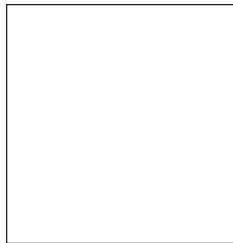


# Retiree Health Benefits: Still Misunderstood...Still Protected

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*“[M]en do not labor for chances on a roulette wheel and employers do not...pay wages with lottery tickets.”<sup>1</sup>*

Retiree health benefits may be as hot a topic as Texas Hold-Em, but they are nothing to gamble with. Most retirees promised employer-paid, lifetime retiree health benefits never imagined that after retirement, they would suddenly face overwhelming charges for these benefits. And current employees, who have labored for years with the expectation of lifetime health insurance security, are equally shocked when they learn their employer is attempting to negotiate “cost-sharing” with their union representatives. Cost-sharing is more than disheartening to an older retiree on a fixed income. It is a breach of an important promise. Did retirees remain loyal employees on the *chance* that their employer might fulfill this promise?

Several CPER articles recently have addressed retiree health benefits.<sup>2</sup> My earlier “Short Primer on Retiree Health Benefits” discussed the law governing impairment of vested retiree health benefits.<sup>3</sup> It focused on the nature of vested rights, their special protection under California law, and the extremely limited circumstance under which an employer could *unilaterally* impair such benefits. However, I reserved for another day the issues presented when benefits are conferred through collective bargaining agreements. That day has arrived.

This article addresses whether and under what circumstances retiree health benefits created through collective bargaining under the Educational Employment Relations Act can be modified or extinguished through subsequent collective bargaining agreements, for existing employees or retirees. However, much of this analysis applies to other public sector employees, unions and employers. In general, changes for those who have already retired are presumptively suspect and

frequently prohibited. Changes for existing employees are more complex, sometimes allowable, frequently not, depending on several factors. Changes for future employees are often, but now always, allowable.

This article was prompted by serious misstatements of law in the recent *CPER* article “Weathering the Gathering Storm Over Post-Retirement Health Care Benefits—Vested or Not.” Among other things, that article incorrectly suggests that retiree health benefits cannot “vest” under collective bargaining agreements, and that retirees cannot challenge changes to their retirement health benefits. Both notions are dead wrong.

Before collective bargaining began for public schools and community colleges in 1976 with the adoption of EERA,<sup>4</sup> many California public employers offered retiree health benefits. The reasons were fairly simple. Public employers typically could not afford wages that were competitive with the private sector, but benefits were a different matter. A good health plan and the opportunity to receive such benefits after retirement, at no cost, induced people to come to work for less pay. Indeed, in 1963 it became the official policy of California to encourage this benefit.<sup>5</sup> So it is hardly surprising that these plans spread throughout the state.

By the time collective bargaining arrived, it was already settled under the National Labor Relations Act that retiree health benefits are a mandatory subject of bargaining.<sup>6</sup> The Public Employment Relations Board followed suit.<sup>7</sup> Many of the pre-bargaining plans were replicated in collective bargaining agreements. In districts where no pre-bargaining policies existed, they were negotiated. The language of the plans sometimes changed, thanks to the bargaining process.

In “Gathering Storm,” the authors argue that retiree health benefits for active employees can be modified through valid collective bargaining agreements with labor unions. The authors intimate that such benefits also can be modified for current retirees. Neither proposition can stand as a general principle. The reality is far more nuanced.

The *San Bernardino* case, the sole authority relied on for the startling position that employees cannot challenge changes to negotiated retiree health benefits, did not even decide the issue for which it is cited.<sup>8</sup> Indeed, there is no judicial authority for this astounding proposition. In fact, the California Supreme Court has held that benefits conferred in collective bargaining agreements are subject to vesting and constitutional protections, and are subject to legal challenges to protect vested rights. Scores of analogous private sector cases have held that retiree health benefits created by collective bargaining agreements are protected from governmental impairment.<sup>9</sup>

Indeed, it is well settled that private sector retirees have standing to file suit under Section 301 of the Labor Management Relations Act to enforce retiree benefit provisions in expired collective bargaining agreements.<sup>10</sup> California law allows enforcement of actions for vested rights through mandamus.<sup>11</sup>

In addition, the central holding of *Thorning v. Hollister*, that retiree health benefits conferred by a public employer are subject to vesting under the Contract Clause, remains good law.<sup>12</sup> Contrary to the “Gathering Storm,” the decision in *Sappington v. Orange Unified School Dist.* did not limit the “reach” of *Thorning*.<sup>13</sup> Rather, *Sappington* involved an unexceptional interpretation, based

on a measly evidentiary record, of a cryptic promise to “underwrite” a retiree health benefit plan, made in a unilaterally adopted city policy. *Sappington* actually illustrates the importance of applying settled tests of contract interpretation, and reviewing extrinsic evidence, to determine the meanings of words and phrases concerning these benefits.

The right to enforce contractual promises has a rich history. The Founding Father’s enshrined the sanctity of contracts in the U.S. Constitution. Article 1, Section 10, provides that “no state shall pass any law impairing obligations of Contracts.” James Madison, writing in the *Federalist Papers*, explained that the Contracts Clause was the “constitutional bulwark in favor of personal security and private

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rights,” explaining that impairment of a contract was “contrary to the first principles of the social compact...”<sup>14</sup> The California Constitution parallels this rule in Article I, Section 9.

California law has identified and protected the vested rights of public employees for almost a century.<sup>15</sup> This precedent is worth summarizing. The contractual basis of the right is an exchange of the employee’s services for the benefits offered in a contract.<sup>16</sup> This entitlement can be implied,<sup>17</sup> or it can be explicit.<sup>18</sup> “Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation.”<sup>19</sup> When a public entity creates a post-retirement benefit plan, an employee’s rights to that plan vests when the employee accepts employment, or when the promise is made or improved upon while employed.<sup>20</sup> This is so “even though the right to immediate payment of [the benefits] may not mature until certain conditions are satisfied.”<sup>21</sup> Requiring increased employee contributions to pension systems has been held to unconstitutionally impair contract obligations.<sup>22</sup>

Pension laws, which were first afforded the protection of vested rights, are to be liberally construed to protect pensioners and their dependents from economic insecurity.<sup>23</sup> California favors this liberal construction of retirement benefit provisions to accomplish their “beneficent purpose” to “protect the reasonable expectations of those whose reliance is induced.”<sup>24</sup> The first cases to apply these principles in situations involving public employers and employees were pension cases (cited in the preceding footnotes). California courts understood that public employers could not lightly impair promised retiree compensation. It was equally clear that policies providing such benefits were contracts, protected by the Constitution. Thus, even unilaterally created employer policies manifested themselves as contracts.<sup>25</sup> Like pensions, retiree health benefits are simply another form of retirement-based deferred compensation, entitled to similar protection.<sup>26</sup>

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When referring to retiree health benefits, we usually mean several discrete benefits: (1) retiree health plans provided without premiums or similar fees to retirees and sometimes their spouses and dependents, which may or may not parallel the plans available to active employees; (2) the copays and deductibles that accompany the plans; and (3) the scope of the plan, that is, whether there is an HMO and/or a PPO option available, and whether the plan is portable. Add in Medicare-eligible employees, Medicare Supplement plans, and Medicare Part B, and the topic becomes even more confusing. This article focuses on changes, regardless of the particular benefit at issue.

It is worth mentioning a few facts often overlooked in the current debate. First, retiree health benefits are widespread in California public jurisdictions. According to a study by the California State Teachers’ Retirement System, between 62 percent and 100 percent of public schools and community colleges provide some form of employer-paid retirement health benefits.<sup>27</sup>

Second, the health benefits “crisis” is not new. Hundreds of court decisions from across the nation have addressed retiree health benefits in the private sector, and occasionally in the public sector. Private sector litigation has been especially intense in the last 20 years.<sup>28</sup>

Although many of these cases arise under a specific federal law inapplicable to the public sector, they often address benefits codified in the terms of collective bargaining agreements, thus offering a rich, though at times conflicting, source of interpretative guidance. Moreover, these cases analyze crucial concepts, such as the survival of benefits following contract expiration and reservation of rights clauses, in addition to theories that might arise in a California public sector case, such as breach or impairment of a promise or contract, equitable estoppel, promissory estoppel, and breach of fiduciary duty.<sup>29</sup>

Third, the accounting requirements of the Government Accounting Standards Board do not require elimination or curtailment of retiree health benefits. Nor does GASB re-

quire the pre-funding of such benefits. GASB merely addresses the reporting of these benefits on an employer's financial statement. As anyone who has worked on a PERB factfinding case involving these benefits can attest, estimates of future costs are about as predictable as the stock market.

My experience with retiree health benefits dates to 1985, when I represented retirees from the San Leandro Unified School District. The district had promised that, upon retirement and qualification for Medicare, the district would reimburse them for their Medicare Part B premiums. The promise had been made in pre-collective bargaining district policies, and in a series of collective bargaining agreements. But after several years, the district reneged on the Part B reimbursement promise. The retirees were understandably upset. A petition for writ of mandate was filed, seeking to enforce the district's promise. The case eventually settled with the restoration of the reimbursement program, and a make-whole remedy.<sup>30</sup>

Since then, I have handled several similar cases for groups of retirees who have had their expectations of employer-paid benefits dashed. Some cases involved promises of paid health plans (paid premiums), while others included pledges of very small copayments and deductibles.<sup>31</sup> In the course of handling these cases, and representing scores of labor unions in negotiations that addressed retiree health benefits, I came to understand that although employer-paid retiree health benefits are a crucial component of compensation for both private and public sector employees, there is uncertainty about the nature of the protections afforded these benefits.

### ***Vested Rights Created in Collective Bargaining Agreements***

There is nothing exceptional about the notion that vested rights for retirees may be created in a collective bargaining agreement. Collective bargaining agreements are bilateral

contracts between contracting parties. In California, their enforceability under the Contracts Clause was settled in *Sonoma County Organization of Public Employees*. There, several cities and counties, suffering from of collective governmental panic following passage of Proposition 13, impaired employees' vested rights by abrogating wage increases required by collective bargaining agreements. The Supreme Court struck down the employers' actions, finding the strict scrutiny standards for the impairment of contracts had not been met.<sup>32</sup> Other states have confronted cases involving impaired vested rights, and reached similar results.<sup>33</sup>

### ***Interpreting a Collective Bargaining Agreement***

Whether a collective bargaining agreement conveys vested rights depends on the "intention of the parties as expressed in the contract."<sup>34</sup> In determining those rights, the task of the court is to "ascertain and give effect to this intention by determining what the parties meant by the words they used."<sup>35</sup>

The case of *Sappington v. Orange Unified School Dist.*, mentioned earlier, did not deal with either a union bargaining agreement or with an explicit promise. Instead, administrative retirees claimed they were promised a particular PPO plan, at district expense, rather than the cheaper HMO plan the district provided, based on an ambiguous policy statement that "the District shall *underwrite* the cost of the District's medical and hospital insurance pro-

gram for all employees who retire...."<sup>36</sup> At the center of the case was the meaning of "underwrite." The retirees offered no evidence regarding the intended meaning of this word. The trial court *agreed the retirees had vested rights to a premium-free plan*, but "construed the policy as a promise to offer [only] at least one health plan for which retirees pay no monthly premium."<sup>37</sup> The appeals court emphasized the *absence of any evidence* that retirees, "individually or as a group, had a reasonable expectation the District would always pro-

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vide free PPO coverage as part of the medical insurance program.”<sup>38</sup>

*Sappington* thus illustrates what are the pivotal issues in cases where retiree health benefits are created by a union collective bargaining agreement: (1) Did the contract language intend to confer a vested right? And, (2) If so, what was actually promised? The answer to these questions lies in the traditional rules of contract interpretation.<sup>39</sup>

### ***Do Retiree Health Benefits Survive the Duration of the Agreement?***

A corollary to these questions is whether the employer promised retiree benefits that survive the duration of the contract. This also involves interpretation of the agreement to elucidate the parties’ intent.<sup>40</sup>

Some employers have argued that the limited duration of a CBA defeats the claims for lifetime retirement health benefits.<sup>41</sup> These arguments are unconvincing. If the mere existence of a contract duration clause defeats claims for lifetime retiree benefits, then deferred compensation of any kind would be disallowed. In fact, nearly every contract has a limited duration, yet many provide for deferred compensation.

According to benefits attorney William T. Payne, most unionized employees who have sued to enforce promises in collective bargaining agreements have prevailed, and most courts have reasoned that general “durational” clauses do not limit promised deferred compensation. For instance, in *Bidlack v. Wheelabrator Corp.*, a series of contracts provided that “...those employees who have retired since September 22, 1959, will have the full cost of their Blue Cross-Blue Shield coverage paid by the Company after they attain 65 years of age.”<sup>42</sup> In addition, these benefits “shall be continued for the spouse after the death of the retiree.”<sup>43</sup> Concluding that courts “do not sit to relieve contract parties of their improvident commitments,” the court found the duration of the CBAs

did not defeat the retirees’ claims and that extrinsic evidence had to be considered. “We reject the extreme position...that all contractual obligations cease on the expiration date stated in the contract,” said the court.<sup>44</sup>

*Mauer v. Joy Technologies, Inc.*, likewise held that the duration of the CBAs did not limit retirees’ right to benefits. If the benefits could be terminated after just three years, when the contracts expired, then the promise would be meaningless and illusory, the court reasoned.<sup>45</sup> That the promised benefits were reduced to a Medicare supplement when an employee became eligible for Medicare further supported the conclusion that the benefits vested. The court found that the employer had unambiguously conferred employer-paid health benefits for the *duration of the retirees’ life*, despite the general duration clause in the CBA. It added that the Medicare supplement would have no value if benefits could be discontinued.<sup>46</sup>

Similarly, in *UAW v. American Pad*, the court rejected the employer’s argument that the contract durational clause limited the right to retirees’ benefits. The court held that the benefits vested when the requisite service was fully performed.<sup>47</sup> And, in *UAW v. Yard-Man, Inc.*, considered to be the seminal private sector retiree health benefits case, the court concluded that retirees’ benefits were lifetime and vested, ruling that a nonspecific general clause (such as a general duration clause of a labor contract) cannot “take precedence” over a more specific clause (such as one promising benefits during retirement).<sup>48</sup>

More recently in *Yolton v. El Paso Tennessee Pipeline Co.*,<sup>49</sup> the court concluded

that the benefits vested despite general durational language. It relied on those decisions holding that absent specific durational language *referring to the benefits themselves*, general durational language “says nothing about those benefits.”

Employer representatives often explain to retirees and prospective retirees the nature of their future pension and insurance benefits. If these representatives fail to delineate the duration of these benefits, and this leads retirees to be-

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lieve they will be “for life,” this is strong evidence favoring the plaintiff-retirees and has proved relevant in decisions rejecting duration of contract defenses.<sup>50</sup>

In addition, evidence that an employer informed employees that, upon retirement, they would receive benefits for life, has been found particularly relevant in interpreting collective bargaining agreements.

### **The Thorning Decision**

The leading California case discussing retirement health benefits as a vested right is *Thorning v. Hollister School Dist.*<sup>51</sup> There, two retired school board members claimed they had been granted vested health benefits that extended beyond their terms of office. The Court of Appeal agreed and relied heavily on California cases protecting vested pension benefits.

It is incorrect that *Thorning* was qualified by *San Bernardino Public Employees Assn. v. City of Fontana*. *San Bernardino* did not decide any issue regarding retiree health benefits. Following a negotiation impasse under the Meyers-Milias-Brown Act, the City of San Bernardino unilaterally imposed reductions in the *future* accrual rate for personal leave and the method of determining longevity pay for active employees. The city did not attempt to eliminate benefits already earned. It also imposed a clause requiring that “[r]etirement insurance benefits were to be renegotiated” for *active* employees who had not yet retired.<sup>52</sup> The employees’ union argued that the rights at issue had vested, and could not be unilaterally changed without violating the Contract Clause.

The court found that neither future *vacation leave accrual rates* or *longevity pay* qualification rules for current employees were vested rights, ruling that the existing rates continued only as long as they were renegotiated in periodic CBAs, and that employees had “no legitimate expectation that the longevity-based benefits would continue.”<sup>53</sup> This was so

“because the benefits were earned on a year-for-year basis under previous MOUs that expired under their own terms.”<sup>54</sup>

Notably, the court did not extend<sup>55</sup> this analysis to retiree *health benefits* because a “court may not issue rulings on matters that are not ripe for review.”<sup>56</sup> The court appropriately declined to reach the issue because there had been no impairment. The authors of “Gathering Storm” have entirely missed the fact that the court *declined to rule* on whether it was illegal to impose the clause requiring future negotiations over the future benefits of existing employees, and that the case did not address benefit rights of those already retired.

The authors of “Gathering Storm” argue that because both *Sappington* and *San Bernardino* rejected the *Palos Verdes* decision, *Thorning* is now questionable authority due to its reliance on *Palos Verdes*.<sup>57</sup> This shaky house of cards falls when these cases are carefully examined.

First, *Palos Verdes* did not involve the enforcement of a collective bargaining agreement under the Contract Clause. Instead, it asserted that certain benefits were “fundamental rights” worthy of constitutional protection, and could not be unilaterally withdrawn after a collective bargaining impasse. Second, *Thorning* cited *Palos Verdes* mainly for the proposition that benefits other than pensions were subject to vesting. Several cases have identified vari-

ous benefits that have contractually vested including health benefits, wage increases, and disability benefits. Third, *Palos Verdes* did not address whether contractually vested post-retirement health benefits were subject to impairment. As is evident, such deferred compensation is of a character considerably different than vacation and other transitory benefits.

In *Olson v. Cory*, the Supreme Court held that promised *salary increases* for judges were vested rights protected by the Contract Clause that could not be abridged by placing a limit on cost-of-living increases for judicial salaries.<sup>58</sup> The *Olson* court clearly held that promised compensation for future years is protected by the Contract Clause: “[T]he ele-

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ments of compensation for [judicial] office become contractually vested upon acceptance of employment.”<sup>59</sup> Similarly, in *Sonoma County Organization of Public Employees v. County of Sonoma*, future *cost-of-living salary increases* for the 1978-79 fiscal year were deemed vested so that passage of a June 1978 initiative measure could not impair such contracts, even though the salary for that following year had not yet been completely earned.<sup>60</sup> In *Frank v. Board of Administration of PERS*, the Court of Appeal held that a disability pension vested at the time of employment even though there was no service requirement for receiving disability benefits; the court rejected the argument that the benefits were not earned and did not vest until the employee was disabled.<sup>61</sup>

### **Reservation of Rights Clauses**

Employers sometimes argue that a “reservation of rights clause” allows post-retirement changes in promised health benefits. These arguments depend greatly on the specific language used in the collective bargaining agreement. For instance, in *Anderson v. Alpha Portland Industries, Inc.*,<sup>62</sup> the court found that the benefits did not survive contract expiration because “[f]rom 1946 through 1955 Alpha ‘reserve[d] the right to change, modify, or discontinue [the group insurance plan] if future conditions made such action necessary...The 1956, 1957, and 1958 CBAs expressly limited benefits to the duration of the agreement....”<sup>63</sup>

Generally, however, the courts have been suspicious of these clauses, and unlikely to apply them unless the reservation of rights is clear and unambiguous. For instance, *Barker v. Ceridian*<sup>64</sup> found no valid reservation of rights to allow impairment of benefits because of ambiguity; it was unclear whether the clause preserved the rights only for those who would be entitled to the benefits in the future, or for those already receiving benefits. The court concluded that too broad a reading would make the promised lifetime benefits “illusory.”

Some employers have relied on documents that contain a reservation of rights clause given to retirees at the time of

retirement. These efforts to restrict vested rights have been struck down by the courts. The City of Santa Barbara learned this when it gave a future retiree a form that dissuaded him from applying for vested retirement benefits. Later, when he sought benefits, the city argued he had waived his rights. In *Hittle v. Santa Barbara County Employees Retirement Assn.*, the Supreme Court found the purported waivers of rights to be ineffective because no consideration was supplied for them, and they essentially were adhesion contracts.<sup>65</sup> *Hittle* holds that an employee cannot waive entitlement to future retirement benefits by signing such a form at the time of retirement, absent

clear notice of what he was waiving.<sup>66</sup>

Thus, *adhesive* documents presented to retirees at the *time of retirement*, containing recitals eliminating previously vested rights, have no legal effect and cannot divest retirees of previously acquired vested rights.

Furthermore, in a collective bargaining system, the presentation of an employer-created reservation of rights document, external to the collective bargaining agreement, amounts to an act of direct dealing and hence is of no independent validity. Direct dealing with employees at any time is an unfair labor practice.<sup>67</sup>

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### **No Need to Use the Term ‘Vest’**

It is unnecessary for an agreement to use the word “vest” in order for the benefits to become vested. Courts may imply contractual obligations “from the particular words” at issue, and implied contracts are “of equal dignity with an express contract for purposes of the prohibition against impairment.”<sup>68</sup> An intent to grant contractual rights can be implied from an unambiguous exchange of consideration between a private party and the state.<sup>69</sup> Federal cases also hold that the use of the words such as “vested” “are not prerequisites to finding the parties intended the benefits to vest.”<sup>70</sup>

Second, Medicare offset language also has been considered strong evidence that retirement health benefits were intended to survive the expiration of the contract. The rea-

soning is that, if the promise was not intended to survive contract expiration, there would be no need to reference qualification for Medicare, an event generally years away for most employees.<sup>71</sup>

### ***Use of Extrinsic Evidence to Prove the Meaning of Contract Language***

If a contract clause is subject to more than one interpretation, it is “ambiguous” under governing case law.<sup>72</sup>

Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, extrinsic evidence nonetheless may play a significant role in interpreting a written contract the terms of which are not entirely clearly. As explained in *Wolf v. Superior Court*:<sup>73</sup>

Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court’s own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible.<sup>74</sup>

Thus, the trial court follows a two-step process. First, it provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions in order to determine ambiguity. If, in light of the extrinsic evidence, the court decides the language is reasonably susceptible to the interpretation urged, extrinsic evidence is then admitted to aid in the second step, interpreting the contract.<sup>75</sup>

The trial court’s determination of whether an ambiguity exists is a question of law. The trial court’s resolution of an ambiguity is also a question of law if no parol evidence is

admitted, or if the parol evidence is not in conflict. Where the evidence is in conflict, the trial court’s interpretation of that evidence is a question of fact.<sup>76</sup>

### ***Unions and Employers Cannot Negotiate to Eliminate Vested Benefits***

Although collective bargaining rests on the principle that a bargaining unit member is bound by a labor agreement even though he or she may not have personally consented to its provisions, the policy of overriding individual interests for the good of the whole is not absolute.<sup>77</sup> Con-

gress did not authorize a “tyranny of the majority over minority interests.”<sup>78</sup> A union may not bargain away *individual* rights in vested retirement benefits.

Federal courts have expressly held that vested pension rights cannot be bargained away by unions in negotiations with employers. As articulated in *Allied Chemical and Alkali Workers of America, Loc. Union No. 1 v. Pittsburgh Plate Glass Co.*,<sup>79</sup> “Under established contract principles, vested retirement rights may not be altered without the pensioner’s consent.” *Allied Chemical* held that retirees

were not “employees” under the federal labor laws, and that unions may, but are not required to, negotiate concerning benefits of retired employees. The court explained that even though unions could bargain for retirees, *they could not bargain away vested rights without individual retiree consent*. This principle of the decision was grounded on the recognition that active employees had no duty to represent the interests of those who retired; and, even if it chose to do so, the union was under no duty to fairly represent the interest of retirees.<sup>80</sup> Thus, the court explained the obvious, that active employees are “free to decide...that current income is more preferable to greater certainty in their own retirement benefits” or those of retirees. Therefore, while a union may bargain for future benefits for active employees, it is constrained in bargaining away those benefits for those who have retired.

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Although *Allied Chemical* focused on the relationship between unions and retired employees, the principle that unions cannot bargain away vested retirement rights has been extended to vested rights of employees *still represented* by the union. These rulings recognize that benefits may vest before the right to their receipt has accrued. This is crucial in California, which has long held that retirement benefits vest for public employees when they are conferred.

For example, in *Terpinas v. Seafarer's International Union of North America*, the court held that once an employee became vested in a disability plan after 10 years of service, the union's agreement to amend the disability plan could not retroactively destroy or alter the employee's vested rights.<sup>81</sup>

It is true that unlike retirement health benefits, virtually all other provisions of a collective bargaining agreement are subject to change. A prime example is seniority. Retiree rights are very different than seniority system rights,<sup>82</sup> which the federal courts have held can be changed by collective bargaining.<sup>83</sup> Seniority rights are *collective* rights and a union's authority to negotiate over seniority is derived from its right to act for "mutual aid or protection."<sup>84</sup> Retiree health benefits, in contrast, are a special form of deferred compensation guaranteed to an individual, which generally is earned only after years of loyal service.

In *Alexander v. Gardner-Denver*, the Supreme Court similarly distinguished between certain rights related to collective activity, such as the right to strike, and *individual* rights, such as the right to equal employment opportunities. It held that an employee's individual rights to be free from discriminatory employment practices could not be waived by a collective bargaining agreement.<sup>85</sup>

Despite the general rule in California that individual employees are bound by the collective agreement, important individual constitutional and statutory rights cannot be waived by unions when enforcement of a collectively bargained provision would contravene an explicit state policy. For example, in *Phillips v. California State Personnel Board*,

the court held that unions cannot bargain away fundamental due process rights to pre- and post-termination hearings for permanent public employees. They may, however, supplant existing procedures with those that meet the minimal requirements of due process.<sup>86</sup> The *Phillips* court relied on this distinction between collective and individual rights in holding that unions may not waive minimum due process in rights termination procedures.<sup>87</sup> A union contract that contains residency requirements in violation of the state Constitution is void and unenforceable. Again, the court was protecting individual rights.<sup>88</sup>

Statutory rights that spring from a strong and explicit state policy cannot be waived in collective bargaining agreements. In *Wright v. City of Santa Clara*, the court held that a collective bargaining agreement could not require reserve officers in the armed forces to relinquish their military paycheck before receiving compensation under the Military and Veterans Code. The court reasoned that the legislature manifested a different intent by not explicitly allowing such a waiver by city employee unions.<sup>89</sup>

A few cases have identified rights that are subject to waiver in collective bargaining. For instance, in *Porter v. Quillin*, the court held that the unions could waive the statutory right where the public policy supporting the right protection — from employer coercion to purchase the employer's products or services — was adequately served by union representation and collective bargaining.<sup>90</sup> In *McMillen v. Civil Service Commission*, the court upheld the union's agreement to differentiate obesity from other medical or physical employee problems because the disciplinary procedural rules still included a due process hearing.<sup>91</sup> In these cases, the employees' rights subject to waiver by the unions were not individual rights to deferred compensation that had been earned by the employee.

Courts have addressed negotiated impairments of retirement health benefits. In *Hauser v. Farwell, Ozmun, Kirk & Co.*, the court rejected the purported analogy to *seniority benefits* and held that "without explicit authority or a power of

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attorney from the individual members,” the union could not bargain away the vested pension rights of employees.<sup>92</sup> The distinction between seniority system rights and retirement benefits rights is founded on the fact that seniority is not a guaranteed benefit but merely a status. It is a rank based primarily on an employee’s length of service relative to others that leads to preferential treatment.<sup>93</sup> Retirement health benefits and other benefits such as vacation pay, unlike seniority, are earned wages, the payment of which is merely deferred.<sup>94</sup>

In *Bokunewicz v. Purolator Products, Inc.*, the court held that disability pension benefits vested prior to application for the benefits and a collective bargaining agreement that modified the plan between the date of injury and the date of application for benefits could not waive the employee’s vested rights.<sup>95</sup> Thus, in the private sector, vested retirement rights cannot be amended through collective bargaining without individual consent.

Some employers dismiss the relevance of *Terpinas*, *Bokunewicz*, and *Hauser* because they are pension cases. But there is no reason why the vested rights to retirement health benefits should not similarly be immune to impairment through collective bargaining. Retirement health benefits are as important to retirees as pensions, especially in light of current health care costs. Indeed, many retirees identify retirement health benefits as a crucial reason to continue working for their employer.

State policy favoring collective bargaining, some argue, should prevent retirement health benefits from vesting at the time of employment. Yet, as evidenced by *Hauser* and other cited cases, corresponding federal policy in favor of collective bargaining does not override vested contractual rights of union represented employees. In *Hauser*, the pension plan originated as a company plan that subsequently was amended through collective bargaining conditional on receipt of *individual waivers* of the rights conveyed by the original plan.<sup>96</sup>

Some employers insist that collective bargaining and exclusive representation precludes individual consent to

these benefits because the right to enter into contracts is affected. In fact, the Supreme Court has left open the possibility that individual contracts “may add to [collective contracts] in matters covered by the collective bargain,” while declaring that in individual contracts the employer “may not...obtain any diminution of his own obligation or any increase of those of employees in the matter covered by collective agreement.”<sup>97</sup> In addition, the contractual right of public employees under the Contract Clause does not apply

to private sector employees’ vested contract rights. Surely, this constitutionally protected right should be held as secure as private sector employees’ rights.

The public policy argument advanced in “Gathering Storm” is not supported by any precedent in this constitutional context. No “paralysis” of labor-management relations will occur by vesting these at the time of employment. Only promised future compensation is vested and protected by the Contract Clause. Although aspects of vacation pay, such as accrual rules, are promised future compensation, most subjects of bargaining do not become

vested rights of employees. Workload, class size, safety conditions, procedures for discipline, and layoff procedures and criteria are not subject to vesting.

### ***Guiding Principles***

So, what principles can be derived from this state of affairs? First, promises can be made that do not allow for post-retirement modification through negotiations. Whether such a promise exists turns on the intent of the parties. And that, in turn, depends on the language used and application of the traditional tools of contract interpretation.

Second, in any given plan, some aspects may be protected vested rights, such as the right to a premium-free plan, while other aspects (i.e. the scope and ancillary costs) may be tied to the benefits offered active employees. While the right to *receive* a plan may be vested, specific copays and deductibles may not. Again, it depends on the language employed.

*Unions and retirees are  
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What is a union to do if an employer insists on negotiating to eliminate or encumber vested rights? They have various courses. Unions can refuse to negotiate rights they believe are vested, asserting that they do not represent retirees. They can demand broad hold harmless and indemnification language. The correct approach depends on the situation. Unions and retirees are advised to investigate the origin of their contract language and maintain good records, for when a dispute arises, those who negotiated the language may no longer be available.

The parties at all times should be cognizant of the principle that a union cannot be forced to agree to waive individually vested rights. ✱

1 *Roxbury Carpet Co.* 73-2 Lab. Awards, CCH par. 8521, at p. 4938-4939 (Summers 1973).

2 See “Weathering the Gathering Storm Over Post-Retirement Health Care Benefits — Vested or Not,” by Jeff Sloan, Genevieve Ng, and Merlyn Goeschl, *CPER* No. 184, June 2007 (“Gathering Storm”); and “Further Storm Warnings in the Territory of Retiree Health Care Benefits,” by Richard Whitmore and Cepideh Roufougar, *CPER* No. 185, August 2007 (“Further Storm”).

3 “A Short Primer on Retirees’ Vested Health Benefits,” by Robert J. Bezemek, *CPER* No. 163, December 2003.

4 Gov. Code Secs. 3540 et seq.

5 Gov. Code Secs. 53201 et seq., especially Sec. 53205 (Stats. 1963, Chap. 1773, Sec. 2).

6 *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157, 159-160, 92 S. Ct. 383.

7 *County of San Joaquin* (2003) PERB Dec. No. 1570, 28 PERC par. 37, p. 158, 164 CPER 119; *Temple City Unified School Dist.* (1989) PERB Dec. No. 782, 14 PERC par. 21027, p. 68, 83X CPER 15.

8 See *San Bernardino Public Employees Assn v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1223, 133 CPER 9.

9 See cases discussed in “Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits: A Plaintiff’s Perspective, William T. Payne, 10 *The Labor Lawyer* 91 (1994).

10 *Pittsburgh Plate Glass* (1962) 404 U.S. , 181, n. 20; *Smith v. News Assn.* (1962) 371 U.S. 195, 200-201; *United Auto Workers v. Yard-Man, Inc.* (6th Cir. 1983) 716 F. 2d 1476, 1484-1486, cert den. (1985) 485 U.S. 1007; *Turner v. Local Union No. 302, Int. Brotherhood of Teamsters* (9th Cir. 1979) 604 F. 1219. 1224 n. 5.

11 This flows directly from California Code of Civil Procedure Sec. 1085, which defines the writ as one that may be issued “to compel the performance of an act which the law specially enjoins as a duty resulting from an office ....” See also *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296; *Santa Clara County Counsels Assn. v. Woodside* (1994) 7 Cal. 4th 525, 540 (*reh. den.* 1994), upholding the right of employees to sue in mandamus to enforce a local salary ordinance.

12 *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598 (*rev. den.* 1993).

13 *Sappington v. Orange Unified School Dist.* (2004) 119 Cal.App.4th 949.

14 *The Federalist*, No. 44, at 282, c. Rositer ed. 1961.

15 *O’Dea v. Cook* (1917) 176 Cal. 659; *Aitken v. Roche* (1920) 48 Cal.App. 753.

16 *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 505-506.

17 *Id.* at 504-505.

18 *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 130.

19 *Olson v. Cory* (1980) 27 Cal.3d 532, 538.

20 *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853, 856; *Legislature v. Eu* (1991) 54 Cal.3d 492, 534; *Association of Blue Collar Workers v. Wills* (1986) 187 Cal.App.3d 780, 786-787. In *Kern*, the court held a city could not deny a pension to a firefighter by repealing the pension system 23 days before his required 20 years of service. Similarly, in *Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 183, the court held that an amendment prior to the plaintiff’s required 25 years of service which disallowed pensions to convicted felons could not make the plaintiff ineligible for his pension upon conviction.

21 *Miller v. State of California* (1977) 18 Cal.3d 808, 815.

22 *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 133.

23 *O’Dea v. Cook*, *supra*, 176 Cal. 659; *United Firefighters of Los Angeles v. City of Los Angeles* (1989) 210 Cal.App.3d 1101, 1102 (*rev. den.*, *cert. den.*).

24 *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 340, 348-350.

25 *Goddard v. South Bay Union High School Dist.* (1978) 79 Cal.App.3d 98, 105; *American Federation of Teachers v. Oakland Unified School Dist.* (1967) 251 Cal.App.3d 91, 97; *Frates v. Burnett* (1970) 9 Cal.App.3d 63.

26 *Thorning*, *supra*, 11 Cal.App.4th at 1607.

27 “A Review of Potential Health Care Benefit Programs Provided by the California State Teachers’ Retirement System,” May, 2001, p. 40.

28 See “Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits: A Plaintiff’s Perspective, William T. Payne, 10 *The Labor Lawyer* 91 (1994)

29 See Payne, *supra*.

30 See *San Leandro School Retirees Action Assn. v. San Leandro Unified School Dist.* (1985) Ala.Co.Sup.Ct. H104212-0.

31 See, e.g., *CRTA Protect v. West Contra Costa Unified School Dist.* (2000) A086837 (1st Dist.), not certified for publication; *Contra Costa Colleges Retirees Assn. v. Contra Costa Community College Dist.* (1996) A064817 (1st Dist.), not certified for publication; *AGREE v. San Ramon Valley Unified School Dist.*, Co.Co.Co. C 95 05063.

32 *Sonoma County Organization of Public Employees v. County of Sonoma*, *supra*, 23 Cal.3d 296, at 304, 321.

33 Connecticut (see *Poole v. City of Waterbury* [2003] 266 Conn. 68, 831 A.2d 211, holding that retired firefighters had a vested right to medical benefits established in collective bargaining agreement); Hawaii (*University of Hawaii Professional Assembly v. Cayetano* [9th Cir. 1999] 183 F.3d 1096, 1102-1104, holding that the state impaired obligations set forth in collective bargaining agreements regarding date employees were entitled to be paid); Maryland (*Baltimore Teachers Union et al. v. Mayor and City of Baltimore* [4th Cir. 1993] 6 F.3d 1012, holding that pay increases in collective bargaining agreement were vested, but allowing impairment); and Massachusetts (*Massachusetts Community College Council v. Commonwealth of Massachusetts* [1995] 420 Mass. 126, 649 N.E. 2d 708, holding that collective bargaining agreements established vested rights).

34 *Pacific Gas and Electric Company v. G. W. Thomas Drayage and R. Co.* (1968) 69 Cal.2d 33, 36-37, at 38; *SEIU v. City of Los Angeles* (1994) 24 Cal.App.4th 136, 143-144 (A court must interpret a contract so as to execute the mutual intent and purposes of the parties).

35 *Id.*

36 *Sappington*, *supra*, 119 Cal.App.4th at 954, emphasis added

37 *Id.* at 955.

38 *Id.*

39 In *How Arbitration Works*, BNA, 6th ed., 2003, these rules are discussed in detail.

40 *Armistead v. Vernitron Corp.* (6th Cir. 1991) 944 F. 2d 1287; *International Union, UAW v. BVR Liquidating, Inc.* (6th Cir. 1999) 190 F.3d 768, cert den. (2000) 529 U.S. 1067; *International Union, UAW v. Yard-Man, Inc.* (6th Cir. 1983) 716 F. 2d 1476.

41 See, e.g., *Anderson v. Alpha Portland Industries, Inc.* (8th Cir. 1988) 836 F.2d 1512.

42 (7th Cir. 1992) 993 F.2d 603 at 605-607.

43 *Id.* at 605.

44 *Id.* at 607.

45 (6th Cir. 2000) 212 F.3d 907, 915, 918; accord, *Policy v. Powell Pressed Steel Co.* (6th Cir. 1985) 770 F. 2d 609.

46 *Id.* at 615-616

47 (6th Cir. 1967) 372 F.2d 427.

48 *International Union, UAW v. Yard-Man, Inc.* *supra*, 716 F. 2d 1476, cert den. (1984) 465 U.S. 1007.

49 *Yolton v. El Paso Tennessee Pipeline Co.* (6th Cir. 2006) 435 F.3d 571, 578-579.

50 *UAW v. BVR Liquidating, Inc.*, *supra*, 190 F.3d 768, 772-776 (durational clause not a defense; evidence that employer's agents informed retirees that their health care benefits would be life-time benefits); *Smith v. ABS Industries, Inc.* (1989) 890 F.2d 841, 846-47; *Armistead v. Vernitron Corp.*, *supra*, 944 F.2d at 1294-1297 (retiree rights survive expiration of CBA; meaning of contract depends on construction of CBA and intent of the parties; context justifies inference they survive; rejecting approach of *Alpha Portland Industries*, *supra*); *Keffner v. Connors Steel*, *supra*, 872 F.2d at 64; *United Steelworkers v. Textron, Inc.* (1st Cir. 1987) 836 F.2d 6, 9; *United Steelworkers v. Newman-Crosby Steel* (D. R.I. 1993) 822 F. Supp. 862, 866.

51 *Thorning v. Hollister School Dist.*, *supra*, 11 Cal.App.4th 1598.

52 The clause said, "During the period...both the City and the PBA agree to meet and confer regarding the additional incremental costs of future benefits...." *Supra*, 67 Cal.App.4th 1215 at 1226.

53 *Supra*, 67 Cal.App.4th 1215 at 1223-1224.

54 The court analogized this to the judges discussed in *Olson v. Cory*, *supra*, who entered into new terms and "impliedly agreed to be bound by salary benefits then offered by the state for a different term." *Id.* at 1225-1226. By analogy, most retirees contemplating lawsuits over changes in their plans invariably have retired before the changes at issue. Although this ruling would not apply to employees who are already vested, its citation illustrates the factual distinction between the typical case and *Fontana*, *supra*, 67 Cal.App.4th 1215.

55 *Supra*, 67 Cal.App.4th 1215 at 1226-1227.

56 *Id.* at 1226.

57 The court in *California League of City Employee Assns. v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135, held that an employer at impasse in collective bargaining over vested rights could not unilaterally modify those rights even though unilateral modification of terms of employment is normally allowed when the parties are at impasse. In 1966, before collective bargaining, three forms of deferred compensation were created (a longevity pay award after nine years of service, extra vacation after ten years, and sabbaticals after six years). In subsequent collective bargaining under the MMBA (Gov. Code Secs. 3500 et seq. added by Stats. 1968), a negotiations impasse occurred and the employer unilaterally implemented its last, best offer. But the court would not allow the bargaining process and *impasse* to supersede these previously vested rights as to those employees "who had been working toward them prior to" the change. *Id.* 137-138. *Palos Verdes* did not involve vested post-retirement benefits.

58 The Supreme Court in *Olson* also cited *Palos Verdes* in part for the proposition that obligations of a public employment con-



tract are protected by the Contract Clause of the constitution. 27 Cal.3d at 538.

59 *Id.* at 538-539, n. 3, citing *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863.

60 (1979) 23 Cal.3d 296, 304.

61 (1976) 56 Cal.App.3d 236.

62 (8th Cir. 1988) 836 F.2d 1512.

63 *Id.* at 1518.

64 (8th Cir. 1997) 122 F.3d 628, cert den. (1998) 529 U.S. 1109.

65 (1985) 39 Cal.3d 374.

66 *Hittle* ruled that the retirement system was bound to its original promise, that a purported waiver is not legally effective unless the party executing it has been “fully informed” of the existence of the right being waived, its meaning, the effect of the waiver presented to him, and has full understanding of the explanation. *Id.* at 389. The burden is on the party claiming waiver to prove it by “clear and convincing evidence” and “doubtful cases will be decided against a waiver.” *Id.* at 390. The court also relied on the principle that California favors pension benefits and construes them liberally to assure that they are given full effect in order to protect the retiree against economic insecurity.

67 The root case holding direct dealing to be unlawful is *J.I. Case Co. v. NLRB* (1944) 321 U.S. 332.

68 *California Teachers Assn. v. Cory*, *supra*, 155 Cal.App.3d at 505.

69 *Ibid.*

70 *Mauer v. Joy Technologies, Inc.* (6th Cir. 2000) 212 F.3d 907, 915; *Bidlack v. Wheelabrator Corp.* (7th Cir. 1992) 993 F.2d 603.

71 *Mauer v. Joy Technologies, Inc.*, *supra*, 212 F.3d at 918; *Policy v. Powell Pressed Steel Co.*, *supra*, 770 F.2d at 615-616.

72 *Pacific Gas and Electric Co. v. G. W. Thomas Drayage and Rigging Co.* (1968) 69 Cal.2d 33, 36-37; *Alexander v. Primerica Holdings, Inc.* (3d Cir. 1992) 967 F.2d 90, 95 and n. 1 (“If a reasonable alternative is suggested, even though it may be alien to the judge’s linguistic experience, objective evidence in support of that interpretation should be considered by the fact finder. See Corbin, *Contracts*, Sec. 542.”

73 (2004) 114 Cal.App.4th 1343.

74 *Ibid.*

75 *Id.* at 1350-1351

76 *Ibid.*

77 *NLRB v. Allis-Chalmers Mfg. Co.* (1967) 388 U.S. 175, 180; *San Lorenzo Education Assn. v. Wilson* (1982) 32 Cal.3d 841, 846.

78 *Emporium Capwell Co. v. Western Addition Community Org.* (1975) 420 U.S. 50, 64, 95 S.Ct. 977, 43 L.Ed. 12.

79 *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157, 181, 92 S.Ct. 383.

80 *Id.* at 181-182, and n. 20.

81 *Terpinas v. Seafarer’s International Union of North America* (9th Cir. 1984) 722 F.2d 1445, 1447-1448.

82 Reference to seniority as a “vested” right in *International Longshoremen and Warehousemen Union v. Kuntz* (9th Cir. 1964) 334 F.2d 165 was the result of the plaintiffs’ characterization, *Ibid.* at 167, a view not shared by the court. *Ibid.* at 171.

83 *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed 1048; *International Longshoremen’s and Warehousemen’s Union v. Kuntz*, *supra*, 334 F.2d 165.

84 *Ford Motor Co. v. Huffman*, *supra*, 345 U.S. at 337.

85 *Alexander v. Gardner-Denver* (1974) 415 U.S. 36, 51-52, 94 S.Ct. 1011, 1021-22

86 *Phillips v. California State Personnel Bd.* (1986) 184 Cal.App.3d 651, 658-659.

87 *Ibid.*, 184 Cal.App.3d at XXX.

88 *International Assn. of Fire Fighters v. City of San Leandro* (1986) 181 Cal.App.3d 179, 183

89 *Wright v. City of Santa Clara* (1989) 213 Cal.App.3d 1503, 1506.

90 *Porter v. Quillin* (1981) 123 Cal.App.3d 869, 876.

91 *McMillen v. Civil Service Comm.* (1981) 6 Cal.App.4th 125, 132. (D. Minn. 1969) 299 F.Supp. 387.

93 *California Brewers Assn. v. Bryant* (1980) 444 U.S. 598, 605-606, 100 S.Ct. 814, 63 L.Ed.2d 55.

94 One author has noted that pension benefits, vacation pay, and even severance pay are distinguishable from seniority as deferred compensation and in a sense “property,” unlike seniority, which is merely a status that is lost when the employment relationship terminates or the contract which defines it expires. Aaron, “Reflections on the Legal Nature and Enforceability of Seniority Rights,” 75 Harv. L. Rev. 1532, 1536, 1537, 1538, 1540-1541 (1962). See, *Smith v. Kingsport Press, Inc.* (6th Cir. 1966) 355 F.2d 416, 420. (3d Cir. 1990) 907 F.2d 1396, at 1401-1402.

96 *Supra*, 299 F.Supp. at 394.

97 *J.I. Case Co. v. NLRB*, *supra*, 321 U.S. 332, 339, 64 S.Ct. 576, 88 L.Ed. 762.