

*Torrance*  
*Professionals & Supervisors*  
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**California Supreme Court Holds that the Pension Reform Law's Elimination of the Ability to Purchase "Air-Time" Does Not Violate the State Constitution**

On March 4, 2019, the California Supreme Court upheld a provision of the Public Employees' Pension Reform Act of 2013 (PEPRA) that eliminated the Additional Retirement Service (ARS) credit. This credit, known as "Air-Time," allowed public employees to purchase service credit for time that they didn't actually work. The credit then boosted their benefit payments during retirement.

The Court held that the state law eliminating this benefit did not violate the contract clause of the California Constitution. In delivering its decision, the Court maintained the status quo by upholding PEPRA's repeal of the ability to purchase Air Time for those who hadn't already done so when the law was enacted. On the other hand, the repeal did not alter the retirement calculations for those who had previously purchased Air-Time credits.

Air-Time originally allowed employees to purchase anywhere between 1-5 years of service which they did not actually work. This enabled employees to increase their retirement allowance in future pension payments. It was a big boost for employees who joined public employment late in their career, employees who left and later returned to public service, and employees who generally didn't have the time left in their careers to work the extra years, for example due to age, disability, layoff, or other life circumstances.

The credit was first made available to all public employees in 2003. At that time, it was assumed that it would be “cost-neutral.” But after it took effect, CalPERS conducted a study finding that the original method of calculation underestimated the overall cost from anywhere between 12%-38%. When the recession came five years later, the Air-Time benefit became a prime target for the larger pension reform movement.

Pension reform advocates first wanted to convert defined benefit pensions into defined contribution accounts, like private sector 401k’s. It was a statewide public debate in California’s 2010 Gubernatorial race between Jerry Brown and Meg Whitman. After Governor Brown was elected, the debate shifted towards maintaining defined benefits but keeping pensions costs manageable. One way included lowering the benefit formula dramatically for new employees (hired after January 1, 2013). Another way included addressing some of the areas in which pension reform advocates rallied against perceived abuses. This put the Air-Time benefit squarely in the crosshairs.

The case that was just decided was brought by a firefighters’ union known as Cal Fire 2881 (“Cal Fire”). They filed a petition in court against CalPERS to try to block the implementation of the Pension Reform Law’s elimination of the Air-Time benefit. They argued that the opportunity to purchase ARS credit was a vested right protected by the contract clause of the California Constitution, and that eliminating the benefit unlawfully impaired that vested right. The lower court ruled that the opportunity to purchase ARS credit was *not* protected by the Constitution, and even if it were, its elimination by the State Legislature in 2013 was “a permissible modification to the pension plan” because it was “materially related to the theory and successful operation of a pension system.”

The California Supreme Court reviewed the case to consider two issues: (1) is the opportunity to purchase ARS credit a “vested right” protected by the Constitution’s contract clause; and (2) if ARS credit is constitutionally protected, does the Legislature’s elimination of the benefit in PEPR amount to an unconstitutional impairment of public employees’ vested rights. The Supreme Court agreed with the lower court on the first issue, that the ARS credit was not a vested right. The Court therefore didn’t weigh in on the latter issue, including what the lower court meant by a “permissible modification” and “materially related to the theory and successful operation of a pension system.”

The Supreme Court’s decision explained that a constitutional right is endowed upon a public employee when:

- The statute or ordinance establishing a benefit of employment and the circumstances of its enactment clearly show an intent by the relevant legislative body to create contractual rights; or
- When, in the absence of a clear legislative intent to create such a right, contractual rights are implied as a result of the nature of the employment benefit.

The Court concluded that the right to purchase ARS credit was not constitutionally protected because there was no indication in the language of the 2003 law that the legislature intended to create contractual rights. Unlike core pension rights, the opportunity to purchase ARS credit was not granted to public employees as deferred compensation for their work. In the absence of any constitutional protection, the legislature was free to modify or eliminate the right to purchase ARS credit, as it did in 2013, when PEPRA took effect. Notably, the Court declined to modify or abandon the long-standing “California Rule,” which holds that vested pension benefits cannot be altered. In the end, the California Supreme Court upheld the elimination of the ARS credit – meaning that pension calculations will be based on actual years worked – without opening the door for future laws or judicial decisions that would allow for cuts to core pension rights. The case is *Cal Fire Local 2881 v. CalPERS*, S239958 (March 4, 2019).

Whether core pension rights are still protected under the California Rule will likely be decided by two other cases currently pending before the California Supreme Court. One is *Marin Association of Public Employees v. Marin County Employees’ Retirement Association*, S237460. The other is *Alameda County Deputy Sheriff’s Association v. Alameda County Employees’ Retirement Association*, S247095. The Appellate Court in the *Marin County* case held that public employees do not have a “vested right” to a pension, but a right only to a “reasonable” pension that is “not an immutable entitlement to the most optimal formula for calculating the pension.” The *Alameda County* case concerns whether the Pension Reform law may be constitutionally applied to certain county retirement plan systems, and specifically whether it can impair benefits for members who were hired prior to the law’s effective date (known as legacy members).

The *Alameda County*, *Marin County*, and *Cal Fire* cases are a trilogy of blockbuster cases before the California Supreme Court. Combined, the decisions could affect all public employees statewide. The main question going forward after the *Cal Fire* case is to what extent the California Supreme Court will allow state laws to impair existing pension benefits, particularly for individuals who are employed by a public agency at the time a

reform law takes effect. The cases concern not only the validity of the Pension Reform Law of 2013, but other state pension reform laws that could be enacted in the future.

Given the longstanding judicial precedent supporting the California Rule, the most likely outcome is that courts will continue to protect core pension rights from legislative impairment, as they did in this case. But what exactly is “vested,” and what constitutes “core pension rights” remains to be determined. The key question in the *Alameda County* and *Marin County* cases is how far the Court will go in delineating the scope of what pension benefits are protected and what benefits may be modified by future laws.

## **News Release - CPI Increases!**

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation. Here’s a look at this month’s figures:

- 1.5% - CPI for All Urban Consumers (CPI-U) Nationally
- 2.4% - CPI-U for the West Region
- 2.5% - CPI-U for the Los Angeles Area
- 3.0% - CPI-U for the Riverside Area
- 2.6% - CPI-U for San Diego Area
- 3.5% - CPI-U for San Francisco Bay Area

## **Questions & Answers about Your Job**

*Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.*

**Question:** Our Agency just provided some “clarification” about their drug testing policy. They do pre-employment, reasonable suspicion, and post-accident testing. Prohibited acts include working while under the

influence of “mind altering chemicals (including marijuana, whether or not the employee maintains a prescription for the same).” Employees violate the policy if they are “under the influence” during work hours “regardless of when

**or where the substance entered the employee's system." The recent clarification is regarding CBD oils and creams that can result in a positive drug test. They claim the DOT says that CBD oil/creams can sometimes result in a positive test for marijuana, that there is some THC in the oil, and that DOT prohibits use of these products. The Agency says they treat this as a positive test under their policy, which is in accordance with DOT guidance. What can we do about this? Most of us have Class A licenses and/or drive an Agency vehicle for work. Prohibiting the use of these products, which don't cause impairment, while on non-work time, is too invasive into an employee's privacy.**

**Answer:** The unsatisfying answer is – probably not much. Although marijuana and cannabis-derived compounds have been decriminalized at the state level, federal law still considers them a Schedule-I prohibited substance (on the same list as heroin). That means that federal agencies like the DOT will consider a positive test for marijuana to be as disqualifying as one for heroin. That's not something your Agency has the power to change. If you or your coworkers must have Class A licenses for your job, you might be stuck with these rules until federal drug policy changes. Even if a Class A license is not required, it still may be challenging to get the Agency to change its policy. This is because

federal grants are often conditioned on having a "drug free workplace" and failing to do so may cost the Agency a lot of grant money. With that said, if your agency does not get federal grant money, and your job does not require a Class A or B license, you may be able to negotiate a change in the policy to allow for consumption of CBD oils. It's ultimately up to you to decide whether the risks of losing your employment based on trace amounts of CBD triggering a positive test is worth abandoning use of the products.

**Question: The Agency just installed new additional security cameras. They can now monitor us the whole entire time we're at work. We also believe they're using the original cameras, which are still up, for purposes that weren't originally intended. Is this invasion of privacy? Do we have any recourse? It didn't seem that intrusive at first, but these trends are very disturbing.**

**Answer:** It is understandable that you would feel your privacy was invaded. The law allows an employer to install new equipment, so those new cameras are probably there to stay, but your Association can have a say in how those cameras are used, at least to the extent that it affects your employment. When new equipment is introduced your Association can demand to meet and confer about its impact. That includes who gets to see the camera feeds, under what circumstances, and what the

recordings are used for (e.g. discipline). You just need to make sure you don't delay – if you don't demand to meet and confer within 6 months of the new equipment being installed you may lose your opportunity to negotiate changes. Get in touch with your professional staff to help you with this process.

**Question: One of our colleagues retired and now our Agency is saying they are going to hire two part time employees to backfill the position. They've also said they can work them each 39 hours per week because they have an exclusion with the pension system that says they are exempt from the 1,000-hour rule. Is this legal? Can we challenge this? We used to have a lot more members, but the number has shrunk considerably in the last decade. We're concerned about membership numbers going forward.**

**Answer:** This is a common trend these days. Ordinarily a part time employee can't work more than 1000 hours in a year before they must be enrolled in the PERS system, but some Agencies have exemptions from this rule. It's possible to call PERS to check if your Agency really does have such an exemption. If so, working the part time employees above 1000 hours is probably legal.

There are a few things you might be able to do about this situation despite that exemption. First, you can ask PERS to

consider withdrawing the exemption. In the past, the exemptions were easier to get. But rules have gotten tighter since and it could be that, once PERS looks at the situation again, it changes its mind. You may also be able to challenge the Agency's decision to transfer bargaining unit work as an erosion of your Association's bargaining unit.

Erosion of the bargaining unit happens when work performed exclusively by members of your Association's bargaining unit is transferred to others, including part timers. Generic stuff like 'filing' or 'answering phone calls' probably wouldn't qualify but something specific like 'evidence control' or 'maintaining park paths' would (so long as no one else is also doing that as part of their job duties). Your professional staff can help you figure out if you have an erosion case and, if so, help file an Unfair Practice Charge at the Public Employment Relations Board.

**Question: We don't have any faith in our current top Management. They're relatively new here and don't have much respect for how things have been done in the past. The Agency used to be a good place to work. They no longer value us workers who have been here for years or in some cases decades. They play favorites with new Department heads that they hired and know from other agencies. They don't listen to us and are completely insulated from the**

**actual work that goes on here. We want to do a vote of no confidence and send a letter to the elected officials to let them know. Is this a good idea? What can we hope to achieve? What are the downsides? How can we fix this?**

**Answer:** Votes of no confidence are tricky and are more likely to cause more blowback than positive results. That's because the vote itself doesn't have any legal effect, but it is also an aggressive (and public) step against management. That's likely to anger them and may even result in your elected officials siding more strongly with management because they feel the employees are attacking them. This doesn't mean they're always a bad idea, but you'll probably be better off saving such a move for later, once you've exhausted other ways to make the situation better.

There's likely no single action that you can do which will get elected officials to act, or management to change how they're managing. Steady pressure is likely to yield better results. One place to start is asking to talk with upper management to see what their perspective is and if they're willing to start changing how they act. If that doesn't work, talking to your elected officials is a good next step. You can ask to meet with them individually (the Brown Act makes some meetings with more than one elected official inappropriate) and discuss the situation,

or even send a letter to them (minus the no confidence vote). Furthermore, you can file grievances if the new management's actions are violating your MOU. You can also try and address it in labor management meetings. If none of that changes management's behavior, a vote of no confidence might get the elected officials' attention. The best outcome is that they care enough about employees' confidence in management to rein the new folks in. To make it less likely they see this as just a rebellion against new managers, document well the policies or practices you feel lessen your agency's ability to serve the public.

**Question: We have a big homelessness problem in our community. Our HR Director has informed us that the Agency wants to reclassify a vacant position and upgrade it in title, job specs and pay. She says they're proposing this after reviewing the workload for the division (housing) and the additional focus this newly reclassified position will have on homeless issues. She believes there are additional tasks that the position would do, but the work is more appropriate for a higher classification. Both positions are in our Association and she sent us the classification specifications. Before they get approval for the position, including the pay, she wants to know if we are good with it. What should we do?**

**Answer:** You should ask for more information. It sounds like this is a necessary position which will pay more, so it is probably a good thing overall, but you want to make sure that you're not approving something before you know if the pay is fair for the duties the position will perform. The Agency has a duty to meet and confer with your Association before creating and staffing a new position. This is your opportunity to ask for changes in things like job specs, duties, and pay, so you want to make

sure you don't approve anything blindly. Ask your Agency to send you the proposed pay for the position, then discuss the proposal with those members of your Association who are familiar with similar jobs to see if what the Agency is proposing is fair. Once you understand what the Agency is proposing and how your members feel about it, then share those concerns with management and, if necessary, schedule a meeting to resolve the details of the new position.

### ***Is Alcoholism a "Workplace Disability"?***

Legally-speaking, under the federal Americans with Disabilities Act (ADA) or the state California Fair Employment and Housing Act (FEHA), alcoholism may be recognized as a disability, triggering requirements to provide workplace accommodation. If an alcoholic is otherwise able to perform the essential functions of the job, he or she may request a "reasonable accommodation." This might be a modified work schedule to attend AA meetings, or unpaid leave for a stay at a residential detox center. The employer may be required to provide such accommodation unless doing so is an "undue burden."

This does NOT mean that the employer must allow an employee who is under the influence to remain at work, or that alcoholic employees are protected from discipline (especially if under the influence on-the-job). Legal decisions concerning individuals with "substance-related" illnesses are complex. But it is clear the employer is not required to tolerate poor performance or misconduct from an alcoholic employee -- particularly if the employer would punish other employees who are not disabled for the same misconduct. If alcohol use adversely affects job performance, contributes to misconduct, or results in mistreatment of others on-the-job, an individual's status as "disabled" won't shield them from discipline unless the employer is using the disease to treat the worker more harshly than a non-alcoholic employee for the same or similar conduct.