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UNFINISHED BUSINESS

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Bill No: SB 278  
Author: Leyva (D), et al.  
Amended: 9/3/21  
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

SENATE FLOOR: 35-0, 6/1/21  
AYES: Allen, Archuleta, Atkins, Becker, Bradford, Caballero, Cortese, Dahle,  
Dodd, Durazo, Eggman, Glazer, Gonzalez, Hertzberg, Hueso, Hurtado, Jones,  
Kamlager, Laird, Leyva, Limón, McGuire, Min, Newman, Ochoa Bogh, Pan,  
Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener, Wilk  
NO VOTE RECORDED: Bates, Borgeas, Grove, Melendez, Nielsen

ASSEMBLY FLOOR: 65-0, 9/7/21 - See last page for vote

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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.

*Assembly Amendments* remove the requirement that the state, school employer or contracting agency pay the retired member, survivor or beneficiary a lump sum or as an annuity based on the disallowed compensation and instead require them to (1) pay a penalty of the amount calculated as a lump sum, as specified, and (2) specify that ninety percent of the penalty shall be paid as restitution to the affected retired member, survivor, or beneficiary.

### **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 PEPRRA, 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 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 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.
- 6) 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 and the employer and the recognized organization did not knowingly agree to compensation that was disallowed;
  - 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.
- 7) Specifies that if the above conditions are met, the state, school employer, or contracting agency that reported contributions on the disallowed compensation shall do all of the following:
- a) Pay to the system, as a direct payment, the full cost of any overpayment of the prior paid benefit made to an affected retired member, survivor, or beneficiary resulting from the disallowed compensation.
  - b) Pay a penalty, as specified, equal to 20 percent of the amount calculated as a lump sum of the actuarial equivalent present value representing the difference between the monthly allowance that was based on the disallowed compensation and the adjusted monthly allowance calculated, as specified, for the duration that allowance is projected to be paid by the system to the retired member, survivor, or beneficiary.
  - c) Ninety percent of the penalty to be paid shall be paid by the state, school employer, or contracting agency as restitution to the affected retired member, survivor, or beneficiary who was impacted by disallowed compensation and 10 percent shall be paid to the system, which shall not be applied to normal contributions or additional contributions that would stand to the credit of the employer, or a member's individual account.
- 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 Assembly Appropriations Committee:

- 1) Ongoing implementation costs to CalPERS, likely in the low hundreds of thousands of dollars annually, with potentially decreasing costs over time, to calculate employer costs in cases when a retirement benefit must be adjusted and to review additional labor memoranda of understanding (MOUs) submitted by employers to ensure they are compliant with laws and regulations. Costs to calculate employer costs would decrease over time to the extent employers make fewer mistakes in reporting disallowed compensation to CalPERS as a result of this bill.

According to CalPERS, it may need to calculate costs for 10 employers annually at a cost to CalPERS of between \$600 and \$1,000 for each calculation, depending on the complexity. CalPERS also anticipates more employers will submit MOUs for review. CalPERS currently receives about 35 to 40 MOU review requests per month and has some limited capacity to take on additional reviews within existing resources. The average cost for each MOU review is about \$330.

- 2) Unknown General Fund or Proposition 98 GF costs to the extent state agencies, public school employers or a CalPERS contracting agency must cover the costs of disallowed payments to their retirees. However, these entities contributed disallowed payments on their employee's behalf and CalPERS provides these disallowed payments back to employers. Employers could use these paybacks to offset costs.

According to CalPERS, in 2019 and 2020, there were a total of 18 adjustments due to disallowed compensation in the system. Though the total dollar amount of disallowed compensation in these cases is unknown, in the case described in this bill's findings and declarations, a retired firefighter had thousands of dollars in disallowed compensation.

**SUPPORT:** (Verified 9/7/21)

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 9/7/21)

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 Agoura Hills, Arcata, Belmont, Beverly Hills, Brea, Brentwood,  
Campbell, Carlsbad, Chino, Citrus Heights, Cupertino, El Cerrito, El Segundo,  
Farmersville, Fountain Valley, Goleta, Gustine, Hesperia, Hidden Hills, La  
Habra, 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  
Las Virgenes-Malibu Council of Governments  
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, “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.

ASSEMBLY FLOOR: 65-0, 9/7/21

AYES: Aguiar-Curry, Arambula, Bennett, Berman, Boerner Horvath, Mia Bonta, Bryan, Burke, Calderon, Carrillo, Cervantes, Chau, Chen, Chiu, Cooley, Cooper, Cunningham, Megan Dahle, Daly, Davies, Flora, Fong, Frazier, Friedman, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Lackey, Lee, Low, Maienschein, McCarty, Medina, Mullin, Nazarian, O'Donnell, Patterson, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Seyarto, Stone, Ting, Valladares, Villapudua, Voepel, Waldron, Ward, Akilah Weber, Wicks, Wood

NO VOTE RECORDED: Bauer-Kahan, Bigelow, Bloom, Choi, Gabriel, Lorena Gonzalez, Gray, Kiley, Levine, Mathis, Mayes, Muratsuchi, Nguyen, Smith, Rendon

Prepared by: Alma Perez-Schwab / L., P.E. & R. / (916) 651-1556  
9/7/21 20:38:57

\*\*\*\* END \*\*\*\*