

SBCERA RESOLUTION No. 2020-5

APPROVAL OF EMPLOYER PAY CODES OF EMPLOYEE COMPENSATION INCLUDED IN COMPENSATION EARNABLE (FOR TIER 1 MEMBERS) AND PENSIONABLE COMPENSATION (FOR TIER 2 MEMBERS)

WHEREAS, the San Bernardino County Employees' Retirement Association (SBCERA) Board of Retirement (BOARD) is required by Government Code sections 31461 and 31542, as well as BOARD Benefits Policy No. 26, *Compensation Earnable and Pensionable Compensation*, to determine *compensation earnable* for Tier 1 members.

WHEREAS, on March 7, 2019, the BOARD adopted a Resolution that considered the "AB 197 cases," which had been accepted for review by the California Supreme Court in *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.*, Cal. Supreme Court Case No. S247095 (review granted March 28, 2018) ("*Alameda*"), and it affirmed that Resolution on June 4, 2020 (collectively, "AB-197 Clean-Up Resolution").

WHEREAS, as stated in the AB-197 Clean-Up Resolution, SBCERA currently includes in compensation earnable (i) certain types of pay that were considered in *Alameda* (standby, on call, and call back) ("PEPRA Exclusions"), and (ii) other types of pay that AB 197 confirmed could or should be excluded from compensation earnable under *In re Retirement Cases* (2003) 110 Cal.App.4th 426 (employer paid premiums to a third party) ("*Alameda Exclusions*", and collectively with PEPRA Exclusions, "Litigated Compensation Earnable Pay Codes");

WHEREAS, the AB-197 Clean-Up Resolution was based on legal and equitable principles as those principles were addressed by the First District Court of Appeal (“First DCA”) in *Alameda*.

WHEREAS, on July 30, 2020, the California Supreme Court filed its decision in *Alameda*, which, pursuant to Supreme Court Rule 8.532, is expected to be final on August 30, 2020 (the “*Alameda* Decision”). The *Alameda* Decision overturns certain legal and equitable determinations of the First DCA in *Alameda* and concludes that all amendments to the definition of Compensation Earnable in Government Code section 31461, enacted as a result of the Public Employees’ Pension Reform Act of 2013 and related statutory changes to CERL (“PEPRA”), effective January 1, 2013 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. The *Alameda* Decision further determines that CERL retirement boards may not include items in compensation earnable that section 31461 requires them to exclude.

WHEREAS, the *Alameda* Decision also held that CERL retirement boards have no discretion to include pay items in Compensation Earnable that are excluded under CERL, PEPRA, or other applicable statutes, disapproving of statements to the contrary in footnote no. 6 of *Guelfi v. Marin County Employees’ Retirement Assn.* (1983) 145 Cal.App.3d 297 (“*Guelfi* footnote 6”).

WHEREAS, the BOARD hereby determines that the *Alameda* Decision and other applicable law require it to change its determinations of pensionability of the Litigated

Compensation Earnable Pay Codes as set forth in the AB-197 Clean-Up Resolution, as resolved below.

WHEREAS, this Resolution is intended to 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.

THEREFORE BE IT RESOLVED, that effective as of August 6, 2020, the following actions are authorized by the BOARD and required of SBCERA:

1) Comply with *Alameda’s* directives regarding mandatorily excluded pay items, which includes the PEPRA Exclusions, and apply that directive to all retiree payroll for individuals who are legacy members who retired on or after January 1, 2013 (including those who will retire on or after the date of this Resolution), effective with the August 31, 2020 retiree payroll.

2) Comply with *Alameda’s* directives regarding the Board’s lack of authority to include the *Alameda* Exclusions in Compensation Earnable, and apply that directive to all retiree payroll for individuals who are legacy members who retired on or after July 30, 2020, when the Supreme Court overturned *Guelfi* footnote 6 and SBCERA was thus on notice of that statement of law (including those who will retire on or after the date of this Resolution), effective with the July 30, 2020 retiree payroll.

3) Recoupment of any overpaid amounts paid to retirees will be determined at a later date in accordance with SBCERA’s Benefit Policy No. 24-Benefit Administration Procedures, applicable federal tax compliance rules, and California law.

Effective with the August 2020 payroll, recalculate and adjust amounts paid to retirees and provide a Notice of Correction Action to each retiree.

4) Present revised pay codes to the Board to ratify exclusions from Compensation Earnable in compliance with the *Alameda* Decision for the PEPRA Exclusions, effective August 30, 2020. Present revised pay codes to the Board to ratify exclusions from Compensation Earnable in compliance with the *Alameda* Decision for the *Alameda* Exclusions, effective July 30, 2020.

5) Communicate to SBCERA participating employers that member contributions are no longer to be taken on pay codes that are excluded as a result of the *Alameda* Decision, effective July 30, 2020 for the *Alameda* Exclusions and effective August 30, 2020 for the PEPRA Exclusions.

6) Refund of active member contributions that were made on pay codes for the PEPRA Exclusions from January 1, 2013-August 29, 2020 will be determined at a later date in accordance with SBCERA's Benefits Policy No. 024 – Benefit Administration Procedures, applicable federal tax compliance rules, and California law. Refund to active members any overpaid member contributions on the PEPRA Exclusions that they make on or after August 30, 2020 as a result of SBCERA's implementation of the *Alameda* Decision.

7) Refund active member contributions that were made on pay codes for the *Alameda* Exclusions prior to July 30, 2020 to SBCERA members who did not retire by that date and who therefore will not have the *Alameda* Exclusions included in the calculation of their retirement allowances received from SBCERA.

8) Inform the SBCERA membership of these decisions through appropriate means.

This resolution supersedes any previous resolutions for employer pay codes of employee compensation.

IN WITNESS WHEREOF, the above Resolution for SBCERA is hereby adopted by the BOARD on this 6th day of August 2020.

SAN BERNARDINO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

By: Janice Rutherford
Janice Rutherford, Chair

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, Deborah Cherney, Secretary to the BOARD of SBCERA, hereby certify the foregoing to be a full, true and correct copy of the record of the action taken by the BOARD, by vote of the members present, as the same appears in the Official Minutes of said Board at its meeting of August 6, 2020.

Deborah S. Cherney
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