

## **AB 197 Lawsuit Update: Calculating Your Retirement Allowance Under AB 197**

### **FREQUENTLY ASKED QUESTIONS**

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On September 12, 2012, the Governor signed into law Assembly Bill 197, with an effective date of January 1, 2013. The measure changed how county retirement boards were permitted to calculate their current members' retirement allowances. In November 2012, members and their representative bargaining units filed a lawsuit challenging the validity of the new law. By operation of a court-imposed Stay Order, CCCERA was prohibited from implementing the new law during the course of the litigation. On May 12, 2014, the Contra Costa County Superior Court entered a Judgment in the litigation and a Writ directing CCCERA to proceed to comply with AB 197, except in one instance (described below). The matter was appealed, and final resolution in the courts could take several years. CCCERA cannot predict the ultimate outcome of this matter in the courts.

The Judgment and Writ issued by the Superior Court do not affect members whose effective date of retirement is on or before July 11, 2014. CCCERA is currently ordered to comply with the new law starting with retirements effective on and after July 12, 2014.

A request for an additional stay was denied by the Court of Appeals on June 30, 2014.

This Update is designed to assist our members in understanding the requirements of AB 197 and how the new law may change the calculation of your retirement allowance from the methods CCCERA used in the past. Of course, we can only provide general guidance through a single website posting – your particular situation may differ. The best information on your own situation will be provided by CCCERA staff, who are ready to assist you with specific questions affecting your own retirement decisions.

## GENERAL OVERVIEW OF AB 197

As a CCCERA member, your retirement is calculated in part based on the compensation you received during your Final Average Salary (FAS) period. AB 197 changes the compensation that may be counted towards calculating your retirement allowance. Three important changes were made to the way CCCERA had been calculating retirement allowances in the past:

**General Rule #1.** CCCERA may no longer count a year's worth of leave paid at termination *plus* payments for leave sold back to your employer in your FAS period. Going forward, if your employer only allows accrued leave cash outs at termination (i.e., no leave sell backs are allowed during employment), you will not be entitled to have these amounts in your pension calculations. If your employer allows you to sell back leave time during your employment, CCCERA will only be allowed to count the lesser of (a) the amount of leave earned in one year and (b) the amount of that earned leave that you are permitted to sell back during your final compensation period. In other words, to be counted towards your retirement allowance, the value of the leave time must be both earned by you and payable to you in cash during service.

**General Rule #2.** CCCERA may no longer count all compensation paid for "on-call" or "standby" time received in your FAS period towards your retirement calculation. CCCERA will not be permitted to count any compensation received for time worked outside normal working hours. This means that if the time is not regularly scheduled and required by your employer to be worked by you and every other employee in your same grade and classification, at the same rate of pay, during your FAS period, CCCERA must not count it towards your retirement calculation.

**General Rule #3.** The CCCERA Board must now consider whether any other items of compensation were paid to enhance a member's retirement allowance. If the Board finds this to be true, it may exclude the items from the retirement calculation. Examples of such excluded items are one-time or "ad hoc" payments, payments made solely due to termination of employment, compensation that was previously paid in kind (like providing a uniform) or for outside third-party services (like insurance) that is converted to cash during the FAS period, and other items the Board determines were paid to enhance a member's retirement benefit. Any such Board determination will occur only after a full hearing before the Board, at which the member will be entitled to appear and present evidence and argument.

## THE ONE EXCEPTION TO THE NEW LEAVE CASHOUT RULE

Pursuant to the Court Order, employees who became CCCERA members before January 1, 2011 ("Legacy Members") reasonably relied on what they were told about how CCCERA would calculate their FAS upon retirement. Some employees may have built up substantial "banks" of accrued leave time in anticipation of having much of it counted toward their retirement allowances. As to these members, CCCERA will be "estopped" (prevented) from fully implementing AB 197. For this limited "estoppel class" of Legacy Members, the Judgment and Writ permit CCCERA to include in FAS more

than allowed in General Rule #1 above. In order to receive “estoppel class” treatment, you must meet these requirements:

1. On or before December 31, 2012, your employer must have allowed you to sell back accrued, unused leave time in amounts greater than the amount of leave time you earned in the FAS period;
2. As of December 31, 2012, you had accrued and not used one of more types of such leave time in an amount exceeding the amount you could earn in one year (or in 3 years if your FAS period is 3 years);
3. You had not used or cashed-out such accrued leave time before your FAS period; and
4. You elect during the FAS period to sell back some or all of your balance of such accrued leave time.

If you meet all of the above requirements, you will be treated as an “estoppel class member” and CCCERA will be permitted to include in your retirement calculation the lesser of (a) the amount of accrued leave you had available on December 31, 2012, or (b) the amount actually sold back during the FAS period (but not at termination.)

Following are some frequently asked questions and answers.

## FREQUENTLY ASKED QUESTIONS AND ANSWERS

### SECTION A - GENERAL QUESTIONS

#### **1. *Am I a Legacy Member?***

For changes regarding leave cash outs, a Legacy Member is an employee with a CCCERA membership date prior to January 1, 2011. Those who became members after that date and before January 1, 2013 came into CCCERA under rules that were consistent with AB 197 and will not be impacted by the Judgment and Writ.

For changes regarding standby/on-call pay or other payments for additional services rendered outside your normal working hours, a Legacy Member is an employee with a CCCERA membership date prior to January 1, 2013.

#### **2. *When do the Judgment and Writ go into effect?***

The Judgment and Writ issued by the Superior Court go into effect on July 12, 2014.

#### **3. *What happens if I retire before July 12, 2014?***

If you retire on or before Friday, July 11, 2014, CCCERA will calculate your retirement allowance in accordance with the rules in place before AB 197.

#### **4. *I want to be sure to retire before the Judgment goes into effect. Do I have to have my retirement papers processed by July 11th or do I just have to make sure my last day on the job is on or before July 11th?***

Your retirement is effective on the day following your last day on the job in pay status. In order to have your retirement allowance calculated under the pre-AB 197

rules, your last day on the job in pay status must be on or before Thursday, July 10, 2014, and your first day of retirement on or before Friday, July 11, 2014. You must file your original (not faxed) signed retirement application no later than July 11, 2014.

**5. *What happens to my retirement allowance if I retire after July 11, 2014, but I am a Legacy Member?***

CCCERA will first calculate your allowance under the new AB 197 rules. Then CCCERA will determine if you are entitled to count the cash value of additional leave time towards your allowance under the limited “estoppel class” exception for Legacy Members described above.

**6. *I heard that the unions have filed an appeal from the Superior Court ruling. How does that affect my rights?***

You are correct, appeals have been filed. A request for an additional stay was denied by the Court of Appeals on June 30, 2014. CCCERA is required to implement AB 197 pursuant to the Superior Court’s Order for all retirements with an effective date of July 12, 2014 or later.

**7. *I became a member of CCCERA after January 1, 2013, does AB 197 apply to me?***

No. Your retirement benefit will be calculated in accordance with the new law that came into effect at the same time as AB 197, called the “California Public Employees’ Pension Reform Act of 2013,” or “PEPRA.” As a PEPRA member, your retirement calculations will not include leave cash outs of any kind or standby/on-call pay.

**8. *I retired before January 1, 2013. Does AB 197 apply to me?***

No. The statutory changes to “compensation earnable” have not been applied to anyone in retirement status on or before December 31, 2012.

**SECTION B - QUESTIONS ABOUT LEAVE CASH OUTS FOR LEGACY MEMBERS**

**1. *How do I know how much leave time I am allowed to earn during my FAS period?***

Your Memorandum of Understanding or other employment contract terms will tell you how much leave time you can earn during service in your twelve or thirty-six month FAS period.

**2. *How do I know how much leave time I am allowed to sell back (“cashout”) during my FAS period?***

Your Memorandum of Understanding or other employment contract terms will tell you how much leave time you can cash out during your twelve or thirty-six month FAS period.

**3. *What is the most cashed-out leave time I will be entitled to count in my FAS period?***

Under AB 197, CCCERA is permitted to count the lesser of (a) the amount of leave time you were entitled to earn during the FAS period and (b) the amount of that earned time you were allowed to sell back (cash out) while in service during the FAS period.

**4. *I earn 240 hours of leave time during my FAS period, and am allowed to sell back 80 of those hours during the period. I'll get the remaining 160 hours' worth at termination. How much will count towards my retirement allowance?***

80 hours' worth. That is the lesser of the amount you earn in the FAS period (240 hours) and the amount you can sell back during that period (80), without regard to termination.

**5. *I earn 240 hours of leave time during my FAS period, and am allowed to sell back 80 of those hours during the period. Will I lose that value if I don't actually sell it back before I retire?***

No. So long as you are permitted to sell back time you earned in your FAS period, it doesn't matter when you get the cash for it. You can sell it back while in service during your FAS period, or you can just take it in a lump sum with any other amounts owed to you at termination. CCCERA will still count it towards your retirement allowance.

**6. *I earn 240 hours of leave time during my FAS period, and am allowed to sell back 80 of those hours during the period. I have another 80 hours of unused leave on the books from earlier years at the beginning of my FAS period. I take 80 hours of time off during the year, and sell back another 80 hours. At termination, I am paid for the remaining 80 hours' worth of time in cash. How much will count towards my retirement allowance?***

You will have 80 hours' worth counted towards your retirement allowance. The 80 hours you took as time off is presumed to have been your unused time from earlier years, leaving you with 240 hours earned and 80 hours cashable during the FAS period. Those 80 hours' worth you sold back during service will count towards your retirement allowance.

**7. *How much vacation pay at termination is counted towards "compensation earnable" under AB 197?***

CCCERA cannot count any value of time that you can only receive in cash because you are terminating service.

**8. *My MOU says that I earn 20 hours of vacation per month (240 hours per year.) I'm not allowed to sell back any of it during service. When I retire, I will have 400 hours of unused vacation hours on the books and I'll get paid all of that in cash at retirement. If I choose my final year of employment as my FAS period, how many of the 400 hours will CCCERA include in my retirement calculation?***

None. If you can only get the cash at termination, it is not both "earned and payable" during service and cannot be included in your benefit calculation.

**9. My MOU says that I earn 20 hours of vacation per month (240 hours per year.) I'm allowed to sell back 80 hours during service. When I retire, I will have 400 hours of unused vacation hours on the books and I'll get paid all of that in cash at retirement. If I choose my final year of employment as my FAS period, how many of the 400 hours will CCCERA include in my retirement calculation?**

Pay for 80 hours will be counted towards your retirement allowance. That's the lesser of the amount you can earn in the final twelve month period and the amount of what you can earn that you can sell back during that same period. It doesn't matter when you actually get paid the cash, 80 hours are "earned and payable" during the FAS period and will be counted.

**10. My MOU says that I earn 20 hours of vacation per month (240 hours per year.) I'm allowed to sell back 80 hours (1/3rd of my annual accrual) once every calendar year. If I sell back 80 hours in May of 2014 and another 80 hours in January of 2015, can I have all 160 hours' worth of cash counted towards my retirement calculation if I choose to retire in April of 2015?**

No. The Board voted at its July 9, 2014 meeting that where the employer allows leave sales annually (for example, once every calendar year) in an amount less than the annual leave accrual, no more than one annual cash out will count as compensation earnable under AB 197. In this example, payment for 80 hours will be included.

**11. My MOU says my employer must pay me for all unused sick leave at termination. How much of that payment will be included calculating my retirement allowance?**

None. If you can only receive it because of termination of employment, CCCERA cannot include it as compensation for calculating your retirement allowance. Note, however, that the unused sick leave time at retirement will be added to your service credit for calculating your allowance. This additional service credit was not affected by AB 197.

## **SECTION C - QUESTIONS ABOUT THE "ESTOPPEL CLASS" EXCEPTION**

**1. I am a Legacy Member. How do I know if I can take advantage of the "estoppel class" exception to the leave cashout rules listed above?**

For CCCERA to include in your retirement allowance pay for leave time that is greater than what you could earn and sell back in your FAS period, you will have to show that you met all four of the requirements listed above in the Section titled, "The One Exception to the New Leave Cashout Rule". This will require you and your employer to preserve and make available to CCCERA good records showing:

- That on or before December 31, 2012 (pre-AB 197), your employer allowed you to sell back in a year more leave time than you could earn in that same year

- The amount of accrued, unused leave time you had on the books as of December 31, 2012
- The amount of leave time you earned from December 31, 2012 to the date of your retirement
- The amount of leave time you took as time off from December 31, 2012 to the date of your retirement
- The amount of leave time you sold back from December 31, 2012 to the date of your retirement
- The amount of leave time you sold back during your FAS period.

The Board has determined at its June 25, 2014 meeting that your bank can be preserved entirely if you never use or sell back more than what you earn and can sell after December 31, 2012. For example, assume you had a bank of 320 hours on December 31, 2012, and prior to the beginning of your final compensation period you only use or sell back hours you earned after December 31, 2012. If your employer allows you to sell back 320 hours during your final compensation period, it will all count towards your retirement allowance.

#### **SECTION D - QUESTIONS ABOUT “ON CALL” AND “STANDBY” PAY**

**1. *I am a Legacy Member. In my FAS period, I will have received some compensation for being on-call, ready to return to work if needed. Will that pay be included in calculating my retirement allowance?***

Yes, but only if the on-call time is regularly scheduled and you and every other employee in your same job classification and rate of pay are required to be on-call in that same time period. If these requirements are not met, then the time will be considered “outside normal working hours,” or overtime, and will not be included in the retirement calculation.

**2. *In my FAS period, my employer scheduled all of the people in my department to be on-call one weekend a year, but we could swap weekends if we wanted to. Will that pay be included in calculating my retirement allowance?***

Yes, if you meet all the criteria in the answer to the preceding question. So long as everybody serves equally, the fact that you swapped time evenly will not matter.

**3. *In my FAS period, my employer scheduled all of the people in my department to be on-call one weekend a year, but since I am single I offered to take the on-call time for a few others so they could spend more time with their families. Will my on-call pay be included in calculating my retirement allowance?***

No, because you don't meet the criteria stated in the answer to the previous question. To be counted, on-call time must be required of and ordinarily served by everyone in the same grade or classification, at the same rate of pay. If many of your colleagues never had to serve on-call, your voluntary time constitutes “overtime” and cannot be counted in the retirement calculation.

## SECTION E - QUESTIONS ABOUT BENEFIT “ENHANCEMENTS”

### **1. *How can I know if the Board is going to reject compensation because it thinks it was only paid to me to enhance my retirement allowance?***

You can't for sure, but there are a few indicators that will alert you to the likelihood that the Board may pull your application for a closer review:

- Did your compensation spike up suddenly in your final year of employment?
- Did you convert some in-kind benefit, like the use of an automobile, receipt of an official uniform, or employer-paid insurance to a cash payment to you in your final year of employment?
- Did you get a special bonus or other compensation only when you announced your impending retirement?
- Did you get a special bonus or other compensation in your final year of employment that others similarly situated to you didn't get?
- Did your employer make any retroactive changes to your employment contract, like granting additional leave time after the fact, in your final year of employment?

### **2. *What happens if the Board rejects some of my compensation from the calculation of my retirement allowance?***

The CCCERA Board will not do this without first giving you a fair opportunity to present any facts you think are relevant to the Board's determination. The Board has established a notice and hearing procedure for handling these situations. Pending a final determination by the Board, the Board may (but is not required to) commence payment of the undisputed portion of your retirement allowance to you and/or your beneficiaries.

**REMEMBER: FOR ANSWERS TO ALL OF YOUR UNIQUE RETIREMENT QUESTIONS, PLEASE CONTACT CCCERA AT (925) 521-3960.**