

TOWNSEND

PUBLIC AFFAIRS

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MEMO

To: City of Cupertino
Legislative Review Committee

From: Townsend Public Affairs, Inc.

Date: March 12, 2021

Subject: Consider adopting a position on Senate Bill 278 (Leyva) Public Employees' Retirement System: Disallowed Compensation: Benefit Adjustments

Summary

SB 278 would require that in the event that a CalPERS retiree has 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 must cover the reduced benefit to the retiree.

Specifically, SB 278 requires:

- If Cal-PERS determines that the compensation reported for a Cal-PERS member by a public employer is in conflict with existing law or regulations, Cal-PERS 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 Cal-PERS member have not been exhausted.
- In the case of an *active Cal-PERS member*, all contributions on disallowed compensation must be credited against future contributions to the benefit of the public employer by Cal-PERS and the public employer must return the member's contributions that were paid on the disallowed compensation.
- In the case of a *retired Cal-PERS 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.
- Cal-PERS to permanently reduce the retired Cal-PERS member or survivor or beneficiary's benefit to exclude the disallowed compensation.
- Requires the public employer to both pay Cal-PERS the full cost of any overpayment resulting from the disallowed compensation AND pay to the retired Cal-PERS member, survivor, or beneficiary an annuity based on the difference between the permissible retirement benefit and the actuarially equivalent present amount of the disallowed compensation. If both the member and employer agree, the benefit may be provided as a lump sum instead of an annuity.
- Requires that the double-payment described above is only due if the following is applicable:
 - The compensation was reported to Cal-PERS and the contributions were made on that compensation while the member was actively employed;

State Capitol Office • 925 L Street • Suite 1404 • Sacramento, CA 95814 • Phone (916) 447-4086 • Fax (916) 444-0383

Federal Office • 600 Pennsylvania SE • Suite 207 • Washington, DC 20003 • Phone (202) 546-8696 • Fax (202) 546-4555

Southern California Office • 1401 Dove Street • Suite 330 • Newport Beach, CA 92660 • Phone (949) 399-9050 • Fax (949) 476-8215

Central California Office • 744 P Street • Suite 308 • Fresno, CA 93721 • Phone (949) 399-9050 • Fax (949) 476-8215

Northern California Office • 300 Frank Ogawa Plaza • Suite 204 • Oakland, CA 94612 • Phone (510) 835-9050 • Fax (510) 835-9030

- The compensation was provided for in a memorandum of understanding or collective bargaining agreement as compensation for pension purposes
- The determination by the system that compensation was disallowed was made after the date of retirement; and
- The member was not aware that the compensation was disallowed at the time it was reported.
- Requires Cal-PERS 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.
- Permits public employers to submit to Cal-PERS 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 (PERL). Cal-PERS must provide guidance on the compensation proposal within 90 days.
- Explicitly states that, for educational entities participating in Cal-PERS, 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.

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. To prevent similar retroactive action against retired employees in the future, SB 278 allows CalPERS contracting agencies to submit a compensation proposal for a pension calculation to determine compliance with the CalPERS regulations. Finally, if a disallowed pay item is identified, employees who are still working will go back to the bargaining table so the employee organization and an employer can work through the issue.”

According to a coalition of public agency associations opposed to SB 278, “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 278 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.”

The Fiscal Responsibility Guiding Principal within the City’s Legislative Platform calls for the City to oppose any new mandates that are unfunded or inadequately funded. In addition, to potentially being in violation to the State Constitution’s provisions related to gifts of public funds, SB 278 could result in a new mandate to fund disallowed retirement benefits without corresponding from the state to do so.

Status

SB 278 was approved by the Senate Labor, Public Employment and Retirement Committee on March 8th on a 5-0 vote. The measure has been referred to the Senate Judiciary Committee. A hearing date has not yet been set.

Support

SB 278 is sponsored by the California Professional Firefighters and supported by the Riverside Sheriffs’ Association.

Opposition

SB 278 is opposed by: California Assn of Joint Powers Authorities, California Special Districts Assn, California State Assn of Counties, and the League of California Cities.

Recommended Action

A) Adopt an oppose position on SB 278 and authorize the Mayor to send letters to the state legislature, unless the City Council decides to place this bill on a future Council agenda to consider as the full Council; Or B) Make a recommendation that the City Council take an oppose position on SB 278.