



California Supreme Court Gears Up for Showdown Over the Scope of Vested Public Pension Rights

02.26.2018 | By [Ashley K. Dunning](#), [John T. Kennedy](#), [Peter H. Mixon](#)

In the latest twist in California's pending vested rights litigation, parties on all sides of *Alameda County Deputy Sheriff's Assn. et al v. Alameda County Employees' Retirement Assn., et al.* (2018) 19 Cal.App.5th 61 (*Alameda*), except the three respondent retirement systems, have filed petitions for California Supreme Court review of the *Alameda* decision.

Why is that a twist? Because those petitioners included labor unions which, for all intents and purposes, prevailed in the court of appeal and obtained the benefit preservation they sought. Then why the petition for review? According to the union petitioners' filing, [t]he Court should grant review because the appellate court flatly refused to follow this Court's longstanding precedent requiring that any detrimental changes to pension rights 'must' be offset by new advantages. The union petitioners thus placed their stake in the ground, demanding complete victory from the Supreme Court, not settling for less. On the other side of the litigation, the State also filed a petition for review, arguing that the Court should grant review to resolve a conflict between appellate panels regarding certain provisions of PEPR, and to clarify the Legislature's authority to revise the definition of pensionable compensation. The State also asserted that [r]eview is also needed to correct an unprecedented order that relies upon principles of estoppel to compel county agencies to permit pension spiking, contrary to the Legislature's clearly expressed will. A sanitation district employer within the Contra Costa County Employees' Retirement Association, which also is a party to the action, filed the third petition for review, also attacking the *Alameda* decision, and characterizing the decision as having gutted AB 197. If allowed to take effect, the Court's opinion not only permits, but *requires*, spiking to continue for legacy employees enrolled in county retirement systems.

The Supreme Court likely will accept review, consolidate *Alameda* with either one or two other cases currently pending before it, and of course the Supreme Court will have the final word on the vested rights doctrine, at least with respect to pending litigation challenging the Legislature's pension reform legislation that was effective January 1, 2013 (Assembly Bills 340 and 197) (Pension Reform Legislation of 2013). The upshot might be a comprehensive review of the Court's vested rights jurisprudence.

We believe the decision in *Alameda* most clearly sets the stage for a Supreme Court resolution of competing versions of the scope of the California Rule. The *Alameda* court -- (Division Four of the First District Court of Appeal (DCA) -- declined to follow the legal conclusions regarding constitutionality and estoppel of its colleagues in Division Two of the First DCA in the *MAPE* case (referred to therein and here for continuity as *Marin*). Thus, two divisions *within the same court of appeal* are now divided over the meaning of the California Rule. As background, *Alameda* was the fifth in a series of published decisions from California courts of appeals regarding the scope of the state's vested rights doctrine applicable to public retirement benefits, known commonly as the California Rule. In sum, the California Rule has been described as affording constitutional protection to public employees' right to earn future retirement benefits on the same terms and conditions as they earned such benefits throughout their prior employment. We have reported on the California Rule and the prior four decisions in E-Alerts regarding POB, SJCCOA, MAPE, and CalFIRE.

While there is much to discuss regarding *Alameda*, we will leave the nuts and bolts of that discussion to the litigation. In short, while *Alameda* provides some useful case analysis and context as a counterpoint to *Marin*, in our view, Division Four veers to certain similarly extreme conclusions regarding the applicable constitutional principles and constitutionality test with respect to Assembly Bill 197's amendments to Government Code section 31461, as did Division Two in *Marin*.

The California Supreme Court now has its work cut out for it to reconcile 70 years of constitutional jurisprudence that has resulted in the California Rule, with *Marin/CalFIRE* on one side of the spectrum and *POB/Alameda* on the other, and with the vested rights cases regarding PEPRAs felony forfeiture provisions following close behind in the court of appeal.

We believe the Court will choose one of the three following paths: 1) a hardening of California courts' interpretation of the federal and state constitution's respective Contracts Clause application of the California Rule to any statutory or retirement board change that is not advantageous to all members; 2) a substantial weakening or even elimination of the California Rule, or, as a middle ground, 3) a clarification that the California Rule does not prohibit the Legislature, or, as to matters within their authority Boards of Retirement, from making modifications to the pension benefit rights of active members as to their prospective accruals — such as the elimination of airtime service credit purchase rights, statutorily mandated or permitted exclusions from compensation earnable of non-salary pay items received in future periods, and enhanced felony forfeiture provisions applicable to periods when the felony was committed— so long as those changes are both reasonable under the circumstances and consistent with the theory and successful operation of defined benefit retirement systems.

All eyes will be on the California Supreme Court as it tackles this challenging issue, with *CalFIRE* now fully briefed, *Marin* waiting for briefing soon, and *Alameda* likely to be accepted for review. A long-awaited resolution to California's vested rights litigation arising from the Pension Reform Legislation of 2013 may be in sight.