

**RESOLUTION OF THE BOARD OF RETIREMENT  
CONTRA COSTA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION**

**AUTHORIZING ACTIONS IN COMPLIANCE  
WITH ASSEMBLY BILL 197 AND THE ALAMEDA DECISION**

**Background**

In 1997, the California Supreme Court held that "compensation earnable" used to determine a member's retirement allowance ordinarily includes all cash payments received during a member's final average salary period ("FAS Period") for services performed, with the exception of overtime pay. *Ventura Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483.

In 2003 and 2004, the California Courts of Appeal ruled that "compensation earnable" did not include cash received at termination of a member's employment for the value of accrued leave time in excess of the amount earned during the FAS period. *In re Retirement Cases* (2003) 110 Cal.App.4th 426; *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal.App.4th 734.

In 2010, the Board of Retirement revised its policy for calculating compensation earnable for new members entering CCCERA membership on or after January 1, 2011, to exclude from compensation earnable amounts paid in cash at termination of a member's employment for the value of accrued leave time in excess of the amount earned during the FAS Period.

In 2012, the California Legislature enacted and the Governor signed into law Assembly Bill 197, which amended Govt Code section 31461 to change the way the Board of Retirement must calculate "compensation earnable." AB 197 applies to the calculation of benefits for all active or deferred employees who first became CCCERA members before January 1, 2013. AB 197 does not apply generally to those who became members of CCCERA for the first time on or after January 1, 2013. The effective date of AB 197 was January 1, 2013, but that date was postponed until July 12, 2014 by orders of the Contra Costa County Superior Court in the AB 197 Action described below ("Stay Order").

In November, 2012, various Petitioners filed suit against CCCERA and the Board of Retirement in Contra Costa County Superior Court as Civil Action No. MSN12-1870 (the "AB 197 Action"). On May 12, 2014, the Contra Costa County Superior Court issued a final Judgment and Writ interpreting AB 197. The Court's Statement of Decision supporting the Judgment concluded that several of CCCERA's prior practices were not consistent with applicable law — primarily with reference to the inclusion of accrued leave cash-outs for time that was not both earned and payable annually during the FAS Period. Notwithstanding the express terms of AB 197, the Writ created (a) an "Estoppel Class" of members for certain leave cash out benefits and (b) a standard by which to determine whether certain on-call and standby pay items must continue to be included in compensation earnable.

The Writ commanded CCCERA to follow AB 197 except as otherwise provided in the Writ, to all member retirements occurring on or after July 12, 2014. To that end, on September 10, 2014, the Board of Retirement adopted its Policy On Determining "Compensation Earnable" Under Assembly Bill 197 For Purposes of Calculating Retirement Benefits For "Legacy" (Pre-PEPRA) Members ("Compensation Earnable Policy").

The Judgment and Writ were appealed to the First District Court of Appeal, which rendered its decision in February, 2018. The California Supreme Court granted the petitions for review of the appellate court decision filed by various parties. On July 30, 2020, the Supreme Court issued a unanimous decision upholding the validity of the statutory exclusions from compensation earnable in AB 197, rejecting the estoppel claims made by the petitioners, and remanding the case to the trial court with directions to vacate the Judgment and conduct further proceedings consistent with the decision. *Alameda County Deputy Sheriff's Assoc. et al., v. Alameda County Employees' Retirement Assn., et al.*, (2020) 9 Cal.5th 1032 (“*Alameda Decision*”).

The *Alameda Decision* concludes that all amendments to the definition of compensation earnable in Government Code section 31461 enacted as a result of AB 197 are constitutional, and that CERL retirement boards may not be contractually bound or estopped by settlement agreements, board resolutions, or other similar actions, from implementing those amendments. Accordingly, the Board of Retirement is legally obligated to follow the *Alameda Decision* in implementing the provisions of AB 197. To that end, on May 5, 2021, the Board of Retirement amended its Compensation Earnable Policy.

The *Alameda Decision* and other applicable law require CCCERA to exclude from compensation earnable:

- All items of pay for accrued leave in an amount that exceeds that which may be earned and payable in each 12-month period during the FAS Period, regardless of when reported or paid, as set forth in CERL Section 31461 subd. (b)(2) (collectively, “Leave Pay Items”).
- All payments made at the termination of employment, except those payments that do not exceed the amount that is both earned and payable in each 12-month period during the FAS Period, as set forth in CERL Section 31461 subd. (b)(4) (collectively, “Terminal Pay Items”).
- All items of pay for additional services rendered outside of normal working hours, as set forth in CERL Sections 31461 subd. (a) and 31461 subd. (b)(3). Examples include on-call pay and standby pay (together, “On Call Pay Items”).
- Pay for accrued leave granted to the “Estoppel Class” members created by the May 12, 2014 Writ.

## **Board Determinations**

The Board of Retirement determines that from the expiration of the Stay Order as of July 12, 2014 and for a period of time thereafter, CCCERA continued to collect contributions from active members on pay attributable to items excluded from compensation earnable under CERL Sections 31461 subds. (b)(2), (3) and (4), and began collecting contributions from active members on excluded Estoppel Class leave cash outs which later was determined to be excluded under the *Alameda Decision*. The Board of Retirement further determines that the *Alameda Decision* and other applicable law make it appropriate to credit or refund certain members’ contributions and take further actions, as set forth below.

The Board of Retirement further determines that this Resolution is intended to and shall comply with the requirements of the Internal Revenue Code of 1986, as amended or replaced from time to time and the regulations issued thereunder (the “Code”), as applicable.

## RESOLUTION

**NOW THEREFORE, BE IT RESOLVED** that CCCERA shall take the following actions as herein authorized by the Board:

- 1) Determine all member contributions attributable to excluded Terminal Pay Items and On-Call Pay Items made on and after July 12, 2014 and credit or refund all such contributions, with appropriate interest, to the affected members, in a manner that complies with applicable federal tax rules and California law.
- 2) Determine all overpayments of benefits made to retired members due to excluded Estoppel Benefits and On-Call Pay Items since July 12, 2014 and recover those overpayments from the affected members, with appropriate interest, net of any contributions made on and after July 12, 2014 attributable to such excluded items, in a manner that complies with applicable federal tax rules and California law.
- 3) Determine appropriate adjustments to the future retirement benefits paid to affected members in Item 2 above and implement those adjustments at the earliest practicable time.
- 4) Provide notice and an opportunity to be heard to all members affected by Items 2 and 3, above.

IT IS FURTHER RESOLVED that this Resolution shall only become effective upon the occurrence of all of the following events:

- 1) Entry of a final Judgment in the AB 197 Action, vacating the May 12, 2014 Judgment and Writ in favor of CCCERA, with all parties to bear their own costs of suit, on terms satisfactory to the Board of Retirement.
- 2) The absence of any timely appeals from the final Judgment entered in the AB 197 Action.
- 3) Entry of dismissals, with prejudice, in Contra Costa County Superior Court Civil Actions No. 14-1221 and 15-00598.

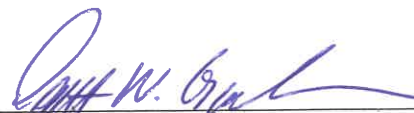
THIS RESOLUTION WAS ADOPTED BY THE AFFIRMATIVE VOTE OF THE BOARD OF RETIREMENT OF THE CONTRA COSTA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION THIS EIGHTH DAY OF SEPTEMBER 2021.

AYES: Andersen, Chebotarev, Finley, Gordon, Holcombe, Kroll, Phillips, Watts

NOES: MacDonald

ABSTAIN: None

ABSENT: None



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Scott W. Gordon

Chairperson of the Board of Retirement

Attest:



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Jerry R. Holcombe  
Secretary of the Board of Retirement