



LAW UPDATE

LABOR AND EMPLOYMENT

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FURTHER UPDATE ON AMNESTY FOR CERTIFICATED ADMINISTRATORS SERVING IN NON-EDUCATIONAL POSITIONS – IMPACT ON RETIREES

BACKGROUND

In bulletins dated November 25, 2013 and February 5, 2014, we described for you the "amnesty" program announced by CalSTRS for certificated employees who have served in positions which may not have involved "creditable service."¹ Under the Education Code, such employees wishing to remain in CalSTRS were supposed to have filed an election form within 60 days of employment in a non-qualifying position (a position which did not involve the rendering of creditable service). Under the amnesty program, CalSTRS will accept the late filing of the election form (CalSTRS Retirement System Election Form ES372).

As you know, **the form must be completed by the employee and employer, processed by the County Superintendent of Schools, and postmarked for delivery to CalSTRS no later than May 23, 2014**, together with a "justification letter" showing relevant employment history (described in greater detail in our February 5 bulletin). A sample justification letter is posted on the Schools Legal Service website at www.schoolslegalservice.org.

THE DILEMMA FOR RETIREES

The question of whether this program applies to retirees who may have served in a non-qualifying position prior to retirement has been a concern from the outset. CalSTRS indicated in a January 27, 2014, e-Bulletin that retirees "need not" file the Election Form, but has issued no formal communication addressing the issue of whether the election form would provide the same protection for retirees as for active employees. There is some concern that filing the form could be treated as an admission (for audit purposes) that the retiree served in a position which did not

¹ See CalSTRS Employer Information Circular Volume 29, Issue 3, "Right of Retirement System Election When Changing Positions."

qualify for STRS benefits. CalSTRS representatives have stated in workshops that the filing of the election form could have (unspecified) consequences for a retiree.

On the other hand, if the amnesty does apply to retirees and they do not file by May 23, they may have lost the opportunity to protect themselves from a challenge in a later audit based on an allegation that they served in a non-qualifying position without filing the election form.

The lack of clarification places retirees in a very awkward position, and has been extremely frustrating for districts and county offices of education seeking to advise them on this question.

CLARIFICATION EFFORTS

We sought clarification on this issue from CalSTRS on two occasions. Working through the California County Superintendents Educational Services Association, a letter requesting clarification as to whether the amnesty policy applies to retirees was sent to CalSTRS. The initial response did not address the question posed. It stated there was "no harm" in retirees filing the form, but the context of the answer related to CalSTRS members who were already retired and seeking to file the form for non-qualifying post-retirement service.

A follow-up request for clarification was made by the Kern County Superintendent of Schools. The reply did not address the questions posed, stating,

"Our point is that no retired member needs to submit the form. The form is only required to be submitted by people who are still active members, which means they are not retired and are still earning service credit through their employment."

So we remain in the dark as to whether the filing of an election form by a retiree would serve to protect the retiree in a later CalSTRS audit.

WHAT ARE OTHER AGENCIES DOING? WHAT IS ACSA ADVISING?

Many education agencies in the state are reluctant to notify retirees without being able to offer them a clear recommendation. Of 25 county offices of education surveyed, only one planned to formally notify retirees. This is apparently the result of concerns that filing the Election Form may have negative consequences for retirees.

The Association of California School Administrators (ACSA) is currently reminding K-12 members that CalSTRS has stated the Election Form does not need to be submitted for retired members, but advises that they may proceed to submit the form if they wish, regardless of the date of retirement.²

² "ACSA would advise that if you wish to proceed with submitting the form and letter to CalSTRS even though you retired prior to the July 1, 1996, to please do so." (ACSA website posting, "Deadline to Protect CalSTRS Service Credit Approaching.")

Taking all of this into account, our office's advice remains that districts may wish to, but are not required to, inform retirees of the amnesty program. If retirees are notified, districts should take care to point out that CalSTRS has stated it is not necessary for them to file the Election Form, and that it is simply unclear whether the filing of the election form will provide the protection extended to active employees if they are subsequently audited on creditable service issues. They should know that at least some CalSTRS officials have stated that filing the form could have unspecified adverse consequences for them.

WHAT IF RETIREES REQUEST TO FILE THE ELECTION FORM?

If retirees request to file the Election Form, our understanding is that most districts are processing them for the retiree. In that case, you may wish to ask retirees to instruct the district in writing to file the form. The following is some suggested language for a form to be signed and dated by the retiree:

I hereby request the _____ District to file a CalSTRS Election Form ES372 on my behalf pursuant to the terms of CalSTRS Employer Information Circular Volume 29, Issue 3 based on service rendered in one or more positions which potentially did not involve creditable service as defined in the Education Code. I have been advised that it is not clear whether the terms of this Employer Circular (and the authorization for late filing of the CalSTRS Retirement System Election Form ES372 by May 23, 2014) extend to CalSTRS members who are retired at the time of filing, nor is it clear whether the protections afforded to active employees under this “amnesty” program extend to retired members. Given this lack of clarity, it is not known whether the filing of the form could signal a basis for an audit of creditable service, or whether the failure to file the form could deprive the retiree of protection in the event of an audit.

IF RETIREES WILL BE NOTIFIED, HOW FAR BACK DO WE NEED TO GO?

The CalSTRS Employer Information Circular does not reference a date prior to which filing the Election Form is not necessary for retirees. Accordingly, some districts have indicated they will notify all retirees, regardless of retirement date.

It is fairly unlikely that a person who retired before July 1, 1996 would be held to the requirement to file the Election Form, since the current statute concerning the election procedure (Education Code section 22508) took effect January 1, 1997. Some districts have indicated they would notify only those retirees who retired on or after July 1, 1996.³

³ July 1, 1996 is a date referenced in an ACSA webinar as being a date of significance in CalSTRS' view because of an amendment to Education Code section 22500.

WHICH PARTICULAR RETIREES SHOULD BE NOTIFIED?

Districts wishing to notify retirees could choose to notify only those retirees who the district knows may have served at one time in potentially non-qualifying positions on or after July 1, 1996. Those positions include those listed in the 2012 CalSTRS Circular⁴ or similar positions, or those for which the duties do not appear to address the creditable service criteria in statute (Education Code section 22119.5). Districts could also opt to notify ALL retirees (or at least those who retired on or after July 1, 1996), on the theory that they may have had non-qualifying positions through prior employing districts of which the district of retirement may be unaware.

Note that employees who first came into CalSTRS in a potentially non-qualifying position may not qualify for the amnesty. Districts are urged to consult counsel concerning such employees before filing the election form.

The situation is frustrating and troubling, and it is very unfortunate that more definitive information has not been made available prior to the deadline. Please call if you would like to discuss this issue further.

— Grant Herndon

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⁴ The positions listed in CalSTRS Employer Information Circular Volume 28, Issue 1, entitled “Positions Not Eligible for Creditable Service” included the following: Chief of Police, Director of Human Resources, Chief Information Technology Officer, Director of Payroll Services, Chief Financial Officer, Director of Buildings, Grounds & Maintenance.