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THIRD READING

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Bill No: SB 278  
Author: Leyva (D)  
Amended: 3/23/21  
Vote: 21

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SENATE LABOR, PUB. EMP. & RET. COMMITTEE: 5-0, 3/8/21  
AYES: Cortese, Ochoa Bogh, Durazo, Laird, Newman

SENATE JUDICIARY COMMITTEE: 10-1, 4/6/21  
AYES: Umberg, Caballero, Durazo, Gonzalez, Hertzberg, Jones, Laird, Stern,  
Wieckowski, Wiener  
NOES: Borgeas

SENATE APPROPRIATIONS COMMITTEE: 6-0, 5/20/21  
AYES: Portantino, Bradford, Jones, Kamlager, Laird, Wieckowski  
NO VOTE RECORDED: Bates

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

**SOURCE:** California Professional Firefighters

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**DIGEST:** This bill provides that, when a retiree's California Public Employees' Retirement System (CalPERS) pension is reduced post-retirement, due to the inclusion of compensation agreed to under a collective bargaining agreement that is later determined to be nonpensionable, the public employer must cover the difference between the pension as originally calculated and as reduced by CalPERS.

**ANALYSIS:**

Existing law:

- 1) Establishes CalPERS 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 CalPERS Board of Administration (Board) and vests the Board with the authority to administer the CalPERS defined benefit pension system, including determining who is an eligible employee to receive benefits and what assets can be purchased by CalPERS. (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 CalPERS member or beneficiary, CalPERS has three years from the date of payment to collect the erroneous payment from the member or beneficiary. In the case of fraud, however, CalPERS 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 PEPRA, 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 CalPERS determines that the compensation reported for a CalPERS member by a public employer is in conflict with existing law or regulations, CalPERS 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 CalPERS member have not been exhausted.

- 2) Requires that, in the case of an *active CalPERS member*, all contributions on disallowed compensation must be credited against future contributions to the benefit of the public employer by CalPERS 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 CalPERS 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 CalPERS to permanently reduce the retired CalPERS member or survivor or beneficiary's benefit to exclude the disallowed compensation.
- 5) Requires the public employer to both pay CalPERS the full cost of any overpayment resulting from the disallowed compensation AND pay to the retired CalPERS 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) Requires CalPERS to also provide a notice to the public employer and affected retired CalPERS member or survivor or beneficiary that includes, at a minimum:
  - a) The amount overpayment resulting from the disallowed compensation made by the public employer;
  - b) The actuarial equivalent present amount owed to the retired CalPERS member, survivor, or beneficiary; and
  - c) 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:
  - a) The compensation was reported to CalPERS and the contributions were made on that compensation while the member was actively employed;

- b) The compensation was agreed to in a memorandum of understanding or collective bargaining agreement between the employer and the recognized employee organization as compensation for pension purposes;
  - c) The determination by the system that compensation was disallowed was made after the date of retirement; and
  - d) The member was not aware that the compensation was disallowed at the time it was reported.
- 8) Requires CalPERS 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 CalPERS 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. CalPERS must provide guidance on the compensation proposal within 90 days.
- 10) States, explicitly, that, for educational entities participating in CalPERS, 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 CalPERS periodically publish a notice of the proposed compensation language submitted to the system by public employers for review and CalPERS's determination of compliance.
- 12) Makes findings and declarations on the need to protect retired CalPERS members from retroactive clawbacks and permanent reductions in benefits.

### **Comments**

*Need for this bill?* According to the author, "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.”

### **Related/Prior Legislation**

SB 1124 (Leyva, 2018) also dealt with disallowed compensation for CalPERS members, retirees, beneficiaries, and survivors. The bill was vetoed.

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

According to the Senate Appropriations Committee, CalPERS indicates that this bill will result in implementation costs, likely in the low hundreds of thousands of dollars annually, to review additional MOUs and calculate employer costs in cases when a retirement benefit must be adjusted. Additionally, the bill could result in additional costs to the State to the extent that state agencies or school employers must cover the costs of disallowed overpayments. The magnitude is unknown (and depends on future actions), but is potentially significant. Contributions based on disallowed compensation would be credited against future contributions, but employers would be required to make immediate payments to make affected retirement members whole.

**SUPPORT:** (Verified 5/20/21)

California Professional Firefighters (source)  
American Federation of State, County and Municipal Employees  
Association of California State Supervisors  
California Association of Professional Scientists  
California Labor Federation, AFL-CIO  
California State Retirees  
Organization of SMUD employees

Peace Officers Research Association of California  
Professional Engineers in California Government  
Riverside Sheriffs' Association

**OPPOSITION:** (Verified 5/20/21)

Association of California Community College Administrators  
Association of California School Administrators  
Big Bear Area Regional Wastewater Agency  
California Association of Joint Powers Authorities  
California Association of School Business Officials  
California County Superintendents Educational Services Association  
California School Boards Association  
California Special Districts Association  
California State Association of Counties  
Cities of Arcata, Belmont, Beverly Hills, Brea, Brentwood, Campbell, Carlsbad,  
Chino, Citrus Heights, Cupertino, El Segundo, Farmersville, Fountain Valley,  
Gustine, Hesperia, Hidden Hills, Lakeport, Lakewood, Lawndale, Livermore,  
Los Altos, Madera, Menifee, Morgan Hill, Murrieta, Newport Beach, Placer,  
Pleasanton, Rancho Cucamonga, San Pablo, Thousand Oaks, Torrance, Tracy,  
Tulare, Visalia, Vista, and Walnut Creek  
County of Nevada  
League of California Cities  
Los Angeles County Division of the League of California Cities  
Los Angeles County Superintendent of Schools  
Orange County Department of Education  
Riverside County Office of Education  
San Bernardino County District Advocates for Better Schools  
School Employers Association of California  
Towns of Apple Valley, Los Gatos, Mammoth Lakes, and Truckee

**ARGUMENTS IN SUPPORT:** The California Professional Firefighters 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.

**ARGUMENTS IN OPPOSITION:** 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.

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5/22/21 12:55:18

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