Metro

Metropolitan Transportation Authority

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FEBRUARY 19, 2013

TO:	**BOARD OF DIRECTORS**
THROUGH:	**ARTHUR T. LEAHY** **CHIEF EXECUTIVE OFFICER**
FROM:	**DONALD E. OTT** **EXECUTIVE DIRECTOR, EMPLOYEE AND LABOR RELATIONS**
SUBJECT:	**CALIFORNIA PUBLIC EMPLOYEES' PENSION REFORM ACT AND FEDERAL 13(c) REQUIREMENTS**

ISSUE

In a Board Box report dated December 5, 2012, we provided the Board with information on the Public Employees' Pension Reform Act (PEPRA), which establishes limits on California public employee defined benefit pension plans, but does not substantially affect the pension benefits of employees who were plan members prior to January 1, 2013, when PEPRA went into effect. The MTA's pension plans for employees who became plan members on or after January 1, 2013, must be modified to comply with PEPRA.

Several unions representing transit employees in California have asserted that PEPRA is inconsistent with collective bargaining rights that are protected in federal 13(c) agreements, and its implementation would therefore disqualify California transit agencies from receiving federal funds for projects. They have filed their objections with the U.S. Department of Labor (DOL), which must certify that agencies that apply for FTA funds comply with 13(c) requirements. The DOL found that the unions' objections were sufficient and has not certified any LACMTA grant applications since PEPRA became law.

BACKGROUND

Staff met with the Board in closed session on January 24, 2013, to present the unions' proposal and to obtain direction from the Board on our response to their proposal. Staff subsequently met with the unions, and they rejected Metro's counter proposal. The only option the unions are willing to consider is to obtain a legislative exemption from PEPRA.

Staff has worked with County Counsel, outside counsel and the DOL in attempts to obtain interim certification for Metro's grant applications. Letters to the DOL from Metro's outside counsel, County Counsel and the California Labor and Workforce Development Agency, which reflect the most recent communication with the DOL, are attached.

They are summarized below:

A. A letter from outside counsel Thompson Coburn, informing the DOL that the funds included in a grant amendment to cover maintenance costs that were incurred in 2012, before PEPRA was passed, should not be held up by the 13(c) issue raised by the unions (the unions have opposed certification of this grant amendment).
B. A letter from County Counsel which outlines the agency's position that PEPRA does not significantly affect the pension plans of "legacy members" (employees who were plan members before 1/1/13), which could not be changed without negotiation and for which the new pension formula would not apply; that while PEPRA affects the defined benefit pension we can offer "new members" (those who became members on or after 1/1/13), we can negotiate a new defined benefit plan for them, and PEPRA does not preclude our negotiating a defined contribution plan to supplement their defined pension benefits. In the letter, Counsel concludes that in light of these facts, the DOL should approve an interim certification of our grants pending the outcome of pension negotiations with our unions.
C. The last letter was sent by the Secretary of the California Labor and Workforce Development Agency, which makes a case similar to County Counsel's - that PEPRA does not substantially change the pension plans for legacy members, whose plans could only be changed through negotiation, and it does not eliminate our ability to bargain pension plans for new members.

NEXT STEPS

Staff will ask the Board to adopt a position on AB 160, a bill that would exempt the pension plans of employees with 13(c) protection, from PEPRA. In addition, staff will continue to communicate with the DOL in efforts to obtain interim certification of our grants until the pension issue is resolved.

ATTACHMENTS:

A. Letter to DOL from Thompson Coburn
B. Letter to DOL from County Counsel
C. Letter to DOL from California Secretary of Labor and Workforce

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February 14, 2013

VIA ELECTRONIC MAIL

J. Douglas Marchant
Team Leader
Division of Statutory Programs
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

**Re: Los Angeles County Metropolitan Transportation Authority
FTA Application
CA-90-X717-07
Additional Funds for Preventive Maintenance**

Dear Mr. Marchant:

We are writing on behalf of the Los Angeles County Metropolitan Transportation Authority (LACMTA) in response to the objections filed by the ATU, TCU, and UTU to the above-referenced grant. The unions object on the misimpression that PEPRA prevents LACMTA from bargaining under Section 13(c), and request consolidation of the handling of this grant with those currently pending on the purported basis that the issues involved are "indistinguishable".

LACMTA requests that this grant not be consolidated with other LACMTA grants pending before the Department, the unions' objections be found insufficient, and this grant be certified by the Department.

Contrary to the unions' statements, the issues involved in this preventive maintenance grant are in fact clearly distinguishable from those presented in other LACMTA grants awaiting the Department's certification. As the application for this grant clearly indicates, these grant funds are for reimbursing LACMTA for certain preventive maintenance costs that were incurred

last July, 2012.[1] PEPRA was not even enacted last July and thus it is impossible for PEPRA to have any effect on the expenditure of these funds.[2]

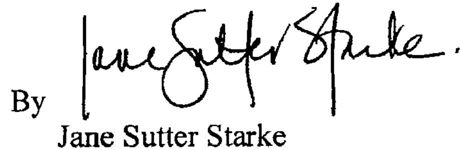
On this basis alone, the unions objections should be rejected by the Department.

Further, as noted in the Department's December 21, 2012 certification for Monterey-Salinas Transit (CA-90-Z022), grants which provide assistance for reimbursable costs during the term of existing labor agreements (under which pension terms are unaffected by PEPRA) can be certified as meeting 13(c) obligations. This grant for preventive maintenance assistance will reimburse LACMTA for costs incurred not only well before these unions' labor contracts expire, but also before PEPRA even became law in California. Consistency thus requires that the Department issue a certification for this grant.

Your consideration of this request is appreciated.

Very truly yours,

Thompson Coburn LLP

By 
Jane Sutter Starke

cc: Ronald W. Stamm, Principal Deputy County Counsel, LACMTA
Don Ott, Executive Director, Employee and Labor Relations, LACMTA
John Lund, Deputy Assistant Secretary, DOL
Ann Comer, Chief, Division of Statutory Programs, DOL
Jessica M. Chu, Associate General Counsel, ATU
Erika A. Diehl, Assistant General Counsel, UTU
Paul E. Knupp III, Guerrieri, Clayman, Bartos & Parcelli

JSS/blt

[1] As stated in the application attached to the Department's February 1st referral letter: "These funds will partially cover PM for July 2012". The term 'partially" refers to the fact that LACMTA had further reimbursable PM expenses in July that will be the subject of a future grant amendment.

[2] PEPRA was signed by Governor Brown on September 12, 2012 (Chaptered by the Secretary of State – Chapter 296, Statutes of 2012). PEPRA's effective date is January 1, 2013.

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JOHN F. KRATTLI
County Counsel

February 13, 2013

J. Douglas Marchant
Project Representative
Division of Statutory Programs
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Los Angeles County Metropolitan Transportation Authority
FTA Applications
CA-04-0261
CA-04-0232-01
CA-95-X042-02
CA-90-Y717-07

Dear Mr. Marchant:

As in-house counsel who advises the Los Angeles County Metropolitan Transportation Authority (MTA) and its management trustees on pension matters, I would like to share with you the legal bases for our opinion that the California Public Employees' Pension Reform Act of 2013 (PEPRA) does not extinguish pension benefits under existing MTA-Union collective bargaining agreements, nor does PEPRA discontinue MTA's statutory duty to collectively bargain with its unions on all mandatory subjects of bargaining, including retirement benefits.

MTA Enabling Law

MTA was created by statute in 1993 to become the single successor to the Los Angeles County Transportation Commission (LACTC), a county transportation commission, and the Southern California Rapid Transit District (SCRTD), a transit district.[1] The Legislature gave MTA all the powers, duties,

[1] Cal. Public Utilities Code § 130050.2: "There is hereby created the Los Angeles County Metropolitan Transportation Authority. The authority shall be the single successor agency

rights and obligations of its predecessors, LACTC and SCRTD. To ensure that MTA inherited all the attributes of its predecessors, the Legislature directed that "MTA" would be substituted in place of "LACTC" or "RTD", wherever these terms appear in law.[2] And, specifically with regard to labor obligations, MTA's enabling law expressly states that:

> "Notwithstanding any other provision of law, the Los Angeles County Metropolitan Transportation Authority shall assume the duties, obligations, and liabilities of the Southern California Rapid Transit District, including those duties, obligations, and liabilities arising from or relating to collective bargaining agreements or labor organizations imposed by state or federal law . . ."[3]

RTD's enabling law, applicable to MTA through section 130051.14, imposes obligations on MTA to bargain with its unions with regard to pension benefits. Section 30750(a) mandates that MTA "bargain in good faith and make all reasonable efforts to reach agreement on the terms of a written contract governing wages, hours, and working conditions. Pensions are considered a form of wages, and MTA law mandates that "[t]he adoption, terms, and conditions of the retirement systems covering employees of the MTA in a bargaining unit represented by a labor organization shall be pursuant to a collective bargaining agreement between such labor organization and the MTA."[4]

When considering PEPRA's impacts on MTA's unions, it is important to recognize that **MTA's statutory obligation to engage in collective bargaining cannot be limited or restricted by any other law**:

> "The obligation of the MTA to bargain in good faith with a duly designated or certified labor organization and to execute a written collective bargaining agreement with that labor organization covering the

(...continued)
to the Southern California Rapid Transit District and the Los Angeles County Transportation Commission . . ."

Unless otherwise noted, all further statutory references shall refer to the California Public Utilities Code.

[2] Sections 130051.13; and 130051.14.

[3] Section 130051.16.

[4] Section 30451.

> wages, hours, and working conditions of the employees represented by that labor organization in an appropriate unit, and to comply with the terms of that collective bargaining agreement, *shall not be limited or restricted by any other provision of law.* The obligation of the MTA to bargain collectively shall extend to all subjects of collective bargaining . . ."[5] (emphasis added.)

MTA also has the statutory authority to perform any acts necessary to accept federal aid:

"The MTA may accept contributions or loans from the United States . . . for the purpose of financing the acquisition, construction, development, joint development, maintenance, and operation of transit facilities . . . in accordance with any legislation which Congress may have adopted . . . under which aid, assistance, and cooperation may be furnished by the United States. . . *The MTA may do any and all things necessary . . . in order to avail itself of the aid, assistance, and cooperation under any federal legislation now or hereafter enacted. . .*"[6] (emphasis added.)

PEPRA Does Not Restrict or Limit MTA's Collective Bargaining Obligations

The level of pension benefits for current employees is a form of wages and falls within a union's scope of representation under labor laws applicable to MTA. Thus, to the extent MTA has discretion over new pension benefits for new employees and other requirements relating to current employees' pension benefits, MTA must negotiate over the areas within its discretion. *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865.

With regard to the pension benefits acquired through collective bargaining by MTA's current employees, nothing in the new pension reform law requires or authorizes MTA to take such benefits away unilaterally. Thus, for the most part, plan benefits in effect on December 31, 2012 for members as of that date are not affected by PEPRA. Existing employees keep the same retirement benefits they have under their existing retirement plans as of December 31, 2012. There is no change required for the defined benefit plan formula, use of 12 months (in the case of ATU members; 36 months for UTU and TCU members) to determine

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[5] Section 30750(c).

[6] Section 30701.

final average compensation, the amount of compensation that may be taken into account or early retirement factors.

In fact, a number of changes that *enhance* benefits may continue to be collectively bargained for existing members. For example, PEPRA clearly allows enhancements as long as they are for future service.[7] Moreover, while there is a limit on establishing new supplemental *defined benefit* plans after 2012 that would provide additional retirement benefits, there is no limit on establishing supplemental *defined contribution* plans.

Most of PEPRA's provisions apply to new members who join a public retirement system for the first time on or after January 1, 2013. With few exceptions, every public employer that provides a defined benefit plan must provide a plan to new members that has a prescribed formula. The general member formula is 2% @ 62[8] with specific reductions for earlier retirement and increased for later retirements up to 2.5% @ 67.[9] Employers and unions that start with a higher formula may keep the higher formula for existing employees or agree to a lower formula plan, but lower benefits for existing employees cannot be imposed by impasse.

Notwithstanding the 2% @ 62 benefit formula for new employees stated in PEPRA, the new law permits a retirement system to use its existing formula or an alternative formula as long as the formula results in no greater risk or cost to the employer than the defined benefit formula required by PEPRA.[10] The actuaries for MTA's pension plans have developed alternative benefit formulas for new employees that have no greater risk and no greater cost than the defined benefit formula prescribed by PEPRA, but the unions have thus far declined to negotiate an alternative formula for new members.

Even with these new limits on defined benefit plans for new employees, there continue to be opportunities for the MTA and its unions to negotiate

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[7] Government Code 7522.44.

[8] A "2% @ 62" formula refers to the standard type of benefit formula in public retirement systems which determines the benefit available to the member (without any actuarial reduction) at retirement by multiplying a stated percentage (2%) of the member's final average compensation (for new members, over no fewer than 36 months) at a stated age (62), which is multiplied by the member's years of service credit.

[9] Government Code 7522.20.

[10] Section 7522.02(d).

substantially higher retirement benefits through supplemental defined contribution plans. Under current tax laws, MTA's defined contribution plans can receive *annual* contributions of up to *$51,000* per participant, an amount well in excess of what would be needed to restore new employees' retirement benefits that may be capped by PEPRA. Especially for younger employees, this level of contributions can provide a very high final retirement benefit, far better than a high formula defined benefit plan. Thus, notwithstanding PEPRA, MTA retains the ability to negotiate supplemental defined contribution plans which may be used in work-arounds to the defined plan limits for new employees.

For existing members in MTA's pension plans, there are no provisions in PEPRA for cost sharing. Cost sharing for existing union members will continue to be governed by the terms of each collectively bargained plan. MTA's ability to require current employees to make pension contributions has not changed under PEPRA. Because PEPRA is long (60 pages) and complex, there are misconceptions regarding the scope and breadth of some of its provisions. For example, MTA's unions may believe that PEPRA allows MTA to require that current employees pay 50% of normal cost of benefits beginning in 2018. However, the unions would be mistaken if they believe that MTA can unilaterally impose mandatory cost-sharing for current employees outside of the collective bargaining process. Nothing in PEPRA authorizes MTA to require current employees to pay 50% of their total annual pension cost, beginning in 2018.[11] Consistent with traditional principles of collective bargaining and its statutory mandates, MTA may continue to negotiate employee contributions to fund its pension plans on a sound actuarial basis.

New members must pay at least 50% of the normal cost of their defined benefit plan effective January 1, 2013 or the date their current collective bargaining agreement expires, whichever is later. Of course, any impacts of mandatory cost sharing for new members can be fully mitigated through negotiations for supplemental defined contribution plans.

As of January 1, 2013, PEPRA prohibits the purchase of "airtime", but MTA's pension plans do not provide employees the opportunity to purchase airtime. The unions have never expressed an interest in airtime or attempted to negotiate airtime for their members. Regardless of any theoretical impacts over the loss of potential airtime, the unions' ability to negotiate additional service

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[11] Only PERS contracting agencies and school districts can unilaterally impose this cost-sharing requirement in 2018. MTA does not contract with PERS for retirement benefits.

credit for *qualified service*, such as prior government service and military service, remains unaffected by PEPRA.[12]

Notwithstanding PEPRA's mandates, MTA can continue to fulfill its collective bargaining obligations with its unions. Opportunities still exist for providing benefit enhancements for existing and new members, consistent with PEPRA. For current workers, PEPRA in no way affects their pension benefit formula, the employer and employee contributions to fund such benefits on a sound actuarial basis, or the need to collectively bargain any changes to the formula or contributions. In fact, PEPRA explicitly recognizes that if existing workers' pension rights are to be changed, that change must necessarily occur through collective bargaining and agreement of the parties.

MTA remains ready, willing and able to negotiate pension benefits and the limited impacts of PEPRA with its unions. Such negotiations could include discussions of: 1) optional benefits for existing employees and new members; 2) employer paid member contributions for existing employees; and 3) new defined contribution plans. PEPRA does not remove mandatory subjects of bargaining under California law from the collective bargaining process applicable to MTA. Therefore, we do not believe that PEPRA limts or restricts in any meaningful way, MTA's statutory obligations to collectively bargain with its unions on pension benefits, a traditional subject of collective bargaining.

Based on the continuing ability of the MTA to collectively bargain over pension benefits and issues consistent with 13(c), there is no basis to withhold interim certification of the pending grants. No circumstances exist as a factual and legal matter that warrant withholding certification within the meaning of section 215.3(h) of the Department's 13(c) Guidelines. Further, under the terms of an interim certification no action can be taken that would irreparably harm employees. MTA's existing collective bargaining agreements remain in place and the MTA has committed to bargain these issues and thus employee interests remain protected.

We appreciate your continuing analysis of this matter, and look forward to working with the Department of Labor to resolve the unions' 13(c) objections, so that MTA can continue to avail itself of FTA grants needed for the acquisition, construction, maintenance and operation of public transit facilities in the County of Los Angeles.

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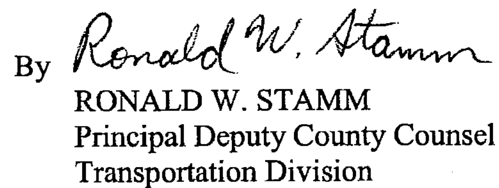
[12] Government Code 7522.46.

Very truly yours,

JOHN F. KRATTLI
County Counsel

By 
RONALD W. STAMM
Principal Deputy County Counsel
Transportation Division

RWS

c: John Lund, Deputy Assistant Secreatary, DOL
Ann Comer, Chief, Division of Statutory Programs, DOL
Jessica Chu, Counsel for ATU
Erika Diehl, Counsel for UTU
Paul E. Knupp III, Counsel for TCU
Jane Starke, Counsel for MTA
G. Kent Woodman, Counsel for MTA
Don Ott, Executive Director, Employee and Labor Relations, MTA

ATTACHMENT C

STATE OF CALIFORNIA
Labor & Workforce Development Agency

GOVERNOR Edmund G. Brown Jr. · SECRETARY Marty Morgenstern

Agricultural Labor Relations Board · California Unemployment Insurance Appeals Board
California Workforce Investment Board · Department of Industrial Relations
Employment Development Department · Employment Training Panel

February 13, 2013

Seth D. Harris
Acting Secretary of Labor and Deputy Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Acting Secretary Harris,

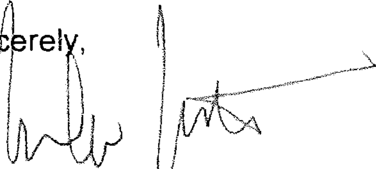
Thank you for requesting our input on the pension reform implemented by California Assembly Bill No. 340 (the Public Employee Pension Reform Act, or "PEPRA"), and its potential impact on grantees' obligations under the Federal Public Transportation Act, codified at 49 U.S.C. § 5333(b) ("Section 13(c)" of the Urban Mass Transportation Act). My legal staff and I have reviewed this matter carefully and concluded that PEPRA does not limit a local transit authority's ability to bargain or to enter into fair and equitable protective agreements or arrangements that satisfy Section 13(c).

As explained in the attached legal memorandum, the changes in state pension law implemented by PEPRA do not impede Section 13(c)'s goal of assuring a continued right to collective bargaining. California's effort to bolster the sustainability of defined benefit pension systems for public employees also does not eliminate the important right of employees to engage in "meaningful, 'good faith' negotiations with their employer over wages, hours and other terms and conditions of employment." (*Donovan v. Amalgamated Transit Union*, 767 F.2d 939, 951 (D.C. Cir. 1985).) To the contrary, PEPRA merely modifies, prospectively, certain aspects of the defined benefit pension plan than can be offered by a public employer. It does not permit employers to unilaterally determine and impose terms under which defined benefit pensions may be provided. And, most importantly, PEPRA retains the ability of current and future employees to engage in good faith collective bargaining. (Compare *Donovan*, 767 F.2d at 954 [Section 13(c) violation found where state legislature removed mandatory subjects of collective bargaining previously enjoyed by employees, including work assignments, benefits, and hours].)

PEPRA promotes retirement security for public employees by placing common-sense limits on the defined benefit pensions that can be offered to future employees. Again, these prospective changes do not impede the ability of current or future workers to engage in good faith collective bargaining and, accordingly, do not conflict with the requirements of Section 13(c). Furthermore, nothing in PEPRA prevents a local transit authority from negotiating other retirement or compensation benefits designed to offset the changes in defined benefit pensions in which future workers may be enrolled.

I am optimistic that the enclosed memorandum will address your concerns about PEPRA and that you will be able to certify that California's grantees continue to be fully eligible for federal grant awards. Please call me before you make any final decisions or take action on this matter. I will make myself and my staff available to answer any remaining questions that might be raised about AB 340's interplay with Section 13(c).

Sincerely,



Marty Morgenstern
Secretary
California Labor and Workforce Development Agency

Enclosure

Cc: Elmy Bermejo, Director OCIA, US DOL
John Lund, PhD, Director OLMS, US DOL
Ann Comer, Chief OLMS-DSP, US DOL
J. Douglas Marchant, Project Representative, OLMS, US DOL

ATTACHMENT C

Memorandum

DATE: February 13, 2013

TO: Marty Morgenstern
Secretary, Labor & Workforce Development Agency

FROM: Mark Woo-Sam
General Counsel, Labor & Workforce Development Agency

SUBJECT: Impact of the Public Employee Pension Reform Act on the Labor Requirements of the Federal Public Transportation Act.

You have asked me to analyze the potential impact of Assembly Bill No. 340 (2011-2012 Sess.) (the Public Employee Pension Reform Act, or "PEPRA") on grantees' obligations under the Federal Public Transportation Act, codified at 49 U.S.C. § 5333(b) (commonly referred to as "Section 13(c)" of the Urban Mass Transportation Act of 1964). Section 13(c) requires that employee protections, commonly referred to as "protective arrangements" must be certified by the Department of Labor before federal transit funds can be released to a mass transit provider. The law protects transit employees and requires the continuation of collective bargaining rights. and protection of their wages. benefits, and other conditions of employment.

Section 13(c) does not, however, enshrine in state law a permanent set of collective bargaining conditions. nor does it compel states to adopt an immutable set of pension laws. It does, however. require the continuation of the right to meaningful bargaining over wages, hours, and other key employment terms, including pensions. PEPRA does not materially diminish the right of transit employees to engage in good faith collective bargaining over wages, hours, benefits, and other terms and conditions of their employment. It also does not alter any vested rights, privileges, or benefits under existing collective bargaining agreements.

Fundamentally, AB 340 is a refinement of longstanding laws that govern the terms and obligations of defined benefit pensions for public employees. Occasional changes to state pension laws are necessary both to provide for changing employee retirement needs as well as the future solvency of retirement systems. Notably, the changes that PEPRA makes are almost

entirely prospective—they apply to new employees hired after January 1, 2013. And any amendments that might apply to current employees exempt employees working under a current MOU.

For these and all the reasons explained below, I conclude that PEPRA does not abridge the collective bargaining rights of mass transit employees in a manner that violates Section 13(c).

1. *Changes to the Contours of State Pension Law Do Not Impede Section 13(c)'s Goal of Assuring a Continued Right to Collective Bargaining.*

Congress implemented Section 13(c) of the Urban Mass Transit Act of 1964 (now the Federal Public Transportation Act) "[t]o prevent federal funds from being used to destroy the collective-bargaining rights of organized workers." (*Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 17 (1982).) The statute is also "a means to accommodate state law [] collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law." (*Id.* at 27.) Central to Section 13(c) is the concept of continued good faith collective bargaining:

> Congress struck a delicate balance in Section 13(c). The statute provides that state law should govern the labor relations of public transit authorities and their employees, but it conditions federal transit aid, in part, on the continuation of collective bargaining rights. In setting out those rights, Congress chose not to incorporate the entire structure and requirements of the NLRA into Section 13(c), for to do so would force states to choose between federal transit aid and their exclusion from the coverage of the NLRA. On the other hand, Congress made it clear that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of Section 13(c). "Good faith" bargaining, to a point of impasse if necessary, over wages, hours and other terms and conditions of employment has always been the essence of federally-defined collective bargaining rights.

(*Donovan v. Amalgamated Transit Union*, 767 F.2d 939, 950 (D.C. Cir. 1985) [emphasis added].)

I have found no authority suggesting that any modification to state law affecting public employee compensation or pensions, and by extension the scope of potential bargaining, is incompatible with the letter or spirit of Section 13(c). In fact, courts have rejected that notion:

> § 13(c)'s framers intended a limited set of provisional protections. . . . To erect upon § 13(c) assurances a near permanent set of specific collective bargaining conditions which the state cannot change is to go beyond this limited purpose.

> [T]o find that specific § 13(c) assurances override state law would also go beyond § 13(c)'s objective of assuring "fair and equitable" arrangements. Clearly, a state law could modify a particular § 13(c) assurance without inevitably bringing about an unfair or inequitable result. . . . Congress's general intent to secure fair arrangements does not require the implementation of any particular set of detailed provisions. Indeed, if the specific detailed provisions of a § 13(c) assurance prevail over any conflicting change in state law, the Secretary of Labor would lose any ongoing power to exercise discretion-to decide whether or not a change makes the state system as a whole unfair to the transit workers. This result would be anomalous given a legislative history stressing the need for flexibility and discretion.

(*Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 634 (1st Cir. 1981) [emphasis added].)

In *Donovan v. Amalgamated Transit Union*, the court similarly recognized that Section 13(c)'s requirement to continue collective bargaining rights "neither imposed upon the states the precise definition of 'collective bargaining' established by the NLRA and the case law that has developed under that Act, nor did it employ a term of art devoid of all meaning, leaving the states free to interpret and define it as they saw fit." (*Donovan*, 767 F.2d at 949.) Against this need for flexibility, the court defined the standard to be employed in evaluating compliance with Section 13(c) – one that requires the continuation of the right to meaningful representation in negotiations over wages, hours, and other key employment terms:

> Section 13(c)'s requirement, therefore, that labor protective agreements provide for "the continuation of collective bargaining rights" means, at a minimum, that where employees enjoyed collective bargaining rights prior to public acquisition of the transit system, they are entitled to be represented in meaningful, "good faith" negotiations with their employer over wages, hours and other terms and conditions of employment. Collective bargaining does not exist if an employer retains the power to establish wages, hours and other conditions of employment without the consent of the union or without at least first bargaining in good faith to impasse over disputed mandatory subjects. It is against this standard that we must measure Act 1506 and MARTA's labor protective agreement.

(*Id.* at 951 [emphasis added].)

Significantly, provision 3 of the Department of Labor's Unified Protective Arrangement (both December 23, 2008, and as updated January 3, 2011), as well the National (Model) Agreement Pursuant to Section 13(c), recognize that state law may foreclose further bargaining on subjects that had been previously bargained:

> All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this agreement (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall be preserved and continued; provided, however that such rights, privileges and benefits which are not foreclosed from further bargaining under applicable law or contract may be modified by collective bargaining and agreement by the Recipient and the union involved to substitute other rights, privileges and benefits.

(Dept. of Labor, Office of Labor-Management Standards, Unified Protective Arrangement (Jan. 3, 2011) provision 3, [emphasis added].)

The foregoing authorities compel the conclusion that Section 13(c) requires a thoughtful qualitative assessment of whether a state's enactments truly eliminate meaningful, good faith collective bargaining over wages, hours and other terms and conditions of employment. Laws that explicitly or implicitly preclude negotiation over mandatory subjects of bargaining will run afoul of this standard. On the other hand, laws like AB 340, which merely modify one aspect of a public employer's authority over compensation, but retain and ensure the ability of current and future employees to engage in good faith collective bargaining, do not.

2. PEPRA Protects the Rights of Employees to Bargain Collectively.

Consistent with the strong right of public employees in California to collectively bargain, AB 340 fully meets the standard articulated in *Donovan*. In *Donovan*, the state legislature removed several mandatory subjects of collective bargaining previously enjoyed by the employees—work assignments, just cause for discharge, subcontracting, fringe benefits for part-time employees, and the number of regular hours of work and overtime. The court emphasized that even with respect to subjects that were not specifically excluded from bargaining: "one cannot be sure whether the Georgia law even requires 'good faith' bargaining over those matters that are subject to negotiations. The statute appears silent on the question and we have been referred to no state judicial decisions indicating an enforceable duty to bargain." (*Donovan*, 767 F.2d at 954.) Against this backdrop, the court correctly determined that by vesting essentially unfettered unilateral control over the terms and conditions of employment without requiring good faith negotiation, Georgia had for all practical purposes eliminated the public transit employee's previously held collective bargaining rights. The state's legal restrictions were therefore antithetical to Section 13(c)'s purpose and express requirements.

In contrast, the statutory changes and continuing robust framework for collective bargaining following AB 340 are not analogous to the elimination of collective bargaining in *Donovan*. Nothing in AB 340 eliminates collective bargaining rights, or even forecloses negotiation on public pensions. Nor does PEPRA grant public employers unilateral authority to establish any aspect of employee work hours, compensation, or benefits by management fiat. Where the state in *Donovan* vested full control in the employer to set the terms and conditions of employment without good faith bargaining, AB 340 prevents employers from doing that. AB 340 sets terms under which public employers may provide defined benefits rather than permitting employers to unilaterally determine and impose them. In doing so, AB 340 adjusts California's prior and frequently-amended laws under which public employers may offer defined benefit pensions; but, it in no way alters the employers' duty to engage in good faith bargaining over pension benefits, or the employees' ability to enforce that duty. Thus, while PEPRA imposes reasonable conditions on employers in offering defined pensions as one aspect of overall employee compensation, it does not impose any limitation on the full opportunity for good faith negotiations over employee compensation, including base salaries and wage rates, overtime premiums, standby pay, pay differentials, bonuses, employer-provided allowances, health and other benefits.

Even within the subcategory of retirement benefits and deferred compensation, PEPRA does not restrict the right to collective bargaining over defined contribution pensions, severance pay, holiday pay, vacation or other compensatory time off and retiree health benefits. Ultimately, AB 340 provides conditions for certain aspects of an important, but narrow, aspect of employee compensation, while leaving open for negotiation the vast interrelated other forms of employee compensation and retirement benefits.

3. The Vague Objections Made to PEPRA Do Not Withstand Scrutiny.

Certain aspects of AB 340 have been singled out as potential areas of concern with respect to Section 13(c) obligations. Principally, these are:

- Requiring that employees contribute at least 50% of the normal costs of their pension benefit;
- Imposing new formulas for calculating pensions for new public employees;
- Imposing anti pension-spiking measures;

- Raising minimum retirement ages;
- Imposing pensionable income limits.

Given the generality of the objections raised, and their conclusory nature, it is difficult to respond with specificity to these contentions. It is important to recognize, however, that the relevant provisions of PEPRA primarily just refined existing laws and apply principally to persons who were not employed by public entities when AB 340 took effect. Moreover, I note that in at least one instance, the objecting labor group concedes that PEPRA has no impact on its current negotiated collective bargaining agreement.

The changes made by PEPRA must be understood in the context of California's well-settled rule that prospective employees have no vested right to any benefits prior to accepting employment, and therefore a public agency is free to change those benefits prior to hiring. (*See Miller v. State of California*, 18 Cal.3d 808, 814-815 (1977) [pension benefits vest upon acceptance of employment]; *Kern v. City of Long Beach*, 29 Cal.2d 848, 855 (1947).) Thus, AB 340's modification of defined benefit pensions for persons hired *after* the law became effective cannot be considered a diminution or abridgment of collective bargaining rights for those persons, as they did not possess any preexisting rights before they were hired.

One aspect of PEPRA merits additional discussion—the provision involving employees sharing in the normal costs of defined benefit pensions. California Government Code section 7522.30(f) provides that if the terms of a memorandum of understanding in effect on January 1, 2013, would be impaired by this cost sharing provision of PEPRA, the requirement shall not apply until the expiration of that contract. Moreover, Government Code section 7522.30 requires collective bargaining if an employer wishes employees to bear greater than 50% of the normal costs of the defined benefit pension, and expressly *forbids* the employer from utilizing impasse procedures to achieve this. (Cal. Gov. Code § 7522.30(e)(3).)

PEPRA also must be viewed in the context of California's long history of regulating pension rights. It bears emphasizing that AB 340's modifications to an employers' authority to provide defined benefit pensions did not create unprecedented restrictions where none previously existed. Under the comprehensive statutory schemes of the County Employees' Retirement Law (Cal. Gov. Code § 31450, et seq., "CERL") enacted in 1937, and the Public Employees' Retirement Law (Cal. Gov. Code, § 20000, et seq.; "PERL"), employers subject to these acts

have for decades lacked legal authority to provide defined benefit pension plans that did not conform to CERL's and PERL's specific requirements, which necessarily governed both the provision of defined benefits, and the funding of those benefits.

Manifestly, the solvency of pension plans and the entities providing them is critical to the delivery of earned pension benefits. PEPRA promotes this vital goal by regulating the promised pension benefits and aspects of their funding, and in so doing maintains the legislature's longstanding commitment to ensuring the actuarial soundness of public pensions. (See *Valdes v. Cory*, 139 Cal.App.3d 773, 786 (1983) ["our review of the present law, its statutory antecedents and the legislative history dispel any doubt that the Legislature intended to create and maintain the PERS on a sound actuarial basis."].) Thus, both the CERL and the PERL have strictly governed aspects of defined benefit pensions including, pension formulas, minimum retirement ages, vesting, employee contributions, employer contributions, definitions of compensation for the purposes of pension formulas and maximum compensation limitations. While specific provisions regulating defined benefit pensions have varied over the decades following enactment of the CERL and PERL, fundamentally, the essential elements of defined benefit pensions have been governed by the prescriptions of state law since 1937, for employers subject to these laws.

In sum, AB 340 does not alter a California public employers' duty to engage in good faith bargaining over wages, hours, and other terms and conditions of employment, including pensions, and in no way impedes the ability to comply with Section 13(c)'s requirements.

4. *Precedents under the NLRA Illustrate the Compatibility Between State Law and Federal Collective Bargaining Policies.*

In light of Section 13(c)'s function in promoting the underlying policies of the National Labor Relations Act, it may be useful to draw a comparison to precedents analyzing the NLRA's interaction with state laws. The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the agreement. (*Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985).)

The Supreme Court's holdings on NLRA preemption confirm that a state's regulation of certain matters impacting employment, and therefore the potential scope of bargaining, can be entirely consistent with the NLRA's collective bargaining goals. Rejecting a challenge to a

Massachusetts law which set mandatory provisions for health care plans even as applied to employer-provided health insurance, the Court analyzed the long history of state regulation for the benefit of workers, and found no conflict with the NLRA, stating:

> [T]here is no suggestion in the legislative history of the [NLRA] that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization.

(*Id.* at 756.) Moreover, before the enactment of the Employee Retirement Income Security Act of 1974 (ERISA) (Pub. L. No. 93-40), Congress recognized pensions as an appropriate area for state regulation. Describing the history of the federal Welfare and Pension Plan Disclosure Act of 1958 ("Disclosure Act", Pub. L. No. 85-836, 72 Stat. 997, repealed and replaced by ERISA) the Supreme Court observed that Congress contemplated the states would play a vital role in pension regulation:

> As we understand the 1958 Disclosure Act and its legislative history, the collective-bargaining provisions at issue here dealt with precisely the sort of subject matter "which Congress . . . indicated may be left to [regulation] by the several states." Congress clearly envisioned the exercise of state regulation power over pension funds, and we do not depart from *Oliver* in sustaining the Minnesota statute.

(*Malone v. White Motor Corp.*, 435 U.S. 497, 506 (1978).) Thus, in *Malone*, the Court held that the NLRA did not preempt Minnesota's Private Pension Benefits Protection Act, which regulated funding and vesting of employee pension plans. In specifically affirming the role of state pension regulation within the NLRA, the Court explained:

> There is little doubt that under the federal statutes governing labor-management relations, an employer must bargain about wages, hours, and working conditions and that pension benefits are proper subjects of compulsory bargaining. <u>But there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining.</u>

(*Id.* at 504-505 [emphasis added].) The Court reached this result notwithstanding the dissents' argument and characterization of the state law in a manner similar to the present objections to PEPRA:

> The statute in this case removes from the bargaining table certain means of dealing with an inevitable trade-off between somewhat conflicting industrial relations goals—the tension between maintaining competitive standards of present compensation and, at the same time, creating a solvent fund for the security of long-term employees upon retirement.

(*Id.* at 516 [Powell J., Burger, C.J., dissenting].)

It is against this backdrop that the requirements of Section 13(c) must be understood and applied. When it enacted the Urban Mass Transportation Act of 1964, the precursor to the Federal Public Transportation Act, Congress considered state authority to regulate employee pensions to be fully compatible with the NLRA's collective bargaining policies and requirements. As a consequence, Section 13(c)'s requirement to continue collective bargaining should similarly be understood as compatible with California's longstanding regulation of public pensions.

Ultimately, AB 340 is analogous to the above precedents and other state regulation of employment conditions that are consistent with the goals of the NLRA. By refining California's existing laws governing the provision of defined benefit pensions, AB 340 protects public employees by ensuring that defined benefit pensions comply with standards designed to promote employee well-being in their retirement and, as necessarily tied to this, the fiscal solvency of those systems charged with supplying the benefits. Since the CERL's enactment in 1937, California has restricted the ability of public employers subject to the Act to unilaterally determine and impose all terms and conditions of defined benefit pensions; PEPRA merely continues this history of regulation.

To the extent that employers and employees engage in meaningful collective bargaining over the vast menu of wage, health, and retirement benefits, and aspects of defined benefit pensions affected by AB 340, AB 340 contemplates this bargaining will occur, mandates it on some subjects and poses no barrier to it in others. AB 340 is therefore fully consistent with the goals and requirements of Section 13(c).