Glendale City Employees Association

September 2020 News

California Supreme Court Upholds the "California Rule" Again and Protects Core Pension Benefits from Legislative Attack

On July 30, 2020, the California Supreme Court issued a landmark ruling in *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* (2020) S247095 ("*Alameda*"). This is one of a trilogy of blockbuster cases about whether the Public Employees' Pension Reform Act of 2013 ("PEPRA") could impair California public employees' vested retirement benefits. Although the Sheriff's union lost the case, and the Court upheld the PEPRA reforms, the most important takeaway is that the Court decided *not* to overturn the long-standing "California Rule."

The California Rule protects vested pension benefits from being altered. Overturning the California Rule would have dealt a big blow to public employee pension rights, opening the door for subsequent laws or cases to gut core pension rights in the future. A key issue in *Alameda* was whether the PEPRA could be constitutionally applied to certain county retirement plan systems, and specifically whether it can impair benefits for members who were hired before the law's effective date (known as "legacy members"). The Court said that it could, but it did so without overturning or seriously undermining the California Rule going forward. California public employees dodged a legal bullet!

The other two cases of the trilogy are the *Marin Association of Public Employees v. Marin County Employees' Retirement Association*, S237460 ("*Marin*"), and *Cal Fire Local 2881 v. CalPERS* (2019) S239958 ("*Cal Fire*"). The *Marin* case is still pending before the California Supreme Court. At issue is whether public employees have a vested right to a specific pension formula, or only to a "reasonable" pension formula. The *Cal Fire* case was decided on March 4, 2019. It upheld a PEPRA provision that eliminated an employee's ability to purchase additional retirement service credit known as "airtime." The airtime benefit, if purchased, boosted an employee's benefit payments during retirement. The Court held that eliminating the ability for current employees to buy airtime if they had not already done so when PEPRA took effect was constitutional. As with the *Alameda* case, the Court in *Cal Fire* reached their result without overturning the California Rule.

In *Alameda*, the Sheriff's union sued the County Retirement board over PEPRA reforms that changed what counts as "compensation earnable." Here, the County, not CalPERS, maintained the union's pension benefits. The County Employees Retirement Law of 1937 ("CERL") governs pension systems maintained by the counties. Under the CERL, the amount of an employee's pension benefit is determined based on a percentage of the compensation earnable received by the employee during a representative year of county employment. In this case, the PEPRA provision had amended CERL's definition of compensation earnable to exclude various types of compensation which had boosted compensation earnable and therefore increased pension payouts in retirement. Reformers characterized this as "pension-spiking" and lobbied for the enactment of the PEPRA to fix this perceived abuse.

But the key dispute was not whether this was constitutional – both sides agreed that it was, at least for new employees. The fight was whether it could be applied retroactively to "legacy employees" defined as those employed by, but not yet retired from, the county as of the effective date of the PEPRA. The union argued that legacy employees have a constitutional right to receive pension benefits calculated according to the law as it existed prior to the PEPRA. They relied on the California Rule, rooted in the contract clause of the state Constitution, which requires any modification of public employee pension plans to satisfy a legal standard set forth most notably in *Allen v. City of Long Beach* (1955) 45 Cal.2d 128. The Court in *Alameda County* described that test as follows:

- Does the modification impose disadvantages on affected employees, relative to the preexisting pension plan?
- If so, are those disadvantages accompanied by comparable new advantages?

- If not, is the agency's purpose in making the changes sufficient, for constitutional purposes, to justify an impairment of pension rights?
    - Public employee pension plans "may be modified for the purpose of keeping the pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system."
- If so, do the changes bear some material relation to the theory of a pension system and its successful operation?
- If so, would providing comparable new advantages to public employees undermine or be inconsistent with that proper purpose?

Alameda County, at pp 4-5. The Court applied that test and concluded that the PEPRA reforms changing what counts as compensation earnable met contract clause requirements. They were enacted for the constitutionally permissible purpose of closing loopholes and preventing abuse of the pension system in a manner consistent with CERL's preexisting structure. The union wanted the Court to interpret the California Rule to require county pension plans either to maintain these loopholes for existing employees or to provide comparable new pension benefits. But the Court refused, saying that doing so "would perpetuate the unwarranted advantages provided by these loopholes." In other words, the Court found that providing comparable new advantages to public employees would undermine or be inconsistent with the agency's purpose.

Sounds confusing enough. But know that, in many ways, the lack of a clear bright line test is what ultimately saved the California Rule. The Court essentially just tinkered at the edges of the Rule, using an opaque and complicated legal analysis to reach their desired result, without discarding the rule altogether, as many reform advocates had hoped. Although it is not as "iron-clad" as before, the California Rule survives yet another challenge and will continue to present a real obstacle to those who want to undermine the hard earned pensions that public employees have paid for and deserve.

Conclusion: The *Alameda*, *Marin*, and *Cal Fire* cases affect public employees statewide. The main question in *Marin* is to what extent can state laws impair core pension benefits – such as the retirement formula itself, not just "enhancements" that either boost service credit or increase pensionable compensation. Together, the impact of these cases extends beyond the validity of the PEPRA to other state pension reform laws yet to be enacted. Given the longstanding judicial precedent supporting the California Rule, *Marin's* most likely outcome is that the Court will continue to protect core pension rights from a legislative attack, as they did in both *Alameda* and *Cal Fire*. It would seem like the California Rule is here to stay! And that's good news for public employees statewide.

Cal-OSHA Sets New Guidelines for

Workplace Health and Safety During COVID-19

California's Occupational Safety and Health Administration (Cal-OSHA) has created COVID-19 guidance documents covering more than 30 industries so that employers can effectively protect and train their workers.

"Protecting employees from workplace hazards is not only required by law, it is also the right thing to do and an essential part of stopping the spread of the virus," said Cal-OSHA Chief Doug Parker.

These guidelines mandate that employers implement ways to protect workers from hazards, including such issues as COVID-19. Employers must take the following steps:

- Modify the worksite so that employees are at least six feet apart or install barriers when that distance is not possible.
- Provide workers with enough time and supplies to disinfect commonly used surfaces and spaces.
- Encourage workers to wash their hands in accordance with federal guidelines and provide them with enough time and supplies to do so properly.
- Provide employees with cloth face coverings or allow them to use their own. Employees should be reimbursed for the cost of buying their own masks if masks are not provided.
- Screen workers for COVID-19 symptoms before each work shift and recommend that they stay home if they feel sick.
- Advise employees of their sick-leave benefits.
- Employees and visitors should always wear face coverings. If the work is moved outdoors, other possible safety hazards such as heat-related illnesses or insufficient lighting must be considered.

In addition to these guidelines, California's Department of Industrial Relations recommends that the following measures be included in an employer's written Injury and Illness Protection Program:

- Make sure that workers who are out sick with a fever or acute respiratory symptoms don't return to the job until at least three days pass without fever (without using fever reducing medications) or respiratory symptoms, and at least ten days have passed since symptoms first appeared.
- Encourage employees to work remotely when possible.
- Practice physical distancing by cancelling in-person meetings and using video or teleconferencing instead.
- Avoid shared work items (phones, computers, etc.) when possible.

Workplaces should be as safe as possible. "When confronted with such an unprecedented hazard as COVID-19, that necessity rises to a new level," says Sherry Grant, workers compensation attorney with the law firm of Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, LLP (GEK). "It is imperative that employers conform to the guidelines outlined by Cal-OSHA, and it is equally as important that employees know what their rights are when it comes to a safe work environment."

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: I have two school-aged children. I just heard that our schools are closing for in-person classes to start the fall term. I do not know how long this will last. School resumes this month but entirely by remote learning. The kids will attend through video conferencing at home during normal school hours. This is a real hardship. My husband and I both work outside the home. Due to COVID, we do not have anyone to watch them during the school day while we are at work. We cannot be the only ones in this situation. What can we do? How are other agencies handling this? My husband has continued to work onsite through the pandemic. My agency allowed me to telecommute in the spring. I have been physically back at work since early June. Neither one of us can afford to stop working or pay to home-school our kids.

Answer: This is a tough situation. You are one of thousands of parents who are facing these challenges in the fall. There are a few things you and your Association ought to explore. First, request to telecommute. Most telecommuting policies were temporary, but if you telecommuted in the spring, it is at least

theoretically possible for you to do so again. If that does not work, talk with the Agency and suggest setting up programs to supervise kids while they learn remotely. Some agencies have set up programs like this for kids of their staff and in some instances for families in the community. A few are going further and exploring partnering with their local school districts to provide trained teachers to supervise these activities.

There are a couple of provisions of the COVID leave law (the FFCRA) that might also help. If your children's schools and childcare will be closed, you are probably eligible for COVID Childcare Leave. This gives you 2/3 of your pay for ten weeks (assuming you have not already used more than two weeks of FMLA leave). This is a benefit you are likely eligible for once distant learning resumes. The other thing to consider is intermittent childcare leave. The FFCRA says that your employer may, but does not have to, let you use childcare leave for parts of a day. So, if you need to watch your child until noon and work in the afternoon, you would be able to do that and use only ½ a day of FFCRA leave. Ask that your Agency allow you to use FFCRA leave intermittently and you may be able to get that leave to stretch even further.

Some agencies are exploring all these options and more – including more flexibility in start or end times, or a separate bank of leave for employees to draw from. But until there is a more permanent universal fix, these are options that may be available to you right now to help you see this through.

Question: I tested positive for COVID-19. I contracted the disease off-work. I told the Agency and they directed me to self-quarantine. I have exhausted the FFCRA Emergency Sick Leave. They are charging my own leave accruals now while I continue to self-isolate. I feel like I am ready to return to work. I have not been showing symptoms. When I contacted HR, they said their lawyer has told them I must get two negative COVID tests within 24 hours of each other before they will return me to work. The testing sites are backlogged, and I am not sure when I will be able to get one test, much less two, much less two within 24 hours of each other. Also, the results are running 5 – 7 days behind. So even if I do get two negative tests within 24 hours, by the time I get the results, it is pointless. Can they do this to me? I am not trying to get anyone sick, but this seems like an overreach and that my rights are being violated.

Answer: The answer is it depends. As to your first question – "can they prevent me from returning to work" – the general rule is that the employer can keep you off work if they have reason to think you are sick. You can return once you give them a doctor's note that clears you for work. If the employer has reason to dispute your

note, they can send you for a fitness for duty exam (and keep you off work if *that* shows you are still sick) but they must pay for it and for the time you are ready, willing, and able to work, until a doctor says otherwise. With COVID, many employers have tried to depart from the general fitness-for-duty rule. They probably cannot do that without creating a formal policy, so if no policy exists, you might insist that a doctor's note is enough to allow you back to work. This is likely to be a contentious conversation, so contact professional staff for help.

As to your second question – "can they force me to use my own leave time" – the answer is probably no, at least not without your consent. This will depend on whether they have written policies in place – such as on the FMLA – that allow the agency to deduct leave accruals for eligible time off. Assuming they do not, know that most employees will elect to use their own leave rather than go into an unpaid status, which might happen if you are really out of FFCRA Leave and don't elect to use your own leave to cover your absences.

Most importantly, though, it sounds like your employer was following an outdated CDC guideline when it required you to get 2 negative tests. As mentioned in the Cal-OSHA article above, if you were symptomatic, you can return once at least three days have passed without fever (without taking fever reducers) or respiratory symptoms, your other symptoms improved, and at least ten days have passed from the first onset of symptoms. If you never developed symptoms, but tested positive, you can return after 10 days since the positive test. Communicate these new guidelines to your employer; they may let you back just due to these updated guidelines.

Ultimately, there should be a written policy so that everyone knows what to expect. If your employer has not provided one, contact your Association leaders. They can meet and confer over one that is less arbitrary and that better balances your interest in quickly returning to work while also keeping the workforce safe. Professional staff can help here too since they have seen a lot of different policies on this. Let your Association leaders know that you have encountered this problem so they can address it for both you and others.

Question: Several of us are required to attend Commission meetings, typically held twice a month. They are held after work starting at 7 pm and can last an hour or sometimes we are there until 10 pm or later. We have always received either comp time or overtime, as our workday starts at 7:30 am. Now with the cashflow problem they are undergoing, our manager is telling us that they will no longer pay comp or overtime, but that we will need to adjust our work schedule that day and

come in later so that the hours we work at the evening meeting are on regular time. This sounds very wrong to us. Comp and overtime are perks in our MOU. I do not think they can take that away, particularly before the new budget is adopted. I do not think they can change our work schedules to avoid OT either, can they? Can you advise us?

Answer: They cannot change your work*week* to avoid paying overtime, but changing schedules is generally a management right. Your workweek under the Fair Labor Standards Act ("FLSA") is the basis for calculating when you have hit 40 hours and start earning overtime. That is generally something like Sunday at 12:00 am until Saturday at 11:59 pm. What your employer *cannot* do is switch that to avoid paying overtime. For example, if you have worked 40 hours Mon-Fri and they ask you to come in for eight more on Saturday, they cannot say that your FLSA workweek now runs Saturday-Friday to avoid paying you overtime for the eight hours they are asking you to work on Saturday.

Work schedules are a different matter. It could be that sometimes your employer needs you to start at 7:30 am and other days to start later. Management is usually allowed to set such schedules. But in some union contracts, they must give you notice before they change it. They also cannot cut your hours to the point where you stop being a full-time employee. But if it is just a question of starting and ending work at a different time on a certain day, your employer can probably insist that you do it.

Keep in mind that your negotiated MOU terms are more ironclad. If your MOU requires notice before your schedule can be changed, you can file a grievance if management does not provide it. If your MOU guarantees you the 7:30 am start time, management cannot change it without your Association's agreement. Management also cannot say that overtime or comp time provisions do not apply. It sounds like your manager is saying that you need to flex your schedule so that the comp time provision is not triggered. If so, management can probably do this unless your start time is fixed in the MOU. But they cannot refuse to pay overtime or comp time if you work over 40 hours in the FLSA workweek.

Question: If staff will be sent home again to work remotely, can a department head (or even a City Council person) mandate images of an employee's private work space at home, in effect, to "prove" in some way that s/he is legitimately conducting City business? Off hand, it seems like a potential government invasion of privacy. I appreciate your guidance.

Answer: No, this is not something the City should be mandating. Management

can inquire whether you have the necessary equipment to perform the work, including any software or security, and they can ask about how you have spent your work time when working remotely. But if you are not having any productivity issues, and you are performing adequately, there is probably not any reason for the City to request images of your remote workstation. It is also not likely that the City would ever ask for this. There does not seem to be a nexus between what any specific image may show and how the work is being performed. The City is much more likely to assess at the outset whether the work itself is something that can be done remotely and to reassess this if/when it appears that it is not working.

The City also needs to provide the employee with the necessary equipment. Having photo images that prove the City has not done this is not wise from a risk-management perspective. Images may also show that the workstation was unsafe, or the cause of a later injury (e.g., carpal tunnel), which could mean the City is liable for workers compensation.

In any event, contact your Association and professional staff if you hear the City is seriously considering this. They can negotiate with the City over a written policy that clarifies the purpose and scope of any "imaging" requirement for remote work, as well as to safeguard your privacy in any non-work areas of your home. The goal should be to address concerns that management may have about equipment or productivity, while still allowing staff to work remotely, and to do so without sacrificing your privacy.

Question: I know that we would want the City to check temperatures, but is there a requirement? I ask this question because some of us are concerned about mechanics who work as contractors at our City Yard. Apparently, these contractors are permitted to administer a temperature check themselves before coming to work even though each employee and visitor has their temperature checked before entering each City facility. One of the contract mechanics tested positive so some employees are concerned. I reached out to HR asking if the City could start taking their temperatures. HR declined. One of the documents the City sent out for re-opening showed that the temperature check was a CDC guideline but when I look it up, it shows that it is optional. Is that true? Please let me know. I appreciate your input.

Answer: You are right – temperature checks are CDC guidelines. This means that, although the CDC does not require them, they believe it is the best practice for keeping everyone safe. In other words, it is highly recommended. As far as state and federal laws are concerned, there is no requirement that everyone

must have their temperature checked before entering a City facility. But look at the rules in your City. Many have instituted temperature-check policies and your City may be one of them. Also, ask your Association leadership if it has met and conferred with the City about the temperature check rules. If not, they might propose a policy that applies the rules more broadly to cover contractors.

Ultimately, it is the City's decision. It can, but is not required to, temperature check everyone coming into City facilities, and it can exempt certain folks like contractors from that requirement. As a practical matter, you are right to be concerned that the City is not taking the necessary safety precautions. It seems silly to require this for some and not for others. If the checks help keep people safe, why not do them universally? And if they don't, why do them at all? Most agencies seem to be moving toward uniform testing to stay on the safe side.

Your City may need a push to help it see the need to do that. From a risk management standpoint, it really is a no-brainer to do temperature checks – for anyone accessing City facilities – even if it is not technically "required" by the CDC. Get in touch with your Association's leadership to help start a conversation with the City about how best to keep employees, citizens, and visitors safe.