



# Two Out of Two: Another Appellate Court Upholds Constitutionality of California's Felony Forfeiture Statute

02.09.2021 | By [Ashley K. Dunning](#), [Peter H. Mixon](#)

On February 5, 2021, a second court of appeal in California upheld the constitutionality of the felony forfeiture statute enacted as part of the Public Employees' Pension Reform Act of 2013 (PEPRA) in *Wilmot v. Contra Costa County Employees' Retirement Association* (2021 Cal. App. LEXIS 101 (Feb. 5, 2021)) ("*Wilmot*"). We wrote about the first felony forfeiture decision, *Hipsher v. Los Angeles County Employees Retirement Assn* ("*Hipsher*"), in our December 16, 2020 eAlert. Both *Wilmot* and *Hipsher* were on remand from the California Supreme Court following its July 30, 2020 decision, *Alameda County Deputy Sheriff's Association, et al. v. Alameda County Employees' Retirement Association, et al. (State Of California)* (2020) 9 Cal.5th 1032 ("*Alameda County*"). We wrote about *Alameda County* in our July 31, 2020 eAlert.

Significantly, in *Wilmot*, unlike *Hipsher*, the court engaged in a detailed and substantive application of the constitutional standards that the California Supreme Court articulated in *Alameda County*.

As an initial matter, the court in *Wilmot* affirmed that the felony forfeiture statute properly applied to an employee, such as the appellant in the case, who had initiated the process of retiring, but whom the retirement board had not yet retired as of PEPRA's effective date of January 1, 2013. Even more importantly, though, the court concluded that even if the employee was retired at the time the statute was enacted and the forfeiture provision was applied to him, "there would be no violation of the California Constitution's provision against the undue impairment of the employee's contract with the governmental employer, nor would that application constitute and ex post facto law." Thus, the court concluded, the felony forfeiture statute may be applied to retirement system members, even if they retired before January 1, 2013, so long as the statutory predicate of the forfeiture (e.g., job connection) was met.

The court next walked through the constitutionality analysis of *Alameda County*, first determining that the legislative change of status quo imposed an economic disadvantage on affected employees that was not offset by comparable new advantages. That conclusion led to the second step of the *Alameda County* analysis: “whether the government’s articulated purpose in making the changes [is] sufficient, for constitutional purposes, to justify any impairment of pension rights.” The court recited that standard as requiring that “alterations of employees’ pension rights must bear some material relation to the theory of a pension system and its successful operation.”

On that prong, the court first noted that PEPRA was enacted “for the purpose ‘of closing loopholes and preventing abuse of the pension system in a manner consistent with CERL’s preexisting structure.’” The court recited a number of potential purposes of a felony forfeiture statute that would not have been constitutionally permissible under *Alameda County*, such as “public outrage,” which was an “essentially political reason” that was “not a permissible or ‘proper purpose,’ and thus was insufficient to justify the forfeiture.” The court also noted another unconstitutional purpose – the intent to enforce a punishment, a point also central to Wilmot’s ex post facto argument. But the court rejected this and found that the statute was designed to serve the same constitutional purpose on which the court in *Hipsher* originally had relied, that a retirement benefit is premised on an employee’s “faithful” performance of his or her responsibilities. As the court stated,

An employee who draws public pay while stealing public property, or embezzling public funds, or who uses public facilities or equipment to run an illegal business (which is what occurred in *Hipsher*), is the antithesis of a ‘faithful’ servant of the public trust. When misconduct turns into outright criminality, it is beyond dispute that public service is not being faithfully performed. To give such a person a pension would further reward misconduct.

The court further observed that the absence of a forfeiture statute for that context “clearly amounted to a ‘loophole’ that the Legislature moved to closed because it ‘distort[ed] the pension calculation.’” Moreover, “Calling a halt to having the public pay for job-related criminality unquestionably ‘bear[s] some material relation to the theory of a pension system and its successful operation.’”

In reaching this conclusion, the court distinguished the only California Supreme Court case dealing with public pension forfeitures – *Wallace v. City of Fresno* (1954) 42 Cal.2d 180 (“*Wallace*”). In *Wallace*, the Supreme Court addressed a felony forfeiture enacted before Wallace had retired, which eliminated his entire pension for a felony conviction based on his post-retirement conduct. The Court held that the termination of all pension rights upon felony conviction for post-retirement conduct for the purpose of meeting “taxpayer objections” does not have a material relation to the theory or operation of a pension plan. The *Wilmot* court noted that Wallace’s conviction was based on conduct that was unrelated to his employment. In contrast, Wilmot’s conviction was based on his theft of public property during the course of his duties as a firefighter. Unlike Wallace, Wilmot failed to fulfill his duty of providing “faithful service” as a firefighter and thus any impairment of Wilmot’s pension rights was justified by a constitutionally permissible purpose.

Finally, the court addressed the third step of the analysis, which is: “even if changes were made for a proper purpose, ‘[t]he Legislature’s decision to impose financial disadvantages on public employees without providing comparable advantages will be upheld under the contract clause only if providing comparable advantages would undermine, or would otherwise be inconsistent with, the modification’s constitutionally permissible purpose.’” (Citing *Alameda County*, *supra* 9 Cal.5<sup>th</sup> 1032, 1093.) The court observed:

We have been unable to imagine how the Legislature could have provided ‘comparable new advantages to offset’ this particular disadvantageous modification because to do so ‘would undermine [and would] . . . be inconsistent with [] the constitutionally permissible purpose underlying the modification.’ [Citation omitted.] Put bluntly, why should the Legislature be required to come up with another way to reward criminality by public employees? Why should the Legislature be prevented from attacking public employee criminality until it came up with another way for job-related crimes to be paid for with public money? Why should the Legislature have to compensate public employees not to commit crimes?

The *Wilmot* court then again expressed its agreement with the *Hipsher* court on this topic: “With eloquent understatement, the *Hipsher* court concluded that accepting Wilmot’s reasoning would ‘yield perverse results,’ ‘would do nothing to disincentivize the very abuse that [Pension Reform Act] is intended to curb, . . . would erode public trust,’ and ‘would be antithetical to the statute’s purpose by unjustly enriching a malfeasant . . . employee for engaging in the very sort of abusive practices section 7522.72 is intended to curb.”

The *Wilmot* court then examined, and rejected, plaintiff’s argument that the felony forfeiture statute was an unconstitutional “ex post facto” law, determining that civil forfeiture of benefits earned while committing a job-related crime was not unlawfully punitive but rather was a proper “remedial civil measure.” The court also noted that “Proportionality has never been a consideration,” when determining the legality of a forfeiture statute:

Violate the California Uniform Controlled Substances Act, and you risk losing your car, real property, or business, as well as ‘[a]ll moneys, negotiable instruments, securities, or other things of value . . . , all proceeds traceable [that] is . . . used or intended to be used to facilitate a violation . . . .’ [Citation omitted.] Lie about how much whisky is being produced at your distillery, and the Government can take the distillery. [Citation omitted.] As Justice Brandeis put it, the severity of a forfeiture’s application has no impact on its established legality. [Citation omitted.]

Thus, the *Wilmot* court concluded that partial forfeiture of Wilmot’s pension benefits pursuant to section 7522.72 did not violate either the impairment of contract or the ex post factor clauses of the California Constitution.

Now that two California Courts of Appeal have deemed the PEPRA felony forfeiture statutes to be constitutional in light of *Alameda County*, we expect the California Supreme Court will deny the pending petition for review of *Hipsher*.

California retirement boards will be left with the task of determining, as due process requires, the extent to which California’s felony forfeiture statutes are to be applied to any of their members—active, deferred or retired—who are convicted of committing job-related and/or pension-related felonies. While the *Wilmot* court characterizes that review as a “near ministerial administrative process,” that administrative review by the retirement board remains an important due process obligation, as the *Hipsher* court observed when originally remanding the case for a due process determination of job-relatedness by the retirement board.