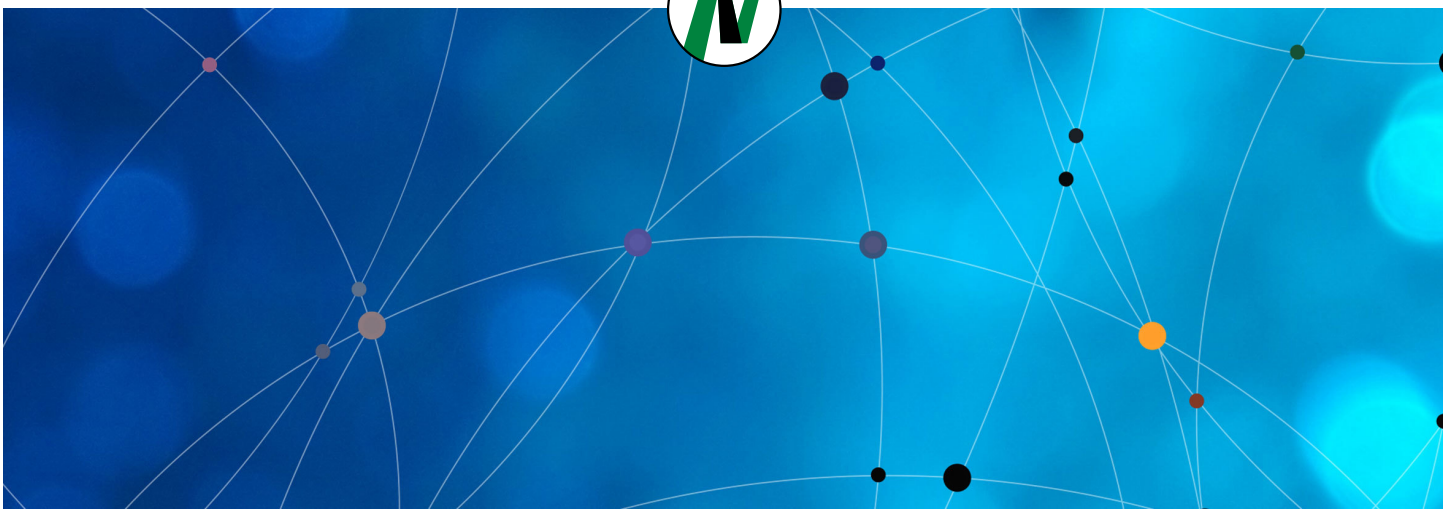

California Court of Appeal Upholds Application of PEPRA to Judges Who Were Elected Before, But Assumed Office After, PEPRA Took Effect

03.27.2018 | By Ashley K. Dunning, Peter H. Mixon

In the latest state appellate decision addressing the constitutionality of the California Public Employees' Pension Reform Act of 2013 (PEPRA) and other recent pension reform legislation, Division One of the First District Court of Appeal upheld the application of PEPRA to judges who were first elected before the legislation's January 1, 2013 effective date but who were not seated until after that date. *McGlynn, et al. v. State of California* [– Cal.App.5th – (March 20, 2018)].

The court in *McGlynn* also addressed the plaintiff judges' estoppel claims, holding that the doctrine did not preclude application of PEPRA even though the retirement system had treated the judges as non-PEPRA members for well over a year after they were seated on the bench.

This is the fifth published decision from the First District Court of Appeal regarding the constitutionality of PEPRA and other recent pension reform legislation, and in it, Division One lands firmly on the side of its colleagues in Division Two [*Marin Association of Public Employees v. MCERA* (*Marin*)] and Division Three [*Cal Fire Local 2882 v. CalPERS* (*CalFire*)] who also upheld the pension reform legislation's constitutionality on the facts addressed in those cases. Indeed, Division One in *McGlynn* addressed those decisions specifically, noting Both cases [*Cal Fire* and *Marin*] provide an excellent overview of the financial crisis facing public pension systems, and both address whether government employees have vested rights in the way in which pension benefits were previously calculated. Both cases conclude they do not. In the most recent PEPRA decision, however, Division One did not mention the other recent vested rights decisions of its colleagues in Division Four [*ACDSA v. ACERA* (*Alameda*)] and Division Five [*Protect Our Benefits v. City of*

San Francisco (*POB*)], both of which refused, either in whole or in part, to uphold the constitutionality of the challenged pension reform legislation. We have reported on each of these cases and those from other appellate districts in other E-Alerts: Alameda, POB, SJCCOA, MAPE, and CalFire.

In *McGlynn*, judges who were first elected in November 2012 claimed they are entitled to receive the pension benefits in effect at the time of their election rather than at the time they assumed office. They first argued that their pension benefit rights became vested at the time of their election, citing a long line of vested rights cases holding that rights vest upon acceptance of employment. Reviewing the specific statutory language applicable to new plan members, however, the Court of Appeal rejected these arguments. Under the provisions of PEPRA, the new benefit provisions apply to any new member – an individual who becomes a member of any public retirement system for the first time on or after January 1, 2013. (Government Code, section 7522.04(f)(1).) Because the new judges did not become members of the Judicial Retirement System until their first day in office – January 7, 2013 – the pre-PEPRA provisions of the retirement law do not apply to them. Thus, the *McGlynn* court held, these judges did not acquire any vested rights to retirement benefits provided under the prior law. The court was also careful to distinguish the decisions in several notable vested rights cases (including *Betts v. Board of Administration* (1978) 21 Cal.3d 859 and *Kern v. City of Long Beach* (1947) 29 Cal.2d 848), concluding that a public employee's pension rights vest upon commencement of actual employment – that is, going on the payroll, providing services to the employer, and making [pension] contributions, if required ….

The claimants in *McGlynn* also argued that the State was estopped from precluding them from participating in the pre-PEPRA benefits plan. Prior to taking office, state officials allegedly informed the judges that they would not be subject to PEPRA. And for more than a year after taking office, the Judges Retirement System treated the judges as exempt from PEPRA provisions. In 2014, the system changed its position, notifying the judges that they were subject to the pension reform laws and increasing their employee contributions more than two-fold. The court nevertheless rejected the claims of estoppel and held that the State and the retirement system were not precluded from correcting the legal mistake and applying PEPRA provisions to these judges consistent with law. The court reasoned that even if estoppel against a public entity might otherwise be warranted, it is improper when application of the doctrine contravenes a statutory limitation. Because PEPRA clearly limited the claimants' pension rights, estoppel could not be applied to defeat application of the statute.

On the estoppel issue, the holding of *McGlynn* contrasts directly with the result in the most recent vested rights case from the First District Court of Appeal – *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Ret. Assn.* (2018) 19 Cal.App.5th 61 (S247095, petition filed February 16, 2018). In *Alameda*, the court of appeal considered claims that several retirement boards were estopped from excluding a certain pay item – terminal pay – from the final compensation of members covered by a litigation settlement agreement. The *Alameda* court acknowledged that these boards did not have the statutory authority to include this pay item in the members' final compensation calculations and that estoppel may not be invoked to expand a public agency's authority beyond statutory limitations. Nevertheless, the court upheld estoppel claims and precluded exclusion of the pay item because retirement boards have plenary authority over the administration of their respective systems under the California Constitution and [s]urely, this broad administrative mandate must include the power to settle litigation …. (*Alameda*, 19 Cal.App.5th at p. —.) Because the retirement boards acted within their statutory powers in settling litigation that formed the basis for including terminal pay in their retirement allowance calculations, the court held that they may be estopped from denying the affected members who joined the plans before

the pension reform legislation (Assembly Bill 197 (2012-2013) was enacted, and the benefit of their bargain, and application of the doctrine, was warranted.

Significantly, Division One in *McGlynn* did not rely on, or even cite *Alameda*, reciting instead established precedent that refuses to require, or permit, retirement systems to prospectively provide retirement benefits to new retirees that contravene statutory limitations on their authority (See, e.g., *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 242; *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870.)

It is no surprise, therefore, that on March 26, 2017, the State of California submitted *McGlynn* to the California Supreme Court as additional precedent to consider as the Supreme Court contemplates several of the parties' pending petitions for review, and the State's petition for depublication, of Alameda.

The plot thus continues to thicken as different iterations of vested rights and estoppel arguments make their way through the courts in California, and parties continue to wait for the Supreme Court to provide further guidance on these important issues.