

California Supreme Court Rules No Vested Right to Airtime Purchases; Leaves California Rule Intact

On March 4, 2019, the California Supreme Court ruled in *Cal Fire Local 2881 et. al. v. California Public Employees' Retirement System* that public retirement system members do not have a vested right to purchase "airtime" – nonqualified service credit unrelated to public service. Consequently, the Court did not need to address the second issue presented by the parties: whether the California Public Employees' Pension Reform Act of 2013 (PEPRA) impaired a constitutionally-protected pension right by eliminating that option.

Notably, the Court expressly declined to alter or amend the so-called "California Rule," the doctrine established in prior decisions affording public pension rights protection under the California Constitution's Contracts Clause. As a result, the High Court left the California Rule intact for the moment. Despite this, several other vested-rights cases, in particular [*Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn. and Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.*](#), are still pending in the High Court – so stay tuned.

Before PEPRA, California Government Code section 20909 permitted CalPERS members with at least five years of service to purchase up to five additional years of airtime. PEPRA eliminated this option for both classic and new public retirement system members after 2012, preserving already-purchased service credit. Cal Fire Local 2881 challenged implementation of this change by the California Public Employees' Retirement System (CalPERS) as an unconstitutional elimination of an alleged vested right. The trial court rejected Cal Fire's claim and the appellate court affirmed, upholding the constitutionality of the change.

The Court initially concluded that the Contracts Clause generally does *not* prohibit the prospective reduction or elimination of statutory terms and conditions of public employment. The Court recognized only two exceptions: (1) when the statute or the circumstances of its enactment clearly evince legislative intent to create a contract right, and (2) when certain benefits of public employees, primarily pension benefits, are protected as an implied contract right.



by Edward M. Bernard & Raymond F. Lynch



The Court found that neither section 20909 nor the circumstances of its enactment clearly showed the Legislature intended to create a contract right to purchase airtime indefinitely. The Court discussed its decision in *Retired Employees Assn. of Orange County v. County of Orange*, (2011) 52 Cal.4th 1171. In that case, the Court concluded that a county Board of Supervisors resolution approving an employment contract negotiated with unions representing county employees *could* create implied contractual rights. By contrast, section 20909's enactment did not establish any contract right upon which to ground constitutional protection.

Next, the Court considered whether the option to purchase airtime is entitled to the same constitutional protection as pension benefits. The Court distinguished a pension, a form of deferred compensation, from other benefits. Unlike other benefits, the constitutionally-protected contractual right to a future pension earned when services are performed is implied from accepting employment under a pension statute and, therefore, vests immediately. Because of this, legislative intent is unnecessary to create a vested pension right.

But the Court found that, unlike a pension, the option to purchase airtime was not deferred compensation. The decision to purchase airtime was each individual employee's to make and not based on the employee's actual service – as, once the five-year requirement was met, further service did not increase the amount of service credited. The Court was not convinced that the option to purchase airtime was constitutionally protected merely because it affected the pension amount.

While this ruling specifically concerns the constitutionality of PEPRAs elimination of airtime purchases implemented by CalPERS, it has broader implications for pension reform generally. Retirement systems and their sponsors should, therefore, work closely with counsel to assess the impact that this ruling may have on any benefit changes.

For more information, please contact:

Edward M. Bernard, Partner
415-995-5807
ebernard@hansonbridgett.com

Raymond F. Lynch, Partner
415-995-5055
rlynch@hansonbridgett.com