

November 17, 2020

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Board of Supervisors
County of Ventura
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Shawn Atin
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Subject: Authorization for the County Executive Officer or his Designee to Advocate to the California State Legislature for Legislation Clarifying that the County's Flexible Benefit Allowance May Continue to Be Included as Pensionable Compensation for the Purposes of Retirement Benefit Calculations for Legacy Members

Recommendation:

It is recommended that your Board authorize the County Executive Officer or his designee to advocate to the California State Legislature for legislation clarifying that the County's Flexible Benefit Allowance may continue to be included as pensionable compensation for purposes of retirement benefit calculations for employees hired prior to January 1, 2013.

Fiscal/Mandates Impact:

None

Discussion:

The proposed legislation for which we seek your Board's authorization to advocate is designed to avert the effects of a recommended action by the Ventura County Employees' Retirement Association (VCERA) to exclude all but a minor portion of the value of the County's Flexible Benefit Allowance (FBA) from pensionable compensation for employees hired prior to January 1, 2013 ("legacy members"). Although no action has been taken by the VCERA Board of Retirement, VCERA staff has taken the position that such exclusion is required by the California Supreme Court's opinion in *Alameda County Deputy Sheriff's Assn. v. Alameda County Employee Retirement Assn.* (2020) 9 Cal.5th 1032 (*Alameda*). County Counsel has opined that *Alameda* does *not* require that action.

Since 1989, by virtue of a resolution adopted by the VCERA Board of Retirement, VCERA legacy members (employees who started participation in the retirement plan prior to January 1, 2013) receive the full value of the bi-weekly FBA included in pensionable compensation for purposes of their retirement benefit calculations. (PEPRA members (employees who started participation in the retirement plan on or after January 1, 2013) do not.) Following issuance of the *Alameda* opinion, VCERA staff advised the Board of

Retirement that, for legacy members who retire on or after July 30, 2020 (the date the *Alameda* opinion was issued), for the purposes of calculating their pension benefit, it may include only the portion of the FBA that an employee would have received in cash had the employee opted out of the flexible benefit plan (i.e., the FBA less the opt-out fee). According to VCERA staff, the FBA is an in-kind benefit and is excluded from the definition of pensionable compensation. Significantly, the *Alameda* opinion does not address in-kind benefits.

VCERA staff's position, if at some point adopted by the Board of Retirement, could have a devastating impact on many County employees. For current employees who plan to retire in the near term, VCERA staff's proposed action would result in an unexpected loss of as much as ten percent (10%) of the anticipated monthly pension benefit. Not only could such action have a significant, if not life-altering, negative impact on the financial status and well-being of these future retirees, it could also have legal ramifications for the County (and VCERA).

To address the impact on the pension benefits for legacy members that would result if the Board of Retirement were to adopt a resolution excluding the full value of the FBA from pensionable compensation, we recommend that your Board authorize the County Executive Officer or his designee to advocate to the California State Legislature for legislation clarifying that the County's FBA may continue to be included in pensionable compensation for legacy members.

We recommend this approach because: a) it provides a clear and precise resolution to this issue without the expense and delay of litigation; and b) it maintains the status quo, preserving the pension benefit, and allows VCERA to continue its practice of including FBA in the calculation of pensionable benefits for legacy members. This approach would not result in any additional cost to the plan, nor would it increase administration requirements for the County or VCERA. Furthermore, this solution would allow for all employees to continue to receive their current benefit levels.

For these reasons, we recommend your Board authorize the County Executive Officer or his designee to advocate to the California State Legislature for legislation clarifying that a county that, prior to July 30, 2020, included FBA as part of its pension benefit calculation for employees hired before January 1, 2013, may continue to do so until such time as its board of supervisors determines that the FBA shall not be considered in such calculation. The language of the proposed legislation would be substantially similar to the following:

"Notwithstanding the provisions in sections 31460 and 31461 to the contrary, a county that, prior to July 30, 2020, included a flexible benefits or cafeteria plan allowance as part of compensation earnable for employees hired before January 1, 2013, shall be permitted to continue to include such flexible benefits or cafeteria plan allowance as part of compensation earnable from and after July 30, 2020, for employees hired before January 1, 2013, unless and until the

board of supervisors, by resolution, determines that such flexible benefits or cafeteria plan allowance shall not be considered compensation earnable. Nothing in this section shall be construed to require a county to include flexible benefits or cafeteria plan allowance as part of compensation earnable.

"This section shall apply only to the retirement system established under this chapter in Ventura County."

This letter has been reviewed by the County Executive Office, the Auditor-Controller's Office, and County Counsel. If you have any questions regarding this item, please call me at (805) 654-2561.

Respectfully,



SHAWN ATIN

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mp - MICHAEL POWERS
County Executive Officer

cc: Jeffery S. Burgh, Auditor-Controller
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