
SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT

Senator Dave Cortese, Chair

2021 - 2022 Regular

Bill No:	SB 278	Hearing Date:	March 8, 2021
Author:	Leyva		
Version:	January 29, 2021		
Urgency:	No	Fiscal:	Yes
Consultant:	Gideon L. Baum		

SUBJECT: Public Employees' Retirement System: disallowed compensation: benefit adjustments

KEY ISSUE

Should the Legislature require that, in the event of a California Public Employees' Retirement System retiree having their pension reduced due to the inclusion of compensation by the relevant public employer that cannot be counted towards a final pension calculation, the public employer must cover the reduced benefit to the retiree?

ANALYSIS

Existing law:

- 1) Establishes the California Public Employees' Retirement System (Cal-PERS) and sets the purpose of the System as effecting the economy and efficiency of public service by providing a path for employees who are incapacitated or superannuated to leave state service, without hardship or prejudice, and be replaced by more capable employees. (Government Code §§20001 & 20002)
- 2) Establishes the Cal-PERS Board of Administration (Board) and vests the Board with the authority to administer the Cal-PERS defined benefit pension system, including determining who is an eligible employee to receive benefits and what assets can be purchased by Cal-PERS. (Government Code §§20090, 20125 & 21090)
- 3) Provides that, in its discretion and upon any terms it deems just, the Board may correct errors or omissions of any active or retired member, or any beneficiary of an active or retired member, as specified. (Government Code §20160)
- 4) Requires that, in the event of an erroneous payment to a Cal-PERS member or beneficiary, Cal-PERS has three years from the date of payment to collect the erroneous payment from the member or beneficiary. In the case of fraud, however, Cal-PERS has 10 years from the discovery of the erroneous payment to collect. (Government Code §20164)
- 5) Creates the California Public Employees' Pension Reform Act (PEPRA) of 2013, which limited what types of compensation can be counted in the calculation of pension benefits for new members. (Government Code §§7522 & 7522.34)
- 6) States the intent of the Legislature, in implementing PEPRA, that the Board has all powers reasonably necessary to invest the assets associated with, and to administer and implement

the provisions of PEPRRA, to the extent and with the same effect as if the provisions of the act are contained in the Public Employees' Retirement Law. (Government Code §20004)

This bill:

- 1) Requires that, if Cal-PERS determines that the compensation reported for a Cal-PERS member by a public employer is in conflict with existing law or regulations, Cal-PERS must prohibit the public employer from continuing to report the disallowed compensation. This requirement also applies to determinations made on or after January 1, 2017 if the appeal rights of the Cal-PERS member have not been exhausted.
- 2) Requires that, in the case of an *active Cal-PERS member*, all contributions on disallowed compensation must be credited against future contributions to the benefit of the public employer by Cal-PERS and the public employer must return the member's contributions that were paid on the disallowed compensation.
- 3) Requires, in the case of a *retired Cal-PERS member* or survivor or beneficiary whose final compensation at the time of retirement was based on disallowed compensation, the contributions made on the disallowed compensation must be credited against future contributions to the benefit of the public employer.
- 4) Requires Cal-PERS to permanently reduce the retired Cal-PERS member or survivor or beneficiary's benefit to exclude the disallowed compensation.
- 5) Requires the public employer to both pay Cal-PERS the full cost of any overpayment resulting from the disallowed compensation AND pay to the retired Cal-PERS member, survivor, or beneficiary an annuity based on the difference between the permissible retirement benefit and the actuarially equivalent present amount of the disallowed compensation. If both the member and employer agree, the benefit may be provided as a lump sum instead of an annuity.
- 6) Cal-PERS must also provide a notice to the public employer and affected retired Cal-PERS member or survivor or beneficiary that includes, at a minimum:
 - i) The amount overpayment resulting from the disallowed compensation made by the public employer;
 - ii) The actuarial equivalent present amount owed to the retired Cal-PERS member, survivor, or beneficiary; and
 - iii) Written disclosures by the public employer's obligations to the retired member under this bill.
- 7) Requires that the double-payment described above is only due if the following is applicable:
 - i) The compensation was reported to Cal-PERS and the contributions were made on that compensation while the member was actively employed;
 - ii) The compensation was provided for in a memorandum of understanding or collective bargaining agreement as compensation for pension purposes
 - iii) The determination by the system that compensation was disallowed was made after the date of retirement; and

- iv) The member was not aware that the compensation was disallowed at the time it was reported.
- 8) Requires Cal-PERS to provide, upon request, to the state, a school employer, or a contracting agency with contact information data in its possession of a relevant retired member, survivor, or beneficiary in order for the state, a school employer, or a contracting agency to fulfill their obligations to that retired member, survivor, or beneficiary pursuant to this section. The recipient of this contact information data shall keep it confidential.
- 9) Permits public employers to submit to Cal-PERS for review any compensation proposal intended to form the basis of a pension benefit calculation in order to determine compliance with California Public Employment Retirement Law (PERL). Cal-PERS must provide guidance on the compensation proposal within 90 days.
- 10) Explicitly states that, for educational entities participating in Cal-PERS, the final responsibility for funding payments described above is that of the educational entity that is the actual employer of the employee. A county superintendent of schools shall have final responsibility for funding payments for its own employees and not for those employees of other educational entities that participate in the system under the auspices of a county superintendent of schools pursuant to contract.
- 11) Requires that Cal-PERS periodically publishes a notice of the proposed compensation language submitted to the system by public employers for review and Cal-PERS's determination of compliance.
- 12) Makes findings and declarations on the need to protect retired Cal-PERS members from retroactive clawbacks and permanent reductions in retirement benefits.

COMMENTS

1. Need for this bill?

The author states the following:

Existing law provides that California's public employers can contract with CalPERS to provide retirement benefits for their public employees, including state and local government firefighters, law enforcement personnel, and school employees. In doing so, CalPERS' contracting employers have a legal and actuarial obligation to correctly report collectively bargained pension-eligible compensation to CalPERS. In some cases, employers have reported retired employee information to CalPERS that is disallowed under the CalPERS plan.... Even though this pay item was bargained and paid for by the employer and employee, if it is subsequently disallowed, the retired employee is ultimately required to pay back the overpaid amount and suffer a permanent reduction in future payments. Many retirees, including firefighters, do not have access to Social Security, meaning that their retirement security is completely reliant on their CalPERS pension.

...

SB 278 would protect the retirement security of CalPERS members by ensuring that any collectively bargained compensation agreed to by their employer and paid for by the employer and retiree cannot be subsequently and retroactively deducted from the retired member's pension allowance because of a disallowed pay item. To prevent similar retroactive action against retired employees in the future, SB 278 allows CalPERS contracting agencies to submit a compensation proposal for a pension calculation to determine compliance with the CalPERS regulations. Finally, if a disallowed pay item is identified, employees who are still working will go back to the bargaining table so the employee organization and an employer can work through the issue.

2. Proponent Arguments:

The California Professional Firefighters, AFL-CIO argue the following in support of this bill:

“Under current practice, when a CalPERS member is within one year of their expected retirement date, they may request up to two official CalPERS-generated retirement estimates in a 12-month period. Official estimates use a member's current account information to project retirement benefits....

As a contracting agency, CalPERS requires an employer to submit specific information about each of its employees to the retirement system in the form of a payroll report. Information contained in this report includes an employee's earnings, contributions, and other pertinent information, such as pay rate, work schedule, total hours worked, reportable earnings, special compensation, and contribution amounts (both by employer and employee)....

In 2012, a firefighter employed by the City of Davis retired after serving the public for nearly 30 years. Prior to retiring, the firefighter *twice* requested an official retirement estimate from CalPERS, which provided a projection of retirement benefits as of the firefighter's estimated retirement date. Based on the information provided by CalPERS in their official retirement estimate, the firefighter made the decision to retire.

In 2017 – five years after the Davis firefighter retired -- CalPERS notified the retired firefighter that the City of Davis had reported certain compensation that CalPERS believed was not pensionable. Consequently, CalPERS sought to collect reimbursement for the overpayment -- not from the City of Davis that had bargained in good faith over that pensionable compensation, *but instead sought collection from the retired firefighter*. The reimbursement sought by CalPERS included a lump sum amount of \$42,000 and a sizeable, future reduction in the retired firefighter's monthly retirement allowance....

If the employer promises and pays for a benefit that is disallowed after the fact, the retiree living on a fixed income who is budgeting according to that fixed income should not have to pay the price for that broken promise. And, employers should make sure that taxpayers don't have to pay the cost of such mistakes to future retirees. For these reasons, we are pleased to sponsor this important bill.”

3. Opponent Arguments:

The California Special Districts Association, League of California Cities, and the California State Association of Counties, writing in opposition, argue the following:

“Under current law, once a benefit is determined to be disallowed, both the employer and the employee cease making future payments on that benefit, past contributions from the employee are returned to the employee, while past contributions from the employer are applied towards future payment. Unfortunately, in the case of a retiree that received the disallowed benefit, the pension system must recoup the overpaid benefit from the retiree. The pension system must recoup that overpayment from the retiree because it is unlawful to pay out a benefit that is not legally allowable or earned.

Public agencies cannot continue to make payments to retirees as proposed by SB 266 for the same legal basis that requires pension systems to recoup their disallowed retirement benefit payments to retirees. Continued payment of a disallowed benefit to a retiree would constitute a gift of public funds, in violation of Section 6, Article 16 of the California Constitution. Again, it is unfortunate that after an agency and their bargaining unit came to an agreement on benefits and those benefits had been paid for any amount of time for the benefit to be taken from the retiree. Although public agencies may feel morally or ethically compelled to do so, public agencies simply cannot continue to make payments directly to a retiree for an unlawful benefit.”

4. Double Referral to the Senate Judiciary Committee:

Should this bill be approved by the Committee, SB 278 will next be heard by the Senate Judiciary Committee.

5. Prior Legislation:

SB 1124 (Leyva, 2018) also dealt with disallowed compensation for Cal-PERS members, retirees, beneficiaries, and survivors. SB 1124 was vetoed by Governor Brown, who said the following in his veto message:

“This bill would establish a retiree's permanent right to incorrectly calculated pension benefits in cases where an error resulted in paying the retiree higher pension benefits than allowed by law.

I share the author's view that a pension must be correctly calculated according to the law in the first instance so that retirees never find themselves on the hook for overpayments.

Clearly, remedies are needed to correct such situations.

But I'm concerned that this bill's broad provisions could be easily abused to circumvent limitations in law intended to protect the government-and ultimately taxpayers-from pension spiking. Indeed, in the case of an error, this bill would effectively perpetuate that error for the rest of a member's life, at substantial taxpayer expense.

Before changing the law in the way that this bill does, I encourage the Legislature to develop policies to prevent such errors in the first place. Such policies might include requiring

CalPERS to review and approve any proposals for pensionable compensation in a memorandum of understanding before the memorandum is finalized. Then, if errors still occurred after CalPERS's review, the penalties and ongoing costs in this bill might be warranted.”

SUPPORT

California Professional Firefighters (Sponsor)
Riverside Sheriffs' Association

OPPOSITION

California Association of Joint Powers Authorities
California Special Districts Association
California State Association of Counties
League of California Cities

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