duration

The CalPERS Board has defined the disability duration in the eligibility requirements for disability retirement to be permanent or last at least twelve consecutive months from the date of an application for benefit or will result in death, as determined on the basis of competent medical opinion.

Continuous Disability Requirement

A member must provide medical records of his or her physical or mental incapacity to perform the duties of his or her job from one year before his or her last day of physical work to present. To establish continuous disability, there must be medical substantiation in file from the last date of physical work to present, with no gaps in medical treatment records more than six months during this period. Rules of presumption do not apply. Even if the Workers' Compensation Appeals Board awards industrial disability benefits to a member under the Labor Code, the judgment does not bind the California Public Employees' Retirement System, which is governed by a different body of law.

The medical determination must be based on the following:

- Competent medical opinion
- Medical records and other available information to support the medical opinion

Medical Qualifications for Disability Retirement

The law distinguishes between a person who suffers some impairment and one who suffers impairment sufficient to become eligible for disability retirement. The courts have concluded that the test is whether the member has a substantial inability to perform the usual and customary duties of the position. Difficulty in performing certain tasks alone is not enough to support a finding of disability. It is the inability to perform the essential functions of the actual and present job duties that determines whether the member is substantially incapacitated for the performance of his or her job duties.

If the member cannot substantially perform the duties of the position, then he or she is disabled for CalPERS retirement purposes; otherwise, the member is not disabled. A CalPERS disability retirement must be based upon an **actual and present** (not prospective) inability to substantially perform the member's actual and usual job duties. Furthermore, prophylactic restrictions are not a basis for a disability retirement. If a disability is not currently present but just may occur in the future, the member is presently ineligible for a CalPERS disability retirement.

Resolution / Determination Document for Disability Retirement

In addition to other information, an employer must certify that its determination of disability was made based upon competent medical opinion and was not used as a substitute for the disciplinary process. An employer must also certify whether a member has an accepted Workers' Compensation Claim(s).

An employer's resolution/determination document for disability retirement must include all of the following information:

1. A statement certifying under penalty of perjury that the determination was made based on competent medical opinion.
2. A statement certifying under penalty of perjury that the determination was not used as a substitute for the disciplinary process. If any of the above mentioned circumstances is met, a statement must also be included that confirms that all relevant personnel documents were forwarded to CalPERS and CalPERS' determination that the member is eligible to apply for disability retirement was obtained prior to starting the process of determination.
3. A finding indicating the member has been found to be substantially incapacitated from the performance of the usual duties of his or her position.

4. A statement confirming whether or not the member had filed a Workers' Compensation claim(s) for his or her disabling condition(s). If so, a statement is required as to whether the claim(s) was accepted.
5. A finding by the employer as to whether or not the causation of the disability was industrial.
 - a) In case of a dispute about the causation of the disability, the employer must provide a copy of the Findings and Award by the Workers' Compensation Appeals Board (WCAB) resolving the question of industrial causation.
 - b) A member must have a minimum of five years of credited service to qualify for non-industrial disability retirement. If a member does not meet the minimum service requirements for disability retirement, the member may still qualify by re-depositing previously withdrawn contributions or contributing an amount for service rendered prior to membership with CalPERS. Generally, time during which the member is absent from state service by reason of injury or illness, which is determined within one-year after the end of such absence to be job-related, shall be considered as time spent in state service for the purpose of qualification for retirement and death benefits.
6. A statement by the employer documenting the member's last day on payroll. In case of a dispute regarding the effective date of the member's retirement, a request must be filed with the WCAB for finding of fact to determine the date the member's condition became permanent and stationary. The employer must provide a copy of the Finding of Fact and that date then becomes the effective date of member's retirement (G.C. section 21164).
7. A statement by the employer as to whether there is, or is not, a possibility of third-party liability present (meaning whether the member's disability was caused by negligence or an intentional act of a party other than the employer).

If a person (other than the employer) caused an injury that results in certain CalPERS benefits being paid, then CalPERS has the right to recover up to one-half of the total retirement benefit costs payable due to this injury from the responsible party (G.C. section 20250).

The employer should also advise CalPERS if it is aware that the member is pursuing a claim (other than a Workers' Compensation claim) against any person or entity for the same injuries that also entitle the member to a disability retirement from CalPERS.

8. A statement from the employer identifying the disabling condition(s) and body part(s) approved: i.e., orthopedic (right knee), psychological, cardiovascular, internal (kidney), neurological (leg) or other.
9. A statement from the employer that there is competent medical opinion certifying the disability is expected to be permanent or last at least twelve consecutive months from the date of an application for benefits or will result in death.
10. If Advance Disability Pension Payments (ADPP) have been or will be paid to the member, the employer must include the monthly amount and the beginning date. The employer must also provide the address to which the reimbursement check should be mailed.

It is the employer's responsibility to report to CalPERS the amount of ADPP paid to a member. If an employer fails to notify CalPERS of ADPP or if the member retires, the local agency and the employee shall arrange for repayment. CalPERS will not reimburse the employer in these situations.

All such documentation submitted by an employer must be signed by the governing body or its lawful delegate (i.e., City Manager, Chief Administrative Officer, County Executive, or other comparable individual). If the governing body chooses to delegate the responsibility of making a disability determination, a certified copy, which is approved and signed by the governing body, of the delegation order of this authority must accompany the finding by such delegate in every instance.

It is imperative for employers to provide all documentation and information referenced above to prevent the delay of benefit payments. Until CalPERS has received all required documentation and information, the disability determination will not be processed and CalPERS will be unable to put the member on a disability retirement roll.

Local Agency Disability Re-Evaluation Procedures

An employer should conduct regular re-evaluations of determinations for disability retirees who are under voluntary service retirement age. The purpose of the re-evaluations is to verify whether the recipient remains physically or mentally disabled from the position which they disability retired for the condition(s) that they were approved for. The re-evaluation process is not a process to discover new conditions. It should include, but is not limited to, gathering the following information:

- Is the retiree currently employed?
 - What type of work is he/she doing? Is he/she working within his/her work restrictions?

- Obtain a duty statement and physical requirements of the job for comparison.
- When an independent medical examination is deemed necessary, submit these documents for the examiner's review.
- Is the retiree currently being treated for his/her disability?
 - If so, obtain a list of his/her treating physician(s) and contact information, and request his/her medical records since retirement.
- If the retiree is not currently being treated or the medical records received from the treating physician do not substantiate a continuous disability, the member should be evaluated by an Independent Medical Examiner.
- If indicated, consider surveillance.

Failure to cooperate with any stage of the re-evaluation process will be considered a refusal to submit to a medical examination. G.C. section 21175 states, "If any recipient of a disability retirement allowance under the minimum age of voluntary retirement for service applicable to members of his or her class refuses to submit to a medical examination, the pension portions of his or her allowance may be discontinued until his or her withdrawal of the refusal. If the refusal continues for one year his or her disability retirement allowance may be cancelled." **The agency should inform CalPERS to take appropriate actions if a retiree is uncooperative with the process.**

In accordance with G.C. section 20128, 20221 and 21192, the agency is requested to submit their determination on the re-evaluation or action requested for uncooperative retirees (discontinue the pension portions if refusal is less than a year; cancel the full allowance if refusal continues for one-year) to CalPERS in the form of a Resolution or determination letter.

Other Resources

For more information on these topics, please refer to the [Public Agency & Schools Reference Guide](#) which contains sample resolutions.

If you have any questions, please contact the CalPERS Customer Contact Center at 888 CalPERS (or 888-225-7377).

Anthony Suine, Chief
Benefit Services Division

CalPERS 3/30/17 Circular Letter

- Requirements for Submitting a Disability Retirement Application
- Info to be Included in Resolution/Determination & Supportive Documents
- 12 Month Disability Duration Requirement
- Continuous Disability Requirement
- Medical Qualifications for IDR
- Disability Re-Evaluation Procedures

Medical Qualifications for IDR

- Difficulty in performing certain tasks alone is not enough for IDR – must be substantially incapacitated
- Must be based on actual and present (not prospective) disability
- Prophylactic work restrictions are not a basis for disability retirement
- If disability is not currently present, but just may occur in the future, the member is presently ineligible for IDR

CalPERS Audit Results (Jan 2018)

- CalPERS audited 60 public agencies re the following:
 - IDR policies and procedures?
 - Pre-retirement disciplinary actions reported?
 - Accepted WC claims required?
 - Competent medical opinions independent of WC process?
 - IDR re-evaluations for members under 50 yo?

CalPERS Audit Results (Jan 2018)

IDR POLICIES & PROCEDURES ?

- 52% no policies and procedures
- 30% policies and procedures board approved
- 18% policies and procedures not board approved

CalPERS Audit Results (Jan 2018)

PRE-RETIREMENT DISCIPLINE REPORTED?

- 50% no disciplinary action
- 18% disciplinary action – CalPERS not notified
- 32% agency didn't provide all requested records

CalPERS Audit Results (Jan 2018)

ACCEPTED WC CLAIM REQUIRED?

- 63% accepted WC claim required
- 20% no accepted WC claim
- 17% agency didn't provide all requested records

CalPERS Audit Results (Jan 2018)

COMPETED MEDICAL OPINION INDEPENDENT OF WORKERS' COMPENSATION

- 90% inside WC
- 2% specialist outside WC (i.e., IDR special medical exam)
- 8% agency didn't provide all requested records

CalPERS Audit Results (Jan 2018)

IDR RE-EVALUATIONS CONDUCTED?

- 100% no re-evaluations performed

TAKE 'EM BACK OR RETIRE 'EM

TAKE ‘EM BACK OR RETIRE ‘EM

- Employee “cannot, at the same time, be denied a disability retirement and also denied employment.”

Montoya v. Retirement Board, City and County of San Francisco,
San Francisco Superior Court No. 321839 (2005)
Roccaforte v. City of San Diego, 89 Cal. App.3d 877 (1979)

- Employee must be given “IDR or placed into a full-time, full-pay, limited duty” position.

Raygoza v. County of Los Angeles(1993) 17 Cal. App.4th1240,1246

RETURN TO WORK PROGRAM

(City of Anaheim)

- Return to Work speeds recovery to pre-injury status
- Employees stay engaged with co-workers, get exposed to new areas, and see the workplace from a new perspective
- The City is committed to accommodating work restrictions whenever possible.
- The City has approximately 600 sworn police and firefighters.



PERMANENT MODIFIED DUTY (PMD) PROGRAM (City of Anaheim)

- What is it?
- Why it works?
- Benefits
 - Employee
 - City



CHALLENGES AND OPPORTUNITIES RE PMD PROGRAM (City of Anaheim)

- Anaheim includes corrections officers in the union and they are eligible for the PMD program.
- Retains employees in their chosen profession, keeps institutional knowledge and the investment the city has made in the employee, and the officers in the PMD program are not counted toward the authorized strength.
- Risk Management pays the salary, thus the department gets “free” labor.
- Employees disabled early to mid-career will not have the income needed from an early disability retirement or the ability to replace that lost income to the level that they are accustomed to earning.



HOW DOES EMPLOYEE ENTER PMD PROGRAM (City of Anaheim)

- Upon notification, by an ANAHEIM approved physician (ANAHEIM may select, at its discretion, the employee's treating physician as an ANAHEIM approved physician) of permanent work restrictions, and/or the permanent and stationary status for an accepted industrial injury of an APA safety employee that precludes the employee from performing the full range of duties of his/her classification, ANAHEIM may, after conferring with the employee, select an appropriate available Program assignment.



RECENT DEVELOPMENTS RE PMD PROGRAM (City of Anaheim)

- Spring 2016 limited the program to 10 participants.
- Offered those above 10 who had been in the program the longest an unopposed IDR.
- When the program is full and we need a space, an IDR is offered to the person who has been in the program the longest.
- We have yet to find someone unwilling to take an IDR, but we have people past normal retirement age who don't want to retire.
- We continue to have people retire service pending, but we are typically successful in front of an independent hearing officer.



FROM THE GROUND UP RTW & IDR PROGRAMS

- Temporary Light Duty Program -- Phase I
- IDR Program -- Phase II



TEMPORARY LIGHT DUTY – Phase I (2013)

- City of Orange – 700 to 800 ee's
- 140 Police
- 120 Fire
- Fire – no LD program
- Challenges
 - Numerous claims
 - 100% 4850 paid
 - Costs due to overtime pay as other workers fill in



TEMPORARY LIGHT DUTY – Phase I (2013)

- Developed written policy
- Reviewed organization’s job descriptions to ensure essential job functions well-defined
- Developed a Bank of light duties
 - Administrative work
 - Safety tasks
- Communicated the Policy
 - LD only for specific period of time
 - 5 day work week, no suppression schedule



TEMPORARY LIGHT DUTY – Phase I (2013) RESULTS

- Claims reduced
 - 15 claims per month down to 2 claims per month
- Cost savings
 - 1st year - \$641,662 (86% reduction) in LC4850
 - 2nd year - \$75, 799 (another 11% reduction over prior year) in LC 4850



IDR PROGRAM – Phase II (2014)

- No program in place
 - IDR's granted if WC claim on record, permanent or prophylactic restrictions
 - Numerous CT claim filings
- IDR Experts/Hanna Brophy
 - Education – Legal Standard, IDR Med evaluations
 - Buy In from P.D., Fire, & CM
 - Implemented in 2014, handled all IDR's for City



IDR PROGRAM – Phase II (2014) RESULTS

- CalPERS evals pursuant to State law (fair, consistent, legal)
- Cost savings
 - CT claims reduced
 - 1st year – 10 approvals, 3 denials
 - Long Term – Fewer IDR's means less employer contributions to pay CalPERS
- 2015 – Association of California Cities for Orange County
 - ***"GOLDEN HUB OF INNOVATION"*** award – Finance Category



TEMPORARY MODIFIED / LIGHT DUTY

- FEHA/ADA do not require Light Duty; it is not a reasonable accommodation
- If Light Duty is offered to workers with compensable claims, employers must offer Light Duty to non-work related injuries (pregnancy and personal medical conditions)
- Light Duty is a business decision with the goal of reducing overall leave and the length of disability

TEMPORARY MODIFIED / LIGHT DUTY

Let's Agree on Vocabulary:

Temporary Modified Duty (Different than Light Duty)

- Performing 100% of the essential functions of the position, same effectiveness and efficiency as all others in the position/class but with accommodations that are temporarily needed or temporarily reasonable to implement
- Determination has not yet been made if the accommodations would be reasonable to implement long-term, but they may be if they truly support employee to perform all of the work safely and fully

TEMPORARY MODIFIED / LIGHT DUTY

Let's Agree on Vocabulary:

Light Duty

(Sometimes called Temporary Alternative)

- Performing some of the essential functions of the usual and customary position, and/or
- Performing less than the full workload of the assignment or working part-time, or
- Performing a different job assignment or set of tasks; regardless if the work is represented by a formal job description or assignment in the organization
- Not required to be offered, but is usually seen as a good business decision if supporting medical improvement.

TEMPORARY MODIFIED / LIGHT DUTY

Opinion Corner: How long should a TMLD assignment be for?

- Is it supporting **medical improvement**, as evidenced by a reduction in restrictions every ____ months?
- Is EE performing **meaningful work** for the organization?

If yes to both... extend.

If no... end assignment and provide leave of absence.

TEMPORARY MODIFIED / LIGHT DUTY

Agreement Signed:

- Before employees come back to work, they sign an agreement.
- Sample Language:
 - A TMLD assignment is offered to support an employee to maintain work patterns and income while he/she continues to medically improve.
 - The assignment will only be extended if the employee is showing medical improvement, as evidenced by a reduction in restrictions every _____ days.
 - The assignment will be immediately ended if the employee's restrictions become permanent and while the interactive process continues



EMPLOYER NAME
REASONABLE ACCOMMODATION/DISABILITY INTERACTIVE PROCESS
Temporary Modified/Light Duty Agreement

Employee Name			
Classification/ Job Title			
Location			
Date of Injury/ Onset of Illness			
Date Assigned to Temporary Light Duty by Physician:			
Light Duty Start Date:		Light Duty End Date:	
Description of Work Restrictions, per Treating Physician (List specifically what is stated in medical note)			
Assignment Type Offered <input type="checkbox"/> Modified <input type="checkbox"/> Light Duty			
Description of Accommodation(s) Offered:			
Work Schedule <input type="checkbox"/> Unchanged <input type="checkbox"/> Changed	Work Hours per Day from _____ am/pm to _____ am/pm		
Assigned Supervisor's Name, if different			
Assignment Not Available. Reason/Discussion Points			

I agree to follow and adhere to the temporary work restrictions as prescribed above by my treating physician. I also understand if I am asked to perform any work assignments or activities that I believe are unsafe or exceed my work restrictions, I will immediately report the situation to my direct supervisor and Human Resources, and I will not perform these activities. I also agree I will immediately report to my direct supervisor and to Human Resources if any of the job activity causes me discomfort, is causing pain or makes my medical condition worse.

I understand my employer has offered me a TMLD assignment as a way to support me to maintain work patterns and income while I continue to medically improve. I understand TMLD assignments typically will not normally exceed a maximum of 90 days, and this TMLD Assignment does not imply entitlement to a permanently modified position. This TMLD assignment may be extended upon approval at 45-day intervals if I continue to medically improve, as evidenced by reduced restrictions. I understand it is my responsibility to provide Human Resources with a new medical notice at the conclusion of the initial approval period. I understand this approval period ends on the date listed above and will not be extended, and my TMLD Assignment may be ended, unless I provide additional needed medical certification. I also understand that this assignment will end immediately when my condition has reached permanent and stationary status and if I am provided with permanent work restrictions.

HR Signature: _____ Date: _____
 Employee's Signature: _____ Date: _____
 Supervisor's Signature: _____ Date: _____

Thank You For Joining Us!

Dave Thomas, Office Managing Partner, Hanna Brophy -- Riverside

Rachel Shaw, Shaw HR Consulting

Dave Nunley, City of Anaheim

DeAnna Soria, City of Huntington Beach