

# ***“The Rising Cost of Retiree Healthcare Benefits: Is Help on the Way?”***

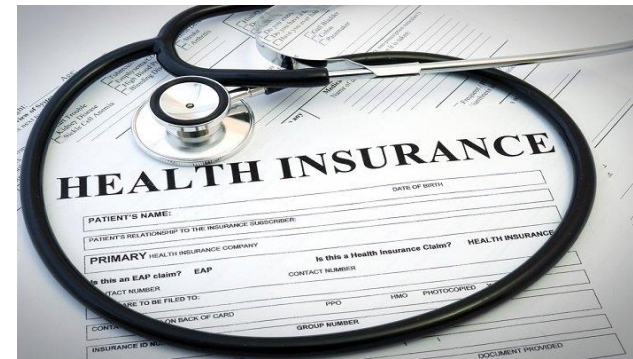
## **LOCC Annual Conference and Expo**



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# *The Magnitude of the Issue*

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- A 2007 survey of 1,200 agencies in California indicated an unfunded liability for retiree health of at least \$118 billion.
- At that time, the cumulative liability for the 231 cities responding to the survey was \$8.8 billion.
- California cities responding to a 2016 League survey showed an unfunded liability of \$10.8 billion for 312 responding cities.
  - Source: *Retiree Health Care: A Cost Containment How-to Guide*. LOCC (9/16).



# *Focus of this Presentation*

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- Impairment of Contract Analysis.
  - Implied Contract Theory.
  - “Vested” Benefits.
  - Impairment.
- “Ballot Box” Solutions.



# *Impairment of Contract*

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- Article I, section 10, clause 1 of the United States Constitution: “No State shall ... pass any ... Law impairing the Obligations of Contracts ....”
- Article 1, section 9 of the California Constitution: “A law impairing the obligations of contract may not be passed.”

# *Elements of Impairment Analysis*

- Is there a valid contract to be impaired?
- If yes, has there been impairment?
- If yes, is the impairment substantial?
  - *Home Building & Loan Assn v. Blaisdell*  
(1934) 290 U.S. 398, 430-431.



# *1. Is there a contract? – Early Developments*

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- *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852:  
Pension provisions of city charter are an integral portion of the contemplated compensation set forth in the contract of employment between the city and a member of the police department, and are an indispensable part of that contract.

# *Sources of Contract Rights*

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- Labor Agreements (Express)
- Council Resolutions, Charter, Codes, Ordinances, Personnel Rules & Regulations (Implied)



# *Implied Contract*

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- Resolution, ordinances, etc. may create an implied contract only if
  - Text and circumstances of passage clearly evince an intent to grant vested benefits, or
  - Contain an unambiguous element of exchange of consideration by a private party for consideration offered by government, or
  - Governmental action ratifies or approves an express contract.

*Retired Employees Assn. of Orange County v. County of Orange* (2011) 52 Cal.4th 1171, 1187-1198; *Sonoma County Ass'n of Retired Employees v. Sonoma County* (9th Cir. 2013) 708 F.3d 1109, 1117.



# *Implied Contract*

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- Presumption that a statutory scheme is not intended to create private contractual or vested rights and plaintiff asserting creation of a contract has the burden of overcoming presumption.
- To overcome presumption, plaintiff must meet heavy burden of establishing from relevant statutory language or relevant circumstances both intent to create a contract and that implied terms of that contract provide vested healthcare benefits.

# *Practical Pointers*



- Examine relevant text of, and relevant circumstances surrounding adoption of, resolutions, ordinances, policies, etc. to ensure absence of indicia of implied contract.
- Include express findings and declarations of intent that none of the above are intended to create contractual rights, express or implied.

## 2. *Impairment of “Vested” Rights – Early Developments*

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- Retirement benefits contained in city charters, ordinances, codes, or policies “vest” upon acceptance of employment.

*Kern v. City of Long Beach, supra*, 29 Cal.2d at 852.



# *Ability to Modify “Vested” Benefits*

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- While an employee may acquire a vested contractual right to retirement benefits, this right is not “rigidly fixed” by the specific terms of the legislation in effect during any particular period in which he serves. ... The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable [retirement benefit].

# *Modification of Retirement Benefits*

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- May not be modified for employees who already have retired.
- But as to current employees, retirement benefits may be modified so long as modification is
  - Reasonable;
  - Bears a material relation to the theory and successful operation of the retirement benefits plan; and
  - When resulting in a disadvantage to employees, is accompanied by comparable new advantages.

*Allen v. Board of Administration* (1983) 34 Cal.3d 114, 120



# *Practical Pointer*



- When drafting or modifying a charter provision, ordinance, code section, policy, etc. addressing retiree health benefits, include language that City reserves the right to modify.

### ***3. Substantial Impairment***

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# *Cases Currently Before Supreme Court*

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- *Marin Association of Public Employees v. Marin County Employees' Retirement Association* (2016) 2 Cal.App.5th 674, review granted.
- *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115, review granted.



# *Issues Involving “Ballot Box” Modifications to Retirement Benefits*

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# *Impairment of Contract Via Ballot Initiative*

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- *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619.



# *Ballot Initiatives and the MMBA*

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- City employer may not avoid MMBA obligations by taking modification of retirement benefits to the ballot box.
  - *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591.
  - *San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447.
- But does that same obligation apply to citizen-sponsored initiatives?
  - *Boling v. Public Employment Relations Board* (2017) 10 Cal.App.5th 853, review granted.



# *Conclusion*

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- Trend has been to narrow application of impairment of contract analysis to modifications of retirement benefits. Question is whether that will continue based on pending Supreme Court cases.
- Even under current state of law, city employers possess tools by which cost-reducing modifications to retiree health benefits can be implemented.



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# Thank You!

