



*Fiduciary Counsel
Comments on VCERA's
Implementation of Alameda
Decision*

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California Law – The State Constitution and the *Alameda Decision*

- Article XVI, Section 17 vests the Board with “plenary” authority over the administration of VCERA, subject to its fiduciary duties.
- On July 30, 2020, the California Supreme Court filed its decision *Alameda County Deputy Sheriff’s Assoc. et al., v. Alameda County Employees’ Retirement Assn., et al.* (2020) __ P.3d.__ (WL 4360051) (S247095) (“*Alameda*”).
- Now that *Alameda* has been decided by the highest court in California, and it interprets the law applicable to county retirement systems, VCERA is bound by its mandates.
- In *Alameda*, the Court described the fiduciary and administrative role of public retirement boards, such as VCERA’s Board of Retirement, to implement statutes governing them as those statutes are written.

California Law – The State Constitution and the *Alameda Decision*

The Supreme Court observed:

- “An understanding of the proper role of county retirement boards under CERL is critical to resolving plaintiffs’ contract and estoppel claims. Under CERL, ‘management of the retirement system is vested’ in the county retirement boards. (§ 31520.) This delegation of authority is echoed by article XVI of our Constitution, which grants to public employee retirement boards, including those operating under CERL, the ‘sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries.’”

California Law – The State Constitution and the *Alameda Decision*

The Supreme Court further noted:

- “The task of a county retirement board is not to design the county’s pension plan but to implement the design enacted by the Legislature through CERL. As noted, CERL speaks of the retirement boards as “manag[ing]” the retirement system (§ 31520), while the Constitution charges them with “administer[ing]” the system and its assets (Cal. Const., art. XVI, § 17, subd. (a)). Although CERL grants to retirement boards the power to make regulations, those regulations must be consistent with the provisions of CERL. (§ 31525 [“The board may make regulations not inconsistent with this chapter”].) The boards do not have the authority to “evade the law” that otherwise applies to their system.”

California Law- The County Employees Retirement Law of 1937 ("CERL")

- Government Code section 31461 of CERL, as amended by Assembly Bill 197 (2012-2013) ("AB 197") and the Public Employees' Pension Reform Act of 2013 (collectively, "PEPRA"), required new exclusions from "compensation earnable" that the *Alameda* Court determined were, in large part, changes in the law.
- The *Alameda* Court further determined that the new exclusions were both constitutional (thus, not a violation of legacy members' vested rights) and must be applied, even if pre-existing settlement agreements or other Board actions provided that such pay items would be included in compensation earnable, and even if active members had paid retirement contributions on those pay items.

Prior VCERA Board Actions on Compensation Earnable and Pensionable Compensation

- The VCERA Board enacted a Pensionable Compensation Resolution in November 2014, implementing PEPRA's specific rules on pensionability to PEPRA members.
- The VCERA Board postponed implementing AB 197 and continued to include a number of pay codes of legacy and PEPRA members that were required to be excluded by PEPRA, deferring further action on those pay codes until *Alameda* was decided for potential vested rights and estoppel-based considerations that derived from post-*Ventura* settlement agreements or otherwise.

The *Alameda* Decision

- *Alameda* was filed on July 30, 2020.
- *Alameda* rejected vested rights and estoppel-based concerns, including those based on post-*Ventura* settlement agreements, that dissuaded the VCERA Board from acting on PEPRA with respect to legacy and PEPRA members previously.

The *Alameda* Decision

- Significantly, the *Alameda* Court's primary conclusions were based on its analysis of the narrow questions relating to the legality of PEPRA amendments to the compensation earnable statute.
- Because those amendments were consistent with the “theory and successful operation” of a public pension system, and because requiring a “comparable new advantage” to members who were disadvantaged by the change in law would undermine the constitutionally permitted purpose of the change, the changes were upheld as a matter of both law and equity.

The *Alameda* Decision— Disapproval of *Guelfi* footnote 6

- *Alameda* also described somewhat greater restraints on CERL Boards than previously was understood with respect to inclusions in compensation earnable that statutes did not permit (e.g., the “*Guelfi* footnote 6” issue and *Alameda* Exclusions).
- In particular, the Court concluded that there was nothing in CERL’s definitions of “compensation” and “compensation earnable” that “hints either that they are intended merely to establish a minimum, rather than to serve as a comprehensive definition, or that they may be implemented at the discretion of local retirement boards.”
- This limitation on the Board’s authority to include that which is statutorily excluded also applies to PEPRA’s definition of “pensionable compensation” for PEPRA members.

Alameda Exclusions— Monetary Value of In-Kind Benefits

The Supreme Court explained:

- “There is no indication, for example, that a local board has the discretion to include the monetary value of in-kind benefits, which are expressly excluded by section 31461. Necessarily, the same is true of any other item of compensation that, even if not expressly mentioned as excluded, does not fall within the definitions. County retirement boards, as discussed above, have the ordinary authority of an administrative body to resolve, in the first instance, ambiguities in the interpretation and application of these statutes, but nothing in the text of sections 31460 and 31461 hints that the discretion extends further.”

(Emphasis added.)

VCERA Implementation of *Alameda*

- Four key questions arise:
 - To whom does *Alameda* apply?
 - As to what period of time are benefits to be corrected?
 - What about member contributions?
 - What pay items must be excluded?

Question No. 1: To Whom Does *Alameda* Apply?

- The *Alameda* Court stated:

“County retirement boards . . . have the ordinary authority of an administrative body to resolve, in the first instance, ambiguities in the interpretation and application of these statutes, but nothing in the text of sections 31460 and 31461 hints that the discretion extends further.”

(Emphasis added.)

Question No. 1: To Whom Does *Alameda* Apply? (cont.)

- The *Alameda* Court also stated:

“We assume for purposes of this analysis that the settlement agreements embodied permissible interpretations of CERL at the time they were executed. The issue here is whether the retirement boards could have agreed to *continue* to implement those interpretations despite a statutory amendment that rendered the interpretations contrary to CERL. For the reasons discussed above, such a provision would have been beyond their authority. County employees can have no express contractual right to the continued adherence to interpretations of CERL that are now, as a result of PEPRA, contrary to the statute.” (Emphasis added.)

Question No. 1:

To Whom Does *Alameda* Apply? (cont.)

- *Alameda* thus determines that PEPRA's amendments to section 31461 apply effective January 1, 2013, as written.
- The *Alameda* Court further stated: "it is the law in effect at the time of retirement that is used to calculate the amount of an employee's pension benefit." (Emphasis added.)
- There is no basis to perpetuate the erroneous construction of CERL as the Supreme Court concluded in *Alameda*, even as to currently retired members. See generally, *Retirement Cases* (2003) 110 Cal.App.4th 426 ("Retirement Cases"); *City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69 ("City v. "SDCERS").

Question No. 1: To Whom Does *Alameda* Apply? (cont.)

- Thus, as to VCERA, *Alameda*'s interpretation of PEPRA amendments to section 31461 and exclusions in section 7522.34, subd. (b) (the "PEPRA Exclusions") applies to VCERA legacy and PEPRA members who retired, and will retire, on and after January 1, 2013, because that was the statute-based law applicable to those individuals when they retired.
- However, *Alameda* Exclusions (i.e., those that are based on the judicial law first stated in *Alameda* rather than statutory exclusions first stated in PEPRA) apply to VCERA members who retired, and will retire, on and after July 30, 2020, because that was when the Supreme Court expressly disapproved *Guelfi* footnote 6.

Question No. 2: As to What Period of Time Are Retirement Benefits to Be Corrected Under *Alameda*?

- As set forth the proposed Resolution, all retirement allowances of legacy and PEPRA members who retired on and after January 1, 2013 for pay periods from July 30, 2020 forward, are to exclude all PEPRA Exclusions.
- As also set forth in the proposed Resolution, the retirement allowances of VCERA members who retire on and after July 30, 2020 are not to include the *Alameda* Exclusions.

Question No. 2: As to What Period of Time Are Retirement Benefits to Be Corrected Under *Alameda*?

- We further conclude, however, that under California law, recoupment from retirees for period preceding the *Alameda* decision is not required. *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210; *Blaser v. State Teachers' Retirement System* (2019) 37 Cal.App.5th 349.
- Tax counsel to address federal tax qualification topic regarding permissible error correction.

Question No. 3:

What About Member Contributions?

- As stated in *Alameda* footnote no. 18, it did not “address,” or thus decide, whether the return of any member contributions made on pay items that are excluded by section 31461, as amended, are warranted.
- As to member contributions taken on pay codes associated with the PEPRA Exclusions before January 1, 2013, contributions were not only permitted, they were required by CERL and PEPRA. The PEPRA amendments to CERL do not provide for a refund of such contributions. *Cf.* Gov. Code sec. 7522.74 (felony forfeiture statute provides for certain refunds of contributions).

Question No. 3: What About Member Contributions? (cont.)

- As to member contributions taken on such non-pensionable pay codes after January 1, 2013, they should be refunded to active members, in a manner that complies with federal tax law.
- As to member contributions taken on pay codes after January 1, 2013 that paid for retirement benefits that included pay items that PEPRA excluded, if those benefits are not recouped from currently retired members, they will typically fully offset the members contributions made on them.

Question No. 4: What Pay Items Must Be Excluded from Compensation Earnable Now?

- Per the Supreme Court's discussion of section 31461, as amended, PEPRA also closes certain "loopholes" such as straddling of fiscal years for leave cash outs (a PEPRA Exclusion) and inclusion of "in-kind" benefits in compensation earnable (an *Alameda* Exclusion).

Question No. 4:

What Pay Items Must Be Excluded from Compensation Earnable Now? –No “Straddling” of Years for Leave Cashout

- With respect to the annual leave cash outs, the Court concluded that the PEPRA Exclusions prohibit “straddling years” for pensionability purposes, such that more leave is included in compensation earnable than that which the member may both earn and receive in cash during “each 12-month period” of the member’s final compensation period.

Question No. 4: No “Straddling” of Years for Leave Cashout

The *Alameda* Court stated:

- “Prior to PEPRA’s amendment, even in counties that limited the amount of leave time that could be cashed out in a calendar year, employees were able to double the amount of cashed out leave time received during a final compensation year by designating a final compensation year that straddles two calendar years, for example, July 1 through June 30. By cashing out leave time in the second half of the prior calendar year and the first half of the subsequent calendar year, a retiring employee could double the amount of cashed out leave time received in the final compensation year. By limiting the inclusion of cashed out leave time to that “earned and payable” in a “12-month period,” subdivision (b)(2) and (4) prevent this practice.”

(Emphasis added.)

Question No. 4:

What Pay Items Must Be Excluded from Compensation Earnable Now?

- Mandatory exclusions are in subdivisions (b)(2), (3) and (4) of section 31461, such as:
 - “Payments for additional services rendered outside of normal working hours” must be excluded. (On-Call and Standby Type pay, as well as any differential pay on excluded over time)
 - This pay is excluded from pensionable compensation as well (Gov. Code sec. 7522.34, subd. (c)(6).)
 - Leave cashouts or buybacks in excess of what “may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid,” must be excluded. (No “straddling”)

Question No. 4: What Pay Items Must Be Excluded from Compensation Earnable Now?

- Exclusions in subdivision (b)(1)(A), (B) and (C) are more discretionary in that the Board “may” exclude such items, such as conversions to cash of in-kind benefits, one-time or ad hoc payment of benefits, and pre-termination golden handshakes.
- Discretionary, as opposed to mandatory, PEPRA Exclusions should not be applied for the first time to current retirees now as a result of *Alameda*, unless a board took such action in response to PEPRA previously and applied that action to future retirees.

Next Steps for VCERA and Its Board

- VCERA is to determine each pay code that is not to be included in compensation earnable under the PEPRA amendments and exclude those pay codes for purposes of both contribution collection and benefit payments for individuals who retired from VCERA on or after January 1, 2013.
- *Alameda* Exclusions should be applied to any member who retired on or after the date VCERA was on notice of the Supreme Court's ruling, i.e., July 30, 2020.
- The Board should adopt a Resolution Implementing the *Alameda* Decision, providing proper direction to VCERA staff on these topics.

Questions?

Thank you