

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2493 (Chen)
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Fiscal: No
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TSG

DIGEST

This bill requires counties operating employee retirement systems under the County Employees Retirement Law (CERL) to reimburse those systems for pension overpayments made to legacy peace officer and firefighter retirees and also pay those retirees a lump sum amount equal to 20 percent of the actuarial equivalent present value of a retiree's "lost" pension going forward due to the benefit recalculation.

EXECUTIVE SUMMARY

Changes in California public laws and subsequent court rulings have shifted how public employers are supposed to calculate the benefits available to their employees in the case of death, disability, or retirement. As a result, some public employers have recalculated or will soon recalculate the benefits owed to their retirees and other beneficiaries. Where an overpayment is found, the public employers may seek to clawback some of the benefits that the retiree or other beneficiary has received. But, of course, the retirees and other beneficiaries have often organized their lives and their finances relying on the benefits they expected to receive before the recalculation. This bill would, with respect to peace officers and firefighter retirees, significantly blunt the impact of these recalculations and clawbacks by requiring counties to: (1) to reimburse their employee retirement systems for pension overpayments; and (2) pay those retirees a lump sum amount equal to 20 percent of the actuarial equivalent present value of a retiree's "lost" pension going forward.

The bill is sponsored by the Association of Orange County Sheriff's Department and the California Professional Firefighters. Support comes from local firefighter and law enforcement unions who assert that the bill is essential to preserving benefits that their members relied on when choosing to take on difficult and dangerous work on behalf of the public. Opposition comes primarily from counties, who argue that the bill unfairly burdens them with paying for changes in the law. The bill passed out of the Senate Labor, Public Employment and Retirement Committee by a vote of 4-0. If the bill passes out of this Committee, it will next be heard in the Senate Appropriations Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides, among other things under the California Constitution that, "the members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system." (Cal. Const., art. XVI, § 17.)
- 2) Establishes the County Employees Retirement Law (CERL) that governs 20 independent county retirement associations and provides for retirement systems for county and district employees in those counties adopting its provisions. Currently, 20 counties operate retirement systems under the CERL and these systems are commonly referred to as "1937 Act system" or "'37 Act systems." These systems are regulated by, and administer the CERL, that is also commonly referred to as the "'37 Act." (Gov. Code § 31450 *et seq.*)
- 3) Establishes that the purpose of the CERL is to recognize a public obligation to county and district employees who become incapacitated by age or long service in public employment and its accompanying physical disabilities by making provision for retirement compensation and death benefit as additional elements of compensation for future services and to provide a means by which public employees who become incapacitated may be replaced by more capable employees to the betterment of public service without prejudice and without inflicting a hardship upon the employees removed. (Gov. Code § 31451.)
- 4) Establishes the Public Employees' Pension Reform Act of 2013 (PEPRA) – a comprehensive reform of public employee retirement that, among other things, increased contributions towards retirement, decreased benefit formulas, and increased the age of retirement that apply to new members of the system first hired on or after January 1, 2013, and made changes that apply to all members towards resolving unfunded liabilities, the manipulation of compensation for purposes of calculating a retirement allowance (i.e., pensions spiking), double-dipping, and other prescribed best practice measures. (Gov. Code § 7522.02 *et seq.*)
- 5) Defines, under the CERL, "compensation" to mean the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation plan, as provided, but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to the member. (Gov. Code § 31460.)

- 6) Defines, pursuant to the CERL, "compensation earnable" by a member to mean the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and the same rate of pay. Among other things, "compensation earnable" expressly does not include certain types or forms of compensation paid to, and when they were paid that, enhance a member's retirement benefit under the system. (Gov. Code § 31461.)
- 7) Establishes that when a county or district reports compensation to the system, it must identify the pay period in which the compensation was earned regardless of when it was reported or paid, and prescribes the reporting requirements and limitations on compensation earnable. (Gov. Code § 31542.5.)
- 8) Establishes that "compensation earnable" must not include overtime premium pay other than premium pay for hours worked within the normally scheduled or regular working hours that are in excess of the statutory maximum workweek or work period applicable to the employee under federal law, as specified, and provides that the definition of "compensation earnable" must not apply to a PEPR member. (Gov. Code § 31461.6.)
- 9) Defines "final compensation" to mean the average annual compensation earnable by a member during any three years elected by a member at or before the time they file an application for retirement, or, if they fail to elect, during the three years immediately preceding their retirement. If a member has less than three years of service, their final compensation must be determined by dividing their total compensation by the number of months of service credited to them and multiplying by 12. In addition, for these purposes, the definition of final compensation here does not apply to a PEPR member. (Gov. Code § 31462.)
- 10) Prescribes how a '37 Act system determines final compensation, including final compensation based on compensation for one year (if adopted by a county), and in relation to intermittent members, subject to certain conditions where applicable. (Gov. Code §§ 31462.05, 31462.1, and 31462.2)

This bill:

- 1) Defines "disallowed compensation" to mean compensation reported for a sworn peace officer or firefighter of the retirement system that the system subsequently determines is not in compliance with the Public Employees' Pension Reform Act (PEPRA) of 2013, existing law relating to compensation earnable, or the administrative regulations of the retirement system, through no fault of the sworn peace officer or firefighter.

- 2) Provides that if the retirement system determines that the compensation reported for a sworn peace officer or firefighter of the system is disallowed, the system must require the county employer or agency to discontinue reporting the disallowed compensation, and retroactively applies the bill's provisions to determinations made on or after July 30, 2020, if an appeal has been filed and the sworn or retired peace officer or firefighter, their survivors or beneficiaries have not exhausted their administrative or legal remedies.
- 3) Provides that for active peace officer or firefighters, all contributions made on disallowed compensation must be credited against future contributions to the benefit of the employer or agency that reported the disallowed compensation, and any paid by, or on behalf of, that member must be returned to the member by the employer or agency that reported the disallowed compensation.
- 4) Provides that for retired sworn peace officers or firefighters, their survivors, or beneficiaries, whose final compensation at the time of retirement was predicated upon the disallowed compensation, the contributions made on the compensation must be credited against future contributions, to the benefit of the employer or agency that reported the disallowed compensation and the retirement system must permanently adjust the benefit of the affected retired member, survivor, or beneficiary to reflect the exclusion of the disallowed compensation, and includes repayment and notice requirements provided that certain conditions are satisfied.
- 5) Requires the retirement system to provide notice to the employer or agency that reported contributions on disallowed compensation, if certain conditions are satisfied.
- 6) Requires the employer or agency that reported contributions on the disallowed compensation to pay a penalty to the system and restitution to an affected retiree, survivor, or beneficiary who was impacted by the disallowed compensation in a lump sum equal to 20 percent of the actuarial equivalent present value of the difference between the member's pension calculated with the disallowed compensation and their adjusted pension calculated without the disallowed compensation.
- 7) Requires the system to, upon request, provide the employer or agency with contact information or data in its possession of a retired member, their survivors, or beneficiaries, so that the employer or agency can fulfill its obligations to those individuals, and that the contact information remain confidential.
- 8) Authorizes an employer or agency to submit an additional compensation item proposed or included in a memorandum of understanding or collective bargaining agreement entered into on or after January 1, 2022, that is intended to form the basis of a pension benefit calculation to the system for review for purposes of consistency

of the proposal with PEPRA, existing law relating to compensation earnable, the retirement system, and administrative regulations of the system, to the system for review.

- 9) Establishes that these provisions do not affect or alter a party's right to appeal any determination regarding disallowed compensation made to the system.

COMMENTS

1. Background

This bill is an attempt to address part of the fallout from the Public Employees' Pension Reform Act of 2013, known as PEPRA. As explained by the Senate Labor, Public Employment and Retirement Committee:

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,¹ 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.

After PEPRA became law in 2013, some 37 Act systems, their members, unions, and employers believed that its provisions regarding the kinds of remuneration excludable from compensation earnable for *legacy* members were constitutionally infirm based on prior court holdings. They pursued litigation while their systems waited for the outcome of the litigation before unwinding the contested remuneration from their members' pension benefit calculations. They argued that PEPRA's provisions affecting legacy members violated their members' contract rights and their settlement agreements from previous litigation. However, the Supreme Court in *Alameda* upheld PEPRA's 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

¹ *Alameda County Deputy Sheriffs Association et al v. Alameda County Employees Retirement Association and Board of Retirement of ACERA* (2020) 9 Cal. 5th 1031.

pension benefits to the theory underlying the 37 Act plans by closing loopholes and proscribing potentially abusive practices.

Thus, most of the PEPRA non-conforming 37 Act systems that continued to include disallowed compensation in their legacy members' pension calculations had to finally begin the laborious and unpopular task of reversing and recalculating those members' pension benefits, 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. Some systems notified their members they were required to comply with the *Alameda* decision and would initiate PEPRA-required adjustments but, in practice, froze their adjustment process, automatically deemed that their members had appealed the determination that their compensation was disallowed, and pursued legislative solutions to provide monetary relief to their members.

This bill would essentially forgive the 37 Act legacy retirees any pension overpayments, collect those overpayments from the retirees' employers in the form of adjusted contribution rates, and require the counties to pay the retirees a lump sum of 20 percent of the actuarial equivalent present value of the difference between their old pension and their adjusted pension, i.e. the amount "lost" because of the required recalculation.

2. Public transparency limitations and privacy protection

The principal policy matter drawing this bill into the purview of the Senate Judiciary Committee is the inclusion of a provision that restricts public access to information.

Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Cod § 6250.) In 2004, the right of public access was enshrined in the California Constitution with the passage of Proposition 59 (Nov. 3, 2004, statewide gen. elec.),² which amended the California Constitution to specifically protect the right of the public to access and obtain government records: "The people have the right of access to information concerning the conduct of the people's business, and therefore . . . the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, sec. 3 (b)(1).) Additionally, it required a statute that limits the public's right of access to be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that

² Prop. 59 was placed on the ballot by a unanimous vote of both houses of the Legislature. (SCA 1 (Burton, Ch. 1, Stats. 2004).

interest. (Cal. Const. art. I, § 3(b)(1).) A public record is defined as any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any public agency regardless of physical form or characteristics. (Gov. Code § 6252(e).)

This bill mandates the public employment retirement systems in question to provide specified notices to affected retirees, survivors, and beneficiaries about the benefits adjustments and any lump sum payment that would result from enactment of this bill. For the purpose of facilitating this communication, the bill requires the retirement system to provide the public employers with any contact information for the affected retirees, survivors, or beneficiaries that the system has in its possession. These would be government records, but making them generally accessible to the public would put people's private contact information into the public domain without their consent. Accordingly, the bill requires the public employer to keep this contact information confidential.

Although this confidentiality requirement places a limitation on public access to information, in light of the important privacy issues implicated, this limitation appears to be justified in this instance.

3. Amendments proposed by the Senate Committee on Labor, Public Employment and Retirement to be taken in this Committee

The bill was heard in the Senate Labor, Public Employment and Retirement Committee on June 22 and must be heard by this Committee on June 28. Because of the scheduling constraints involved, the amendments accepted in the Senate Labor, Public Employment and Retirement Committee will be processed in this Committee.

4. Arguments in support of the bill

According to the author:

AB 2493 will ensure that if a reporting error is to occur, through no fault of the employee, that the onus will be placed upon the employer to ensure that these retirees, who worked their careers in high-profile units such as homicide, bomb squad, officer-involved shootings, canine, and other specialized units within the Sheriff's Department and District Attorney's Office. Whom continuously gave up valuable family time during evenings, holidays, and weekends in order to remain readily available to immediately respond when called upon, are not the subject of a sudden claw back, and additionally receive a small portion of the future pension amounts that they were promised. AB 2493 would protect the retirement security of sworn peace officers and firefighters by

ensuring that any compensation agreed to by their employer and paid for by the employer and the retiree cannot be subsequently and retroactively deducted from the retired member's pension allowance because of a disallowed pay item.

As one of the sponsors of the bill, the Association of Orange County Deputy Sheriffs writes:

AB 2493 (Chen), which is sponsored by the Association of Orange County Deputy Sheriffs, and will ensure that the financial security of retired sworn peace officers and firefighters, who have spent their careers protecting and serving, is not compromised when there has been a reporting error through no fault of the employee. [...] Oftentimes, retirees make the decision to retire based on the retirement dollar amount provided to them. Retirees should not bear the heavy burden from errors that, through no fault of their own, result in a clawback of retirement funds as well as significantly reduced monthly payments going forward. This creates a substantial hardship for retirees that budget based on a fixed income. AB 2493 would protect the retirement security of sworn peace officers and firefighters by ensuring that any compensation agreed to by their employer and paid

5. Arguments in opposition to the bill

For example, in opposition to the bill, California State Association of Counties, the California Special Districts Association, the Urban Counties of California, and the Rural County Representatives of California jointly write:

Assembly Bill 2493 [...] would place a significant financial burden on counties by requiring member agencies of county retirement systems to pay substantial penalties for decisions they did not make and over which they had no authority. [...] AB 2493 unfairly places the financial consequences of the Court's decision on counties and other agencies by requiring '37 Act system employers to pay a "penalty" equal to 20 percent of the current actuarial value of retiree benefits deemed unlawful. The penalty, which will result in affected agencies owing millions of unbudgeted dollars to retirees for what the Court found to be an illegal benefit, implies those agencies made the decision to misapply the law. In reality, they simply complied with the pension agreements established between employees, employers, and retirement systems.

SUPPORT

Association of Orange County Sheriff's Department (sponsor)
California Professional Firefighters (sponsor)
Barstow Professional Firefighters Association Local 2325
California Fraternal Order of Police
Contra Costa County Professional Firefighters Local 1230
Kern County Firefighters Local 1301 Union
Lathrop-Manteca Firefighters Local 4317
Long Beach Police Officers Association
Marin Professional Firefighters Local 1775
Orange County Professional Firefighters Association, Local 3631
Peace Officers Research Association of California
Sacramento County Deputy Sheriffs' Association
San Bernardino County Firefighters Local 935
San Bernardino County Safety Employees' Benefit Association
San Bernardino County Sheriff's Employees' Benefit Association
Sheriff's Employees Benefit Association
Ventura County Professional Firefighters Association Local 1364

OPPOSITION

California Special Districts Association
California State Association of Counties
Kern County Board of Supervisors
Marin County Employees' Retirement Association
Rural County Representatives of California
Santa Barbara County Board of Supervisors
San Bernardino County Employees' Retirement Association
Sonoma County Employee' Retirement Association
Urban Counties of California

RELATED LEGISLATION

Pending Legislation: AB 1667 (Cooper) proposes a series of measures designed, together, to better protect public teachers against the possibility of losing retirement or other benefits due to miscalculation of the amount of benefits to which the teacher is entitled. Those measures include changes to how the teachers' retirement system, CalSTRS, may audit and adjust its members' pension allowances upon discovery of specified errors and changes in how adjustments related to disallowed compensation are applied. AB 1667 will be heard by this Committee on the same day as this bill.

Prior Legislation:

AB 826 (Irwin, 2021) would have amended the CERL definition of “compensation” and “compensation earnable” for legacy members of the Ventura County Employee Retirement Association (VCERA) to include an employee’s flexible benefit allowance, subject to specified criteria, and ensure that such compensation not be deemed disallowed compensation prohibited by PEPRA and the *Alameda* decision. AB 826 is currently on the Inactive File on the Senate Floor.

SB 278 (Leyva, Ch. 331, Stats. 2021) required CalPERS public employers to reimburse CalPERS for overpayments made to retirees whose pension allowances were eventually adjusted downward to reflect the disallowed compensation initially included in their pension calculation.

SB 266 (Leyva, 2019) would have required that, in the event of a CalPERS 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 would have to cover the reduced benefit to the retiree, as specified. The Assembly held the bill at the Desk after being withdrawn from Engrossing and Enrolling.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 0)

Assembly Floor (Ayes 68, Noes 0)

Assembly Public Employment and Retirement Committee (Ayes 6, Noes 0)
