MCERA RETIREMENT EDUCATION HALF DAY MEETING AGENDA
THURSDAY, SEPTEMBER 12, 2019
MERCED COUNTY EMPLOYEES' RETIREMENT ASSOCIATION
3199 M STREET, MERCED, CA 95348

Please turn your cell phone or other electronic device to non-audible mode.

CALL TO ORDER: estimated time of 9:30 A.M. or after Administration Meeting Adjournment.

- ROLL CALL

PUBLIC COMMENT

Members of the public may comment on any item under the Board's jurisdiction. Matters presented under this item will not be discussed or acted upon by the Board at this time. For agenda items, the public may make comments at the time the item comes up for Board consideration. Persons addressing the Board will be limited to a maximum of five (5) minutes in total. Please state your name for the record.

MEETING

- BOARD EDUCATION HALF DAY
  Discussion and possible action on the following presentations:
  - Fiduciary Training – Ashley Dunning, Nossaman, LLP.
  - Brown Act Training – Jeff Grant, County Counsel of Merced County
  - Disability 101 Training – Forrest Hansen & Kristie Santos

INFORMATION ONLY

ADJOURNMENT

All supporting documentation is available for public review in the office of the Merced County Employees' Retirement Association, 3199 M Street, Merced, California, 95348 during regular business hours, 8:00 a.m. – 5:00 p.m., Monday through Friday.

The Agenda is available online at www.co.merced.ca.us/retirement

Any material related to an item on this Agenda submitted to the Merced County Employees' Retirement Association, after distribution of the Agenda packet is available for public inspection in the office of the Merced County Employees' Retirement Association.

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NOSSAMAN LLP

Fiduciary Principles to Guide Public Retirement Fund Trustees

Ashley K. Dunning
Partner | Co-Chair, Public Pensions & Investments

Training for the Board of Retirement
Merced County Employees' Retirement Association

September 12, 2019

Overview

- **Fiduciary duty of care**
- **Fiduciary duty of loyalty**
- **Application of fiduciary principles to MCERA's planned design/build of new office space**

Fiduciary Duty of Care

- **Prudent Expert Rule**
  - "The members of the retirement board . . . shall discharge their duties with respect to the system with the *care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.*"
- **Cal. Const., art. XVI, § 17(c) (emphasis added).**

Fiduciary Duty of Care

- **Prudent Expert Rule**
  - "As an initial guideline, a trustee 'has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law.'"
  - *O'Neal v. Stanislaus County Employees' Retirement Assoc.* (2017) 8 Cal.App. 5th 1184, 1209 ("*O'Neal*") [quoting Rest. 3d Trusts, §76, accord, Prob. Code, §16000]"

Fiduciary Duty of Care: the "Prudent Expert"

- **Skill required of trustees**
  - The Prudent Investor Rule standards
    - "require fiduciaries possessing special facilities and skills to make those advantages available to the trust and its beneficiaries."
    - Restatement 3d Trusts, sec. 227, Cmt. *d*.
  - Standard is *objective*, not subjective to the trustee.
    - Private pension trustees may not escape the "reasonable person" standard of prudence in making investments by having a "pure heart and an empty head". *Donovan v. Cunningham* (716 F.2d 1455, 1467 (5th Cir. 1983)

Fiduciary Duty of Care: the "Prudent Expert"

- **Skill required of trustees**
  - The "prudence standard is 'not that of a prudent lay person, but rather that of a prudent fiduciary with experience dealing with a similar enterprise'." *Whitfield v. Cohen*, 682 F. Supp. 188, 194 (S.D.N.Y. 1998) (quoting *Marshall v. Snyder*, 1 Empl.Ben. Cases (BNA) 1878, 1886 (E.D.N.Y. 1979)).
  - Courts may probe the thoroughness of a fiduciary's analysis and basis for its decisions, rather than simply deferring to a determination that a fiduciary may make. See *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996), cert. denied, 520 U.S. 1237.

Fiduciary Duty of Care: Actuarial Services and "Competency" of Assets

- **Duty to Assure Competency of Retirement System Assets**
  - "The retirement board of a retirement system . . . consistent with the exclusive fiduciary responsibilities vested in it, shall have the *sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the . . . retirement system*."
- **Cal. Const., art. XVI, § 17(e) (emphasis added).**

Fiduciary Duty of Care: Actuarial Services and "Competency" of Assets

- In *O'Neal*, petitioners challenged various board of retirement decisions relating to the actuarial methodologies and transfers of funds among reserves authorized by the board of retirement.
- *O'Neal* concluded that the retirement board had not violated its fiduciary duty of care by making certain actuarial decisions that resulted in lowering the employer contribution rate (such as permitting negative amortization), though it deferred a final decision on that topic with respect to the alleged breach of the duty of loyalty (discussed further below).
  - *O'Neal*, *supra,* 8 Cal. App. 5th at pp. 1209, 1221, n. 10.

Fiduciary Duty of Care: Duty to Monitor

- The duty to monitor and to take corrective action when reasonably appropriate is fundamental to a trustee's exercise of the duty of care. Rest. 3d Trusts, § 227, p. 14 (1992), comment d ("The duty of care requires the trustee to exercise reasonable effort and diligence in making and monitoring investments for the trust, with attention to the trust's objectives").

Fiduciary Duty of Care: Duty to Monitor

- **In 2015, the United States Supreme Court addressed this topic in *Tibble v. Edison International*, 575 U.S. ___, 135 S. Ct. 1823, 191 L. Ed. 2d 795 (May 18, 2015) ("*Tibble I*"):**
  - In this case, Petitioners contended that fiduciaries of an ERISA defined-contribution plan acted imprudently in offering higher priced retail-class mutual funds to them, when the fiduciaries allegedly could have offered effectively the same mutual funds to them at the lower price available to institutional investors such as the plan.
  - The lower price reportedly reflected the lower administrative costs afforded to institutional investors.

Fiduciary Duty of Care: Duty to Monitor

- ***Tibble I* observed:**
  - Under the common law of trusts, a fiduciary is required to conduct a regular review of its investments with the nature and timing of the review contingent on the circumstances.
  - Under trust law, a trustee also has a "continuing duty to monitor trust investments and remove imprudent ones."
  - A fiduciary's alleged "imprudent retention of an investment" could provide the basis of an action that would trigger the running of a limitations period, not simply the original investment date.

Fiduciary Duty of Care: Duty to Monitor

- ***Tibble I* remanded the case for consideration by the 9th Circuit and did not decide in this instance:**
  - Whether the challenged mutual funds' investments fee structure as compared to analogous investment opportunities constituted a breach of fiduciary duty by the trustees who failed to remove the more expensive, but otherwise equivalent, investment options from the mutual funds proposed to members of the plan.

Fiduciary Duty of Care: Duty to Monitor

- On remand from the Supreme Court, the *en banc* 9th Circuit vacated the district court's judgment in favor of the plan sponsor and its benefits plan administrator on claims of breach of fiduciary duty in the selection and retention of certain mutual funds for a benefit plan governed by ERISA.
  - *Tibble v. Edison Int'l*, 843 F.3d 1187, 1198 (9th Circ. 2016) ("*Tibble II*")

Fiduciary Duty of Care: Duty to Monitor

- **The 9th Circuit observed:**
  - "In fulfilling his duties, a trustee is held to "the prudent investor rule," which requires that he "invest and manage trust assets as a prudent investor would"; that is, by "exercis[ing] reasonable care, skill, and caution," and by "reevaluat[ing] the trust's investments periodically as conditions change."
    - *Tibble II, supra*, at p. 1197 [quoting A. Hess, G. Bogert & G. Bogert, Law of Trusts and Trustees § 684, 145-46 (3d ed. 2009) [hereinafter Bogert 3d]) Bogert 3d § 684.]

Fiduciary Duty of Care: Duty to Monitor

- ***Tibble II* also observed:**
  - "pursuant to the Restatement (Third) of Trusts, a trustee is to 'incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship." [Rest. 3d Trusts, § 90(c)(3); *see also id*. § 88.] The Restatement further instructs that "cost-conscious management is fundamental to prudence in the investment function," and should be applied "not only in making investments but also in monitoring and reviewing investments." Id. § 90, cmt. b; *see also id*. § 88, cmt. a.
  - *Tibble II*, *supra*, at pp. 1197-1198.

Fiduciary Duty of Care: Duty to Monitor

- *Tibble II* vacated the district court's decisions regarding applicability of a statute of limitations regarding challenges to mutual funds added to the Plan before 2001.
- The 9th Circuit then remanded for trial on the claim that, "regardless of whether there was a significant change in circumstance, [the Plan Sponsor] should have switched from retail-class fund shares to institutional-class fund shares to fulfill its continuing duty to monitor the appropriateness of trust investments."
  - *Tibble II*, *supra*, at p. 1198.

Fiduciary Duty of Care: Duty to Monitor

- **Outcome:**
  - On August 16, 2018, the U.S.D.C., Central District of California Court of Appeal issued Findings of Fact and Conclusions of Law in favor of plaintiffs. (CV 07-5359 SVW (AGRx)) ("*Tibble III*")
  - Court *in Tibble III* held Defendants liable for breaching their fiduciary duties of care and loyalty, beginning six years prior to the date the action was filed (based on 6 year statute of limitations under ERISA), by not disposing of retail share classes *immediately* after institutional share classes were made available.

Fiduciary Duty of Care: Duty to Monitor

- **The court in *Tibble III* explained:**
  - "The Court does not suggest that in all duty to monitor cases a fiduciary would breach their duty the day a fund becomes imprudent. Certainly, reasonable fiduciaries are not expected to take a daily accounting of all investments, and thus the reasonable discovery of an imprudent investment may not occur until the systematic consideration of all investments at some regular interval. [Citing *Tibble I* at 1828.] However, the facts of this particular case present an extreme situation. Defendants have never disputed that a reasonable fiduciary would be knowledgeable of the existence of the institutional shares for the mutual funds at issue. Thus, there is no credible argument that a reasonable fiduciary only would have discovered these share classes during some later annual review. Defendants always knew, or should have known, institutional share classes existed."

Fiduciary Duty of Care: Duty to Monitor

- ***Tibble III* status:**
  - On October 25, 2018, the Court entered judgment in favor of the Plaintiff class, jointly and severally, in the amount of $13,161,491, and the Court denied plaintiffs' request to recover their expert witness fees
  - Plaintiffs appealed the denial of $964,212 in expert witness fees to the 9th Circuit (Case No. 18-55974).

Take-Aways from *Tibble*?

- **Retirement systems should ensure that:**
  - Some process is adopted and implemented to ensure reasonable oversight on a periodic basis of the investments made on behalf of the trust beyond the due diligence undertaken when the investment decision was originally made.

Take-Aways from *Tibble*?

- **Monitoring process should:**
  - Analyze compliance with systems' existing investment policies and contractual terms
    - Including, among other terms, diversification and leverage limits, and fee and expense allocation provisions.
  - Include a process to trigger a more focused review in some circumstances
  - Monitoring obligation applies to MCERA's planned design/build of new office space, retain oversight
- **Exclusive reliance on self-reporting by investment managers and others who have a self-interest in a particular investment/project may be insufficient.**

Fiduciary Duty of Care: Diversify Investments

- **Duty to Diversify Retirement System Assets**
  - "The members of the retirement board of a public pension or retirement system *shall diversify* the investments of the system so as to *minimize the risk of loss* and to *maximize the rate of return, unless under the circumstances it is clearly not prudent to do so*."
    - Cal. Const., art. XVI, § 17(d) (emphasis added).
- **Note difference of above language from ERISA language (and prior sec. 17(b) language) requiring diversification unless it is clearly "<u>prudent not</u>" to do so. The California diversification requirement is more rigorous than the ERISA standard.**

Fiduciary Duty of Care: Consult with Experts

- "To the extent necessary or appropriate to the making of informed investment judgments by the particular trustee, care also involves securing and considering the advice of others [such as legal, actuarial, real estate and investment counsel] on a reasonable basis."
  - Rest. 3d Trusts, supra, § 227, p. 15, comment d.

Fiduciary Duty of Care: Consult with Experts

- The implicit corollary to the duty to consult with experts is that if a fiduciary fails to follow the advice of its professional consultants, it must demonstrate an informed, reasonable, and prudent rationale for failing to do so.
- Another implicit corollary is that expert advice from a reasonable source should provide the basis for a Board's decision to take an alternative course of action on a topic within that area of expertise (e.g., investment, real estate, actuarial, legal).

Fiduciary Duty of Care: Delegation

- "A trustee has a duty personally to perform the responsibilities of the trusteeship *except as a prudent person might delegate those responsibilities to others*. In deciding whether, to whom and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising agents, the trustee is under a duty to the beneficiaries to exercise *fiduciary discretion* and to act as a *prudent person* would in act in similar circumstances."
  - Rest. 3d Trusts, supra (Prudent Investor Rule, § 171, adopted in 1992) (emphasis added).

Fiduciary Duty of Care: Delegation

- **On delegation, Tibble III observed at pp. 16-17 (emphasis added):**
  - "In order to determine whether an investment decision is prudent, a fiduciary has a duty to investigate, and may secure independent advice from financial advisors or other experts in the course of the investigation. *Donovan v. Bierwith*, 680 F.2d 263, 272-73 (2d. Cir. 1982). **However, the fact that a fiduciary secured independent advice does not necessarily indicate that he acted prudently**. Howard, 100 F.2d at 1489; *Bierwith*, 680 F.2d at 272; *George v. Kraft Foods Global, Inc.,* 641 F.3d 786, 799 (7th Cir. 2011) (reversing grant of summary judgment for defendants on breach of prudence claim because "relying on the advice of consultants" is not a complete defense)."

Fiduciary Duty of Care: Prudent Delegation

- ***Prudence* is the key to delegation as to all aspects of the topic:**
  - Whether to delegate;
  - How to delegate;
  - To whom a task is delegated; and
  - How to supervise.

Fiduciary Duty of Care: Prudent Delegation

- **Uniform Prudent Investors Act:**
  - A trustee may delegate investment and management function that a prudent trustee of comparable skills could properly delegate under the circumstances . . .” 7B Unif. Laws Ann. (2000) at 303.

Summary re Fiduciary Duty of Care

- **Duty of care = Duty of prudence**
  - Prudence requires *asking questions* and *understanding the rationale* for actions before taking them
  - Prudence requires *analyzing advice* and *recommendations* received from experts, not acting as a "rubber stamp," but also, if not adopting the experts' recommendation(s), having a reasonable basis for doing so that is *informed by the applicable expertise* implicated by the decision and that is consistent with fiduciary duties
  - Prudence requires *following the Plan Document and other applicable law*, as well as the Board regulations, policies, resolutions and other rules governing the retirement system

Fiduciary Duty of Loyalty: Exclusive Benefit Rule

- "The assets of the . . . retirement system are *trust funds and shall be held for the exclusive purposes of providing benefits to participants in the . . . retirement system and their beneficiaries* and defraying reasonable expenses of administering the system."
  - Cal. Const., art. XVI, § 17(a) (emphasis added).

Fiduciary Duty of Loyalty: Prompt Delivery of Benefits and Related Services

- "The retirement board of a . . . retirement system shall have the sole and exclusive fiduciary responsibility . . . *to administer the system in a manner that will assure prompt delivery of benefits and related services* to the participants and their beneficiaries . . . ."
  - Cal. Const., art. XVI, § 17(a) (emphasis added).

Fiduciary Duty of Loyalty: Primary Duty Rule

- "The members of the retirement board . . . shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A *retirement board's duty to the system's participants and their beneficiaries shall take precedence over any other duty*."
  - Cal. Const., art. XVI, § 17(b) (emphasis added).

Fiduciary Duty of Loyalty: Collateral Interests?

- **Collateral interests of Board members?**
  - The strict duty of loyalty in trust law ordinarily prohibits the trustee from . . . investing in a manner that is intended to serve interests other than those of the beneficiaries or the purposes of the settlor. *Thus, for example, in managing the investments of a trust, the trustee's decisions ordinarily must not be motivated by a purpose of advancing or expressing the trustee's personal views concerning social or political issues or causes*.
  - Rest. 3d Trusts, supra, § 227, p. 12, comment c (emphasis added).

Fiduciary Duty of Loyalty: Conflicting Interests Among Various Members and Beneficiaries

- Can be complex and crosscutting.
- Determinations of priorities among members and beneficiaries must serve the *overall best interest of members and beneficiaries of the retirement system*.
- Appropriate balance may not be obvious when the interests within the member and beneficiary groups are not the same.

Fiduciary Duty of Loyalty: Conflicting Interests Among Various Members and Beneficiaries

- **Dissimilar interests among beneficiaries are built into most trusts.**
- **Trust law has evolved to grant trustees a fair measure of discretion to balance those competing beneficiary interests.**
  - *See* Rest. 3d Trusts, §§ 50, 183 comment a, and 232; *Estate of Bissinger*, 212 Cal.App.2d 831, 833 (no liability where trustee bank "acted reasonably, prudently, in good faith and in the exercise of its best judgment . . . and with the intention of being fair to both the income and remainder beneficiaries"); and IIIA Fratcher, Scott on Trusts, § 232, p. 7 (4th ed. 1988) ("The trustee, however, ordinarily has considerable discretion in preserving the balance between beneficiaries").

Fiduciary Duty of Loyalty

- **Conflicting Interests Among Members and Beneficiaries?**
  - Examine specific provisions, and identified purposes if any, in Plan Document and determine means to implement those provisions and serve those purposes.
  - Consider number of active, deferred and retired members and their beneficiaries affected by Board action.
  - Consider degree of hardship created by potential curtailment or provision of particular benefit.
  - Consider equities as between members/beneficiaries.
  - Consider whether proposed action implicates any vested rights of members/beneficiaries, including, without limitation, actuarial competency of retirement system assets to pay promised benefits.

Fiduciary Duty of Loyalty: Not an "agent" for another

- Trustees are not permitted to administer the retirement system as an "agent" for the party that appointed, or subgroup of members that elected, that individual to the Board.
- On the contrary, the California Constitution, Art. XVI, Sec. 17 (Prop. 162) seeks to prevent such political "meddling" or "interference" by others and mandates loyalty to the overall best interest of members and beneficiaries.
  - *See generally NLRB v. Amax Coal Co*., 453 U.S. 322 (1981) (no "dual loyalties"); *Hittle v. Santa Barbara CERA*, 39 Cal. 3d 374 (1985) (traditional fiduciary duties apply to public retirement system trustees); *Claypool v. Wilson*, 4 Cal.App.4th 646, 676-7 (1992) (Cal. Const., art. XVI, sec. 17 imports the existing law of trusts).

Fiduciary Duty of Loyalty: U.S. Supreme Court in *NLRB v. AMAX*

- Under traditional employee benefit trust law, even though the pre-ERISA statute: "requires an equal balance between trustees appointed by the union and those appointed by the employer, *nothing in the language of [the provision] reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him, or that an employer may direct or supervise the decisions of a trustee he has appointed."* 453 U.S. at 331 (emphasis added).

Fiduciary Duty of Loyalty: Employer contributions?

- California authorities have, however, permitted public retirement system fiduciaries to take actions that result in reduction in employer contributions so long as:
  - those actions do not compromise competency of assets of the retirement system to pay promised benefits;
  - no conflict of interest arises in doing so; and
  - the action is in the overall best interest of members and beneficiaries as that interest relates to matters of proper concern to the retirement system.
    - *See generally Bandt v. Board of Retirement* (2006) 136 Cal.App.4th 140; *see also Claypool v. Wilson* (1992) 4 Cal.App.4th 646.

Fiduciary Duty of Loyalty: Employer contributions?

- Recent *O'Neal* decision also endorsed the conclusion in *Bandt* that "a retirement board could consider its active members' interest in retaining their jobs when making funding decisions." *O'Neal*, supra, 8 Cal.App. 5th at p. 1219.
- Further, *O'Neal* stated that "A trier of fact could view conduct preserving current jobs as good for current retirees who rely on continuing contributions to ensure the viability of their retirement." *Id*.
- *However*, the court in *O'Neal* required a trial to be conducted to determine whether there was a breach of the duty of loyalty in that instance. *Id*.

Fiduciary Duty of Loyalty: Employer contributions?

- In January 2019, the *O'Neal* trial court issued a 57-page opinion analyzing the retirement board's actuarial and related determinations that plaintiffs had challenged and that had been the subject of trial.
- The court concluded that the board did not breach its fiduciary duty of loyalty in its decision-making because it sought to take actions that were prudent and in the overall best interest of the membership during a time of extreme financial risk to the retirement system and its plan sponsors, stating:
  - "Most importantly, in this Court's opinion, the Board's decisions helped the County manage through the financial crisis in the short term to assure the sound funding of the promised benefits in the long term." (Statement of Decision, p. 52)
- Plaintiffs timely appealed the trial court decision.

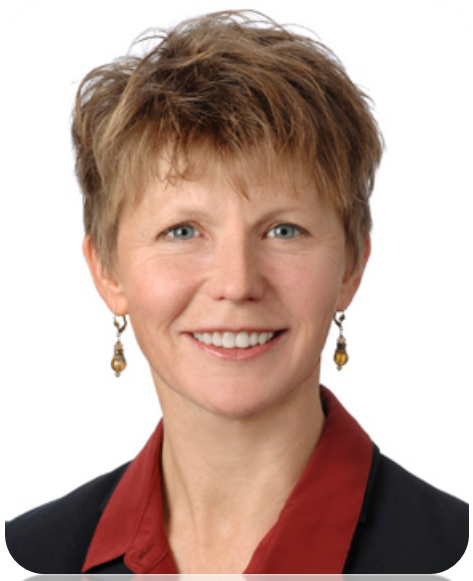
Application of fiduciary principles to MCERA's planned design/build of new office space

- Under the California Constitution, MCERA Board has plenary authority and fiduciary responsibility with respect to both investments and administration
- Planned design/build of new office fills both an investment and an administrative purpose for MCERA, and it should be considered prudently, with both purposes considered.
- Cost considerations are important.
- Process is important – make sure record reflects that process: minutes reflecting deliberation, written materials provided by expert consultants, demonstrate *prudence* and that actions are taken in the *overall best interest of serving members and beneficiaries* with respect to the provision of their retirement benefits by MCERA.

Fiduciary Goal with respect to all MCERA Board actions

- A Board of Retirement must use *informed judgment and act in the overall best interest of system members/beneficiaries* in a manner that is *consistent with applicable laws* when exercising its plenary authority over administration and investments, and its actions in that regard *may not be "arbitrary" or "capricious"* and must be *rationally related to the information* presented to the Board.

Thank You!



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Disability Retirement: 101

Navigating through Disability Statutes and Case Law

Overview
Disability Retirement: 101

- Who can determine if a member is disabled?
- Applications for disability retirement
- Disabled defined
- Service v. non service disability retirement
- Reasonable accommodations and things to consider
- Safety presumptions
- Medical records and opinions
- The hearing process
- What are other 37 act systems doing?

Who can Determine if a Member is Disabled?

- "Permanent incapacity for the performance of duty shall in all cases be determined by the Board." (§31725)
- Staff's role in disability process is "fact finding" only and counseling members
- The member and or the member's employer may obtain a judicial review of the Board's decision by requesting a *writ of mandate* from the Courts
- The burden of proof is on the member to prove they are disabled

Applications for Disability

- Application for disability retirement shall be made while the member is in service (§31722)
- Within four months after discontinuance of service
- More than four months after discontinued service if the member is continuously disabled or unable to determine permanency of disability at the time of retirement. (*Flethez v San Bernardino, 2017*)

Disabled Defined

The legal standard for disability (§31720):

Is the applicant permanently incapacitated for performance of the usual duties associated with their position?

- *Permanence*
- *Incapacitated*
- *Usual Duties*

Member has not waived their right to retirement in respect to this particular disability

Disability cannot be a substitute for the employer's disciplinary process (§31720.3)

Service Connected Disability

- Service:
  - Eligible first day of employment
  - Must be permanently disabled
  - Disability must be directly linked to employment - must be real and measurable, does not need to account for entire disability
  - Spouse is eligible for continuance as along as legally married or registered domestic partner
  - Benefit is 50% of final salary or service retirement calculation, if greater
  - Spouse/partner entitled to 100% continuance
  - First 50% is a tax free benefit

Non Service Connected Disability

- Non Service:
  - 5 years of service
  - Must be permanently disabled
  - No direct link to employment necessary
  - Spouse is eligible for continuance as along as legally married or registered domestic partner for one year or longer
  - Benefit is up to 33% of final salary or service retirement calculation, if greater
  - Spouse/partner entitled to 60% continuance
  - Taxable benefit

Reasonable Accommodations

- If employee's permanent work restrictions can be reasonably accommodated, then the employee is not permanently incapacitated
- Available permanent assignment within the employee's job classification, then the employee is not permanently incapacitated
- Case Law (*O'Toole v Retirement Board, 1983) outlines that a Police Department's practice of allowing an officer to perform a limited duty job of a public affairs officers for six years overrode the Department's stated policy of having no permanent light duty assignments*

Reasonable Accommodation - Things to Consider

- In accordance with civil service rules and merit system procedures the applicant can be offered another position, transferred or reassigned
- If compensation offered in new position is less than previous salary, the Board may, in lieu of disability retirement, pay the difference in compensation
- If a new position cannot be arranged prior to the hearing, then the member shall receive disability retirement until the position is arranged
- This is not mandatory and the member can refuse this arrangement

(§31725.5, 31725.6 and 31725.65)

Other Things to Consider

- A member may be entitled to service retirement allowance while the Board contemplates a determination of a disability retirement (§31725.7)
- Members under the age of 55 who the Board determined to be disabled may be re-examined to determine if they are still disabled (§31729)
- If determined that a member is not disabled after re-examination and the *member's employer offers to reinstate the member*, then the benefit will/can be canceled
- Members cannot refuse to be re-examined
- The Board may direct staff to investigate a member's disability (sometimes referred to as "sub rosa")

Safety Presumptions

- What are safety presumptions?
  - The Board is bound by the presumption that specific disabilities diagnosed in safety members are caused by their employment
- Examples of safety presumptions:
  - Heart trouble (police and fire, §31720.5)
  - Cancer (police and fire, §31720.6)
  - Blood borne infectious disease (safety, fire, probation, police, §31720.7)
  - Biochemical chemical exposure (fire, active peace officer – excludes not engaged in active law enforcement or fire duties, §31720.9)
- Safety presumptions can be rebutted by other evidence

Medical Records & Opinions

- Staff can send a member for an independent medical examination (IME)
- Staff often receive medical opinions that are conflicting – the Board is empowered to resolve conflicts between differing medical opinions
- Members can produce their own medical records from a physician for consideration (e.g. treating or expert opinion)
- Workers compensation has different thresholds and purpose – not the same as determining permanency of a disability
- Medical records may show that a person is disabled but it may not be connected to their employment

The Hearing Process

- The member has a choice to have their case heard in closed or open session
- The Board has certain rights and duties;
  - To ask for more information (medical or otherwise) pertaining to the disability
  - Resolve the issue of conflicting evidence
  - Be objective and resist personal/professional biases
- The duty of staff is to present the facts to the Board for determination with a recommendation based on medical records
- Members have a right to due process; important to ensure non-represented members receive due process
- Once the board makes a determination, the member and or the member's employer may obtain a judicial review of the Board's decision by requesting a W*rit of Mandate* from the Courts

What are Other System's Doing?

Hearing Officer;

- Member submits application and records to staff
- All information sent to System's disability attorney
- Disability attorney summarizes and makes recommendation to the Board (accept/deny/set for hearing)
- If recommendation is to send to hearing, then System uses a Hearing Officer (usually a retired judge)
- Hearing Officer conducts hearing and summarizes findings
- Recommendation of Hearing Officer sent to Board for final determination
- Member has the right to *Writ of Mandate*

Questions or Comments?