**Department of Human Resources**
**Initial Statement of Reasons**

## I. Problem Statement

The Legislature adopted Senate Bill 1240 (Government Code section 18720.45[1]) in response to a State Auditor's Report (Report). This Report found that a technician for the California Department of Transportation (CalTrans) falsified data relating to the structural soundness of bridges and freeways constructed by CalTrans. The technician subsequently entered into an agreement with CalTrans that prohibited the technician from future employment with the state. Despite this agreement, the Report found there was a substantial risk that the technician might be unknowingly rehired by the state and that a subsequent state employer may not have the necessary information to make an informed hiring decision.

This is not an isolated occurrence. When resolving disputes, state agencies often enter into agreements with employees in which the employee agrees not to return to employment with that particular agency or agrees not to return to employment anywhere in state civil service. As a matter of practice, in the vast majority of such agreements the employee agrees to refrain from seeking future employment only with a particular agency. Agreements not to return to employment anywhere in state civil service tend to occur only when the employee's behavior was so egregious that the citizens of the State of California are best served by the state not reemploying this individual anywhere within state civil service.

Currently, there is no mechanism in the state whereby state agencies, other than the prior agency who entered into the agreement, can obtain the information. Therefore, section 18720.45 requires disclosure of both types of agreements; those which include an agreement not to return to one particular agency, as well as those that contain an agreement not to return to employment in state civil service as a whole.

Two aspects of this statute require further definition. First, there is a dispute as to whether the statute requires the disclosure of both agreements not to return to work anywhere in the state civil service as a whole and the more common agreements not to return to work at a particular agency. Second, the statute fails to specify the type of the agreements that must be disclosed. In some instances, this may result in the disclosure of agreements that are unrelated to an applicant's work performance.

The Department's interpretation of the scope of disclosure required by section 18720.45 is supported both by law and good public policy. The Department reads section 18720.45 to require the disclosure of both broad agreements not to return to any state agency and more narrow agreements not to return to a particular state agency. However, based on verbal discussions between Department employees and some exclusive representatives, it has become evident that some employees and their exclusive representatives interpret section 18720.45 to only require disclosure of the more broad agreements in which the employee agreed not to seek or accept employment anywhere in state civil service.

[1]Unless otherwise indicated, all statutory references refer to the Government Code.

Further, section 18720.45 does not describe the types of agreements that must be disclosed. Where the agreements prohibit the applicant from seeking or accepting subsequent employment anywhere in state civil service, all types of agreements are relevant and must be disclosed. However, where an applicant agreed not to seek or accept subsequent employment with a particular state agency, the applicant should only be required to disclose those agreements that pertain to the employee's prior work performance, reliability, and ability to be a good fit for a subsequent employer. For example, agreements pertaining only to the Family Medical Leave Act or workers' compensation, are not relevant to a potential employer's hiring decision. These types of settlements are not necessarily reflective of an applicant's qualifications, reliability, and ability to be a good fit with a subsequent employer.

In the absence of regulatory clarification, this dispute over the interpretation of section 18720.45 may result in applicants failing to disclose required information, applicants disclosing unnecessary information, or agencies unknowingly hiring individuals who have previously agreed not to return to the state.

## II. Purpose

The purpose of the proposed regulation is to clarify section 18720.45 and to specify precisely what agreements must be disclosed on applications for state employment.

**Section 599.829.1, subdivision (a)**

Subdivision (a) defines "state agency" to provide clarity to the regulation.

**Section 599.829.1, subdivision (b)**

Subdivision (b) provides the precise questions and instructions to be included on employment forms. Providing the verbatim language that must be used ensures that agencies ask for the required information in a manner that is consistent, unambiguous, and that complies with the statute. The information is sought in two separate questions to make clear that both broad agreements not to return to any state agency and more narrow agreements not to return to a particular state agency must be disclosed.

## III. Necessity

**Section 599.829.1**

This regulation is necessary to clarify any potential ambiguity in section 18720.45 and to ensure that the proper information is required on employment forms.

**Section 599.829.1 (a)**

It is necessary to include a definition of "state agency" in this regulation because, as described above, there is a dispute about the breadth of the disclosure requirement. To ensure that this dispute is resolved and the disclosure requirements are clear, a definition of "state agency" must be included.

As used herein, "state agency" is broadly defined to include all state subdivisions within the state civil service, but to exclude the California State University. This breadth is necessary to serve the purpose of the statute which seeks to prevent state agencies from unknowingly rehiring individuals who previously agreed not to seek or accept employment with the state.

**Section 599.829.1 (b)**

Subsection (b) provides the precise questions and instructions that must be included on employment forms to ensure the disclosure of the information required by section 18720.45. To ensure that both broad agreements not to return to any state agency and more narrow agreements not to return to a particular state agency are disclosed, two questions have been provided: one to address each type of agreement.

Including these questions and instructions is necessary to ensure that agencies ask for the required information in a way that is clear, consistent, and that complies with the statute.

**Section 599.829.1 (b)(i)**

This provision provides the first question that must be included on employment forms and directions for its completion. This question is necessary to obtain one subset of the information sought by section 18720.45. This question requests applicants to disclose whether they have ever entered into a broad agreement not to seek or accept employment with any state agency in the civil service as a whole.

This question does not limit the types of agreements that must be disclosed, but instead requires the disclosure of all agreements not to seek or accept employment in the state civil service as a whole. It is unnecessary to limit this question to a specific type of agreement, for example an agreement that arose out of workers compensation claim, because an individual who made such an agreement should not be applying for a position anywhere in state civil service. All agencies, therefore, have an interest in this information regardless of the context in which the agreement arose.

**Section 599.829.1 (b)(ii)**

This provision provides the second question that must be included on employment forms and directions for its completion. This question requires applicants to disclose whether they have entered into a written agreement not to seek or accept employment with a particular state agency. The Department interprets section 18720.45 to, by its terms, apply to such agreements; however, some employees and their exclusive representatives have verbally informed the Department that they disagree.

This regulation is necessary to unequivocally establish the proper scope of disclosure required by section 18720.45. The Department has adopted this interpretation because it is supported by the law and because that construction best serves the purpose of the statute.

The statute requires that agreements not to return to state employment be disclosed on employment forms. Section 18720.45 uses the term "state" a total of three times. The words of a statute should be given their ordinary and usual meaning and should be given their same meaning throughout the statute unless the Legislature has indicated otherwise.[2] The ordinary and usual meaning of the term "state" means the State of California and every unit of state government because the state acts through its units, and units of state government derive authority to act only because they are units of the state as a whole.[3] The first reference to "state" is to a former employee's "agreement with the state." When a state employee enters into such agreements, the agreements are negotiated and signed by a particular state agency as a unit of state government on behalf of the state as a whole. Thus, the term "state" means both the state agency and the state as a whole. The second reference is to "previous employment with the state." When a state employee works for the state, the employee works for and reports to a particular state agency, which has authority to hire, fire, promote, demote and discipline the employee as a unit of state government on behalf of the state as a whole. Thus, the term "state" means both a particular state agency and the state as a whole. The third reference is to "subsequent employment with the state." Again, when a state employee works for the state, the employee works for and reports to a particular state agency, which has authority to hire, fire, promote, demote and discipline the employee as a unit of state government on behalf of the state as a whole. Section 18720.45 therefore contemplates and requires disclosure of two types of agreements—agreements not to return to employment with a particular state agency (or a single unit of state government), and agreements not to return to employment with the state (or every unit of state government).

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[2] Hassan v. Mercy American River Hosp. (2003) 31 Cal.4th 709, 729.

[3] This reading of "state" is consistent with the definition of "state" found elsewhere within the Government Code. For example, in Title 1, the Government Code broadly defines the word "state" to include "the State or any department, agency, board, commission, or authority of the state." (Gov. Code, § 940.6.) Similarly broad definitions are used elsewhere throughout the Government Code. (Gov. Code, §§ 900.6; 5921, subd. (b); 7596, subd. (b); 54280, subd. (c).)

This interpretation best serves the purposes of the statute. Section 18720.45 was passed in order to combat the substantial risk that former employees who agreed not to return to state employment will be unknowingly rehired by the state and to ensure that state employers obtain information about applicants that help inform their hiring decisions. The great majority of agreements limiting an individual's future employment with the state prohibit individuals from seeking or accepting employment with a particular agency. If such agreements were excluded from disclosure, this exclusion would undermine these purposes.

This interpretation encourages transparency, affording state appointing authorities the opportunity to consider an applicant's entire employment history with the state. The appointing authorities will then be able to determine whether the applicant would be a good fit for the job notwithstanding the applicant's incompatibility with his or her former state employer.

This question also specifies which types of agreements not to return to a particular agency must be disclosed. An applicant only need reply "yes" to this question, if the agreement involved an adverse action, a rejection during probation, or an absence without leave separation (AWOL). Thus, where the applicant's prior agreement permits him or her to apply to a different state agency, this restriction protects applicants by limiting the disclosure requirement to agreements that relate to an applicant's work performance. A state agency and an employee could enter an agreement involving matters unrelated to that employee's work performance, such as a dispute over Family Medical Leave Act rights or workers' compensation. Those types of agreements do not necessarily reflect the employee's qualifications and ability to be a good fit for a subsequent employer and, thus, are excluded from disclosure by this regulation.

By contrast, adverse actions, rejections during probation, and AWOLs are relevant and permissible areas of inquiry for a future employer because they relate to an employees work performance, reliability, and ability to be a good fit for a subsequent employer. Adverse actions indicate that an employee has been disciplined for poor behavior or poor performance. Rejections during probation reflect an employee's failure to meet the expectations of that position. AWOLs demonstrate that an employee has failed to report to work for five (5) consecutive days without approval. Requiring the disclosure of agreements involving these three subjects best serves the purpose of the statute because it requires that those agreements that relate to an employee's history of poor behavior, work performance, or unreliability must be disclosed. Moreover, there is currently no mechanism in place in the state whereby other state agencies can obtain this information.

## IV. Benefits

This regulation will benefit applicants for employment, agency employers, and the state civil service overall. With the guidance provided by this regulation, applicants for employment will

be provided precise directions regarding what information they are required to disclose regarding any previous agreements not to seek or accept employment with the state. The regulation will decrease the likelihood that applicants will fail to provide required information and/or the chance that they will provide unnecessary information. State agencies will receive relevant information regarding applicants' prior work history and will be able to make more informed hiring decisions. Specifically, they will be able to avoid unknowingly appointing individuals who had previously agreed to refrain from seeking or accepting employment with the state. Finally, all state agencies will benefit from better informed hiring decisions which will result in a stronger workforce.

## V. Documents relied upon

- State Auditor's Report
- Government Code sections 900.6, 940.6, 5921, 7596, 54280
- California Committee Report: 2013 California Senate Bill 1240, April 18, 2014
- California Bill Analysis, Senate Public Employment and Retirement, April 21, 2014
- California Committee Report: 2013 California Senate Bill 1240, May 7, 2014
- California Bill Analysis, Senate Rules Committee, May 8, 2014
- California Committee Report: Assembly Committee on Appropriations, July 2, 2014

## VI. Economic Impact Assessment

In accordance with Government Code section 11346.3, subdivision (b), the Department has made the following assessments concerning the proposed regulation:

The Department determined this regulation will not create or eliminate jobs within California. This regulation does not impact the private sector.

The Department determined this regulation will not create new businesses or eliminate existing businesses within California. This regulation does not impact the private sector.

The Department determined this regulation will not expand current California businesses. This regulation does not impact the private sector.

This regulation is necessary to clarify and make specific section 18720.45. Adoption of this regulation will improve the ability of state agencies to determine whether applicants would be suitable for employment. This improvement in hiring may improve aspects of worker safety, the

state environment, and the health and welfare of California residents through better hiring decisions within the state civil service. Ultimately, better qualified civil service employees will result in improvement to the services provided by the state and will benefit all California residents.

## VII. Reasonable Alternatives To The Regulation And The Department's Reasons For Rejecting Those Alternatives

The Department considered taking no action to make specific and clarify section 18720.45. However, the Department has verbally been told by some employees and their exclusive representatives that they believe the disclosure requirement in the statute is ambiguous. If allowed to remain undefined, this ambiguity may result in incomplete disclosures by candidates for employment and less informed hiring decisions by appointing powers. This ambiguity will undermine the purpose of the provision and ultimately result in appointing powers receiving insufficient information. Therefore, the alternative of taking no action was rejected.

The Department also considered adopting the proposal advanced by some employees and their exclusive representatives, which would only require the disclosure of broad agreements not to return to the state as a whole. The Department rejected this alternative because it does not comport with the language of the statute and because the Department's interpretation results in greater transparency in hiring, best serves the purpose of the statute, and is good public policy.

The Department will consider alternatives proposed during the written comment period. Reasonable alternatives to be considered include alternatives that are proposed as more effective, less burdensome and equally effective, or more cost effective and equally effective in effectuating the purpose of the statute. Any such proposed alternatives must be considered if the alternatives achieve the purpose of the regulation and are in full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation.

## VIII. Evidence Supporting Finding of No Significant Statewide Adverse Economic Impact Directly Affecting Business

The Department has found no evidence that the regulation would impose a significant statewide adverse economic impact affecting business. The proposed regulation affects only those applying for employment in the state civil service and neither impacts nor applies to small businesses.