THE PUBLIC SECTOR

Courts continue to affirm PEPRA's reforms

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The Public Employees' Pension Reform Act (PEPRA) took effect on January 1, 2013. Around that time, public employee unions filed lawsuits challenging various parts of the Act. It has taken years for those lawsuits to work their way through the court system, leaving public agencies waiting for guidance on several important issues. In December 2016, appellate courts issued decisions addressing two of those outstanding issues: employer payment of member contributions and the purchase of additional service credit. In each case, the court upheld PEPRA's reforms.

Employer payment of member contributions can be discontinued

The County Employees' Retirement Law of 1937 (CERL) requires employees to pay half the contribution required to fund the cost-of-living adjustment (COLA) portion of their pension benefits but allows a county to choose to pay some or all of the member contribution. In this case, the county had voluntarily paid the entire member contribution toward the COLA since 1975.

In negotiations with its correctional officers' union in 2012, the county proposed to stop paying the member contribution. Upon reaching impasse shortly after PEPRA took effect, the county stopped the payment as part of implementing its final offer.

The union filed a lawsuit claiming that the county had to continue paying the COLA contribution because PEPRA prohibits any unilateral increase in member contributions before January 1, 2018. The court disagreed, finding that explicit language in a PEPRA amendment to the CERL preserved the county's existing authority to stop paying employees' COLA contributions.

Although this case involved a specific CERL provision, the court stated that interpreting PEPRA to limit an employer's preexisting authority to have employees pay their own share of pension costs would be contrary to the statute's overriding purpose of reducing public pension liability by having employees pay more of the cost of their benefits. The court's recognition of this principle should provide support for employers in future challenges under PEPRA to eliminate employer-paid member contributions. *San Joaquin County Correctional Officers' Assn. v. County of San Joaquin* (California Court of Appeal, 3rd District, 12/20/16).

Full disclosure: *Our firm represents San Joaquin County in this litigation.*

Purchase of additional service credit not a perpetual right

In 2003, the California Legislature amended the Public Employees' Retirement Law (PERL) to allow eligible California Public Employees' Retirement System (CalPERS) members to purchase up to five years of additional service credit, commonly known as "air time." Under the amendment, the member paid the full cost of the additional service credit, which was added to his years of actual service upon retirement to determine his pension benefit.

PEPRA eliminated CalPERS members' ability to purchase air time as of January 1, 2013. In response, the state's firefighters' union filed a lawsuit claiming that elimination of the benefit violated the California Constitution because members have a vested contractual right to purchase air time. The court disagreed for two reasons.

First, the court found no language in the 2003 PERL amendment that indicated an intent to create a perpetual right to purchase air time. Rather, the statutory language indicated that air time could be purchased as long as the benefit was offered.

Second, the court concluded that the elimination of air time was a permissible modification of members' pension benefits even though they received no comparable benefit in return. The court found the modification did not deprive members of a reasonable pension because it eliminated a benefit that actually was detrimental to the retirement system—paying pension benefits for time members didn't actually work. As the court noted, "This simply is not a case where the state provided a retirement benefit to its employees in exchange for their work performance, and then took the benefit away, despite the employees' continued service, without offering a comparable benefit."

This decision reinforces two important principles:

(1) Courts will not find a vested right to a retirement benefit unless the evidence of an intent to create one is clear.

(2) A retirement benefit may be eliminated without being replaced by a comparable benefit, at least in some circumstances.

Because the issues are so fact-specific, however, public employers must be careful when proposing to eliminate or reduce retirement benefits. *Cal Fire Local 2881 v. California Public Employees' Retirement System* (California Court of Appeal, 1st District, 12/30/16).

Bottom line

These decisions continue the courts' slow process of affirming PEPRA's reforms. To date, no appellate court has struck down any part of PEPRA. Indeed, only once has an appellate court found that a public agency violated PEPRA, when a county implemented retirement formulas for new members before the existing labor contract expired. Thus, with one exception, the courts' interpretations of PEPRA appear to be aligned with how public agencies have understood and implemented its reforms.

As of press time, the deadline to petition the California Supreme Court to review these decisions hadn't passed. Therefore, it is possible that the supreme court may review and reverse either or both of the decisions. Also, the supreme court has granted review in *Marin Assn. of Public Employees v. Marin County Public Employees' Retirement Assn.*, in which the 5th District Court of Appeal held that PEPRA's elimination of certain types of specialty pay from pensionable compensation on a prospective basis did not impair employees' vested right to a reasonable pension. However, that review is on hold while the 1st District Court of Appeal decides a similar issue in a consolidated case arising out of Alameda and Contra Costa counties.

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