

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 3025 (Valencia)
Version: May 2, 2024
Hearing Date: June 25, 2024
Fiscal: No
Urgency: No
AM

SUBJECT

County employees' retirement: disallowed compensation: benefit adjustments

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 employees 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. The bill also stops the reporting of disallowed compensation for active members, as specified, and requires CERL retirement systems to credit employer contributions and return member contributions on the disallowed compensation. The bill requires an employer that receives information about a member, survivor, or beneficiary to keep that information confidential and only use it to carry out its duties under the bill.

EXECUTIVE SUMMARY

Changes in California public employment 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 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. The principal policy matter drawing this bill into the purview of the Senate Judiciary Committee is the inclusion of a provision that restricts access to public records. California generally recognizes that public access to information concerning the conduct of the people's business is a fundamental and necessary right, but also recognizes that this right must be balanced against the right to privacy. The bill is sponsored by the California Professional Firefighters and the Fraternal Order of Police. Support comes from various unions. Opposition comes primarily from associations representing local government entities. The bill passed out of the Senate Labor, Public Employment and Retirement Committee by a vote of 5 to 0.

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 administrating 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 a 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 applies 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)
- 11) Provides, pursuant to the California Constitution, that the people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies are required to be open to public scrutiny. (Cal. const. art. I, § 3(b)(1).)
 - a) Requires a statute to be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. (Cal. const. art. I, § 3(b)(1).)
 - b) Requires 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 interest. (Cal. const. art. I, § 3(b)(1).)

- 12) Governs the disclosure of information collected and maintained by public agencies pursuant to the CPRA. (Gov. Code §§ 792.000 et seq.)
 - a) States that, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Code § 7921.000.)
 - b) Defines "public records" as any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code § 7920.530.)
 - c) Defines "public agency" as any state or local agency. (Gov. Code § 7920.525(a).)

- 13) Provides that all public records are open to inspection at all times during the office hours of a state or local agency and every person has a right to inspect any public record, unless the record is exempt from public disclosure. Any reasonably segregable portion of a record must be available for inspection by any person requesting the record after deletion of the portions that are exempted by law. (Gov. Code § 7922.525.)
 - a) Some records are prohibited from being disclosed and other records are permissively exempted from being disclosed. (See e.g. Gov. Code §§ 7920.505 & 7922.200.)
 - b) There are several general categories of documents or information that are permissively exempt from disclosure under the CPRA essentially due to the character of the information. The exempt information can be withheld by the public agency with custody of the information, but it also may be disclosed if it is shown that the public's interest in disclosure outweighs the public's interest in non-disclosure of the information. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, at 652.).

This bill:

- 1) Defines "disallowed compensation" to mean nonpensionable compensation reported for a member of the retirement system that the system subsequently determines is not in compliance with the Public Employees' Pension Reform Act (PEPRA) of 2013, the holding in *Association v. Alameda County Employees' Retirement Association* (2020) 9 Cal.5th 1032 (hereafter *Alameda*), or the system's administrative regulations or policies through no fault of the member. "Disallowed compensation" also includes nonpensionable compensation that was previously included in an agreement.
- 2) Provides that if the retirement system determines that the compensation reported for a member of the system is disallowed, the system must require the county employer or agency to discontinue reporting the disallowed compensation.

- 3) Provides that for active members, 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 directly or indirectly through the employer or agency that reported the disallowed compensation.
- 4) Provides that for retired members, their survivors, or beneficiaries, whose final compensation at the time of retirement was predicated upon the disallowed compensation, the employer contributions made on the disallowed 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, return any member contributions paid by, or on behalf of, that member, to the member directly, and the system must permanently adjust the benefit of the affected retired member, survivor, or beneficiary to reflect the exclusion of the disallowed compensation.
- 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) In lieu of the process described above, a system that has initiated a process prior to January 1, 2024, to permanently adjust the benefit of the affected retired member, survivor, or beneficiary to reflect the exclusion of the disallowed compensation as provided may continue to use that process provided that it is consistent PEPRA, and with the holding in *Alameda*.
- 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 and requires the use of such contact data only to the extent necessary to carry out its duties under this section.
- 8) Authorizes an employer or authorized employee representative 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, 2025, 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, the holding in *Alameda*, 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 after July 30, 2020.
- 10) States that it is the intent of the Legislature in enacting this bill to fully comply with the provisions of the Internal Revenue Code, the Internal Revenue Service Employee Plans Compliance Resolution System, and any successor to such Internal Revenue Service program, that apply to public retirement systems in order to maintain and ensure the federal income tax exempt status of the county employees' retirement systems.

COMMENTS

1. Stated need for the bill

The author writes:

AB 3025 safeguards eligible county employees' pensions by preventing initiated processes to collect disallowed compensation. Placing the responsibility on employees to repay non-pensionable funds, determined without their fault, undermines the commitment to a secure retirement. Those who are currently serving and those who have retired anticipate the responsible management of their retirement plans. This expectation is particularly significant, given that many individuals have devoted their careers to public service, and in some instances, have even risked their lives in the line of duty.

2. Background

This bill is an attempt to address part of the fallout from the Public Employees' Pension Reform Act of 2013, known as PEPRA. It is substantially similar to AB 2493 (Chen, 2022), which passed this Committee on a vote of 10 to 0. The main difference between this bill and AB 2493 is that this bill applies to all employees of CERL and AB 2493 only applied to legacy peace officer and firefighter retirees. It is also similar to SB 278 (Leyva, Chapter 331, Statutes of 2021), which required the public employer to cover the difference between the pension as originally calculated and as reduced by CalPERS when a retiree's 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 non-pensionable. SB 278 passed this Committee on a vote of 10 to 1.

As explained by the Senate Labor, Public Employment and Retirement Committee analysis of AB 2493 (Chen, 2022):

PEPRA limited the types of compensation that public employers can include for purposes of calculating their employees' pension

allowance. PEPRAs, as upheld by the California Supreme Court in its 2020 *Alameda* decision, excluded certain items of pay - *to legacy employees as well as PEPRAs 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). PEPRAs 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 PEPRAs 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 PEPRAs' provisions affecting legacy members violated their members' contract rights and their settlement agreements from previous litigation. However, the Supreme Court in *Alameda* upheld PEPRAs' 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 pension benefits to the theory underlying the 37 Act plans by closing loopholes and proscribing potentially abusive practices.

Thus, most of the PEPRAs 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 PEPRAs-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.¹

3. Limitation on the access to public records and privacy

The principal policy matter drawing this bill into the purview of the Senate Judiciary Committee is the inclusion of a provision that restricts access to public records. 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 § 7921.000.) In 2004, the right of public access was enshrined in the California Constitution with the passage of Proposition 59 (Nov. 3, 2004, statewide general election),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).) In 2014, voters approved Proposition 42 (Jun. 3, 2014, statewide direct primary election)³ to further increase public access to government records by requiring local agencies to comply with the CPRA and the Ralph M. Brown Act⁴, and with any subsequent statutory enactment amending either act, as provided. (Cal. Const., art. I, sec. 3 (b)(7).)

Under the CPRA, public records are open to inspection by the public at all times during the office hours of the agency, unless exempted from disclosure. (Gov. Cod § 7922.252.) 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 § 7920.530.) There are several general categories of documents or information that are permissively exempt from disclosure under the CPRA essentially due to the character of the information. The exempt information can be withheld by the public agency with custody of the information, but it also may be disclosed if it is shown that the public's interest in disclosure outweighs the public's interest in non-disclosure of the information. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, at 652.). Additionally some records are prohibited from

¹ Sen. Comm. of Lab., Pub. Empl. and Retirement analysis of AB 2493 (2021-22 reg. sess.) as amended Apr. 5, 2022 at p. 4.

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))

³ Prop. 42 was placed on the ballot by a unanimous vote of both houses of the Legislature. (SCA 3 (Leno, Ch. 123, Stats. 2013))

⁴ The Ralph M. Brown Act is the open meetings laws that applies to local agencies. (Gov. Code §§ 59450 et. seq.)

disclosure or are specifically stated to not be public records. (*see* Gov. Code § 7924.110(a).)

California generally recognizes that public access to information concerning the conduct of the people's business is a fundamental and necessary right.⁵ At the same time, the state recognizes that this right must be balanced against the right to privacy.⁶ The general right of access to public records may, therefore, be limited when records include personal information. In recognition of this, the bill states that in order to protect the privacy of retired members, survivors, or beneficiaries any information received by employers from the system regarding them is confidential. In light of the personal nature of the information being collected, the bill's findings appear consistent with the state's right to privacy and limits on the disclosure of public records.

4. Proposed amendment

The author may wish to amend the bill to expressly state that the confidential information is not subject to disclosure under the California Public Records Act. The specific amendment is as follows:

Amendment⁷

(6) Upon the employer's request, the system shall provide the employer with contact information data in its possession of a relevant retired member, survivor, or beneficiary in order for the employer or 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~~ and *confidential*, shall use such contact data only to the extent necessary to carry out its duties under this ~~section~~ section, and shall not be disclosable under the California Public Records Act (Division 10 commencing with Section 7920.000) of Title 1).

5. Statements in support

The California Professional Firefighters, a sponsor of the bill, and a coalition of various unions representing firefighters write in support, stating:

Generations of hard-working members of California's middle class have dedicated their careers to public service – often earning less over the course of their career when compared to their private industry counterparts – to earn and pay for the promise of a secure retirement. Like many retirees, when a firefighter or law enforcement officer retires, they rely on a fixed monthly pension to meet their day-to-

⁵ Cal. Const., art. I, § 3; Gov. Code, § 7921.000.

⁶ Cal. Const., art. I, § 1.

⁷ The amendments may also include technical, nonsubstantive changes recommended by the Office of Legislative Counsel.

day needs. Moreover, unlike private sector employees, many public employees, including a sizeable percentage of public safety personnel, do not receive Social Security benefits. For these retirees, their fixed pension is typically their only source of retirement income, which is further impacted for those who do not have access to employer-provided retiree healthcare.

Unfortunately, that promise of a secure retirement has been impacted for many firefighters through the imposition of a disallowed compensation determination. [...] AB 3025 would protect the promised and paid for pensions of our retirees through a number of mechanisms, as well as putting in place steps to ensure that similar issues do not happen again in the future.

6. Statements in opposition

The California State Association of Counties, California Special Districts Association, Urban Counties of California, Rural County Representatives of California, and League of California Cities write in opposition, stating:

Following the passage of the Public Employees' Pension Reform Act of 2013 (PEPRA), county retirement systems took varying approaches to comply with the provisions of PEPRA related to which types of compensation may be included in retirement benefit calculations. On July 30, 2020, the California Supreme Court issued a decision in the case *Alameda County Deputy Sheriff's Assn. v Alameda County Employees' Retirement Assn.*, otherwise known as the "Alameda decision," in which the Court upheld provisions PEPRA related to disallowed forms of compensation for retirement calculations. Over the last four years, the impacted '37 Act systems have been working to comply with Alameda and recalculate retirement benefits for members who retired after January 1, 2013.

AB 3025 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

California Professional Firefighters (sponsor)

Fraternal Order of Police (sponsor)

American Federation of State, County and Municipal Employees, Afl-cio

Association of Orange County Deputy Sheriffs

California Fraternal Order of Police
California Labor Federation, Afl-cio
California Professional Firefighters
California Teachers Association
Contra Costa County Professional Firefighters Local 1230
Kern County Firefighters Local 1301 Union
Long Beach Police Officers Association
Los Angeles County Firefighters Local 1014
Marin Professional Firefighters Local 1775
Orange County Employees Association
Orange County Professional Firefighters Association, Local 3631
Sacramento Area Firefighters Local 522
Sacramento County Deputy Sheriffs' Association
San Bernardino County Firefighters Local 935
San Bernardino County Sheriff's Employees' Benefit Association
Ventura County Professional Firefighters Association Local 1364

OPPOSITION

California Special Districts Association
California State Association of Counties
Kern County
League of California Cities
Rural County Representatives of California
Urban Counties of California

RELATED LEGISLATION

Pending Legislation:

AB 1997 (McKinnor, 2024) makes changes to the Teachers' Retirement Law (TRL), administered by CalSTRS, relating to creditable compensation, creditable service, and the reporting of compensation to the system by CalSTRS employers for purposes of retirement, among other provisions. This bill is currently pending in Senate Appropriations.

AB 2284 (Grayson, 2024) authorizes a CERL retirement system to define "grade," as specified, for purposes of compensation and calculating a retirement benefit. This bill is currently in the Senate Labor, Public Employment and Retirement Committee.

Prior Legislation:

SB 432 (Cortese, Ch. 215, Stats. 2023) clarified certain Education Code provisions as amended by AB 1667 (Cooper, Ch. 754, Stats. 2022) relating to the recovery of pension

overpayments from retired teachers by CalSTRS due to errors in reported compensation.

AB 2493 (Chen, 2022) was substantially similar to this bill. AB 2493 died on concurrence in the Assembly.

AB 1667 (Cooper, Ch. 754, Stats. 2022) among other provisions, prescribed various requirements in connection with audits by CalSTRS, CalSTRS' interpretation and clarification of rules relating to creditable compensation, CalSTRS' review of compensation items included in a memorandum of understanding or collective bargaining agreement, errors relating employer reporting of compensation to the system, and the recovery of payments.

SB 278 (Leyva, Ch. 331, Stats. 2021) required that when a retiree's 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 non-pensionable, the public employer must cover the difference between the pension as originally calculated and as reduced by CalPERS.

PRIOR VOTES

Senate Labor, Public Employment and Retirement Committee (Ayes 5, Noes 0)

Assembly Floor (Ayes 72, Noes 0)

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