



# THE PUBLIC SECTOR

## Ballot initiatives on pension reform are gaining steam

by Jon Holtzman

After last year's passage of Governor Jerry Brown's pension reform measure, known as the California Public Employees' Pension Reform Act (PEPRA), the pervasive question has been whether the impetus for real pension reform is over, despite the fact that the governor's measure was weak tea at best. Recent activity suggests the clear answer is that a broader pension reform measure on the ballot is likely—although it's unclear whether it will make the ballot in 2014 or 2016.

Why? Well, from a pension geek perspective, PEPRA failed to address the central problem most public-sector employers face: The cost of existing pension and retiree healthcare obligations is unsustainable, and recent court decisions have made it very difficult to change benefits for current employees without risking extraordinary litigation costs and liability. From a more political perspective, various private polls suggest the public doesn't believe the pension problem has been solved.

What would a pension initiative look like? There are numerous groups with an oar in the water on the issue, so the precise contours are far from clear. But some consensus appears to be emerging around a few major issues that both PEPRA and the courts have failed to address.

First, California courts' interpretation of the Contracts Clause of the California Constitution is fundamentally flawed—and based on a series of cases that have progressively misread earlier cases to conclude that benefits vest on the first day of employment and cannot be changed for future service. The conclusion that benefits cannot be changed for future employment can't be squared with collective bargaining laws that have been enacted since the key cases on which California "vesting" law is based.

Second, California law on the "implied vesting" of benefits makes no sense. For the better part of the last century, the guiding principle for major expenditures in the public sector is that they must be approved by the governing body (on the local level, that's the board of supervisors or city council) or by the electorate. So, for example, most jurisdictions require that contracts exceeding a particular amount be approved by the governing body. State law expressly provides that collective bargaining agreements must be approved by the governing body before they can become effective. Yet when it comes to pension and retiree healthcare

benefits—which are often granted without any contract at all—their permanence can be "implied" by indirect evidence.

Put simply, an obligation that lasts forever and entails perhaps 25% of the local budget (and that's conservative since most local governments have yet to fund their retiree healthcare benefits) can be implied without a clear vote by the governing body, but the purchase of a fire truck requires an expressly approved contract. That simply makes no sense.

Finally, there's an ongoing debate about the power of the voters to make changes in local retirement provisions. The debate is complicated by the fact that local governments provide retirement benefits under a patchwork of state laws. Generally, there have been numerous challenges to the power of the voters or governing bodies to make changes in pension and retiree healthcare provisions. Most notably, the Public Employee Relations Board (PERB) has issued a slew of complaints seeking to interfere with voters' ability to make decisions regarding pensions. Again, that makes no sense.

Under California law, most general obligation bonds require voter approval. Retirement benefits often involve even greater expenditures. Surely the voters should have a say if they wish to weigh in. PEPRA greatly complicated the debate by severely limiting increases in employee contributions to pensions and by not appearing to address how voters can make changes to pension plans. One thing is especially clear: Issues involving initiatives enacted by the people should be under the exclusive jurisdiction of the courts, not state administrative agencies.

These are but a few examples of change that needs to occur to allow California government to restore services and survive economically. It's tempting to think that the recent economic upturn will allow governments to prosper again without often painful reforms. But that simply isn't going to happen. Probably the best-case scenario if reforms aren't enacted is that governments will continue to limp along at current—and generally inadequate—service levels, which have been severely reduced as a result of the Great Recession. That's optimistic.



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