

CONCURRENCE IN SENATE AMENDMENTS

AB 826 (Irwin)

As Amended August 3, 2022

Majority vote

SUMMARY

Original Committee of Reference: P. E. & R.

Makes changes to the 1937 County Employees' Retirement Law (CERL) specifically applicable only to the County of Ventura relating to the flexible benefits allowance (FBA) and public employee retirement under the CERL.

Senate Amendments

Current Committee Recommendation: Concur

- 1) Establish that "compensation" and "compensation earnable," as each are respectively defined under the CERL, include flexible benefits plan allowance paid by a county or a district on behalf of its employees as part of a cafeteria plan offered pursuant to Section 125 of the Internal Revenue Code, if all of the following requirements are met:
 - a) The flexible benefit plan allowance is made available to any person in the same grade or class of positions. For this purpose, "grade or class of position" is defined to mean a number of employees considered together because they share similarities in job duties, work location, collective bargaining unit, or other logical, work-related grouping, and specifically excludes a single employee who must not be considered a grade or class of positions.
 - b) The flexible benefit plan allowance is not expressly excluded from "compensation earnable" pursuant to existing law, as specified.
 - c) The retirement system included the flexible benefit plan allowance as part of "compensation earnable" as of July 30, 2020, and the employer and employee paid contributions to the retirement system based on the flexible benefit plan allowance as of that date.
 - d) The employer and the employee pay the required contributions to the retirement system as the employee continues to earn the flexible benefit plan allowance.
- 2) Establish that for employee groups in which the monetary amount of the flexible benefits plan allowance is the same for all employees, regardless of the number of dependents, the entire amount must be included in compensation earnable. For employee groups in which the monetary amount of the flexible plan allowance varies among employees depending on the number of dependents, the amount included in the compensation earnable must be the amount provided to an employee with no dependents.
- 3) Provide that these provisions, applicable only to the County of Ventura, only apply to employees who are not "new members," as defined pursuant to the Public Employee Pension Reform Act (PEPRA) of 2013. Thus, they only apply to legacy members (i.e., pre-PEPRA members).

- 4) Establish that these provisions to eligible members who retire on or before December 31, 2025, and that for those who retire after that date, to the extent the retirement system excludes the remuneration, as described, from the definition of "compensation" or "compensation earnable," the retirement system must refund contributions to the member, and credit contributions to the employer that were made on the excluded remuneration in accordance with the requirements of the Internal Revenue Code.
- 5) Make legislative findings and declarations as to the necessity of a special statute for the County of Ventura.

COMMENTS

Brief Background of the CERL

The CERL is administered by 20 separate and independent retirement systems and their respective boards.

While the CERL generally provides a certain level of uniform standards relating to retirement benefits and the administration of such benefits, it also recognizes and allows for a modicum of variation in the administration of these systems and administration of retirement benefits because each CERL jurisdiction is separate and independent from the other, and each may administer benefits on behalf of, and to, its members that another may not, or does so in a different manner.

Through the statutory construction of the CERL, historically, the Legislature has recognized and continues to permit this variation, and the construction of this bill remains consistent with that legislative history.

Brief Background of the PEPRA Relating to Compensation That May Be Included to Calculate a Retirement Benefit and Relevant Case Law

Following negative legislative experience regarding fraud and abuse in public employee retirement, the Legislature enacted the PEPRA. The PEPRA excluded certain items of pay to legacy (i.e., pre-PEPRA) employees as well as PEPRA employees (i.e., those whom are employed or become a member of a California public employee retirement system for the first time on or after January 1, 2013) as part of an effort, among numerous other substantial policy reasons, 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).

Among the changes to public employee retirement and toward that end, the PEPRA limited the types of compensation or remuneration that public employers can include for purposes of calculating an employees' pension allowance.

The Relation of This Matter to the California Supreme Court's Decision in Alameda

Following the implementation of the PEPRA in 2013, some CERL members, employers, and CERL systems believed that its provisions regarding the kinds of remuneration that may be excluded from compensation earnable for legacy members remained unclear. This lack of clarity became the impetus for litigation in which members, employers, and these systems waited for a court decision regarding the matter believing that the PEPRA's provisions affecting legacy

members violated prior contract and settlement agreements with those members. (*Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* (2020) 9 Cal.5th 1032.)

On July 30, 2020, the California Supreme Court upheld the PEPRA in relation to the CERL in its ruling in *Alameda*. In *Alameda*, which addressed legal issues involving compensation earnable under the CERL (and naturally through implication, also the PEPRA), the court held that *under the CERL, county employees have no express contractual right to the calculation of their pension benefits in a manner inconsistent with the terms of the PEPRA... [it was] enacted for the constitutionally permissible purpose of closing loopholes and preventing abuse of the pension system in a manner consistent with the CERL's preexisting structure.* (Emphasis added.)

Moreover, the court held that the PEPRA provides 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, and 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 CERL plans by closing loopholes and proscribing potentially abusive practices.

Following the California Supreme Court's decision in *Alameda*, those CERL systems that continued to include the affected compensation practices in their legacy members' pension calculations had to reassess the retirement allowance of their members affected by the decision to comply with the court's decision, which *required them to reverse and recover up to eight years of pension overpayments from retirees and refund contributions that those retirees and active members who have paid on the contested compensation* (emphasized), unless the system determined that it may be unnecessary to collect certain overpayments.

Applicable Effective Date

It may be unclear whether the author intends the bill to retroactively apply to members who have retired before this bill becomes effective (i.e., January 1, 2023) should it become law. Although the bill provides that the FBA is includable in the compensation earnable for legacy members in Ventura County who retire before December 31, 2025, the county CERL system's 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.

This Bill

This bill is narrow in its scope, application, and duration, and seeks to provide clarification specific to the County of Ventura and its FBA for purposes of compensation and compensation earnable and thus must be included in calculating a legacy member's pension benefit if it meets specified conditions.

Please see the policy committee analysis for a full discussion of this bill.

According to the Author

"The recent decision in *Alameda* created confusion among CERL retirement systems about how to correctly apply the PEPRA to long-standing compensation practices. In the County of Ventura, legacy members (i.e., those who started participation in the county retirement system

pre-date January 1, 2013), received the full value of a bi-weekly FBA that paid for premiums for the county's healthcare plan, in their "compensation earnable." The court's decision did not specifically address pre-tax cash diversions like the FBA. Exclusion of the this benefit from compensation earnable would have a significant impact on many legacy employees, especially those who are the lowest paid who would see a reduction in their monthly pension benefit of as much as 10 percent, which could be catastrophic to members who budgeted and planned their retirements around their expected benefit amount.

The author further states that, "[this bill] is a district bill that will ensure specified public employees in Ventura County do not have their pensions unfairly reduced. The exclusion of the FBA from compensation earnable would have a significant impact on many legacy employees, especially those who are the lowest paid."

Arguments in Support

The sponsors state that, "[t]he *Alameda* decision created confusion among county retirement systems governed by CERL about how to correctly apply the PEPRA definitions to long-standing compensation practices, including the FBA in Ventura County. The *Alameda* decision did not specifically address compensation, like Ventura's FBA, but some have argued that these payments could fall outside the allowed compensation under the CERL. In Ventura's case, however, the County has included the FBA in the pension calculation for legacy employees because employees receive the full cash value and it is a regular, set amount paid every pay period – it is not subject to pension spiking or any other manipulation."

Arguments in Opposition

Correspondence submitted address a prior version of this bill.

FISCAL COMMENTS

None. This bill is keyed nonfiscal by Legislative Counsel.

VOTES**ASM NATURAL RESOURCES: 9-2-0**

YES: Luz Rivas, Flora, Chau, Friedman, Cristina Garcia, McCarty, Muratsuchi, Stone, Wood

NO: Mathis, Seyarto

ASM APPROPRIATIONS: 13-3-0

YES: Lorena Gonzalez, Calderon, Carrillo, Chau, Fong, Gabriel, Eduardo Garcia, Levine, Quirk, Robert Rivas, Akilah Weber, Holden, Luz Rivas

NO: Bigelow, Megan Dahle, Davies

ASSEMBLY FLOOR: 64-9-5

YES: 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

NO: Bigelow, Megan Dahle, Davies, Gallagher, Kiley, Lackey, Seyarto, Smith, Voepel

ABS, ABST OR NV: Chen, Choi, Maienschein, Mathis, Patterson

SENATE FLOOR: 29-9-2

YES: Allen, Archuleta, Atkins, Becker, Bradford, Caballero, Cortese, Dodd, Durazo, Eggman, Gonzalez, Hertzberg, Hueso, Hurtado, Kamlager, Laird, Leyva, Limón, McGuire, Min, Newman, Pan, Portantino, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener

NO: Bates, Borgeas, Dahle, Grove, Jones, Melendez, Nielsen, Ochoa Bogh, Wilk

ABS, ABST OR NV: Glazer, Roth

ASM PUBLIC EMPLOYMENT AND RETIREMENT: 6-0-1

YES: Cooper, Calderon, Cooley, McKinnor, O'Donnell, Seyarto

ABS, ABST OR NV: Voepel

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CONSULTANT: Michael Bolden / P. E. & R. / (916) 319-3957

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