

AMENDED IN ASSEMBLY SEPTEMBER 3, 2019

AMENDED IN ASSEMBLY AUGUST 14, 2019

AMENDED IN ASSEMBLY JUNE 17, 2019

AMENDED IN SENATE MAY 17, 2019

SENATE BILL

No. 266

Introduced by Senator Leyva

February 12, 2019

An act to add Section 20164.5 to the Government Code, relating to public employees' retirement.

LEGISLATIVE COUNSEL'S DIGEST

SB 266, as amended, Leyva. Public Employees' Retirement System: disallowed compensation: benefit adjustments.

(1) Existing law, the Public Employees' Retirement Law (PERL), establishes the Public Employees' Retirement System (PERS), which provides a defined benefit to members of the system, based on final compensation, credited service, and age at retirement, subject to certain variations. PERL authorizes a public agency to contract to make its employees members of PERS and prescribes a process for this. PERS is administered by its board of administration, which is responsible for correcting errors and omissions in the administration of the system and the payment of benefits. Existing law requires the board to correct all actions taken as a result of errors or omissions of the state or a contracting agency, in accordance with certain procedures.

The California Public Employees' Pension Reform Act of 2013 (PEPRA) generally requires a public retirement system, as defined, to modify its plan or plans to comply with the act. PEPRA, among other

things, establishes new defined benefit formulas and caps on pensionable compensation.

This bill would establish new procedures under PERL for cases in which PERS determines that the benefits of a member or annuitant are, or would be, based on disallowed compensation that conflicts with PEPRA and other specified laws and thus impermissible under PERL. The bill would also apply these procedures retroactively to determinations made on or after January 1, 2017, if an appeal has been filed and the employee member, survivor, or beneficiary has not exhausted their administrative or legal remedies. At the threshold, after determining that compensation for an employee member reported by the state, school employer, or a contracting agency is disallowed, the bill would require the applicable employer to discontinue the reporting of the disallowed compensation. The bill would require that contributions made on the disallowed compensation, for active members, be credited against future contributions on behalf of the state, school employer, or contracting agency that reported the disallowed compensation and would require that the state, school employer, or contracting agency return to the member any contributions paid by the member or on the member's behalf.

With respect to retired members, survivors, or beneficiaries whose benefits are based on disallowed final compensation, the bill would require PERS to adjust the benefit to reflect the exclusion of the disallowed compensation, and provide that contributions made on the disallowed compensation be credited against future contributions on behalf of the employer entity that reported the disallowed compensation. Additionally, if specified conditions are met, the bill would require the employing entity to refund overpayment costs to the system and to pay retired members, survivors, and beneficiaries whose benefits have been reduced an annuity, or a lump sum, as prescribed, that reflects the difference between the monthly allowance that was based on the disallowed compensation and the adjusted monthly allowance calculated without the disallowed compensation, as provided. The bill would require the system to provide certain notices in this regard. This bill would require the system to provide confidential contact information of retired members, and their survivors and beneficiaries, who are affected by these provisions to the relevant employing entities, the confidentiality of which the entities would be required to maintain.

The bill would authorize the state, a school employer, *as specified*, or a contracting agency, as applicable, to submit to the system an

additional compensation item proposed to be included or contained in a memorandum of understanding or collective bargaining agreement on and after January 1, 2020, that is intended to form the basis of a pension benefit calculation in order for PERS to review its consistency with PEPPRA and other laws, as specified, and would require PERS to provide guidance regarding the review within 90 days, as specified. The bill would require PERS to publish notices regarding proposed compensation language submitted to the system for review and the guidance given by the system that is connected with it. *For educational entities that participate in the system, the final responsibility for funding payments to the system and to retired members, survivors, and beneficiaries would belong to the educational entity that is the actual employer of the employee.* The bill would make related legislative findings and declarations.

(2) Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would make legislative findings to that effect.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. (a) The California Public Employees' Retirement
2 System (CalPERS) is the largest public pension fund in the United
3 States, administering defined benefit retirement plans for
4 California's public employees, including state and local
5 government firefighters, law enforcement personnel, and school
6 employees.

7 (b) Of the numerous positions maintained by the state, schools,
8 and local governments, each is unique and each is vital to ensuring
9 quality public services that help keep our state strong, a critical
10 component to promoting our state's continued economic recovery
11 and future growth.

12 (c) Fire service, law enforcement, school personnel, and other
13 public employees exhibit varying demographic features and career
14 patterns. Each requires a different skill set and knowledge base,

1 as well as unique requirements for recruitment, training, retention,
2 and compensation.

3 (d) Generations of hard-working members of California’s middle
4 class have dedicated their careers to public service, often earning
5 less over the course of their careers when compared to their private
6 industry counterparts, to earn and pay for the promise of a secure
7 retirement.

8 (e) A public employee’s pension is based on collectively
9 bargained compensation that takes the form of base pay and special
10 compensation for additional skills, extraordinary assignments, or
11 education.

12 (f) For CalPERS, it is the employer’s responsibility to ensure
13 that employee information is reported to CalPERS accurately and
14 on a timely basis in order to correctly calculate an employee’s
15 service credit and final compensation for retirement purposes.

16 (g) In 2012, after serving the public for nearly 30 years, a
17 firefighter employed by a CalPERS contracting agency, which
18 provided an official projection of retirement benefits based on the
19 firefighter’s estimated retirement date, made the decision to retire
20 based on that projection.

21 (h) In 2017, five years after officially retiring, CalPERS notified
22 the firefighter retiree that the retiree’s former employer had
23 erroneously reported and remitted contributions on certain
24 compensation, which CalPERS later determined in an audit was
25 not pensionable compensation. CalPERS sought repayment of the
26 purported overpayment directly from the retired firefighter totaling
27 thousands of dollars, as well as imposed a substantial future
28 reduction to the retiree’s monthly allowance. Unfortunately, this
29 scenario is not isolated to just this one retiree. A handful of other
30 firefighter, law enforcement, and school retirees have reported
31 similar stories across multiple CalPERS employers.

32 (i) For over eight decades, CalPERS has proven its ability to
33 fairly administer the retirement system to uphold the promises
34 made by its employers for those members who invest their life’s
35 work in public service. However, this kind of clawback has the
36 potential to take a major toll on the finances of retirees, including
37 firefighters and law enforcement officers who, unlike private sector
38 employees, do not receive social security benefits and instead rely
39 on their fixed monthly pension as their sole source of retirement
40 income.

1 (j) In enacting this bill, it is the intent of the Legislature to ensure
2 that a retired CalPERS member is protected when alleged
3 misapplication or calculation of compensation occurs as a result
4 of an employer's error, and that this protection be provided to
5 retirees whose appeal of CalPERS' determination, and subsequent
6 reduction of the retiree's allowance, is not final. It is further the
7 intent of the Legislature that errors made on the part of the
8 employer, with respect to a promise to a retiree, be borne by the
9 employer rather than through a retroactive clawback and permanent
10 reduction in the retired member's pension.

11 SEC. 2. Section 20164.5 is added to the Government Code, to
12 read:

13 20164.5. (a) For purposes of this section, "disallowed
14 compensation" means compensation reported for a member by the
15 state, school employer, or a contracting agency that the system
16 subsequently determines is not in compliance with the California
17 Public Employees' Pension Reform Act of 2013 (Article 4
18 (commencing with Section 7522) of Chapter 21 of Division 7 of
19 Title 1), Section 20636 or 20636.1, or the administrative regulations
20 of the system.

21 (b) If the system determines that the compensation reported for
22 a member by the state, school employer, or a contracting agency
23 is disallowed compensation, the system shall require the state,
24 school employer, or contracting agency to discontinue reporting
25 the disallowed compensation. This section shall also apply to
26 determinations made on or after January 1, 2017, if an appeal has
27 been filed and the member, the retired member, survivor, or
28 beneficiary has not exhausted their administrative or legal
29 remedies.

30 (1) In the case of an active member, all contributions made on
31 the disallowed compensation shall be credited against future
32 contributions to the benefit of the state, school employer, or
33 contracting agency that reported the disallowed compensation, and
34 any contribution paid by, or on behalf of, the member, including
35 contributions under Section 20691, shall be returned to the member
36 by the state, school employer, or contracting agency that reported
37 the disallowed compensation.

38 (2) In the case of a retired member, survivor, or beneficiary
39 whose final compensation at the time of retirement was predicated
40 upon the disallowed compensation, the contributions made on the

1 disallowed compensation shall be credited against future
2 contributions, to the benefit of the state, school employer, or
3 contracting agency that reported the disallowed compensation and
4 the system shall permanently adjust the benefit of the affected
5 retired member, survivor, or beneficiary to reflect the exclusion
6 of the disallowed compensation.

7 (3) (A) In the case of a retired member, survivor, or beneficiary
8 whose final compensation at the time of retirement was predicated
9 upon the disallowed compensation as described in paragraph (2),
10 the repayment and notice requirements described in this paragraph
11 and paragraph (4) shall apply only if all of the following conditions
12 are met:

13 (i) The compensation was reported to the system and
14 contributions were made on that compensation while the member
15 was actively employed.

16 (ii) The compensation was provided for in a memorandum of
17 understanding or collective bargaining agreement as compensation
18 for pension purposes.

19 (iii) The determination by the system that compensation was
20 disallowed was made after the date of retirement.

21 (iv) The member was not aware that the compensation was
22 disallowed at the time it was reported.

23 (B) If the conditions of subparagraph (A) are met, the state,
24 school employer, or contracting agency that reported contributions
25 on the disallowed compensation shall do both of the following:

26 (i) Pay to the system, as a direct payment, the full cost of any
27 overpayment of the prior paid benefit made to an affected retired
28 member, survivor, or beneficiary resulting from the disallowed
29 compensation.

30 (ii) Pay to the retired member, survivor, or beneficiary, as a
31 lump sum or as an annuity based on that amount, the actuarial
32 equivalent present value representing the difference between the
33 monthly allowance that was based on the disallowed compensation
34 and the adjusted monthly allowance calculated pursuant to
35 paragraph (2) for the duration that allowance is projected to be
36 paid by the system to the retired member, survivor, or beneficiary.
37 The payment, or payments, shall be made by the state, school
38 employer, or contracting agency that reported contributions on the
39 disallowed compensation as an annuity unless the retired member,
40 survivor, or beneficiary and the state, school employer, or

1 contracting agency, as may be applicable, mutually agree to a lump
2 sum payment or payments.

3 (4) The system shall provide a notice to the state, school
4 employer, or contracting agency that reported contributions on the
5 disallowed compensation and to the affected retired member,
6 survivor, or beneficiary, including, at a minimum, all of the
7 following:

8 (A) The amount of the overpayment to be paid by the state,
9 school employer, or contracting agency to the system as described
10 in subparagraph (B) of paragraph (3).

11 (B) The actuarial equivalent present value owed to the retired
12 member, survivor, or beneficiary as described in subparagraph (B)
13 of paragraph (3), if applicable.

14 (C) Written disclosure of the state, school employer, or
15 contracting agency's obligations to the retired member, survivor,
16 or beneficiary pursuant to this section.

17 (5) The system shall, upon request, provide the state, a school
18 employer, or a contracting agency with contact information data
19 in its possession of a relevant retired member, survivor, or
20 beneficiary in order for the state, a school employer, or a
21 contracting agency to fulfill their obligations to that retired
22 member, survivor, or beneficiary pursuant to this section. The
23 recipient of this contact information data shall keep it confidential.

24 (c) (1) The state, a school employer, *including a county*
25 *superintendent of schools, school district, community college*
26 *district, charter school, regional occupational center, or other*
27 *local educational agency*, or a contracting agency, as applicable,
28 may submit to the system for review an additional compensation
29 item that is proposed to be included, or is contained, in a
30 memorandum of understanding adopted, or a collective bargaining
31 agreement entered into, on and after January 1, 2020, that is
32 intended to form the basis of a pension benefit calculation, in order
33 for the system to review consistency of the proposal with the
34 California Public Employees' Pension Reform Act of 2013 (Article
35 4 (commencing with Section 7522) of Chapter 21 of Division 7
36 of Title 1), Section 20636 or 20636.1, and the administrative
37 regulations of the system.

38 (2) A submission to the system for review under paragraph (1)
39 shall include only the ~~proposed~~ compensation item language and
40 a description of how it meets the criteria listed in subdivision (a)

1 of Section 571 or subdivision (b) of Section 571.1 of Title 2 of the
2 California Code of Regulations, along with any other supporting
3 documents or requirements the system deems necessary to complete
4 its review.

5 (3) The system shall provide guidance regarding the submission
6 within 90 days of the receipt of all information required to make
7 a review.

8 (d) The system shall periodically publish a notice of the
9 proposed compensation language submitted to the system pursuant
10 to paragraph (c) for review and the guidance provided by the
11 system.

12 (e) This section does not alter or abrogate any responsibility of
13 the state, a school employer, or a contracting agency to meet and
14 confer in good faith with the employee organization regarding the
15 impact of the disallowed compensation or the effect of any
16 disallowed compensation on the rights of the employees and the
17 obligations of the employer to its employees, including any
18 employees who, due to the passage of time and promotion, may
19 have become exempt from inclusion in a bargaining unit, but whose
20 benefit was the product of collective bargaining.

21 (f) *For educational entities participating in the system, the final*
22 *responsibility for funding payments under subparagraph (B) of*
23 *paragraph (3) of subdivision (b) is that of the educational entity*
24 *that is the actual employer of the employee. A county*
25 *superintendent of schools shall have final responsibility for funding*
26 *payments for its own employees and not for those employees of*
27 *other educational entities that participate in the system under the*
28 *auspices of a county superintendent of schools pursuant to contract.*

29 (f)

30 (g) This section does not effect or otherwise alter a party's right
31 to appeal any determination regarding disallowed compensation
32 made by the system.

33 SEC. 3. The Legislature finds and declares that Section 2 of
34 this act, which adds Section 20164.5 of the Government Code,
35 imposes a limitation on the public's right of access to the meetings
36 of public bodies or the writings of public officials and agencies
37 within the meaning of Section 3 of Article I of the California
38 Constitution. Pursuant to that constitutional provision, the
39 Legislature makes the following findings to demonstrate the interest
40 protected by this limitation and the need for protecting that interest:

1 In order to appropriately maintain the current confidentiality of
2 personal contact information held by the Public Employees'
3 Retirement System regarding retired members of the system, and
4 their survivors and beneficiaries, it is necessary to limit access to
5 this information if it is provided to other public entities for purposes
6 of Section 20164.5 of the Government Code.

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