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# *Fiduciary Counsel Comments on KCERA's Implementation of Alameda Decision*

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Presented to the Board of Retirement of Kern County Employees' Retirement Association

August 24, 2020

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

- Article XVI, Section 17 vests the Board with “plenary” authority over the administration of KCERA, 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, KCERA is bound by its mandates.

- In *Alameda,* the Court described the fiduciary and administrative role of public retirement boards to implement statutes governing them as those statutes are written.

# California Law-
# The County Employees Retirement Law of 1937 (“CERL”)

- Government Code section 31461 of CERL, as amended by Assembly Bill 197 (2012-2013) and the Public Employees’ Pension Reform Act of 2013 (“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 KCERA Board Actions on Compensation Earnable and Pensionable Compensation

- The Board continued to include a number of pay codes of both legacy members and PEPRA members that were potentially 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 and, pursuant to applicable California Supreme Court rules, is to be final thirty days later.

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

## The *Alameda* Decision

- Significantly, the *Alameda* Court's 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.

# KCERA 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 <u>nothing in the text of sections 31460 and 31461 hints that the discretion extends further</u>.”

  (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. <u>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</u>." (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.

- 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 KCERA, *Alameda*'s interpretation of PEPRA amendments to section 31461 (the "PEPRA Exclusions") applies to KCERA legacy 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.

- *Alameda* also established that PEPRA exclusions in section 7522.34, subd. (c) also must be followed, notwithstanding KCERA's post-*Ventura* settlement agreement provisions to the contrary.

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

- Retirement benefits that KCERA pays retirees going forward are to implement PEPRA's amendments to section 31461 as well as the exclusions in subdivision (c) of section 7522.34.
- A decision will need to be made about any potential recoupment of overpayments from retirees with respect to the PEPRA exclusions.
- 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.)

- A decision will need to be made about whether and how to return contributions to active and deferred members that were taken on excluded pay items from January 1, 2013 forward, including addressing the topic as to retired members where the overpaid benefits offset the members contributions that were paid on excluded items.

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

- *Alameda* 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).

- Per the Supreme Court's discussion of section 31461, as amended, PEPRA also closes certain "loopholes" such as straddling of fiscal years for leave cashouts (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?

- Mandatory exclusions are in subdivisions (b)(2), (3) and (4),

- 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.

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

- KCERA 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 KCERA on or after January 1, 2013.

- The Board should adopt a Resolution Implementing the *Alameda* Decision, providing proper direction to KCERA staff on these topics.

# Questions?

Thank you