

California Supreme Court Allows Elimination of “Air Time” Benefit but Avoids Reconsideration of the “California Rule”

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The opportunity to purchase pension service “Air Time” was not a vested right and was permissibly eliminated by the Legislature. Many observers hoped that in *Cal Fire Local 2881 v. CalPERS* the California Supreme Court would make a definitive statement concerning the scope of public pension rights under the so-called “California Rule.” Having found that the benefit was not due constitutional protection, the Court explained that: “For that reason, we have no occasion in this decision to address, let alone to alter, the continued application of the California Rule.”

Eligible members of CalPERS had the option to purchase additional retirement service (ARS) credit of up to five years. The benefit was commonly called “Air Time” because some contended the service was made up “out of thin air.” As originally conceived, the benefiting employee would pay the cost of the benefit. In practice, the cost was difficult to estimate and employers bore the burden of pricing errors. The Public Employees’ Pension Reform Act of 2013 (PEPRA) eliminated this option. The Court stressed that PEPRA did not affect the rights of employees who purchased Air Time. “What is claimed here to be a vested right is the *opportunity to purchase* ARS credit, rather than any of the rights conferred by its purchase.”

Constitutional protection applies to the terms and conditions of public employment only where the creation of contract rights is clear in the laws creating them. However, where pension rights are involved, courts have traditionally extended protection by implication “even in the absence of clear manifestation of legislative intent.” Under the California Rule, the protection covers not just the benefits already earned, but extends to the expectation that an employee can continue to earn the same benefits throughout employment. Stated differently, pension benefits vest on the first day of employment and generally cannot be reduced during employment without substitution of a benefit of comparable value.

A unanimous Supreme Court concluded that the Legislature did not show an intent to create a contractual right or a benefit that would not be subject to repeal in the Air Time statute. The Court further noted that the benefit was not different in form from other optional benefits an employee could purchase. Consequently, the opportunity to purchase Air Time was not a vested contract right and its elimination did not impair constitutionally protected rights.

The California Supreme Court has several other pending cases where vested rights and the California Rule could be involved. If you have questions on this case or public retirement issues, please contact **Roy A. Clarke** or **Rebecca Green** in our Labor & Employment Department.