

Date of Hearing: April 24, 2018

ASSEMBLY COMMITTEE ON JUDICIARY

Mark Stone, Chair

AB 1912 (Rodriguez) – As Amended April 19, 2018

SUBJECT: PUBLIC EMPLOYEES' RETIREMENT: JOINT POWERS AGREEMENTS:
LIABILITY

KEY ISSUES:

- 1) SHOULD THE MEMBER AGENCIES OF A JOINT POWERS AUTHORITY (JPA) BE LEGALLY RESPONSIBLE – WHETHER BY JOINT AND SEVERAL LIABILITY OR BY APPORTIONMENT – FOR PENSION OBLIGATIONS OF THE JPA?
- 2) SHOULD THE BOARD OF THE PUBLIC EMPLOYEES RETIREMENT SYSTEM BE REQUIRED TO BRING A CIVIL ACTION AGAINST THE MEMBER AGENCIES OF A JPA TO RECOVER PENSION OBLIGATIONS OF THE JPA?

SYNOPSIS

The premise of this well-intentioned bill is fairly simple: when several government agencies form a joint powers authority (JPA), and the JPA for one reason or another dissolves or is otherwise unable to meet its pension obligations, the member agencies of the JPA should be held responsible so that retirees do not have the pensions that they have earned and contracted for reduced, as recently happened with a JPA in Los Angeles County. As the analysis points out, while the bill's premise is fairly simple and straightforward, the means used to get there is anything but. Because the bill was amended in principle in the prior Committee, and only in print two business days before this hearing, the Committee has not had time to fully analyze the bill, much less propose concrete amendments to a number of apparent drafting and structural errors in the bill in print. Nonetheless, this is an important measure that deals with a serious and timely issue; it is hoped that if the bill moves forward the author will work with all stakeholders in order to protect retiree benefits in a way that is both workable and equitable.

Under the Joint Exercise of Powers Act, two or more public agencies may agree to form a new agency – a JPA – that will exercise powers common to the member agencies. This allows agencies to jointly address problems that do not neatly conform to jurisdictional lines. Existing law presumes that any debts, liabilities, or obligations incurred by the JPA become the debts, liabilities, and obligations of member agencies "unless the agreement specifies otherwise." Despite the law's presumption in favor of shared liability, in all but a handful of cases the member agencies adopt an agreement that "specifies otherwise." Therein lays the problem at the heart of this bill. This bill attempts to address the problem by simply prohibiting the agencies from "agreeing otherwise" when it comes to the JPA's retirement obligations to a public retirement system. If this were all that it did, the bill would be fairly straightforward. Instead, as explained in the analysis, the bill creates an elaborate structure that appears to confuse "joint and several liability" with "apportioned" liability; it creates an unclear litigation timeline; and imposes joint and several liability not only on both new and existing agreements, but it also imposes liability on "former" members of a JPA for all of the JPA's obligations, even if the member has left the JPA long before the JPA incurred the obligation.

The bill is sponsored by SEIU and supported by several associations of public employees and professionals. The bill is opposed by the League of California Cities and several associations of state and local governments and special districts.

SUMMARY: Provides that the member agencies of a joint powers authority (JPA) shall be jointly and severally liable for the retirement obligations of the JPA. Specifically, **this bill:**

- 1) Provides, notwithstanding an existing law that makes member agencies of a JPA liable for the debts, liabilities, and obligations of a JPA unless the parties agree otherwise, that the parties may not agree otherwise with respect to the retirement liabilities of the JPA, if the JPA contracts with a public retirement system.
- 2) Specifies that if a JPA participates in a public retirement system, all member agencies of the JPA, both current and former, shall be jointly and severally liable for all obligations to the retirement system. Specifies that this provision shall apply retroactively to all parties, both current and former, to the JPA agreement.
- 3) Prohibits the board of the Public Employee's Retirement System (PERS) from contracting with any JPA unless all the parties to the agreement are jointly and severally liable for all of the JPA's obligations to PERS. Specifies that any current agreement that does not meet these requirements must be reopened to include a provision holding all member agencies jointly and severally liable for the JPA's obligations to PERS.
- 4) Specifies that the PERS board shall have a lien on the assets of a terminating JPA and on the assets of all of the member agencies of the JPA, as specified.
- 5) Requires the PERS board, upon the request of a terminating JPA or upon the request of any member agency of the JPA, to enter into an agreement with a terminating JPA or the member agency in order to, first, ensure that final compensation of benefits are calculated in a prescribed manner and, second, to ensure that benefits are adequately funded, as prescribed. However, if the board determines that it is not in the best interest of the retirement system, it may choose not to enter into such an agreement.
- 6) Specifies that if the parties do not enter into the agreement pursuant to the provisions above, the member agencies shall assume the retirement obligations. Requires the member agencies to mutually agree as to the apportionment of the agency's retirement obligations among themselves, provided that the agreement equals the total retirement obligation of the JPA. If the member agencies are unable to mutually agree upon an apportionment, the PERS board shall apportion the obligation among the member agencies. However, if after the PERS board apportions liability the members mutually agree to a different apportionment that equals the total liability, the agreement made by the member agencies shall supersede the apportionment made by the board.
- 7) Requires the PERS board to bring a civil action against any and all members of a terminated JPA to compel payment of the terminated JPA's pension obligations, and specifies that the board shall be entitled to reasonable attorneys' fees in addition to other costs.
- 8) Makes changes to the Public Utilities Code relating to a "community choice aggregator," if formed as a JPA, so as to similarly provide that member agencies are liable for the retirement obligations of the JPA and may not agree otherwise.

EXISTING LAW:

- 1) Authorizes two or more agencies to agree to jointly exercise any common power as a Joint Powers Authority (JPA). If authorized by their legislative or other governing bodies, two or more public agencies may, by agreement, jointly exercise any power common to the contracting parties. The agency or entity provided by the agreement to administer or execute the agreement may be one or more of the parties to the agreement; a separate public entity, commission, or board constituted by the agreement; or a person, firm or corporation, including a nonprofit corporation, designated in the agreement. (Government Code Section 6500 *et seq.*)
- 2) Provides that if the agency created by the JPA agreement is not one or more of the parties to the agreement, but is a separate public entity, commission, or board created by the agreement, then the debts, liabilities, and obligations of the created agency are the debts, liabilities, and obligations of the parties to the agreement, unless the agreement specifies otherwise. (Government Code Section 6508.1.)
- 3) Provides that any terminating agency that has a contract with the PERS system shall be liable to the system for any deficit in funding for earned benefits, and other specified costs, from the date of termination to the date the agency pays the system, and further provides that the board shall have a lien, as specified, on the assets of a terminated contracting agency in an amount equal to the deficit. (Government Code Section 20574.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: According to the author, this bill was prompted, in large measure, by the fact that nearly 200 employees of the East San Gabriel Valley Human Services Consortium, a Joint Powers Authority operating under the name "LA Works," had their CalPERS pension benefits reduced by up to 63 percent after the JPA dissolved. LA Works, the JPA, was created by four cities in Los Angeles County (Azusa, Covina, Glendora, and West Covina) in order to provide job training for jail inmates and other unemployed or underemployed persons. Amidst allegations that LA Works overcharged Los Angeles County, the county terminated its contract with LA Works in 2014. Beginning in 2015, LA Works ceased submitting pension contributions to CalPERS. CalPERS, in turn, attempted but failed to collect money from either the JPA or the member agencies. Accordingly, CalPERS' only option, apparently, was to reduce the benefits of most of the nearly 200 employees by approximately 63 percent. This bill attempts to address the problem illustrated by this case by providing, notwithstanding any agreement to the contrary, that the member agencies will be responsible for the retirement obligations of a JPA that has failed to meet its public pension obligations.

State Auditor's Report and Recommendations. While the East San Gabriel Valley termination prompted this bill, at about the same time, the California State Auditor was conducting an investigation of the South Orange County Wastewater Authority (SOCWA), a JPA formed in 2001 by ten member agencies, including local water districts, service districts, and cities. In addition to finding that SOCWA had accounting problems more generally, the State Auditor also noted that SOCWA's JPA agreement "does not expressly hold its members liable for retirement benefits of its employees," specifically pension and other post-employment benefits which amounted to \$18 million as of June 2017. When the Auditor asked SOCWA whether its member agencies would be liable for these benefits if SOCWA dissolved and did not have sufficient funds to meet this obligation, SOCWA responded that it "believed" the members would be liable.

The Auditor, however, concluded that it was not clear from the agreement whether or not the member agencies would be liable in the event SOCWA could not meet these obligations. Although the Committee was not able to obtain a copy of this agreement, it must contain some language that purports to relieve the member agencies from liability because, under existing law, the debts and liabilities of the JPA are presumed to also be the debts of members "unless the agreement specifies otherwise." (Government Code Section 6508.1.) In order to eliminate any ambiguity, and to ensure that retirees get the benefits to which they are entitled, the Auditor recommended legislation that would "require *new* JPA agreements to hold the members responsible for the JPA's unfunded pension and other postemployment benefits obligations." (California State Auditor, *South Orange County Wastewater Authority*, Report # 2017-113, March 2018, pp. 1-2, 17-19; emphasis added.) In other words, while existing law presumes member agencies are responsible for the debts and liabilities of the JPA, *unless an agreement specifies otherwise*, the Auditor effectively recommended that the ability to agree otherwise be eliminated, at least for "new" agreements. As for *existing* JPA agreements, the Auditor recommended legislation requiring all existing JPAs to disclose annually, as part of any regularly scheduled communications to beneficiaries, whether the JPA's members are liable for the JPA's unfunded retirement obligations. (*Id.* at 19.)

As discussed in more detail below, this bill goes significantly beyond the approach recommended in the State Auditor's recommendation. Whereas the Auditor recommended making member agencies of *new* JPAs subject to joint and several liability, while only requiring *existing* JPAs to inform beneficiaries as to the extent of member agency liability, this bill would impose joint and several liability on the member agencies of both new and existing JPA. Existing agreements that do not provide for joint and several liability would be "reopened" so that such liability could be provided for. Moreover, the bill would impose joint and several liability on both "current and former" members of the JPA. It is the retrospective aspect of this bill, including even former members of a JPA, which appears to cause the greatest concern among the opponents of this bill.

Proposed changes to existing liability for the obligations of a JPA. Under the Joint Exercise of Powers Act, two or more public agencies may agree to form a new agency – a JPA – that will exercise powers common to the member agencies. This allows agencies to jointly address problems that do not neatly conform to jurisdictional lines. Existing law presumes that any debts, liabilities, or obligations incurred by the JPA become the debts, liabilities, and obligations of member agencies "unless the agreement specifies otherwise." Despite the law's presumption in favor of shared liability, in all but a handful of cases the member agencies adopt an agreement that "specifies otherwise." This bill attempts to address this problem by prohibiting the agencies from "agreeing otherwise" when it comes to the JPA's retirement obligations to a public retirement system. If this were all that it did, the bill would be fairly straightforward. Instead, as explained below, the bill creates an elaborate structure that raises a number of questions.

Questions regarding the structure of the bill in print. Because the bill was amended in principle in the prior Committee, and only in print two business days before this hearing, the Committee has not had time to fully analyze, much less propose concrete amendments, to a number of drafting and structural issues in the bill in print. The remainder of this analysis, discusses just two related issues that go to the overall structure and intent of the bill: first, the bill appears to confuse "joint and several liability" with "apportioned" liability, or at least it is unclear how the provisions that impose joint and several liability work with the provisions on apportioned liability; second, the bill creates a somewhat confusing litigation timeline by

requiring the PERS board to bring a civil action against "any and all" member agencies, though it is unclear whether this civil action is independent of the provisions calling for apportionment or if it is merely the means by which the PERS board would enforce its apportionment.

Joint and several liability vs. apportioned liability. Proposed new Government Code Section 6508.2 provides, notwithstanding any agreement or provision of the law to the contrary, that if a JPA participates in a public retirement system all member agencies, both current and former, "shall be jointly and severally liable for all obligations to the retirement system." Other references to joint and several liability of the parties appear throughout the bill. However, despite these declarations, the bill also provides that when a JPA terminates, all members must mutually agree to "apportion" responsibility for the JPA's retirement obligations amongst them; if they fail to do so, then the PERS board will apportion the liability among the members. However, "joint and several liability" is very different from "apportioned" liability. The former means that any one of the members could be responsible for the entire amount; the latter means each member will pay its share. It is not entirely clear in what meaningful sense members are jointly and severally liable if, in the end, liability will be apportioned, whether by mutual agreement of the members, or by imposition from the PERS board. It is unclear, to the Committee at least, whether this merely reflects an error in terminology or if this language is substantive and intentional. For example, did the drafters assume that the members would need to be made jointly and severally liable in order for the board to impose liability? It is not clear why this should be the case; the board's power to apportion liability is granted by the statute. Do the members only become jointly and severally liable *after* the board has apportioned liability and the members fail to pay their portion? This last question speaks to the next issue: the timing of the litigation.

The litigation timeline and the requirement that the PERS board bring a cause of action. It appears, under the bill, that the apportionment of liability occurs after the JPA, or one of its member agencies, request the PERS board to enter into an agreement that will terminate the JPA's contract with PERS. (See proposed Section 20575.1.) Among other things, that agreement must include a final calculation of benefits and ensure that benefits are adequately funded. If such an agreement cannot be reached – that is, one that ensures funding by the JPA – then subdivision (d) would apparently require the parties to mutually agree as to the apportionment of the JPA's retirement obligations. If the members fail to reach an agreement, the PERS board will apportion liability to each member agency. (If the members do not like the board's apportionment, they are given one last opportunity to reach a mutual agreement that will supersede the board's agreement.)

Not only is it unclear as to how this "apportionment" squares the members' supposed "joint and several liability," it is also unclear where the apportionment stands, both in time and in legal theory, to the proposed new Section 20577.5. That section provides that the PERS board "shall" bring an action against "any and all of the member agencies" that were parties to the terminated JPA in order to compel payment of the terminated JPA's pension obligations. Although it is not entirely clear from the language, this action would presumably be brought only *after* an apportionment of the JPA's obligations has been made and one or more members failed to pay their apportioned share. However, the language requiring the PERS board to bring a civil action against "any and all" of the member agencies suggest joint and several liability, which would allow the PERS board to obtain the entire obligation from any one member. Presumably, the PERS board would bring an action only against the member or members who had not paid the imposed or agreed upon portion, but the language – along with the earlier imposition of joint and

several liability – would allow the PERS board to sue *any* member for the *entire* amount. Indeed, if the author and sponsor truly intend to impose joint and several liability, then the PERS board could even sue a member that had paid its portion in order to collect the portions not paid by the other members. While this might seem an unlikely scenario, there is nothing in the bill to prevent it.

ARGUMENTS IN SUPPORT: According to the author, this bill was prompted, at least in part, by the fact that nearly 200 employees of the East San Gabriel Valley Human Services Consortium, (ESGV) JPA had their CalPERS pension benefits reduced by about 63 percent after the JPA dissolved. "We know," the author writes, "that JPAs are valuable to the communities and regions that they serve. And, we also know that this problem has occurred once and could happen again, absent the surety of the JPAs member agencies, and without doing something to prevent it from occurring again." The author suspects that what happened with ESGV could happen again given that there are "approximately 170 JPAs currently contracting with CalPERS covering approximately 25,000 employees and retirees that could see a similar occurrence if the JPA becomes financially distressed or insolvent." The author believes that AB 1912 will "provide retirement security to a JPA's employees and retirees if the JPA contracts with CalPERS or any other public pension system for retirement benefits." Finally, the author adds that this measure "is not intended to vary or modify CalPERS' fiduciary duties or responsibilities. Rather, it should be viewed as a principle that CalPERS treat each member with the same standards of fiduciary duty and responsibility that it owes to the system in its entirety. The provisions requiring joint and several liability, and that require CalPERS to seek legal redress would advance this principle"

ARGUMENTS IN OPPOSITION: The League of California Cities (LCC), along with several other associations representing local governments, special districts, and joint powers authorities, oppose AB 1912 because it "places substantial burdens and new unworkable requirements on local and state agencies by applying retroactive as well as prospective joint and several liability for all retirement related obligations to any current or former member of a JPA through its existence." LCC contends that JPAs play an important role in promoting regional, multi-jurisdictional efforts to solve problems that cannot be adequately addressed by one local agency or jurisdiction acting on its own. LCC and the other associations claim that "the unfunded liability of California's 130 government pension plans stands at \$241.3 billion and \$125 billion for retiree healthcare costs." In addition to adding to this already-existing burden of unfunded pension obligations, LCC and the other associations also argue that AB 1912 provisions of the California constitution that prohibit an agency from incurring debt beyond the agency's ability to pay the debt back from revenues received in the same fiscal year without the approval of two-thirds of its voters.

Opponents especially object to the bill's retroactive application to existing contracts and former members. LCC, for example, argues that under this bill public agencies would "be on the hook for decisions made after a local government left a JPA."

Finally, the opponents also point to what they see as the general "unworkability" of the bill's provisions, including the provisions that appear to call for both "joint and several liability" and "equitable" apportionment. LCC wonders if the bill's intent "is to create 'several' liability that is apportioned among JPA members," and if this is the intent, "this should be clarified so that individual JPA members are not held liable for the full amount." However, LCC also notes that

even if the bill were amended to assign equitable or apportioned liability, it would be very difficult to assign "equitable" liability among both current and former members.

REGISTERED SUPPORT / OPPOSITION:**Support**

Association of California State Supervisors
California Association of Professional Scientists
California State Retirees
LIUNA Local 792
Orange County Professional Firefighters Association, IAFF Local 3631
Professional Engineers in California Government
Retired Public Employees Association

Opposition

California Association of Joint Powers Authority
California Contract Cities Association
California Special Districts Association
California State Association of Counties
City of Glendora
City of La Canada Flintridge
Country of Riverside
League of California Cities
Urban Counties of California

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