Court of Appeal Rejects Another Post-PEPRA Challenge

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On December 20, 2016, the California Court of Appeal struck another blow to a legal challenge brought against an employer who changed its pension policies in the wake of the Public Employees' Pension Reform Act of 2013 (PEPRA).

In the case, *San Joaquin County Correctional Officers Association* [SJCCOA] *v. County of San Joaquin* (3d District COA, Case No. C079413, Dec. 20, 2016), Petitioner SJCCOA sought an order preventing the County of San Joaquin from unilaterally revoking its longtime employer pick-up of employee contributions for cost of living adjustments (COLAs) so that the employees would have to make COLA contributions themselves, claiming that new provisions of the California Government Code that PEPRA had added to the County Employees Retirement Law of 1937 (CERL) (sections 31631 and 31631.5), impliedly eliminated the County's prior unilateral authority to end employer pick-ups of employee contributions.

The legal question presented in the case was: What is a plan sponsor's power to terminate employer pick-ups of employee contributions after the PEPRA amendments to Gov. Code secs. 31631 and 31631.5 of CERL, or otherwise?

The San Joaquin County Superior Court had concluded in the proceeding below that the County had pre-existing authority under CERL sections 31581.1 and 31581.2 to terminate its own pick-up of employee contributions and that section 31631.5 did not rescind that authority.

As background, both CERL sections 31631 and 31631.5, which apply to so-called Legacy or Classic (non-PEPRA) members, purport to provide employers with a greater ability to shift employer contribution payment responsibilities to members, with section 31631 providing that such shifting must occur by MOU and 31631.5 providing that such shifting may not be imposed before January 1, 2018. However, both sections 31631 and 31631.5 also state in each of their respective subsections (b), that Nothing in this section shall modify a board

of supervisors' or the governing body of a district's authority under law as it existed on December 31, 2012, including any restrictions on that authority, to change the amount of member contributions.

The Superior Court concluded:

1. As to section 31631.5, it was key that while subdivision (a), which authorizes a county to require employees to pay 50% of the COLA, does not go into effect until 2018, subdivision (b) expressly preserves a county's pre-existing unilateral authority to end county pick-ups of partial COLA costs.
2. Predating PEPRA, CERL gives a county the ability to agree to pay any portion of employee contributions, and also the ability to amend or repeal such a resolution at any time [subject to meet & confer] . . .

The Court of Appeal agreed. Noting that PEPRA was intended to rein in what was perceived by the Legislature to be overly generous retirement packages for public employees, the Court also observed that the Legislature delayed the effective date of some provisions to ease the transition and allow some changes to be negotiated gradually. The Court further stated, most importantly, however, that the new legislation was not designed to shield compensation packages that were already subject to reduction under prior laws, specifically, CERL.

The determination that neither PEPRA, nor another other principle of law, shields members from changes in contribution requirements that already were built into a retirement plan in effect prior to PEPRA is not groundbreaking from a legal perspective, and the decision thus should come as no surprise. As the Court observed, PEPRA was designed to *limit* public employee retirement compensation—within constitutional bounds—in the face of concern over underfunded liabilities. (Emphasis in original.)

The Court's discussion of PEPRA in this published decision is perhaps more interesting than the result itself. Specifically, the Court recited some of the more controversial language found in *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal. App. 5th 674, 681, review granted Nov. 22, 2016, S23760) (*MAPE*), regarding the funding status of public pension funds in California to support its conclusion that PEPRA, as part of the Legislature's response to this perceived problem, in part 'made fundamental alterations in the manner in which public pensions are calculated.' While citing *MAPE*, in a footnote the Court also stated We express no view about the [*MAPE*] court's interpretation of precedent regarding the validity of changes to retirement benefits, we merely agree with its account of the historical backdrop animating recent pension reform legislation in California. The Court concluded: In short, the County always has had the power to eliminate the COLA pickup, subject to labor laws, and those laws permitted the county to do so in the event of a bargaining impasse, which occurred. Nothing in PEPRA limited the County's power in this regard.

Our View

This conclusion is consistent with existing law in California. The Court's determinations regarding the pick-up topic do not, however, extend to many other aspects of CERL (or other statutory retirement plans), unless those statutory provisions also explicitly provide that the benefits are non-vested (i.e., that they may be changed at any time), or the statutes afford some other Retirement Board discretion and/or other flexibility in their interpretation and/or application over time.

Stay Tuned: On December 21, 2016, the First District Court of Appeal hears oral argument in another PEPRA case, this time analyzing the constitutionality of the elimination of nonqualified service credit purchases: *CalFIRE Local 2881 v. CalPERS* (First District Court of Appeal, Div. 3, Case No. A142793). We will report on

that case when it’s decided during the first quarter of 2017.