
THIRD READING

Bill No: AB 826
Author: Irwin (D)
Amended: 8/3/22 in Senate
Vote: 21

SENATE LABOR, PUB. EMP. & RET. COMMITTEE: 4-1, 7/12/21
AYES: Cortese, Durazo, Laird, Newman
NOES: Ochoa Bogh

ASSEMBLY FLOOR: 64-9, 5/27/21 - See last page for vote

SUBJECT: County Employees Retirement Law of 1937: compensation and compensation earnable

SOURCE: County of Ventura
Service Employees International Union, California

DIGEST: This bill amends the County Employees Retirement Law (37 Act) definition of “compensation” and “compensation earnable” for legacy members of the Ventura County Employee Retirement Association (VCERA) who retire on or before December 31, 2025, to include an employee’s flexible benefit allowance.

Senate Floor Amendments of 8/3/22 specify that the bill’s provisions apply to VCERA members who retire on or before December 31, 2025, who are not new members under PEPRA; require VCERA employers to refund contributions paid on remuneration excluded by VCERA to members who retire after December 31, 2025, and to credit any contributions made by the employer; and delete the provision that erroneously references this bill’s provisions as declarative of existing law.

ANALYSIS:

Existing law:

- 1) Establishes the County Employees Retirement Law of 1937 Act (referred to as “37 Act” or “CERL”) consisting of twenty county retirement systems to provide defined benefit pension benefits to public county or district employees, as specified. (Government Code § 31450 et seq.)
- 2) Provides that 37 Act retirement system members are entitled, upon retirement for service, to receive a retirement allowance consisting of their service retirement annuity, their current service pension, and their prior service pension, as specified. (GC § 31673)
- 3) Establishes benefit provisions for the general defined benefit plan that each member county can adopt by resolution. Existing law also provides specific plan elements by statute to particular systems, as specified. Thus, while 37 Act retirement systems have similar characteristics each has its own particular benefit structure and requirements. (e.g., GC § 31461.1)
- 4) Defines “compensation earnable”, as specified, in the 37 Act, as amended by PEPRAs and “pensionable compensation”, as specified, in PEPRAs. Both terms refer to a member’s compensation that a pension system may include in calculating the member’s pension benefit. (The former applies to legacy members and the latter to PEPRAs members.) Existing law also specifically excludes certain forms of compensation from pension benefit calculations in order to prevent manipulation of pension benefits in contravention of the theory and successful operation of a pension system. (GC § 31461 and GC § 7522.34)
- 5) Establishes PEPRAs, a comprehensive reform of public pension law designed to stabilize public pension systems while preserving the objective of ensuring that public employees who dedicate a lifetime of service to California receive retirement security in their old age (GC § 7522 et seq.).
- 6) Excludes the following forms of compensation from compensation earnable:
 - a) Any compensation determined by the board to have been paid to enhance a member’s retirement benefit under that system, including:

- (1) Compensation that had previously been provided in kind to the member by the employer or paid directly by the employer to a third party other than the retirement system for the benefit of the member, and which was converted to and received by the member in the form of a cash payment in the final average salary period.
 - (2) Any one-time or ad hoc payment made to a member, but not to all similarly situated members in the member's grade or class.
 - (3) Any payment that is made solely due to the termination of the member's employment, but is received by the member while employed, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period regardless of when reported or paid.
- b) Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.
- c) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.
- d) Payments made at the termination of employment, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid. (GC § 31461)
- 7) Provides that the average compensation during any period of service as a member of the Public Employees' Retirement System, a member of the Judges' Retirement System or Judges' Retirement System II, a member of a 37 Act county retirement system in another county, a member of the State Teachers' Retirement System, or a member of a retirement system of any other public agency of the state that has established reciprocity as specified, shall be considered compensation earnable or pensionable compensation by a 37 Act county member for purposes of computing final compensation for that member provided certain conditions are met, as specified. (GC § 31835)

This bill:

- 1) Provides that its provisions apply only to Ventura County. (Although by including remuneration that is currently excludable, the bill could affect other 37 Act systems who employ former employees of VCERA who have reciprocity between that system and VCERA).
- 2) Amends the definition of “compensation” and “compensation earnable” to include flexible benefits plan allowances (FBA) paid by a county or a district on behalf of its employees as part of a cafeteria plan, as specified, for legacy VCERA members who retire on or before December 31, 2025.
- 3) Sets the following requirements that the FBA must meet to be included in compensation and compensation earnable:
 - a) The employer makes the FBA available to any person in the same grade or class of positions. “Grade or class of positions” means a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical, work-related grouping. The retirement system and employer shall not consider a single employee a grade or class of positions.
 - b) Existing law, as specified, does not expressly exclude the FBA from compensation earnable.
 - c) The retirement system included the FBA as part of compensation earnable as of July 30, 2020, and the employer and employee paid contributions to the retirement system, based on the FBA as of that date.
 - d) The employer and employee pay the required contributions to the retirement system as the employee continues to earn the FBA.
- 4) Provides that where the FBA monetary amount is the same for all employees regardless of dependents, the entire amount is includable in compensation earnable.
- 5) Provides that where the FBA monetary amount varies among employees according to the number of the employee’s dependents, the amount includable in compensation earnable is the amount provided to an employee with no dependents.
- 6) Makes the bill’s provisions inapplicable to “new members” of VCERA as defined by PEPRA (i.e., there is a distinction between “new members” and

“new employees” who have legacy membership in another reciprocal retirement system and through that reciprocity establish legacy membership in VCERA. The latter group would be eligible for this bill’s benefits).

- 7) Makes the bill’s provision applicable to eligible VCERA members who retire on or before December 31, 2025.
- 8) Provides that, for members who retire after December 31, 2025, to the extent the retirement system excludes any remuneration from compensation earnable, VCERA shall refund contributions to the member, and shall credit contributions to the employer, that were made based on the excluded remuneration in accordance with requirements under the Internal Revenue Code.
- 9) Declares that a special statute is necessary and a general statute cannot be made applicable because of the unique circumstances of the retirement system in Ventura County.

Background

PEPRA limited the types of compensation that public employers can include for purposes of calculating their employees’ pension allowance. PEPRA, as upheld by the California Supreme Court in its 2020 *Alameda* decision, excluded certain items of pay - *to legacy employees as well as PEPRA employees* – as part of efforts to end pension spiking (i.e., the practice of padding compensation at the end of the employee’s career to inflate the life-long pension benefit the employee would get upon retirement). PEPRA provided express examples of remuneration that are excluded per se and also examples of remuneration that a retirement board may exclude if it determined the compensation was paid to enhance a member’s pension benefit.¹

After PEPRA became law in 2013, some 37 Act members and employers believed that its provisions regarding the kinds of remuneration excludable from compensation earnable for *legacy* members were constitutionally infirm. They pursued litigation while their systems waited for the outcome of the litigation before unwinding the contested remuneration from their members’ pension benefit

¹ Per se exclusions include, for example, payments for excess unused leave, payments for additional services outside normal work hours, and termination payments made at time of termination. Examples of potential exclusions for compensation to enhance pension benefits include conversions of third party cash or in-kind payments to direct cash payments to the member during the final compensation period, one-time or ad hoc payments made to individuals, and excess termination payments made prior to termination and during the final compensation period. (GC §31461)

calculations, believing that PEPRAs provisions affecting legacy members violated those systems' previous contracts and settlement agreements with those members. However, the Supreme Court in *Alameda* upheld PEPRAs provisions. The court found, in part, that the pension systems' past practices and settlement agreements did not prevent the Legislature from revising the law to achieve the permissible purpose of conforming pension benefits to the theory underlying the 37 Act plans by closing loopholes and proscribing potentially abusive practices.

Thus, 37 Act systems that continued to include affected compensation practices from their legacy members' pension calculations began the laborious and unpopular task of reversing compensation calculations, recovering from retirees up to 8 years of pension overpayments, and refunding contributions that those retirees and active members, and their employers, paid on the contested compensation.

Ventura County. This bill seeks to provide clarification that a specific kind of remuneration, Ventura County's FBA, is includable in compensation and compensation earnable and thus must be included in calculating a legacy member's pension benefit if it meets specified conditions.

According to the author, Ventura County includes the FBA in their pension calculations because members receive the full cash value; it is a regular, set amount paid every pay period; and is not subject to pension spiking or any other manipulation. Both the employer and employees have planned for and paid into these pension accounts. The bill's supporters argue that these elements of the FBA show that it is not the sort of compensation practice subject to pension spiking and thus, VCERA should not exclude the FBA where the practice was long-standing and its inclusion was part of the expectation of both employee and employer.

Potential Effect on other retirement systems through reciprocity. Other 37 Act county retirement systems, including those of Sonoma, Kern, and San Bernardino Counties have previously expressed concerns regarding the bill and whether it creates instability and inequity in the law by weakening the finality of PEPRAs and *Alameda*. In particular, the Sonoma system raised concerns that the bill could lead to revisions in actuarial valuations for other retirement systems that have reciprocity with VCERA.

Under reciprocity, an employee's prior retirement system calculates the employee's pension for service with the prior employer using the compensation earned at the employee's subsequent employer, subject to certain conditions, as reported by the subsequent employer.

To the extent this bill results in including compensation that VCERA would otherwise exclude from compensation earnable or that other retirement systems estimated in their actuarial calculations could not be included in compensation, the bill may result in increased retirement liabilities for those systems that have reciprocity with VCERA and whose members received FBA at VCERA. On the other hand, this bill clarifies for all 37 Act counties that Ventura's FBAs are includable for VCERA legacy members who retire before December 31, 2025, and thus, reduces the potential for future conflict and litigation on the matter.

Applicable Effective Date It is unclear whether the author intends the bill to apply retroactively to members who have retired before this bill becomes effective, on January 1, 2023, should it become law. Although the bill provides that the FBA is includable in the compensation earnable for VCERA legacy members who retire before December 31, 2025, VCERA members who retire prior to January 1, 2023, would normally have their retirement benefits based on the law as it exists prior to the implementation of this bill's provisions.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 8/5/22)

County of Ventura (co-source)

Service Employees International Union, California (co-source)

OPPOSITION: (Verified 8/2/22)

Govern for California

Howard Jarvis Taxpayers Association

Merced County Employees' Retirement Association

ARGUMENTS IN SUPPORT: According to the author,

“AB 826 is a district bill that will ensure specified public employees hired prior to January 1, 2013 do not have their pensions unfairly reduced. For members of the Ventura County Employee Retirement Association (VCERA) only, the bill clarifies the definition of “compensation earnable” to include an employee’s flexible benefit allowance, subject to certain criteria.”

ARGUMENTS IN OPPOSITION: According to Govern for California,

We are a nation of laws, not of nullification. Ventura County had no right not to comply with PEPRA upon its effective date. The Legislature should reject AB 826, and Ventura County should get to work complying with a law that it should have complied with more than eight years ago.

According to the Merced County Employees Retirement Association,

“AB 826 opens the door for groups to simply legislate their way around PEPRA and the ‘Alameda Decision’. MercedCERA feels this sets a bad precedent and creates an environment where Supreme Court decisions are ignored and eroded, which consequently would directly impact our members and their benefits, as well as the administration of our System. MercedCERA also feels AB 826 would thwart the actuarial process, as we would constantly be readjusting our assumptions regarding what is pensionable and what is not.”

ASSEMBLY FLOOR: 64-9, 5/27/21

AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Berman, Bloom, Boerner Horvath, Burke, Calderon, Carrillo, Cervantes, Chau, Chiu, Cooley, Cooper, Cunningham, Daly, Flora, Fong, Frazier, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Lee, Levine, Low, Mayes, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Nguyen, O'Donnell, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Stone, Ting, Valladares, Villapudua, Waldron, Ward, Akilah Weber, Wicks, Wood, Rendon

NOES: Bigelow, Megan Dahle, Davies, Gallagher, Kiley, Lackey, Seyarto, Smith, Voepel

NO VOTE RECORDED: Chen, Choi, Maienschein, Mathis, Patterson

Prepared by: Glenn Miles / L., P.E. & R. / (916) 651-1556
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