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## SB-266 Public Employees' Retirement System: disallowed compensation: benefit adjustments. (2019-2020)

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CALIFORNIA LEGISLATURE— 2019–2020 REGULAR SESSION

### 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 ~~a lump sum or an annuity reflecting 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, 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 ~~for determination of compliance in order for PERS to review its consistency~~ with PEPR and other laws, as specified, and would require PERS to ~~respond~~ *provide guidance regarding the review* within 90 days, as specified. The bill would require PERS to publish notices ~~identifying items of allowable compensation derived from regarding proposed compensation~~ language submitted to the system for ~~review~~ *review and the guidance given by the system that is connected with it*. 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 Local Program: no

## THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

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

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

(c) Fire service, law enforcement, school personnel, and other public employees exhibit varying demographic features and career patterns. Each requires a different skill set and knowledge base, as well as unique requirements for recruitment, training, retention, and compensation.

(d) 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 careers when compared to their private industry counterparts, to earn and pay for the promise of a secure retirement.

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

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

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

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

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

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

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

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

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

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

(2) In the case of a retired member, survivor, or beneficiary whose final compensation at the time of retirement was predicated upon the disallowed compensation, the contributions made on the disallowed compensation shall be credited against future contributions, to the benefit of the state, school employer, or contracting agency that reported the disallowed compensation and the system shall permanently adjust the benefit of the affected retired member, survivor, or beneficiary to reflect the exclusion of the disallowed compensation.

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

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

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

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

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

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

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

(ii) Pay to the retired member, survivor, or beneficiary, as a lump sum or as an annuity based on that amount, the actuarial equivalent present value representing the difference between the monthly allowance that was based on the disallowed compensation and the adjusted monthly allowance calculated pursuant to paragraph (2) for the duration that allowance is projected to be paid by the system to the retired member, survivor, or beneficiary. The payment, or payments, shall be made by the state, school employer, or contracting agency that reported contributions on the disallowed compensation ~~in the option selected by~~ *as an annuity unless* the retired member, survivor, or beneficiary ~~pursuant to a settlement or agreement between the parties, and the state, school employer, or contracting agency, as may be applicable, mutually agree to a lump sum payment or payments.~~

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

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

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

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

(5) The system shall, upon request, provide 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.

(c) (1) The state, a school employer, or a contracting agency, as applicable, may submit to the system for review an additional compensation item that is proposed to be included, or is contained, in a memorandum of understanding adopted, or a collective bargaining agreement entered into, on and after January 1, 2020, that is intended to form the basis of a pension benefit calculation, in order for the system to ~~determine compliance~~ *review consistency of the proposal* with the California Public Employees' Pension Reform Act of 2013 (Article 4 (commencing with Section 7522) of Chapter 21 of Division 7 of Title 1), Section 20636 or 20636.1, and the administrative regulations of the system.

(2) A submission to the system for review under paragraph (1) shall include only the proposed compensation item language and a description of how it meets the criteria listed in subdivision (a) of Section 571 or subdivision (b) of Section 571.1 of Title 2 of the California Code of Regulations, along with any other supporting documents or requirements the system deems necessary to ~~evaluate compliance with the California Public Employees' Pension Reform Act of 2013 (Article 4 (commencing with Section 7522) of Chapter 21 of Division 7 of Title 1), Section 20636 or 20636.1, and the administrative regulations of the system.~~ *complete its review.*

(3) The system shall ~~respond to~~ *provide guidance regarding* the submission within 90 days of the receipt of all information required to make a ~~determination.~~ *review.*

(d) The system shall periodically publish a notice of the proposed compensation language submitted to the system pursuant to paragraph (c) for review and the ~~system's determination of compliance.~~ *guidance provided by the system.*

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

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

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

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