

**RESOLUTION OF THE BOARD OF RETIREMENT OF
VENTURA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION
REGARDING *ALAMEDA* IMPLEMENTATION TO COMPENSATION EARNABLE
AND PENSIONABLE COMPENSATION**

WHEREAS, the Ventura County Employees' Retirement Association ("VCERA") and the VCERA Board of Retirement ("Board") are governed by the County Employees Retirement Law of 1937 (Gov. Code sections 31450, et seq. ("CERL")) and the Public Employees' Pension Reform Act of 2013 (Gov. Code sections 7522, et seq.), enacted by Assembly Bill 340 (regular session 2011-2012), effective January 1, 2013 ("PEPRA").

WHEREAS, by Resolution adopted on November 17, 2014, the Board implemented PEPRA's provisions regarding the determination of "pensionable compensation" in Government Code section 7522.34 ("Pensionable Compensation"), which applies to VCERA members for their service rendered on or after January 1, 2013 as "new members" under Government Code section 7522.04(f) of PEPRA ("New Member" or "PEPRA Members") ("Pensionable Compensation Resolution").

WHEREAS, the Pensionable Compensation Resolution includes a reservation of rights to change any particular determination it makes on the bases set forth therein and that reservation of rights applies to this *Alameda* Implementation Resolution as well.

WHEREAS, the Board is required by Government Code sections 31460, 31461 and 31542, to determine *compensation* and *compensation earnable* for those VCERA members ("legacy members") who are not PEPRA Members and is required by Government Code sections 31460, 31542, and 7522.34, to determine *compensation* and *pensionable compensation* for those individuals who are PEPRA members.

WHEREAS, the Board has taken numerous prior actions to implement pensionable compensation to PEPRA members as anticipated by the Pensionable Compensation Resolution, but the Board has postponed applying Assembly Bill 197 (2012-2013) ("AB 197"), as it amended section 31461 ("PEPRA Exclusions"), because it was awaiting the outcome of pending litigation against other CERL retirement systems who had implemented the PEPRA Exclusions ("AB 197 Litigation").

WHEREAS, on July 30, 2020, the California Supreme Court filed its decision in the AB 197 Litigation, in a decision entitled *Alameda County Deputy Sheriff's Assoc. et al., v. Alameda County Employees' Retirement Assn., et al.* (2020) 9 Cal.5th 1032 (the "*Alameda Decision*"). The *Alameda Decision* concludes that all amendments to the definition of compensation earnable in Government Code section 31461, enacted as a result of the PEPRA and related statutory changes to CERL (PEPRA Exclusions), effective January 1, 2013 are constitutional, and that CERL retirement boards may not be contractually bound or estopped by settlement agreements, board resolutions, or other similar actions, from implementing those amendments. The *Alameda Decision* further determines that CERL retirement boards may not include items in retirement allowance calculations, either compensation earnable under section 31461, as amended, or pensionable compensation under section 7522.34, that the applicable statutes require them to

exclude. As used herein, the term “PEPRA Exclusions” shall refer to any payments that are not permitted by subdivision (b)(2), (3) or (4) of Government Code section 31461 to be included in “compensation earnable,” or by subdivision (c) of Government Code section 7522 to be included in “pensionable compensation,” including, among other items, payments received by the member for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

WHEREAS, the *Alameda* Decision also held that CERL retirement boards have no discretion to include pay items in retirement allowance calculations that are excluded under CERL, PEPRA, or other applicable statutes even without the enactment of PEPRA (“*Alameda* Exclusions), disapproving of statements to the contrary in footnote no. 6 of *Guelfi v. Marin County Employees’ Retirement Assn.* (1983) 145 Cal.App.3d 297 (“*Guelfi* footnote 6”).

WHEREAS, the Board hereby determines that the *Alameda* Decision and other applicable law require it to change its determinations of certain pay codes for either compensation earnable, pensionable compensation, or both, as resolved below.

WHEREAS, this Resolution is intended to comply with the requirements of the Internal Revenue Code of 1986, as amended or replaced from time to time and the regulations issued thereunder (the “Code”) as applicable.

NOW, THEREFORE BE IT RESOLVED, by the VCERA Board of Retirement declares the following:

1. The foregoing Recitals are incorporated herein by this reference.
2. VCERA shall comply with *Alameda*’s directives regarding mandatorily excluded pay items, which includes the PEPRA Exclusions, and apply that directive to all retiree payroll for individuals who retire on or after January 1, 2013 (including those who will retire on or after the date of this Resolution), effective with the first retiree payroll occurring after *Alameda*, that is, as of the VCERA retiree payroll on August 31, 2020;
3. VCERA shall comply with *Alameda*’s directives regarding the Board’s lack of authority to include the *Alameda* Exclusions in compensation and compensation earnable. To the extent, in contravention of *Alameda*, VCERA currently includes any benefits that members may not receive in cash and therefore that are not “compensation” under Government Code section 31460 (e.g., all portions of Flex Credit that *may not be provided to members in cash* under a participating employer’s rules applicable during the pertinent time period) (“in-kind benefits” as described in *In re Retirement Cases* (2003) 110 Cal.App.4th 426), apply that directive to all retiree payroll for individuals who retire on or after July 30, 2020, when the Supreme Court overturned *Guelfi* footnote 6 and VCERA was thus on notice of that statement of law (including those who will retire on or after the date of this Resolution); provided, however, in light of pending litigation over the legality of certain “opt-out fees” currently required by the County of Ventura (“County”) (see *Sanders v. County of Ventura* (U.S.D.C., Central District of California, Case No. 2:19-cv-06370-MWF-E) (“*Sanders v. County* litigation)), implementation of this provision to Flex Credit will occur as described further in paragraphs 6 and 9 below.

4. With respect to overpayments that occurred prior to the August 31, 2020 payroll, VCERA shall not recoup those amounts related to PEPRA Exclusions from retirees unless directed to do so by the Internal Revenue Service and/or a final, non-appealable, order of a court of competent jurisdiction (any overpayments made on and after the August 31, 2020 payroll would be recouped).

5. VCERA shall make a corrective distribution (which may include interest) on the overpaid contributions reported on PEPRA Exclusions to retirees: (i) if such retirees were in active member service anytime on or after January 1, 2013; and (ii) to the extent the member's contributions exceed any retirement benefit payments that were based on the PEPRA Exclusions. In the event no contributions associated with the PEPRA Exclusions remain for a retiree, no corrective distribution of contributions shall be made.

6. Subject to a final court determination in *Sanders v. County*, or other determination acceptable to the VCERA Board, that opt-out fees are lawful such that those amounts (or mandatory minimum insurance coverage as discussed in paragraph 9 below, whichever is lower) constitute in-kind benefits to members because they may not be received in cash directly by the member ("Opt-Out Fee Legality Determination"), VCERA shall also make a corrective distribution (which may include interest) to active and deferred members of contributions that they made on in-kind benefits that constitute *Alameda* Exclusions (provided such members did not retire before July 30, 2020 and therefore will not have the *Alameda* Exclusions included in the calculation of their retirement allowances from VCERA).

7. VCERA shall make a corrective distribution (which may include interest) to active and deferred members for employee contributions reported and or associated with PEPRA Exclusions while in active service from January 1, 2013 through the date of implementation of the corrective distribution.

8. For clarification with respect to all corrective distributions provided for in this Resolution, to the extent a particular payment is permitted to be included in compensation earnable under section 31461 so long as the timing of the payment did not result in prohibited overpayments (e.g., "straddling" of years for leave cash outs, which is a "PEPRA Exclusion"), active member contributions will continue to be taken, and will not be refunded, on those leave cash outs because they properly contribute to the payment of the member's future VCERA retirement allowance's inclusion of leave cash outs in an amount that does not exceed that which may be earned and payable in each 12-month period during the final average compensation period, regardless of when reported or paid.

9. For clarification with respect to corrective actions regarding *Alameda* Exclusions (e.g., return of contributions, collection of future contributions and determination of compensation earnable for members who retire on or after July 30, 2020), VCERA will assume that the VCERA member maximizes his or her benefit that may be received in cash directly by the member. See generally, *Hittle v. Santa Barbara County Employees' Retirement System* (1985) 39 Cal.3d 374. Further, as provided in paragraphs 3 and 6 above, VCERA shall defer the return of contributions relating to *Alameda* Exclusions until an Opt-Out Fee Legality Determination. If *Sanders v. County* determines that such opt-out fees have not been lawful, then no return of contributions will be warranted for individuals as to whom the County applies

the conclusion in *Sanders*. Further, in that instance, retirement benefits of any members who retire on or after July 30, 2020 that do not include Flex Credit that was able to be received in cash (as determined by *Sanders*) will be trued up (with interest if applicable).

10. Any amounts that VCERA is unable to collect from VCERA's active, deferred, and retired members as a result of this corrective action shall be collected instead through participating employer payments on the unfunded actuarial liability in accordance with recommendations from VCERA's actuary.

11. Present impacted pay codes as soon as practicable to the Board to ratify exclusions from compensation earnable and pensionable compensation in compliance with *Alameda*, and communicate to VCERA participating employers that member contributions are no longer to be taken on such pay codes.

12. Provide members with an opportunity to administratively appeal factual determinations VCERA makes regarding pay codes with which they may disagree (such as whether particular pay codes are for services rendered during normal working hours of members in the class or grade of the member). Gov. Code §31461(b)(3); see *Stevenson v. Board of Retirement of OCERS* (2010) 186 Cal.App.4th 498. Such appeals would occur under Code of Civil Procedure section 1085. *Shelden v. Marin Cty. Employees' Pet. Assn.* (2010) 189 Cal.App.4th 458.

13. Inform VCERA members of the foregoing actions through appropriate means; and

14. This resolution supersedes any previous resolutions for employer pay codes of employee compensation relating to compensation earnable and pensionable compensation to the extent they are inconsistent with the foregoing directives.

ADOPTED AND APPROVED by the Board of Retirement of the Ventura County Employees' Retirement Association on the 12th day of October 2020, with the exception of numbered paragraph 3, 6 and 9, the subjects of which will be addressed through an action for declaratory relief or other appropriate judicial resolution.

Arthur "Art" E. Goulet, Chair of the Board