

## **Authority**

Gov. Code § 7522.72 provides as follows<sup>1</sup>:

(a) This section shall apply to a public employee first employed by a public employer or first elected or appointed to an office before January 1, 2013, and, on and after that date, Section 7522.70 shall not apply.

(b)

(1) If a public employee is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction. (2) If a public employee who has contact with children as part of his or her official duties is convicted of a felony that was committed within the scope of his or her official duties against or involving a child who he or she has contact with as part of his or her official duties, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.

(c)

(1) A member shall forfeit all the rights and benefits earned or accrued from the earliest date of the commission of any felony described in subdivision (b) to the forfeiture date, inclusive. The rights and benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the member's conviction. Rights and benefits attributable to service performed prior to the date of the first commission of the felony for which the member was convicted shall not be forfeited as a result of this section.

(2) Paragraph (1) shall apply to the extent permissible by law.

(3) For purposes of this subdivision, "forfeiture date" means the date of the conviction.

(d)

(1) Any contributions to the public retirement system made by the public employee described in subdivision (b) on or after the earliest date of the commission of any felony described in subdivision (b) shall be returned, without interest, to the public employee upon the occurrence of a distribution event unless otherwise ordered by a court or determined by the pension administrator.

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<sup>1</sup> The same provisions appear in Govt. Code § 7522.74 for public employees first employed, elected or appointed on or after January 1, 2013. Accordingly, these Procedures shall apply to all OCERS members.

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(2) Any funds returned to the public employee pursuant to subdivision (d) shall be disbursed by electronic funds transfer to an account of the public employee, in a manner conforming with the requirements of the Internal Revenue Code, and the public retirement system shall notify the court and the district attorney at least three business days before that disbursement of funds.

(3) For the purposes of this subdivision, a "distribution event" means any of the following:

- (A) Separation from employment.
- (B) Death of the member.
- (C) Retirement of the member.

(e)

(1) Upon conviction, a public employee as described in subdivision (b) and the prosecuting agency shall notify the public employer who employed the public employee at the time of the commission of the felony within 60 days of the felony conviction of all of the following information:

- (A) The date of conviction.
- (B) The date of the first known commission of the felony.

(2) The operation of this section is not dependent upon the performance of the notification obligations specified in this subdivision.

(f) The public employer that employs or employed a public employee described in subdivision (b) and that public employee shall each notify the public retirement system in which the public employee is a member of that public employee's conviction within 90 days of the conviction. The operation of this section is not dependent upon the performance of the notification obligations specified in this subdivision.

(g) A public retirement system may assess a public employer a reasonable amount to reimburse the cost of audit, adjustment, or correction, if it determines that the public employer failed to comply with this section.

(h) If a public employee's conviction is reversed and that decision is final, the employee shall be entitled to do either of the following:

- (1) Recover the forfeited rights and benefits as adjusted for the contributions received pursuant to subdivision (d).
- (2) Redeposit those contributions and interest that would have accrued during the forfeiture period, as determined by the system actuary, and then recover the full amount of the forfeited rights and benefits.

(i) The forfeiture of rights and benefits provided in this section, with respect to judges, are in addition to and supplement the forfeitures and other requirements provided in Section 75033.2, 75062, 75526, or 75563. If there is a conflict between this section and Section 75033.2, 75062, 75526, or 75563, the provisions that result in the greatest forfeiture or provide the most stringent procedural requirements to the claim of a judge shall apply.

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(j) A public employee first employed by a public employer or first elected or appointed to an office on or after January 1, 2013, shall be subject to Section 7522.74.

### **Procedure**

1. From time to time OCERS may learn that a member has been convicted of one or more felonies. Regardless of how OCERS learns about a member's felony conviction, OCERS staff will investigate the matter to determine the extent of any retirement benefit forfeiture required by law.
2. Among the information that OCERS staff will obtain will be the criminal court record, evidence of the commission of the criminal acts, the judgment of conviction, and any other information OCERS staff believes is appropriate in order to assist the Board of Retirement in discharging its obligation to make the determinations required by Govt. Code sections 7522.72 and 7522.74. OCERS may exercise its subpoena power (see Govt. Code sec. 31535) for this purpose. Staff is not limited to the criminal record in gathering the information it believes appropriate for the Board's determination.
3. The purpose of staff's investigation is to assist the Board in the following:
  - a. Establishing the earliest date of the commission of the felony;
  - b. Establishing whether the felony arose out of or in the performance of the member's official duties, in pursuit of the office or appointment; in connection with obtaining salary, disability retirement, service retirement, or other benefits; or was committed within the scope of the member's official duties against or involving a child who he or she has contact with as part of his or her official duties; and
  - c. Calculating the amount of overpaid benefits, employee contributions to be credited to the member, the appropriate adjustment to future benefits due to the member, and the method and timing of any recovery of overpayments due from the member.
4. If the member is active or deferred:
  - a. OCERS will determine the amount of service credit earned from the date of first commission of the subject felony to the date of conviction. OCERS will then remove from the member's account any service credit earned between the date of first commission and the date of conviction. OCERS will determine the amount of member contributions attributable to the removed service credit. No interest will be credited on the contributions.
  - b. The member will be treated as if he or she had become a deferred member on the date of first commission of the subject felony for all purposes, including but not limited to retirement eligibility.
  - c. Member contributions due to the member will be refunded to the member upon the occurrence of a distribution event through a credit to the member's employer in order to avoid violation of Internal Revenue Service early distribution rules. Such refunds to the employer will be made to the employer through an electronic funds transfer.

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5. If the member is retired:
  - a. OCERS will review the member's account to determine the member's service credits and final average salary ("FAS") as if the member deferred as of the date of the first commission of the subject felony.
  - b. OCERS will then determine whether the member had sufficient service credit to retire as of the date of first commission of the subject felony. If not, OCERS will rescind the retirement and place the member into deferred status until the member has sufficient eligible service to qualify for retirement.
  - c. If the member did have sufficient eligible service to retire as of the date of first commission of the felony, OCERS will recalculate the member's retirement allowance based on the deferral date by making appropriate changes to service credits and final average salary.
  - d. If the recalculated retirement allowance results in an overpayment of retirement benefits by OCERS, OCERS will seek to recoup the overpayment from the member pursuant to this Procedure.
  - e. OCERS will also determine the amount of contributions made by the member from the date of first commission of the felony to the date of conviction. These member contributions will be refunded to the member without interest; provided, however, that where there has been an overpayment by OCERS, OCERS will use the contribution refund, without interest, as an offset to the overpayment and only refund the amount by which the contributions exceed the amount of the overpayment (*see* Govt. Code section 7522.72(d)(1).)
  - f. For purposes of this Procedure, "overpayment" includes compounded interest on the principal amount of any such overpayment at OCERS' actuarial assumed rate of interest effective from time to time during the forfeiture period.
6. Following OCERS staff determination of the foregoing information, staff shall notify the member in writing that OCERS has been advised of the conviction, has determined the first date of commission, has determined that it was or was not job related, and, if applicable, has calculated the overpayments, the contributions and the monthly adjustment going forward and the manner and time in which it will recover any overpaid benefits due from the member, and will make those changes effective on a date not less than 45 days nor more than 90 days (the "Effective Date") following the date of the Notice. The Notice will include a copy of this Procedure. OCERS Staff may seek Board determination or direction on any matter referred to in Sections 3, 4 and 5 of this Procedure before sending the Notice to the member.
7. Notwithstanding Par. 6, the member shall have the right to request that the matter be heard and determined by the Board. If the member makes the request in writing received by OCERS at least seven (7) days before the Effective Date set forth in the Notice, the matter will be placed on the Board's next regular open meeting agenda that is at least 45 days after the member's request is received by OCERS. **If a request is not received by OCERS at least seven (7) days before the Effective Date set forth in the Notice, the**

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**member waives his or her right to request that the matter be heard and determined by the Board.** Both the member and OCERS staff shall have the opportunity to submit to the Board written evidence, sworn testimony and argument relevant to the matters under consideration. All written submissions shall be delivered to the Board and the other party at least fourteen (14) days before the date of the Board meeting. At the time of the Board meeting, the member and OCERS staff may present written evidence, sworn testimony and argument and may be represented by counsel. At the conclusion of the presentations, the Board will take action as it determines appropriate. OCERS shall notify the member in writing of the Board's determination within three (3) business days following the determination.

8. Pending the finality of (a) OCERS' staff determination if the member does not request to be heard by the Board, or (b) the Board's determination if the member timely requests a Board determination, OCERS will not implement any changes, seek to recover any overpayments, refund any contributions or adjust any future monthly benefits of the member. Such changes, recovery of overpayments, refunds and adjustments shall be made at the earliest practicable time, as determined by OCERS' staff, unless otherwise directed by the Board. In the exercise of its discretion, OCERS may recover amounts due from the member and the member's estate by lump sum payment, installment payment, benefit deduction, any combination thereof, or in any other manner satisfactory to OCERS.
9. At least three(3) business days prior to payment of any refund of member contributions, OCERS will notify the court and the District Attorney's Office or other prosecuting authority of any contribution refund payments OCERS will be making to the member, either directly or through the member's employer.
10. In making any determinations under this Procedure, the Board may appoint one of its members or a referee to make findings and recommendations (*see* Govt. Code section 31533.) In this instance, the Board shall then proceed as described in Govt. Code section 31534.
11. The member has the right to challenge OCERS' administrative determination under the writ procedures set forth in the California Code of Civil Procedure. A member's filing of a writ challenging OCERS' final administrative determination shall not prevent OCERS from implementing its determination, unless a court orders otherwise.
12. This Procedure shall not be subject to OCERS' Policy Regarding the Overpayment or Underpayment of Benefits or Contributions.
13. This Procedure shall apply to any member convicted of a felony after January 1, 2013.
14. If this Procedure conflicts with any statutory or case law, the statutory or case law shall govern.