



# Felony Forfeitures Statutes Tested Again: A Tale of Two States' Pension Reform Statutes—One Forfeiture Survives and One Does Not

09.28.2023 | By [Ashley K. Dunning](#), [John T. Kennedy](#), [Alexander Westerfield](#)

The constitutionality of California's felony forfeiture statute, as applied by the Board of Administration of the California Public Employees' Retirement System (CalPERS), survived yet another challenge in September 2023, after having been upheld by two courts of appeal decisions in 2021 (see here: [Two Out of Two: Another Appellate Court Upholds Constitutionality of California's Felony Forfeiture Statute](#) (nossaman.com)).

Meanwhile, across the country, the Board of the Massachusetts State Retirement System's application of that state's felony forfeiture statute, which takes a more expansive approach to forfeiture than California, fell nearly simultaneously to a similar challenge.

## The California Tale – Partial Forfeiture of Benefits Affirmed

On September 21, 2023, the California Court of Appeal for the Second Appellate District issued a unanimous decision, *Estrada v. California Public Employees' Retirement System* (Case No. B3217848, Sept. 21, 2023), confirming that a public employee who pleads “no contest” to a felony arising out of, or in the performance of, his or her official duties forfeits public retirement benefits that accrued during all periods after the employee first began committing the felony. This result occurs *even if* the felonious conduct could have been charged as a misdemeanor – in criminal law lingo, a “wobbler”. This result also occurs even if the judge in the criminal proceeding reduces the conviction to a misdemeanor by a later “nunc pro tunc” order – not to correct a scrivener's error in the order (which is the reason such orders are permitted by law), but rather, seemingly, to avoid the forfeiture of retirement benefits.

In *Estrada*, the crimes charged were misappropriation and embezzlement of public funds, as well as unauthorized computer access. These crimes occurred when Elaine Estrada, who was in charge of payroll

deductions for her employer, the City of La Habra Heights (City), removed the employee share that she was required to pay for dependents covered on her benefit plan for two years, beginning in 2007. The City did not discover the discrepancy until an audit in 2012 because Estrada was responsible for the payroll and timekeeping of all City employees. The Los Angeles County District Attorney's Office filed a felony complaint against Estrada in 2016. In 2017, Estrada's counsel advised the trial court that Estrada had entered into a "no contest" plea agreement to the felony charge of unauthorized computer access. As a result of that plea agreement, sentencing was set out six months, at which time the felony plea was to be vacated and a misdemeanor plea was to be entered in its place, so long as with Estrada paid the full amount of the missed payroll deductions (just under \$6,000).

In 2018, while Estrada was serving probation, the City submitted a forfeiture of benefits form to the state retirement system, CalPERS, regarding Estrada's criminal conviction. The form indicated that Estrada was convicted of a job-related felony on June 28, 2017, and that the earliest date of the commission of the felony was September 1, 2007. After a comprehensive administrative adjudication, including a hearing before an administrative law judge, the CalPERS Board implemented the forfeiture required by California law, i.e., (1) forfeiture of accrued retirement benefits earned after September 1, 2007; (2) ineligibility to return to CalPERS-covered employment or to accrue further CalPERS benefits; and (3) return to Estrada of any member contributions that she made to the retirement system during the forfeiture period.

In *Estrada*, the California Court of Appeal affirmed the CalPERS Board's application of the subject felony forfeiture statute, noting that the statute, which is part of the California Public Employees' Pension Reform Act of 2013 (PEPRA), "was enacted to close loopholes and to curb abusive practices that existed in California's public pension system. [Citing *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* (2020) 9 Cal.5th 1032, 1054, 1102.]" The court in *Estrada* also cited with approval California's recent appellate cases affirming the constitutionality of PEPRA's felony forfeiture statutes, *Hipsher v. LACERA* (2020) 58 Cal.App.5th 671 and *Wilmot v. CCCERA* (2021) 60 Cal.App.5th 631, noting the purpose of the felony forfeiture statutes specifically: "to protect the public employee pension system from abusive practices . . . and to preserve public trust in government by discouraging serious criminal activity abusive of the public trust" and "to close an egregious loophole that allowed public funds to reward criminality."

Significantly, the court also observed the limitations of California's "partial forfeiture requirement" – that is, it is "triggered only by felonious conduct committed in the scope of the pensioner's public employment" and it is "limited to service time from the date the criminal conduct began." Also important to this proceeding however, the legislature clearly applied the felony forfeiture rules to all circumstances in which a public employee was charged with a job-related felony and admitted that conduct. The only exception would be if a public employee's conviction were later "reversed," but the felony forfeiture rules apply notwithstanding a subsequent downgrading of the conviction from a felony to a misdemeanor or a reduction in penalties for the conviction. Therefore, what mattered in *Estrada* was the felony charge levied against and pled to by the (former) public employee arising from her public duties, and her "no contest" plea to that charge. At that point, the partial forfeiture of retirement benefits was effectively resolved, subject to the due process rights of the former employee addressed in *Hipsher*.

### **The Massachusetts Tale – Complete Forfeiture of Benefits Overturned**

On September 13, 2023, the Massachusetts District Court (in *Giulino v. State Board of Retirement*, Pittsfield District Court Case No. 2227CV000072) considered the same topic of public employee felonious acts, in

that instance involving a scandal regarding overtime abuses by a retired Massachusetts State Police lieutenant, John Giulino. Giulino was convicted under state law for making a false claim to a public employer, larceny, and procurement fraud. Giulino pled guilty in 2019, and received two years of probation, for having received more than \$28,000 for nearly 280 hours of overtime that he did not work in 2015 and 2016.

Massachusetts and California differ dramatically, however, in their felony forfeiture rules. Under Massachusetts law, the Massachusetts State Retirement Board determined that Giulino faced *complete forfeiture* of all of his pension benefits, rather than the *limited forfeiture* provided by California's statute. In the case of Giulino, the Massachusetts court concluded that complete forfeiture was "grossly disproportionate to the gravity of the offenses" and overturned the retirement board's complete forfeiture of all of Giulino's pension benefits.

Applying the relevant test under Massachusetts law—which stems from the prohibition against excessive fines in the Massachusetts Declaration of Rights—the court considered four factors: the nature and circumstances of the Giulino's crimes, whether those crimes were related to other illegal activity, the maximum possible sentence, and the harm caused by Giulino's conduct. The court, continuing to follow excessive fines precedent, then weighed the effect of total forfeiture against the defendant's financial status, concluding that the gravity of Giulino's crimes was not sufficient to justify the ruinous consequences of total forfeiture. Particularly important to the court was the fact that Giulino had, as a part of his criminal plea, had already returned his unearned overtime wages.

"The State Retirement Board takes the protection and responsibility of the State Employees Retirement System and its trust very seriously," a statement from the Massachusetts Attorney General noted. "We are still considering all available options."

### **Takeaway from this Tale of Two States**

Regardless of the next steps in either *Estrada* or *Giulino*, it remains clear that efforts by public retirement boards to protect their retirement systems from abuse by public employees who engage in felonies when they are supposed to be serving the public will rise or fall based on whether the law that's being enforced, and the manner in which it is enforced, passes constitutional muster.

Unfortunately, the challenge for public retirement boards and systems of having to address these challenging issues is far from over.