

April 4, 2019

CalPERS Legal Office
Attn: Preet Kaur, Senior Attorney
P.O. Box 942707
Sacramento, CA 95811

Dear Ms. Kaur:

CalPERS proposed establishment of the Cambria/Fuller case as a precedent decision would have significant ramifications for local government agencies. This action would dictate how agencies deliver their services through interim and contract services, by virtually excluding their ability to safely contract workers through third party employers.

CalPERS Board policy regarding the designation of precedential decisions calls for consideration of the following two questions:

1. Does the decision contain a significant legal or policy determination of general application that is likely to recur?
2. Does it include a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made and how the law was applied?"

CalPERS proposed action to designate the Fuller decision as precedent *should be rejected, as the decision lacks a clear and complete analysis of the issues in sufficient detail so that interested parties can understand why the findings of fact were made and how the law was applied.* CalPERS should draft a regulation defining independent contracting and third-party employment and comply with the requirement for public notice and comment or ask the Legislature to amend the Public Employees' Retirement Law.

Public agencies have relied upon cost effective and efficient staff assistance services as critical for their operations. Public agencies have the authority to define their operational needs pursuant to governing law. CalPERS authority is limited to administering the Public Employees' Retirement Law. While we recognize the interest by CalPERS in protecting the fiscal viability of its pension trust, various statutes provide California's public agencies the legal authority to define their operational needs and to select individuals or firms for specific duties. *All of these legislative statutes must be harmonized and cannot be viewed in isolation.*

CalPERS attempted, but never adopted, a regulation defining employment status or identifying the indicia of common law control which third party employers must demonstrate. Therefore, CalPERS relies upon

the common law control test for determining employee status. Contracting agencies must attempt to comply with this test and the ever-evolving application by CalPERS auditors, ALJ and CalPERS Board decisions, and case law. The lack of clarity resulting from not having clear regulations has resulted in numerous administrative appeal challenges which by their very nature impose severe time and financial impacts on CalPERS, on individuals, and on public agencies. Third party employers, whether public agencies or private entities, are burdened by the inability of CalPERS to clearly define what indicia of common law control are required to show that they, and not the receiving agency, are truly the employer under the common law control test.

Common law control test factors are whether the person to whom service is rendered has the right (whether exercised or not) to control the manner and means of accomplishing the result desired. Secondary factors include the right to discharge at will without cause; whether the worker is engaged in a distinct occupation or business; skill required in the occupation; who pays for equipment and business expenses; length of time services are to be performed; method of payment, whether by hour or job; whether the work is part of the employer's regular business; whether the parties believe they are creating the employer-employee relationship; worker's opportunity for entrepreneurial profit or loss depending upon his or her managerial skill; worker's use of helpers or replacements; and degree of permanence of the working relationship. Courts have said that these factors cannot be applied mechanically as separate tests; they are intertwined, and their weight depends often on particular combinations.¹

CalPERS adoption of the Fuller decision as a "precedent" will allow it to cite it as "authority" in future administrative appeals. It is already difficult to challenge adverse audit findings because the individual or agency has the burden of proof in any administrative appeal. Even when a neutral administrative law judge rules against CalPERS, it has the authority to reject the proposed decision, thereby forcing the party appealing to either concede or file a challenge in superior court. Even in superior court there is judicial deference to the decision-making by CalPERS. *Therefore, to avoid adverse audit findings and costly appeals, it is critical that public agencies have the benefit of unambiguous regulations or laws to guide them on how contract and third-party service providers will not violate pension rules. This is CalPERS' obligation and burden, which cannot legally be determined by staff decisions; only the CalPERS Board of Administration has the legal authority to set policy.*

¹ Adoption of *Cambria/Fuller* would be the first precedential decision involving third party employment, and therefore the significance of this cannot be ignored. Other CalPERS precedential decisions do not involve third party employers. *Neidengard*, (2005) Decision No. 05-01, and *Galt*, (2008), No. 08-01. However, in a case cited in a CalPERS training manual introduced as a hearing exhibit, the administrative law judge concluded that respondent was employed by a joint powers agency providing "sophisticated consulting services, as well as human resource and management services," like RGS. As the manual states, there is no single universally-agreed upon set of 'tests' that determine whether an employee is a 'contractor' or an 'employee. Significantly, it shows that CalPERS accepts the concept that 'leased' workers (analogous here to RGS) may be excluded from membership, although there are no operational definitions by which to guide public agency interim and contracted staffing decisions.

CalPERS is now seeking to adopt a regulation through a “precedential” decision from a case that has numerous conflicting facts and fails to offer clear future guidance to interested parties. The Fuller decision is factually inconsistent and infused with a legally deficient analysis; and will likely greatly increase the number of CalPERS “reinstatements” into the system, causing great financial hardship on individuals and agencies.

The decision contained numerous mixed facts as to whether Ms. Fuller was an employee of Regional Government Services, which assigned her as a short-term financial services advisor while Cambria Community Services District recruited for a permanent finance manager. CalPERS approach will severely restrict the ability of local government agencies to address rapidly changing staffing needs; it will also increase the costs.

Many of the audits by CalPERS are inconsistent as to whether an individual is an “independent contractor,” either employed on his/her own or through a third-party employer, versus a “common law employee.” Clear definitions will reduce the expense of adverse audits, administrative appeal challenges, and foster more cost-effective agency staffing decision-making when interim or project-based services become necessary.

Background of Regional Government Services/Cambria/Fuller Employment Relationship

Cambria Community Services District (“Cambria”), a CalPERS contract employer, provides water, wastewater, and fire services to an unincorporated community of some 6,400 people on the remote Central Coast. A small agency with limited resources was faced with an urgent dilemma when its finance manager resigned upon 30-day notice. Pending recruitment for a permanent replacement, it urgently required someone to *perform* interim finance functions. Ms. Fuller, an experienced public sector financial professional employed by Regional Government Services (“RGS”), a public joint powers agency which provides services to other public entities through RGS employees, was assigned to perform interim financial functions. RGS contracted with Cambria and entered into an employment contract with Fuller for her to provide services to Cambria and other agencies.

In the CalPERS audit of Cambria, the auditor failed to request documents from or interview executives from RGS, despite the fact that RGS, Cambria and Ms. Fuller all considered RGS to be her employer. Thus, the decision is also fatally flawed as silent on due process violations committed by the CalPERS auditor who failed to inquire of RGS or review any RGS personnel documents and indicia of control exercised by RGS. The CalPERS “Employment Relationship Questionnaire” submitted by Cambria clearly explained that Ms. Fuller was not considered a Cambria employee:

“Fuller had her own place of business; Fuller provides the same type of service to other agencies; Cambria does not have first call on her time or services; Fuller determines hours of work; Fuller is not required to do the work personally; Fuller was not trained by an agency employee, correspondence, required attendance at meetings or other methods that provided instruction on the manner or means of accomplishing the desired result; Although

“stationary” and “business cards” were inaccurately checked as facilities/equipment furnished to Fuller, the generic stationary did not identify Fuller, and *no business cards* were provided; Cambria did not have the right to control how Fuller performed her work; Fuller was not directed, supervised or reviewed by any Cambria employee; Invoices “are rendered by her employer: Regional Government Services;” Cambria could terminate the relationship [with RGS] at any time; and Fuller could quit at any time without liability to Cambria...In your opinion, is the individual an employee of the agency? *No. She was tasked with providing finance manager services, but she alone determined what those services were, produced work based on her own knowledge and abilities and was not supervised or evaluated. She provided guidance to employees but was not a supervisor and could not evaluate, hire, fire or discipline employees. Ibid.”*

RGS, Cambria, and Fuller shared intent to contract for skilled, cost effective financial advisor services. CalPERS has no statutory authority to invalidate this operational decision. *The factual record is replete with evidence that RGS was indeed Ms. Fuller’s employer, not Cambria. The decision misapplied the common law control test by disregarding significant indicia of control by RGS and Cambria’s treatment of Ms. Fuller differently than its permanent Finance Manager position. On these grounds this decision is not appropriate for designation as precedent.*

It appears the attempt to make this case precedential is designed to limit the independent contractor test to only those factors CalPERS thinks important and to exclude all other factors, effectively creating a new test.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Averett", with a stylized flourish at the end.

Richard Averett
Executive Director
Regional Government Services Authority