



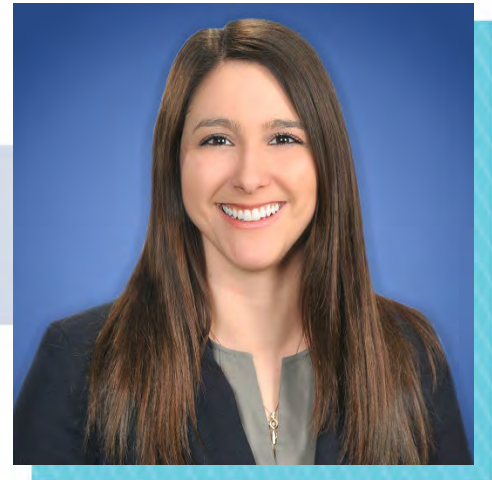
CalSTRS & CalPERS 101: “Hot Topics”

Presented by:
Janae D. Castellani

TCOE Law Seminars
October 13, 2022

Janae D. Castellani

Senior Counsel



Fresno Office
jcastellani@lozanosmith.com
559.431.5600

Overview

Janae Castellani is senior counsel in Lozano Smith’s Fresno office. She is a member of both the firm’s Labor and Employment and the Facilities and Business Practice Groups.

Ms. Castellani assists clients through both Certificated and Classified employee discipline, including representing clients in employee dismissal proceedings. Ms. Castellani has experience advising school districts regarding the Brown Act, employee leave rights, negotiations, investigations and CalPERS and CalSTRS retirement issues.

Experience

Ms. Castellani has a wide range of experience in the litigation realm, including preparing discovery requests and responses, pleadings, and motions and has represented clients at various types of administrative hearings.

Ms. Castellani also has prior experience in representing city governments, including responsibility for code compliance, opposing *Pitchess* Motions, and obtaining Nuisance Abatement Warrants on behalf of the City.

Admissions

Ms. Castellani is admitted to the Eastern District of California, the Southern District of California and to practice in all California courts.

Education

Ms. Castellani earned her Juris Doctor degree from the University of Notre Dame Law School, where she was an articles editor for *The Journal of College and University Law*. She received her Bachelor of Arts in Political Science and Psychology from University of San Diego where she graduated magna cum laude. Ms. Castellani has received certification through ATIXA as a participant in Level 1 and Level 3 ATIXA Civil Rights Investigator Trainings.

WHO WE ARE & WHAT WE DO

Lozano Smith is a full-service education and public agency law firm serving hundreds of California's K-12 and community college districts, and numerous cities, counties, and special districts. Established in 1988, the firm prides itself on fostering longstanding relationships with our clients, while advising and counseling on complex and ever-changing laws. Ultimately, this allows clients to stay focused on what matters most – the success of their district, students and communities they serve. Lozano Smith has offices in eight California locations: Sacramento, Walnut Creek, Fresno, Monterey, Bakersfield, Los Angeles, Mission Viejo, and San Diego.

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- Charter School
- Community College
- Facilities & Business
- Governance
- Investigations
- Labor & Employment
- Litigation
- Municipal
- Public Finance
- Public Safety
- Special Education
- Student
- Technology & Innovation
- Title IX

COST CONTROL is important for public agencies and an area we have mastered. We recognize and understand your financial restraints and work tirelessly to provide the best legal representation with those limitations in mind. One of the best ways we keep legal costs to a minimum is through strategic, preventive legal services. These include Client News Briefs to keep you updated on changing laws affecting education. In addition, we offer extensive workshops and legal seminars providing the tools needed to minimize liability, reducing the need for legal assistance down the road.

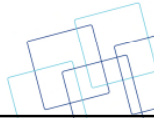
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DIVERSITY IS KEY and we consciously practice it in all that we do. It is one of our core beliefs that there is a measurable level of strength and sensitivity fostered by bringing together individuals from a wide variety of different backgrounds, cultures and life experiences. Both the firm and the clients benefit from this practice, with a higher level of creative thinking, deeper understanding of issues, more compassion, and the powerful solutions that emerge as a result.

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Topics

- CalSTRS & CalPERS- Key Concepts
- Retirement Issues at the Bargaining Table
- Hiring Retirees
- Changes in the Law- Overpayment Collection



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Key Concepts

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School District Retirement Systems

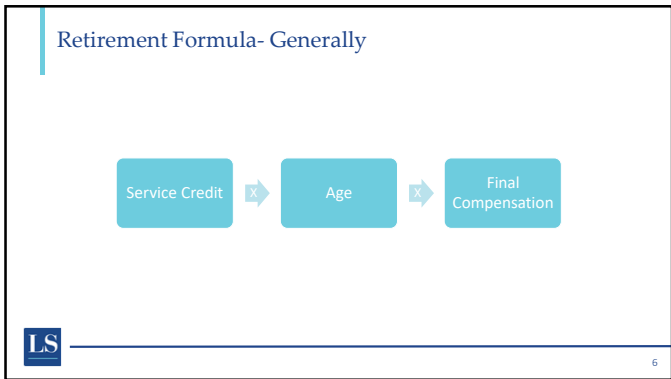
CalSTRS ---> Certificated Employees*

CalPERS ---> Classified Employees

Default enrollment is CalPERS unless eligible for CalSTRS

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CalSTRS – Key Terms

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- Defined Benefit Supplement Account (“DBS”)
- Creditable Service
- Creditable Compensation
- Class of Employees
- Teacher Retirement Law (“TRL”)


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CalPERS- Key Terms

- Compensation Earnable vs. Pensionable Compensation
 - Pay Rate (i.e. Base Salary)
 - Special Compensation
- Class of Employees
- Publicly Available Pay Schedule



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- CalSTRS: Multiple Salary Schedules/Work Years
- CalSTRS: “Stipends” versus “Extra Duty Pay”
- CalPERS: Defining compensation/requirements of salary schedules



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The Hours Article

Does your CBA clearly describe the workday and work year of all classes of employees?

- Teachers
- Ag Teachers
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- School Psychologists & Speech/Language Therapists



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Hypothetical #1 - There Aren't Enough Hours in the Day

A school district has negotiated for its Teachers on Special Assignment (“TOSAs”) to work 186 days, the same duty year as all other teachers. However, TOSAs are allowed to work up to 200 workdays, depending upon need. Any days over 186 are compensated at the employee’s daily rate and the school district codes and reports these additional days to the Defined Benefit Account.

Is this school district properly reporting this information to CalSTRS?



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Separate Salary Schedules - CalSTRS Potential Issues

What is a Valid "Class of Employees"?

- Similarity of the **job duties** being performed;
- Employment in the same type of **program**; OR
- The employees share other similarities related to the nature of the work being performed.



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Hypothetical #2 - Different Grade Levels = Different Duties

A District employs elementary and secondary counselors. Elementary counselors provide counseling services for student behavior, whereas secondary counselors provide academic and vocational guidance and work on student schedules. Based on these duties, the elementary counselors' work year is 185 days and the secondary counselors' work year is 205 days.

Is this a valid structuring of the District's counselor positions?



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Separate Salary Schedules - CalSTRS Potential Issues

What are Prohibited Classes of Employees?

- Employers cannot distinguish classes of employees based on:
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 - The characterization or restructuring of compensation
 - Workday: Working a longer or shorter day
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Hypothetical #3 - What About Our Directors?

A District has two full-time Athletic Director positions. The Athletic Director position has a job description that requires a teaching credential. Athletic Directors are in CalSTRS. Athletic Directors are not required to teach, however, due to the volume of their other duties.

Are there any potential CalSTRS issues with the District's Athletic Director position?



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CalSTRS - "Stipends" versus "Extra Duty Pay"



Extra duty pay or stipends are taxable income
Regarding creditability for CalSTRS retirement, there are numerous factors that must be considered:

- classic or new members
- One-time payments or payments over time
- payment for additional duties or payment for outgrowth activities

"Stipends" implies an ad hoc or one-time payment



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Hypothetical #4 - Off-Schedule Pay

After a difficult year at the bargaining table, your District has come to a tentative agreement with its teachers' union. The TA includes a 2% raise on the salary schedule and a 2% off-schedule payment.

What are the potential retirement implications of this TA?



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Collective Bargaining: CalPERS

- Use regulatory language to define compensation in contracts
- Avoid “stipend” language and structure money to be paid over-time worked
- All base salary on the salary schedule
- All special comp. in the CBA
- For unrepresented employees, place on the salary schedule



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Issue Spotting Checklist At the Bargaining Table

- Are separate salary schedules for certificated positions valid?
- Stipends?
- Activity/Athletic Directors?
- Tax/retirement non-representation language?*
- Class of employee issues: same hours/same pay/duties?
- Tax/Retirement representations?



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Hiring Retirees

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Hiring Retirees- Why does employment status matter?

- Uncle Sam’s concern (tax impact)
- CalSTRS perspective: Is the work creditable?
 - Duty to report whether employed as employee, employee of a third party, independent contractor, consultant
- CalPERS perspective: is the person an employee or independent contractor?
 - If true independent contractor, exempt from restrictions
 - Get written confirmation from CalPERS



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Post-Retirement Employment Restrictions

CalSTRS Retirees

1. Comparable compensation
2. Separation-from-service requirement
3. Annual earning limit
4. Employer reporting requirements
5. No classified work
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CalPERS- Post-Retirement Work Restrictions

Comparable Pay Requirement



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CalPERS- Post-Retirement Work Restrictions

CalPERS Retirees' 180-Day Separation-from-Service Requirement

Two exceptions:

- 1) Critically Needed Position;
- 2) Faculty Early Retirement Program

Exceptions **do not** apply to those who accepted **any** retirement incentive



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CalPERS- Post-Retirement Work Restrictions



Hourly Work Limit

960 hours per year for all CalPERS employers

No exceptions



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CalPERS- Post-Retirement Work Restrictions

Employer Reporting Requirements

- The retiree must be enrolled in myCalPERS online system
- School employers must report hours worked and pay rate in myCalPERS



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CalPERS- Post-Retirement Work Restrictions

Bona Fide Separation from Employment Requirement

Bona fide separation requires that the employee meet both of the following conditions:

- No written or verbal agreement between the employee and the employer to work after retirement **and**;
- 60 calendar days between employee's retirement and post retirement employment.



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**CalPERS-
Post-Retirement
Work Restrictions**

- No Unemployment Insurance Payments in the Preceding Twelve Months.
- If violated, employer must terminate the retiree.



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CalPERS- Post-Retirement Work Restrictions

Strict Limitations on Duration of Work and CalPERS Retiree Skills

- CalPERS retirees cannot be hired into permanent or regular staff positions without reinstatement from retirement.
- CalPERS retirees can be hired during a recruitment period if for a limited period of time and the position requires specialized skills or during an emergency.



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Key Questions to Ask During the Hiring Process

- What public retirement system did the individual retire from?
- Service or disability retiree?
- What position will the retiree hold?



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Changes in the Law: Overpayment Process

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Compensation Reporting Errors

Compensation reporting mistakes are common.

Audit and error correction process.



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Benefit Overpayments

Mistakes reporting compensation can result in retiree benefit overpayments if the erroneous compensation data was used to calculate retirement benefits.

Practice has been for pension system to collect benefit overpayments from the retiree who received the money.

This has been unpopular with retirees and the labor unions.



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CalPERS and SB 278

Effective January 1, 2022

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New Law (SB 278) Moves Liability Risk to the District

Bill's stated intent was to protect retired CalPERS members from retroactive "clawback" of benefit overpayments when mistake was fault of CalPERS or the employer.

Created new term: "**disallowed compensation**" – which is defined to mean compensation reported by the employer that CalPERS subsequently determines is not in compliance with law or regulations.



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Overpayment Errors paid by the District as Penalties

Retiree monthly benefit is still adjusted to the correct amount prospectively-impacts retiree.

Clawback from the retiree is eliminated if certain factors are met- liability is shifted to the employer for the benefit overpayment.

Adds a significant "penalty" paid by the employer.



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Employer Pays if 4 Factors are Met:

1. The compensation was reported, and contributions were made, while the member was actively employed.
2. The compensation was agreed to in a MOU or CBA and the Union did not knowingly agree to compensation that was disallowed.
3. The determination by the system that compensation was disallowed was made after the date of retirement.
4. The member was not aware that the compensation was disallowed at the time it was reported.



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Employer Pays "Restitution" to Retiree

If the 4 conditions are met, the employer must pay:

- A penalty equal to 20 percent of the amount calculated as a lump sum of the actuarial equivalent present value representing the difference between the monthly allowance that was based on the disallowed compensation and the adjusted monthly allowance for the duration that allowance is projected to be paid by the system.
 - 90% of penalty is paid to the retiree as "restitution"
 - 10% of penalty is paid to CalPERS




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Process for Review or MOU or CBA Language

Employers can submit a draft MOU or a CBA, entered on or after January 1, 2022, to CalPERS

CalPERS must provide guidance on how to report the compensation within 90 days

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CalSTRS and AB 1667


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Collection of Benefit Overpayments Shifts to Fault-Based System

Retiree repays benefit overpayment if the error was the fault of the retiree.

If error was due to inaccurate reporting by the employer, the employer repays the benefit overpayment.

If employer followed inaccurate guidance from CalSTRS, then the employee and employer do not repay the overpayment.

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CalSTRS Guidance: Binding on CalSTRS !!

Employers only responsible for following guidance in effect at the time compensation is reported.

If CalSTRS' "rules" or guidance are later determined by CalSTRS to result in "disallowed compensation" then it is a system error and is paid 85% by the State and 15% by all employers.



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CalSTRS Required to Publish Guidance Annually

At least annually, CalSTRS must provide "resources" that interpret and clarify creditable compensation and creditable service laws.

Employers are entitled to rely upon this guidance.



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Process for Review of MOU or CBA Language

Employers or the union can submit to CalSTRS for review MOU or CBA language that is intended to form the basis of a pension benefit calculation.

CalSTRS must provide guidance on how to report the compensation within 30 days.




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Best Practices Moving Forward

- ✓ Submit collectively bargained language to CalPERS/CalSTRS for review and written guidance.
- ✓ CalSTRS- Keep up-to-date on annual CalSTRS guidance



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Take-Aways

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Resources

- CalSTRS Publications
 - <https://www.calstrs.com/>
- CalPERS Publications
 - <https://www.calpers.ca.gov/>
- Lozano Smith Client News Briefs
 - <http://www.lozanosmith.com/news-clientnewsbriefs.php>



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Questions



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For more information, questions and comments about the presentation, please feel free to contact:

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Or any of the attorneys in one of our 8 offices.




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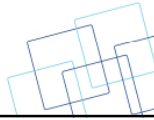



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School District Retirement Systems

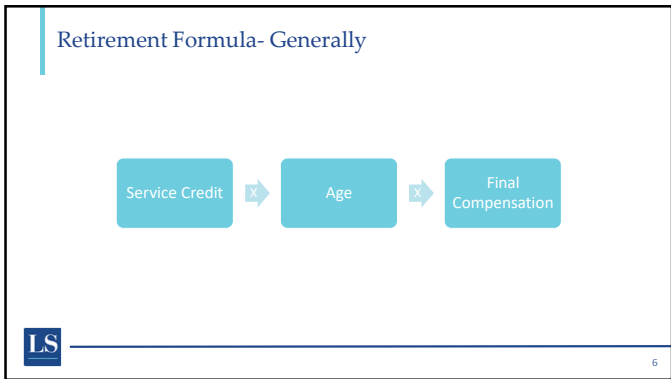
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960 hours per year for all CalPERS employers

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Employer Pays "Restitution" to Retiree

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- ✓ CalSTRS- Keep up-to-date on annual CalSTRS guidance



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Take-Aways

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Resources

- CalSTRS Publications
 - <https://www.calstrs.com/>
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For more information, questions and comments about the presentation, please feel free to contact:

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