

TEACHERS' RETIREMENT BOARD

REGULAR MEETING

Item Number: **5**

SUBJECT: Creditable Compensation Regulations

ITEM NUMBER: 5

CONSENT:

ATTACHMENT(S): 1

ACTION: X

DATE OF MEETING: June 5, 2014 / 15 mins.

INFORMATION:

PRESENTER(S): Ed Derman

PURPOSE

The purpose of this item is to seek the board's approval to move forward with modifications to the previously approved regulatory text that clarifies creditable compensation for CalSTRS 2% at 60 members. These modifications will necessitate an additional 15-day public comment period.

BACKGROUND

At the [September 2013](#) board meeting, the board directed staff to proceed with drafting regulations to clarify creditable compensation and related statutes. At the [December 2013](#) meeting, the board reviewed the draft regulations and directed staff to proceed with the formal rulemaking process. In [April 2014](#), the board directed staff to post proposed changes to the regulations text for a second comment period based on revisions that were made in response to comments received during the first comment period and the hearing the board held on [February 6, 2014](#).

Staff conveyed to the board in December and again in April that a second comment period of 45 days would most likely be warranted based on the scope of the comments from stakeholders. In fact, because the edited regulations text that was ultimately posted contained changes that were substantial but sufficiently related to the originally noticed text, the Government Code allows for a comment period of 15 days. Nonetheless, the revised regulations were posted for public review for a full 45 days, as recommended by staff and directed by the board.

DISCUSSION

The proposed regulations are attached. There are minor revisions to the language the board reviewed in April 2014.

Staff identified a shortcoming in the language that appeared to preclude the establishment of a separate class of employees for part-time community college faculty. Under the Teachers' Retirement Law, the minimum standard for part-time faculty is 525 hours per year; for full-time faculty, the minimum standard is 1,050 hours. However, the regulations specify that a separate class cannot be established on the basis of performing similar duties for a longer day, or more days per year, and define "similar duties" to include, among other creditable service activities, teaching in a single category. This would present an unintended conflict between the Education Code and

the regulations. The regulations text has been amended accordingly to include a reference to the Education Code and the express exemption provided for community college faculty.

One public comment was received during this comment period. The feedback, from an employer, was that a July 1, 2015, effective date would provide for more adequate preparation time than the January 1, 2015, date specified in the regulations. Specifically, the commenter stated that cash-in-lieu stipends currently reported as creditable compensation are determined in August each year, taking expected employer contributions into account when determining the stipend amount. As a result, knowing whether creditability of the amounts would change mid-year is important to planning. The commenter explained that since it cannot be assured that employers will have access to the final regulations language in time to prepare for the mid-fiscal year changes, a July 1, 2015, effective date would be easier to implement, as well as cleaner for fiscal year reporting.

Staff is sympathetic to the logistical concern expressed by the commenter. However, upon considering the consistency these regulations will bring to the reporting of creditable compensation, and weighing the stakeholder demand for these regulations as well as the board's initial direction to move forward with them expeditiously, staff has determined that the benefits of a timely implementation of these regulations outweighs the convenience of having them coincide with the start of a fiscal year.

Instead, staff recommends that the board adopt the regulations as soon as feasible in order to maximize the time employers can use to prepare for a January 1 implementation. Because the proposed changes being presented to the board today relate solely to clarifying how the regulations correspond with existing law, staff believes that comments that would require modification to these proposed changes are unlikely. Therefore, final regulations could be slated to present to the board as early as the July meeting.

RECOMMENDATION

Staff recommends that the board direct staff to proceed with posting the proposed edits for a 15-day public comment period and modify the July meeting agenda to include a tentative item during which the board could adopt the proposed regulations.

Proposed changes to text of regulations: Creditable compensation

Title 5. Education. Division 3. Teachers' Retirement System.

All new text to be added to the California Code of Regulations follows, under new Articles 1-5 in new Chapter 2.

Chapter 2. Compensation

Article 1. General Provisions

§ 27200. Members affected by this chapter.

This chapter applies to members who are not subject to the California Public Employees' Pension Reform Act of 2013 (Article 4 [commencing with Section 7522] of Chapter 21 of Division 7 of Title 1 of the Government Code).

§ 27201. Effective date.

The provisions of Articles 2 through 4 and Section 27602 of Article 5 of this chapter are effective beginning with compensation that is earned for service performed on or after January 1, 2015. The provisions of Sections 27600 and 27601 are effective on or after January 1, 2015, regardless of the date service was performed.

Article 2. Class of Employees

§ 27300. Basis of establishment of a class of employees.

- (a) One or more employees constitute a class of employees pursuant to Education Code Section 22112.5 on the basis of ~~either or both~~ any of the following:
- (1) Similarity of the job duties being performed.
 - (A) Job duties are those activities described as creditable service in subdivisions (a) and (b) of Section 22119.5 of the Education Code.
 - (B) The job duties grouped within each paragraph of subdivision (a) and within subdivision (b) of Section 22119.5 of the Education Code are deemed similar for the purposes of this subdivision.
 - (C) An employer may establish a class that is comprised of employees whose assignment is a combination of two or more job duties.
 - (D) Employees performing similar job duties who are also performing activities described in paragraph (6) of subdivision (a) of Section 22119.5 of the Education Code belong to the class of employees performing the similar job duties, unless they are placed in a separate class pursuant to subparagraph (C).

- (E) If an employer establishes a class comprised of one employee pursuant to subdivision (b) of Section 22112.5 of the Education Code, the employer must demonstrate that job duties for that class are in common use by at least two other employers.
- (2) Employment in the same type of program.
 - (A) A program is any educational program established pursuant to state or federal law.
 - (B) One or more employees may be considered a separate class because they work in a separate program as defined in subparagraph (A) from other employees who have similar job duties.
- (3) The employees share other similarities related to the nature of the work being performed.

*Note: Authority cited: Section 22305, 22112.5, 22119.2 and 22213, Education Code.
Reference: Sections 1205, 22112.5 and 22119.5, Education Code.*

§ 27301. Prohibited classes of employees.

- (a) An employer may not establish a class of employees that is distinguished by any of the following:
 - (1) The retirement benefit formula or retirement program.
 - (2) A minimum or maximum threshold for age or service credit.
 - (3) The characterization or restructuring of compensation, in the absence of the criteria described in Section 27300.
 - (4) An option or requirement for one or more employees who perform similar job duties to work a longer or shorter day, or work more or fewer days per year, performing ~~additional~~ similar job duties, in the absence of the criteria described in paragraph (2) of subdivision (a) of Section 27300, except as provided in subdivision (c) of Section 22138.5 of the Education Code for the minimum standard for full time in community colleges.
 - (5) Performing only activities described in paragraph (6) of subdivision (a) of Section 22119.5 of the Education Code because those activities must be related to, and an outgrowth of, the instructional and guidance program of the school and performed in addition to other activities described in Section 22119.5 of the Education Code in order to be creditable service.

Note: Authority cited: Section 22305, 22112.5, 22119.2, 22207, and 22213, Education Code. Reference: Sections 22112.5, ~~and~~ 22119.5, and 22138.5, Education Code.

Article 3. Creditable Compensation

§ 27400. Salary.

- (a) Salary is compensation that meets all of the following requirements:
 - (1) Paid in cash by an employer to an employee for the performance of creditable service.
 - (2) Explicitly characterized as salary on a contract, salary schedule or employment agreement.
 - (3) Used as a basis for future pay increases, with one exception. It is not required that compensation paid to execute duties that are related to, and an outgrowth of, the instructional and guidance program of the school pursuant to paragraph (6) of subdivision (a) of Section 22119.5 of the Education Code be used as the basis of future pay increases.
 - (4) Paid without a requirement by the employer for proof of expenditure.
- (b) The employer must establish a compensation earnable for all assignments for which an employee will earn salary.
 - (1) If an employer provides additional compensation in exchange for performing activities described in paragraph (6) of subdivision (a) of Section 22119.5 of the Education Code, the additional compensation is for additional service, and the employer must establish a compensation earnable for those activities.
- (c) If compensation is restructured into salary, regardless of how it was paid previously, the compensation will be considered salary beginning on the effective date of the restructure.
- (d) Salary includes amounts deducted from salary at the discretion of the employee.
- (e) If compensation otherwise meets the definition of “fringe benefit” under Section 27501 or “expenses paid or reimbursed by an employer” under Section 27502, and the compensation is consistent with paragraphs (1) through (4) of subdivision (a), it is salary.

Note: Authority cited: Sections 22305, 22119.2, 22119.5, 22138.5, 22207, 22213, 22214, 22215, and 22458, Education Code. Reference: Sections 22115, 22119.2, 22119.5, 22138.5 and 22138.6, Education Code.

§ 27401. Remuneration that is paid in addition to salary.

- (a) Remuneration in addition to salary, when paid in cash in accordance with a publicly available written contractual agreement where applicable and required by law, includes the following compensation that is not associated with the performance of additional service, provided that it is paid to all persons who are in a class of employees, in the same dollar amount, same percentage of salary or same percentage of amount being distributed:

- (1) Compensation for meeting any of the following qualifications or requirements:
 - (A) Possession or attainment of a certificate, license, special credential or advanced degree.
 - (B) Career or service longevity.
 - (C) Hiring, transfer or retirement.
 - (D) Employment in a position that is hazardous or difficult to staff.
 - (E) Employment in an assignment in which the number of students enrolled exceeds the contractual amount.
 - (F) Achievement of a performance benchmark.
- (2) Compensation that is paid contingent upon availability of funds.
- (b) If compensation is restructured into remuneration in addition to salary, regardless of how it was paid previously, the compensation is remuneration in addition to salary beginning on the effective date of the restructure.
- (c) Remuneration in addition to salary does not include the following as described in Sections 27501 and 27502:
 - (1) Cash paid by an employer to an employee who receives cash in lieu of a fringe benefit, or cash in lieu of an expense paid or reimbursed by the employer.
 - (2) Cash paid by an employer on behalf of an employee for a fringe benefit, expense or reimbursement.
 - (3) Cash paid by an employer to an employee that is the remainder from money allocated for fringe benefits or expenses that are paid by the employer.

Note: Authority cited: Sections 22305, 22119.2, 22119.5, 22207, 22213, 22214, 22215, and 22458, Education Code. Reference: Section 22119.2, Education Code.

Article 4. Noncreditable compensation

§ 27500. Amounts not deducted from a member's salary.

- (a) Compensation paid in addition to salary that is contingent upon the purchase of any of the items described in paragraph (5) of subdivision (a) of Section 22119.2 of the Education Code is deemed covered by the employer and is not creditable compensation.

Note: Authority cited: Sections 22305, 22119.2, 22207, 22213, and 22250, Education Code. Reference: Section 22119.2, 22458, and 24950, Education Code.

§ 27501. Fringe benefit.

- (a) A fringe benefit is any of the following:
 - (1) A good or service for which the cost is paid to a third party or otherwise covered by the employer.

- (2) Compensation allocated to an employee to cover a personal or business expense that could otherwise be provided in the form of a good or service as specified in paragraph (1).
- (3) Cash in lieu of, or cash remaining from, a good or service as specified in paragraph (1).
- (b) If any part of creditable compensation is restructured into a fringe benefit, that amount will not be considered creditable compensation beginning with the effective date of the restructure.

Note: Authority cited: Section 22305 and 22119.2, Education Code. Reference: Section 22119.2, Education Code.

§ 27502. Expenses paid or reimbursed by an employer.

- (a) An expense paid by an employer includes any of the following:
 - (1) Compensation allocated to an employee to cover a cost the employee is expected to incur in the course of performing duties for that employer, which could otherwise be covered by the employer or provided in the form of a reimbursement of the cost.
 - (2) Cash paid directly to a third party or a cost that is otherwise covered by the employer.
 - (3) Cash in lieu of, or cash remaining from, compensation allocated to cover a cost pursuant to paragraph (1).
- (b) An expense reimbursed by an employer is cash paid to the employee that meets all the following requirements:
 - (1) There is a business connection to the expenditure.
 - (2) The employee is required to provide documentation or accounting of the expenditure to the employer.
 - (3) The employee is required to return excess reimbursements or advances to the employer if actual incurred expenses are less than the amount reimbursed or advanced.
- (c) If any part of creditable compensation is restructured into an expense paid or reimbursed by the employer, that amount will not be considered creditable compensation beginning with the effective date of the restructure.

Note: Authority cited: Section 22305 and 22119.2, Education Code. Reference: Section 22119.2, Education Code.

Article 5. Appropriate crediting of contributions.

§ 27600. Consistent treatment of compensation.

- (a) In assessing the consistency of an increase that occurs during the period of time specified in subdivision (f), an increase is consistent if the employer demonstrates that it is due to any of the following:
- (1) A restructure of compensation that is a permanent change, as indicated by not meeting either of the criteria for inconsistency described in subdivision (d).
 - (2) A salary deferral due to a reduction in school funds.
 - (3) A commensurate percentage increase in compensation earnable for the majority of members employed by the same employer.
 - (4) A change in duties required of the employee that is incorporated in the first contract for the immediate successor to the position.
 - (5) An increase in responsibility of the employee that is incorporated in the first contract for the immediate successor to the position.
 - (6) Attainment of an educational or performance benchmark.
 - (7) An increase that establishes pay parity as demonstrated by any of the following:
 - (A) Commensurate compensation earnable for that same position in the past.
 - (B) Commensurate compensation earnable for other employees performing similar duties for the same employer or other employers.
 - (8) A commensurate compensation earnable for the immediate successor.
 - (9) A commensurate compensation earnable for the immediate predecessor.
 - (10) More education or experience than the immediate predecessor.
 - (11) An increase in compensation that is required to recruit for a position which is directly responding to a specific time-bound financial crisis, not to exceed 150 percent of the base compensation earnable of the predecessor in the position or the most similar position prior to the crisis. For the purposes of this paragraph, a specific time-bound financial crisis is, for school districts, a negative certification of financial obligations pursuant to Section 1240 of the Education Code or, for community college districts, a finding of serious hardship of financial condition as defined in subdivision (c) of Section 59204 of Subchapter 4, Chapter 10, Division 6 of this Title.
- (b) Notwithstanding paragraph (2) of subdivision (d), in assessing the consistent treatment of compensation for a position, if the successor's compensation is structured such that the compensation earnable is lower than the member's and the reduction in successor pay is attributable to less education or experience, it shall be presumed to be consistent.
- (c) In assessing the consistency of an increase that occurs during the period of time specified in subdivision (f), an increase that is not due to any of the circumstances listed in subdivision (a) is presumed to be inconsistent.

- (d) A restructure of compensation pursuant to paragraph (1) of subdivision (a) is inconsistent if either of the following apply:
 - (1) The restructure is effective on or after January 1, 2016, and is outside of that employer's standard bargaining or employment contract negotiation time frames.
 - (2) The restructure is implemented for a class of one, and the change is reversed upon hire and negotiation of the first contract of the immediate successor.
- (e) Notwithstanding subdivision (a), if there is determined to be a pattern of assignment of duties or responsibilities by an employer to employees during the final compensation period, the additional compensation for those duties is presumed to be inconsistent.
- (f)
 - (1) For a member whose initial final compensation after his or her most recent retirement is calculated using a period of three consecutive school years or 12 consecutive months pursuant to Section 22134, 22134.5 or 22135 of the Education Code, the period of time is seven years preceding and including the last day used to calculate final compensation.
 - (2) For a member whose initial final compensation after his or her most recent retirement is calculated using any three years due to a reduction in school funds pursuant to Section 22136 of the Education Code, the period of time begins four years prior to the first day used to calculate final compensation and ends on the last day used to calculate final compensation.

Note: Authority cited: Sections 22305, 22119.2, 22207, 22215, 22250, and 22458, Education Code. Reference: Sections 22112.5, 22119.2, 22458, and 22905, Education Code.

§ 27601. Appropriate crediting of contributions.

- (a) Upon determination that compensation was treated inconsistently, except in cases where an adjustment to the crediting of contributions would not result in a change to a member's final compensation, CalSTRS shall limit the amount of contributions that are credited to the Defined Benefit Program during the period of time specified in subdivision (b).
 - (1) If the inconsistent treatment of compensation is the result of a restructure of compensation, the employer shall report the amount that was restructured to the member's Defined Benefit Supplement account.
 - (2) If the inconsistent treatment of compensation is not attributable to a restructure, the employer shall report the portion of compensation in excess of the following thresholds to the member's Defined Benefit Supplement account:
 - (A) For inconsistent compensation increases concurrent with a change in position, the threshold for the fiscal year in which the inconsistent

- compensation increase occurred is the immediate predecessor's salary increased by the percentage calculated pursuant to paragraph (3). The resulting amount is the baseline on which the percentage increase calculated pursuant to paragraph (4) shall be applied to determine the threshold for each subsequent fiscal year.
- (B) For inconsistent compensation increases not concurrent with a change in position, the threshold for the fiscal year in which the inconsistent compensation increase occurred is the member's compensation earnable for the year prior to the year in which the inconsistent increase occurred increased by the percentage calculated pursuant to paragraph (3). The resulting amount is the baseline on which the percentage increase calculated pursuant to paragraph (4) shall be applied to determine the threshold for each subsequent fiscal year.
- (3) For the purposes of subparagraphs (A) and (B) of paragraph (2), the percentage increase to establish the baseline amount shall be the greater of either (A) or (B), whichever is applicable, or (C), as follows:
- (A) 150 percent of the median percentage increase of the compensation earnable of the members at the member's employer between that fiscal year and the previous fiscal year, if that employer has at least 30 members.
- (B) 150 percent of the median percentage increase of the compensation earnable of the members within the member's county between that fiscal year and the previous fiscal year, if the member's employer has less than 30 members.
- (C) 150 percent of the median percentage increase of the compensation earnable of active members statewide, or zero, whichever is greater.
- (4) For the purposes of subparagraphs (A) and (B) of paragraph (2), the percentage increase applied during each subsequent fiscal year shall be calculated as follows:
- (A) For each subsequent inconsistent increase that is not concurrent with a change in position, the percentage calculated pursuant to paragraph (3) is applied to the prior year's threshold amount.
- (B) For each subsequent inconsistent increase that is concurrent with a change in position, the percentage calculated pursuant to paragraph (3) is applied to the immediate predecessor's salary.
- (C) For each subsequent consistent increase that is not concurrent with a change in position, the same percentage increase that the member earned is applied to the prior year's threshold amount.
- (D) For each subsequent consistent increase that is concurrent with a change in position, the threshold amount is the actual compensation earnable for that new position.

(b)

- (1) For a member whose initial final compensation after his or her most recent retirement is calculated using a period of three consecutive school years or 12 consecutive months pursuant to Section 22134, 22134.5 or 22135 of the Education Code, the period of time shall not exceed the seven years preceding and including the last day used to calculate the member's final compensation.
- (2) For a member whose initial final compensation after his or her most recent retirement is calculated using any three years due to a reduction in school funds pursuant to Section 22136 of the Education Code, the period of time shall not exceed the the number of years that begins four years prior to the first day used to calculate final compensation and ends on the last day used to calculate final compensation.

Note: Authority cited: Section 22305, 22119.2, 22207, 22213, and Education Code.

Reference: Section 1205, 2574, 22112.5, 22119.2, and 22458, Education Code.

§ 27602. Compensation that is paid a limited number of times.

- (a) Contributions for the following types of compensation are creditable to the Defined Benefit Program:
 - (1) Compensation paid to achieve compensation parity between part-time and full-time faculty of California Community Colleges for similar work, as funded pursuant to the Budget Act.
 - (2) Compensation based on the allocation of funds from the California State Lottery Education Fund.
- (b) Compensation is creditable to the Defined Benefit Supplement account if compensation was restructured into salary or remuneration in addition to salary as described in subdivision (c) of Section 27400 or subdivision (b) of Section 27401, and is paid a limited number of times, has a specified end date, or is otherwise not permanent.
- (c) Contributions for remuneration in addition to salary shall be credited to the member's Defined Benefit Supplement account if both paragraphs (1) and (2) are met:
 - (1) The compensation is not ongoing, as limited by either of the following:
 - (A) The number of times is specified in law or in a publicly available written contractual agreement.
 - (B) The compensation is not scheduled to continue.
 - (2) The compensation is paid to an individual contingent upon either of the following:
 - (A) Availability of funds, except as provided in subdivision (a).
 - (B) Meeting any of the following qualifications or requirements:
 - (i) Possession or attainment of a certificate, license, special credential or advanced degree.
 - (ii) Career or service longevity.

- (iii) Hiring, transfer or retirement.
- (iv) Employment in a position that is hazardous or difficult to staff.
- (v) Employment in an assignment in which the class size exceeds the contractual amount.
- (vi) Achievement of a performance benchmark.

Note: Authority cited: Sections 22305, 22119.2, and 22458, Education Code. Reference: Sections 14700, 22119.2 and 22905, Education Code; Section 8880.5, Government Code.