

AMENDED IN SENATE JUNE 19, 2008

AMENDED IN ASSEMBLY MAY 3, 2007

AMENDED IN ASSEMBLY APRIL 9, 2007

CALIFORNIA LEGISLATURE—2007—08 REGULAR SESSION

**ASSEMBLY BILL**

**No. 268**

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**Introduced by Assembly Member Charles Calderon**

February 5, 2007

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~~An act to amend Sections 240 and 791 of, and to add Sections 1243 and 1390 to, the Evidence Code, relating to evidence. An act to amend Section 20822 of, to add Sections 19858.8 and 20281.7 to, and to add Chapter 19 (commencing with Section 21710) to Part 3 of Division 5 of Title 2 of, the Government Code, relating to public employees' retirement.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 268, as amended, Charles Calderon. ~~Evidence: admissibility of statements.~~ *Public employees' retirement: Deferred Retirement Option Program.*

*(1) Existing law authorizes the Department of Personnel Administration to provide for annual leave benefits with respect to each officer and employee excluded from the definition of state employee for the purposes of the Ralph C. Dills Act, which regulates state employer-employee relations. Existing law permits an employee who is excluded from the definition of state employee for the purposes of that act to make an irrevocable election, in lieu of earning sick leave and vacation benefits, to participate in the annual leave program.*

*This bill would provide that an excluded or exempt state employee of State Bargaining Unit 5, 6, 7, or 8, who participates in the Deferred*

*Retirement Option Program shall also participate in the annual leave program and accumulate no more than 12 hours of annual leave credits per month.*

*(2) The Public Employees' Retirement Law provides a comprehensive set of rights and benefits for various employees of the state and local agencies. That law also establishes the Public Employees' Retirement System and sets forth the provisions for its administration and the delivery of benefits to its members. Under that law, the retirement benefits of a retirement system member are based, in part, on the completed service credit and compensation received by that member.*

*This bill would establish the Deferred Retirement Option Program as a voluntary program in the Public Employees' Retirement System for the excluded or exempt state employees of State Bargaining Unit 5, 6, 7, or 8, as specified. The program would provide eligible members, upon retirement, access to a lump sum in addition to a monthly retirement allowance, as specified. The program would also permit a specified beneficiary to receive any remaining balance upon the death of the member.*

*The bill would require that the program result in a cost savings or be cost neutral to the state, direct the Public Employees' Retirement System to prepare a cost analysis of the program, as specified, and direct the Board of Administration of the Public Employees' Retirement System to implement the program on July 1, 2009, except as specified. The bill would also require the actuary to conduct a biennial valuation of the program, as specified, and authorize the Department of Personnel Administration to terminate the program if it is not cost neutral, subject to specified conditions.*

*(3) The Public Employees' Retirement Law provides that the state's employer contribution from the General Fund to the Public Employees' Retirement Fund shall be made quarterly. That law defines the term "compensation" for purposes of determining required contributions and benefits. That law generally requires a miscellaneous member to pay 5%, and a specified patrol and state peace officer/firefighter member to pay 8% of compensation as his or her normal retirement contribution to the Public Employees' Retirement System, subject to specified exceptions.*

*This bill would provide that an excluded or exempt state employee of State Bargaining Unit 5, 6, 7, or 8, who participates in the Deferred Retirement Option Program, shall not pay contributions to or receive service credit in the Public Employees' Retirement System. The bill*

would also provide that the state shall not pay employer contributions from the General Fund to the Public Employees' Retirement Fund relating to these excluded or exempt state employees.

~~(1) Existing law defines "unavailable as a witness," for purposes of the Evidence Code, to mean that the declarant is, among other things, exempted or precluded on the ground of privilege, disqualified, dead, or absent for a specified reason.~~

~~This bill would supplement that definition to add the circumstance that the declarant refuses to testify, notwithstanding imposition of sanctions, and the statement is offered against the party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.~~

~~(2) Existing law provides that evidence of a statement previously made by a witness that is consistent with his or her testimony at a hearing is inadmissible to support his or her credibility, unless it is offered after an inconsistent statement has been admitted for purposes of attacking his or her credibility, as specified, or after an express or implied charge has been made that his or her testimony is recently fabricated or is influenced by bias or other improper motive.~~

~~This bill would also except from that general prohibition of inadmissibility, evidence of a statement in which the witness' credibility is an important issue, the probative value of the statement substantially outweighs any attendant probative dangers, and there is independent, corroborating evidence for the truth of the statement.~~

~~(3) Existing law, known as the "hearsay rule," provides that, at a hearing, evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated is inadmissible. Existing law also provides exceptions to the hearsay rule to permit the admission of specified kinds of evidence.~~

~~This bill would provide that evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered to describe or explain an event or condition and is made while the declarant was perceiving the event or condition, as specified.~~

~~This bill would further provide that evidence of a statement that is offered against a party who has engaged or acquiesced in wrongdoing that has caused the unavailability of the declarant as a witness is not made inadmissible by the hearsay rule. The bill would require the party seeking to introduce a statement to establish, by a preponderance of the evidence, that the elements of this provision have been met at a~~

~~foundational hearing. The bill would provide that hearsay evidence, including the hearsay evidence that is the subject of the foundational hearing, is admissible at the foundational hearing. The bill also would provide that a finding that those elements have not been met shall not be based solely on the uncontroverted hearsay statement of the unavailable declarant, as specified. The bill would provide that, if a statement to be admitted pursuant to these provisions includes a hearsay statement made by anyone other than the unavailable declarant, that other hearsay statement is inadmissible unless it meets the requirements of an exception to the hearsay rule.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~ yes.  
 State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 19858.8 is added to the Government Code,  
 2     to read:  
 3     19858.8. (a) In lieu of sick leave and vacation provisions of  
 4     Sections 19858.1 and 19859, an employee, as defined in subdivision  
 5     (d), shall participate in an annual leave program. Each employee  
 6     who participates in the annual leave program and who is employed  
 7     full time shall receive 12 hours credit for annual leave with pay  
 8     per month, regardless of the length of service of that employee.  
 9     (b) A part-time or hourly employee shall accrue proportional  
 10     annual leave credits based on the schedule in this section. The  
 11     time when annual leave shall be taken shall be determined by the  
 12     appointing power of the officer or employee.  
 13     (c) The department shall provide by rule for the regulation and  
 14     accumulation of annual leave, the effect of an absence from the  
 15     payroll of 10 work days or less in a calendar month upon credit  
 16     for annual leave, methods by which an employee leaving the  
 17     employment of the state may be compensated for, or otherwise  
 18     receive proper credit for, his or her accumulated annual leave,  
 19     and other provisions necessary for the administration of this  
 20     section.  
 21     (d) This section shall apply to an excluded or exempt employee  
 22     of State Bargaining Unit 5, 6, 7, or 8, who participates in the  
 23     Deferred Retirement Option Program pursuant to Chapter 19  
 24     (commencing with Section 21710) of Part 3.

1 SEC. 2. Section 20281.7 is added to the Government Code, to  
2 read:

3 20281.7. A member who is an excluded or exempt employee  
4 of State Bargaining Unit 5, 6, 7, or 8, who participates in the  
5 Deferred Retirement Option Program pursuant to Chapter 19  
6 (commencing with Section 21710) shall not accrue credit for  
7 service in the system and shall not make employee contributions  
8 to the system for employment with the state.

9 SEC. 3. Section 20822 of the Government Code is amended to  
10 read:

11 20822. (a) From the General Fund in the State Treasury there  
12 is appropriated quarterly, to the retirement fund, the state's  
13 contribution for all of the following:

14 (1) All state miscellaneous members and all other categories of  
15 members whose compensation is paid from the General Fund.

16 (2) All university members whose compensation is paid from  
17 funds of, or funds appropriated to, the university.

18 (3) All state miscellaneous members who are employed by the  
19 State Department of Education or the Department of Rehabilitation  
20 and whose compensation is paid from the Vocational Education  
21 Federal Fund, the Vocational Rehabilitation Federal Fund, or any  
22 other fund received, in whole or in part, as a donation to the state  
23 under restrictions preventing its use for state contributions to the  
24 retirement system.

25 (4) All state miscellaneous members and all other categories of  
26 members whose compensation is paid from the Senate Operating  
27 Fund or the Assembly Operating Fund or the Operating Funds of  
28 the Assembly and Senate.

29 (b) ~~No~~An appropriation shall *not* be required pursuant to this  
30 section with respect to any state member who, pursuant to Section  
31 20281.5, is not accruing service credit during the first 24 months  
32 of service, unless and until that service credit is credited to the  
33 member.

34 (c) An appropriation shall *not* be required pursuant to this  
35 section with respect to a state employee who participates in the  
36 Deferred Retirement Option Program pursuant to Chapter 19  
37 (commencing with Section 21720).

38 SEC. 4. Chapter 19 (commencing with Section 21710) is added  
39 to Part 3 of Division 5 of Title 2 of the Government Code, to read:

1           *CHAPTER 19. DEFERRED RETIREMENT OPTION PROGRAM*

2  
3                           *Article 1. General Provisions*

4  
5           21710. This chapter shall be known and may be cited as the  
6 “Deferred Retirement Option Program.”

7           21710.1. The Deferred Retirement Option Program is hereby  
8 created to add flexibility to the system. This program permits a  
9 member who elects to participate in the program to accumulate  
10 and defer retirement funds. That member may access a lump-sum  
11 payment for a specified period in addition to his or her normal  
12 monthly retirement allowance. This program also permits a  
13 member, subject to the Internal Revenue Code, to rollover his or  
14 her lump sum into a 401(k) or individual retirement account.

15           21710.2. The design and administration of the Deferred  
16 Retirement Option Program shall conform with the applicable  
17 provisions of Title 26 of the United States Code and the Revenue  
18 and Taxation Code.

19           21710.3. If any provision of this chapter or application thereof  
20 to any person or circumstance is held invalid, that invalidity shall  
21 not affect other provisions or applications of this chapter that can  
22 be given effect without the invalid provision or application, and  
23 to this end the provisions of this chapter are severable.

24           21710.4. The board shall implement the Deferred Retirement  
25 Option Program pursuant to the provisions of this chapter on July  
26 1, 2009, unless the board determines, by resolution, that the  
27 implementation tasks cannot be completed until a later date, in  
28 which case the board shall implement the program pursuant to  
29 this chapter no later than January 1, 2010.

30           21710.5. The board may adopt regulations to implement the  
31 program.

32           21710.6. The program shall result in a cost savings or be cost  
33 neutral. The system shall, on or before June 1, 2009, issue a report  
34 providing an analysis of the anticipated cost impact to the state  
35 during the 2009–10 fiscal year of the program established by this  
36 chapter. The purpose of the report is to assist in reaching the goal  
37 of a cost savings or cost neutral program for the state employer.

38           21710.7. After the program is implemented, the actuary shall  
39 conduct a valuation of the program every two years to determine  
40 its fiscal impact to the state employer and shall report the findings

1 to the board and the Department of Personnel Administration no  
 2 later than July 1, 2011, and biennially each July 1, thereafter. The  
 3 program may be terminated, by written notice from the Department  
 4 of Personnel Administration to the board, if the annual valuation  
 5 indicates that the program is not cost neutral and has increased  
 6 the liability of the state employer. The terms of any termination of  
 7 the program shall be subject to the meet and confer process.

8  
 9 Article 2. Definitions

10  
 11 21712. Unless the context otherwise requires, the definitions  
 12 set forth in this article shall govern the interpretation of terms in  
 13 this chapter.

14 21712.1. "Actual retirement date" means the effective date of  
 15 the member's retirement following termination of all employment  
 16 subject to membership in the system.

17 21712.2. "Deferred retirement calculation date" means the  
 18 date subsequent to the member's actual retirement date as of which  
 19 benefits under the program shall be calculated as provided in  
 20 Article 4 (commencing with Section 21714.1).

21 21712.3. "Deferred retirement period" means the period of  
 22 time between the member's actual date of retirement and the date  
 23 the member ends his or her participation in the program, which  
 24 period shall not be less than 12 months nor more than 60 months.

25 21712.4. "Program" means the Deferred Retirement Option  
 26 Program established by this chapter.

27 21712.5. "Program payment" means the amount to be paid to  
 28 the member as a result of his or her participation in the program,  
 29 as calculated in Section 21714.1.

30  
 31 Article 3. Eligibility

32  
 33 21713. This program is established for excluded or exempt  
 34 employees of State Bargaining Unit 5, 6, 7, or 8.

35 21713.1. A member described in Section 21713 shall be eligible  
 36 to elect to participate in the program at anytime the member has  
 37 met the minimum service requirements applicable for a service  
 38 retirement and attained at least 50 years of age.

39 21713.2. A member who is eligible to elect to participate in  
 40 the program shall voluntarily:

1 (a) Make this election prior to retirement on a form prescribed  
 2 and retained by the board.

3 (b) Designate his or her deferred retirement calculation date,  
 4 which date shall not be more than 60 months nor less than 12  
 5 months subsequent to the member’s actual retirement date and  
 6 shall be subsequent to the date that the member meets the minimum  
 7 age and service requirements for a service retirement. The deferred  
 8 retirement calculation date shall not be prior to January 1, 2010.

9 (c) Receive benefits from the system upon retirement at the time  
 10 and in the manner provided in this chapter.

11 (d) A member who participates in the program shall participate  
 12 in the annual leave program described in Section 19858.8.

13 (e) A member shall not be required to pay contributions to or  
 14 receive service credit in the system during his or her participation  
 15 in the program, as described in Section 20281.7, and no  
 16 appropriation shall be required by the state with respect to any  
 17 employer contributions, as described in subdivision (c) of Section  
 18 20822.

19 21713.3. (a) Except as described in subdivision (b), the  
 20 election to participate in the program shall be irrevocable.

21 (b) A member may be allowed to extend his or her participation  
 22 in the program if this extension does not exceed 60 cumulative  
 23 months of participation in the program.

24 21713.4. A member who participates in the Deferred Retirement  
 25 Option Program may not participate in reduced worktime for  
 26 partial service retirement pursuant to Article 4 (commencing with  
 27 Section 21110) of Chapter 12 of this part.

28 21713.5. A member who participates in the program and  
 29 reinstates from retirement shall not be eligible to again participate  
 30 in the program upon subsequent retirement.

31

32 Article 4. Calculation of Distribution

33

34 21714.1. Upon the termination of employment and retirement  
 35 of an eligible member who has elected to participate in the  
 36 program, the system shall calculate the following amounts:

37 (a) The member’s monthly service retirement allowance payable  
 38 the day prior to when the member begins to participate in the  
 39 program.

1 (b) *The member's program payment, which shall be the amount*  
2 *calculated pursuant to subdivision (a), plus interest at an annual*  
3 *rate of 5 percent minus the costs the system incurs to administer*  
4 *the program.*

5 21714.2. *The retirement allowance pertaining to service of the*  
6 *member other than as an exempt or excluded employee of State*  
7 *Bargaining Unit 5, 6, 7, or 8, shall be based upon the member's*  
8 *actual retirement date and not the deferred retirement calculation*  
9 *date.*

10  
11 Article 5. *Distribution Methods*  
12

13 21715.1. *Upon termination of employment and retirement from*  
14 *the system, a member who has elected to participate in the program*  
15 *shall receive the member's program payment as calculated*  
16 *pursuant to Section 21714.1.*

17 21715.2. *The member shall elect one of the following as the*  
18 *form of distribution of the member's program payment:*

19 (a) *A single lump-sum payment.*

20 (b) *A lump-sum rollover to a 401(k) or individual retirement*  
21 *account.*

22 21715.3. (a) *Notwithstanding any other provision of this*  
23 *chapter, a participant, nonparticipant spouse, or beneficiary shall*  
24 *not be permitted to elect a distribution under this chapter that does*  
25 *not satisfy the requirements of Section 401(a)(9) of Title 26 of the*  
26 *United States Code, including the incidental death benefit*  
27 *requirements of Section 401(a)(9)(G) and the regulations*  
28 *thereunder.*

29 (b) *A lump-sum distribution to the participant that reflects the*  
30 *entire program payment of the participant shall be made not later*  
31 *than April 1 of the calendar year following the later of the calendar*  
32 *year in which the participant attains 70 and one-half years of age*  
33 *or the calendar year in which the participant terminates all*  
34 *employment for the employer.*

35 (c) *In the case of a lump-sum distribution on account of the*  
36 *participant's death, distributions shall be paid no later than*  
37 *December 31 of the calendar year in which the second anniversary*  
38 *of the participant's date of death occurs unless the beneficiary is*  
39 *the participant's spouse in which case the benefit shall be paid on*

1 or before December 31 of the calendar year immediately following  
2 the calendar year in which the participant dies.

3

4

Article 6. Beneficiaries

5

6 21716. The beneficiary or beneficiaries entitled to receive any  
7 remaining balance described in Section 21715.3 shall be the same  
8 beneficiary or beneficiaries designated by the member to receive  
9 the postretirement death benefit provided by Article 5 (commencing  
10 with Section 21620) of Chapter 14 of this part.

11 SECTION 1. Section 240 of the Evidence Code is amended to  
12 read:

13 240. (a) ~~Except as otherwise provided in subdivision (b),~~  
14 ~~“unavailable as a witness” means that the declarant is any of the~~  
15 ~~following:~~

16 (1) ~~Exempted or precluded on the ground of privilege from~~  
17 ~~testifying concerning the matter to which his or her statement is~~  
18 ~~relevant.~~

19 (2) ~~Disqualified from testifying to the matter.~~

20 (3) ~~Dead or unable to attend or to testify at the hearing because~~  
21 ~~of then existing physical or mental illness or infirmity.~~

22 (4) ~~Absent from the hearing and the court is unable to compel~~  
23 ~~his or her attendance by its process.~~

24 (5) ~~Absent from the hearing and the proponent of his or her~~  
25 ~~statement has exercised reasonable diligence but has been unable~~  
26 ~~to procure his or her attendance by the court’s process.~~

27 (6) ~~If the declarant refuses to testify, notwithstanding imposition~~  
28 ~~of sanctions, and the statement is offered against the party that has~~  
29 ~~engaged or acquiesced in wrongdoing that was intended to, and~~  
30 ~~did, procure the unavailability of the declarant as a witness.~~

31 (b) ~~A declarant is not unavailable as a witness if the exemption,~~  
32 ~~preclusion, disqualification, death, inability, or absence of the~~  
33 ~~declarant was brought about by the procurement or wrongdoing~~  
34 ~~of the proponent of his or her statement for the purpose of~~  
35 ~~preventing the declarant from attending or testifying.~~

36 (c) ~~Expert testimony that establishes that physical or mental~~  
37 ~~trauma resulting from an alleged crime has caused harm to a~~  
38 ~~witness of sufficient severity that the witness is physically unable~~  
39 ~~to testify, or is unable to testify without suffering substantial~~  
40 ~~trauma, may constitute a sufficient showing of unavailability~~

1 pursuant to paragraph (3) of subdivision (a). As used in this section,  
2 the term “expert” means a physician and surgeon, including a  
3 psychiatrist, or any person described by subdivision (b), (c), or (e)  
4 of Section 1010.

5 The introduction of evidence to establish the unavailability of a  
6 witness under this subdivision shall not be deemed procurement  
7 of unavailability, in absence of proof to the contrary.

8 SEC. 2. Section 791 of the Evidence Code is amended to read:

9 791. Evidence of a statement previously made by a witness  
10 that is consistent with his or her testimony at the hearing is  
11 inadmissible to support his or her credibility, unless one of the  
12 following circumstances exists:

13 (a) It is offered after evidence of a statement made by him or  
14 her that is inconsistent with any part of his or her testimony at the  
15 hearing has been admitted for the purpose of attacking his or her  
16 credibility, and the statement was made before the alleged  
17 inconsistent statement.

18 (b) It is offered after an express or implied charge has been  
19 made that his or her testimony at the hearing is recently fabricated  
20 or is influenced by bias or other improper motive, and the statement  
21 was made before the bias, motive for fabrication, or other improper  
22 motive is alleged to have arisen.

23 (c) All of the following exist:

24 (1) The witness’ credibility is an important issue, not merely  
25 relevant, at the hearing.

26 (2) The probative value of the statement substantially outweighs  
27 any attendant probative dangers.

28 (3) There is independent, corroborating evidence of the truth of  
29 the statement that consists of evidence other than the witness’  
30 similar statement on direct examination at the hearing.

31 SEC. 3. Section 1243 is added to the Evidence Code, to read:

32 1243. Evidence of a statement is not made inadmissible by the  
33 hearsay rule if both of the following conditions are satisfied:

34 (a) The statement is offered to describe or explain an event or  
35 condition.

36 (b) The statement was made while the declarant was perceiving  
37 the event or condition, or immediately thereafter.

38 SEC. 4. Section 1390 is added to the Evidence Code, to read:

39 1390. (a) Evidence of a statement is not made inadmissible  
40 by the hearsay rule if the statement is offered against a party who

1 ~~has engaged or acquiesced in wrongdoing that has caused the~~  
2 ~~unavailability of the declarant as a witness.~~

3 ~~(b) (1) The party seeking to introduce a statement pursuant to~~  
4 ~~subdivision (a) shall establish, by a preponderance of the evidence,~~  
5 ~~that the elements of subdivision (a) have been met at a foundational~~  
6 ~~hearing.~~

7 ~~(2) Hearsay evidence, including the hearsay evidence that is the~~  
8 ~~subject of the foundational hearing, is admissible at the~~  
9 ~~foundational hearing. However, a finding that the elements of~~  
10 ~~subdivision (a) have not been met shall not be based solely on the~~  
11 ~~unconfronted hearsay statement of the unavailable declarant, and~~  
12 ~~shall be supported by independent corroborative evidence.~~

13 ~~(3) The foundational hearing shall be conducted outside the~~  
14 ~~presence of the jury. However, if the hearing is conducted after a~~  
15 ~~jury trial has begun, the judge presiding at the hearing may consider~~  
16 ~~evidence already presented to the jury in deciding whether the~~  
17 ~~elements of subdivision (a) have been met.~~

18 ~~(e) If a statement to be admitted pursuant to this section includes~~  
19 ~~a hearsay statement made by anyone other than the declarant who~~  
20 ~~is unavailable pursuant to subdivision (a), that other hearsay~~  
21 ~~statement is inadmissible unless it meets the requirements of an~~  
22 ~~exception to the hearsay rule.~~