PRE-RETIREMENT COUNSELING/ POST-RETIREMENT EARNINGS LIMITS

PERAC

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RETIREMENT 101: LONG TERM EMPLOYEES AND PENSION REFORM

EXISTING MEMBERS

- Can pension reform affect pre-existing members?
- How is that even possible?
- What about G.L. c. 32, Section 25(5)?
- What about "The Opinion of the Justices, 1973"?

SECTION 25(5)

- Subsection 25 entitled "Guarantees; effects of amendments or repeal; mandamus"
- (5) *Effect of Amendments or Repeal.* — The provisions of sections one to twenty-eight, inclusive, and of corresponding provisions of earlier laws shall be deemed to establish and to have established membership in the retirement system **as a contractual relationship under which members who are or may be retired for superannuation are entitled to contractual rights and benefits, and no amendments or alterations shall be made that will deprive any such member or any group of such members of their pension rights or benefits provided for thereunder**, if such member or members have paid the stipulated contributions specified in said sections or corresponding provisions of earlier laws. (Emphasis supplied).

OPINION OF THE JUSTICES, 1973

- Opinion of the Justices to the House of Representatives, 364 Mass. 847 (October 30, 1973)
- Legislature asks the Justices if they may change the contribution rate for public employees from 5% to 7% without changing the benefit payable to the public employee at the end?
- Justices: No

OPINION OF THE JUSTICES, 1973

- The core of a member's reasonable expectations must be protected
- Increase in deduction rate can only be made to future employees
- Hence the fact that we have employees paying 5%, 7%, 8% and 9%, and those who entered membership on or after January 1, 1979 must pay an additional 2% on everything earned over $30,000 per year

OPINION OF THE JUSTICES, 1973

- Always invoked at the suggestion of any change to the retirement system
- But what did the Justices actually say?
- An enforceable contract, but a *relaxed* one
- Not a gratuity or governmental largesse

"The retirement scheme has generated material expectations on the part of employees and those expectations should in substance be respected."

WHICH ONE OF THESE WOULD QUALIFY AS A "MATERIAL EXPECTATION"?

- As an elected official, I can retire with only six years of creditable service.
- As an elected official, I am entitled to be credited with a year of creditable service in any calendar year in which I work just one day.
- I can earn creditable service as long as I am paid over $200 in a year.

WHAT ABOUT THESE?

- I am allowed to work in two or more systems and combine the salaries I make into one retirement allowance.
- I can get a huge raise in the last few years I am on the job, and get an increased retirement allowance based upon the raise.
- If I commit a crime related to my office or position, I will lose my pension only as of the date of the conviction, not the date of the offense.

AND THESE?

- I can get a stipend for wearing work boots entitled "Work Boots Stipend" and it will be included in regular compensation.
- As an elected official, I am allowed to retire, and then run for re-election immediately, and not have to worry about Section 91(b)'s earning limitations if I am re-elected.
- I can buy back non-membership time using buyback interest, and I can buy back membership time with buyback interest at any time I so desire.

ELECTED OFFICIALS

BEFORE CHAPTER 21:

- Able to retire with only 6 years of service
- Awarded one year of creditable service for as little as one day of service

AFTER CHAPTER 21:

- Must have a minimum of ten years to retire
- Awarded creditable service for time actually in office

THE UNDER $5000 RULE

- The now relatively new Section 4(1)(o)
- a/k/a "The Under $5000 Rule"
- This section deals only with creditable service, not regular compensation, and not membership

THE UNDER $5000 RULE

- The Section 4(1)(o) now in effect provides as follows:
  - The service of a state, county or municipal employee employed or elected in a position receiving compensation of less than $5,000 annually, which service occurs on or after July 1, 2009, shall not constitute creditable service for the purposes of this chapter.

THE UNDER $5000 RULE

- Before July 1, 2009, in general, all service as an employee for which compensation was received was creditable service.

- On or after July 1, 2009, all service as an employee for which compensation of under $5,000 per year is received will not be creditable service.

DUAL MEMBERSHIP

BEFORE JANUARY 1, 2010:

- Unless you one day trigger the new dual membership provision, your salaries from concurrent service will be combined at your retirement and your retirement allowance will be based upon the combined salaries
- Annuity account will be transferred to the last system worked

JANUARY 1, 2010 AND THEREAFTER

- Unless your service is "grandfathered" in when concurrent service occurs the retirement allowance will not be combined from service in various systems
- Retirement will occur separately from each system

DUAL MEMBERSHIP

- Triggering mechanism for its application:
  - a member of 2 or more systems
  - who, on or after January 1, 2010, has received regular compensation from 2 or more governmental units concurrently…
- So as long as you never receive concurrent regular compensation from 2 or more governmental units, the new law will not apply to you
- World full of elected officials who quit their posts before December 31, 2009

DUAL MEMBERSHIP: THE GRANDFATHER CLAUSE

- (e) A person who has been a member of 2 or more systems and who, on or after January 1, 2010, has received regular compensation from 2 or more governmental units concurrently shall, upon retirement, receive a superannuation retirement allowance to become effective on the date of retirement that is equal to the sum of the benefits calculated pursuant to this section as though the member were retiring solely from each system; provided, however, that notwithstanding paragraph (c) of subdivision (8) of section 3, each system shall pay the superannuation retirement allowance attributable to membership in that system to the member; **and provided further, that this section shall not apply to any member who has vested in 2 or more systems as of January 1, 2010.**

ANTI-SPIKING

- Spiking with regard to public pensions has been defined as the receipt by a public employee of large pay increases in the years just prior to their retirement to artificially inflate their compensation in order to receive larger pensions than they otherwise would be entitled to receive.

ANTI-SPIKING: THE FIRST PROVISION

- Two anti-spiking provisions were inserted into the law with Chapter 176.
- The first anti-spiking provision is found at Section 14, which requires an inquiry about whether the annual rate of regular compensation received during the period of five consecutive years preceding retirement exceeds 100 per cent in any two consecutive years.

DIRE CONSEQUENCES

- People who were members prior to April 2, 2012 who trigger this section will lose their right to have their retirement allowance figured on a three year average, and they will have their retirement allowance figured on a five year average instead.
- **WARNING:** If this section is triggered, the retirement allowance will be based upon "the annual rate of regular compensation received by the member *during the period of five consecutive years preceding retirement."*
- They will not be able to have their retirement allowance based upon *any* consecutive five year period, regardless of whether another period may produce a higher average.

ANTI-SPIKING: THE SECOND PROVISION

- The second anti-spiking provision provides that retirement calculations shall not include regular compensation that exceeds the average of the two preceding years' regular compensation by more than 10 %.

- It should be noted that it does not take a significant increase in regular compensation to trigger a violation under this section. A member who receives an increase in regular compensation of 6.6% for two consecutive years will have regular compensation that exceeds the average of the previous two years by more than 10%.

- Some exceptions, particularly "from a modification in the salary or salary schedule negotiated for bargaining unit members under Chapter 150E" and "bona fide change in position" apply to this provision.

WHAT IF A PERSON RUNS AFOUL OF BOTH ANTI-SPIKING PROVISIONS?

- It is theoretically possible for a member's receipt of regular compensation within a certain time frame to trigger both anti-spiking provisions.
- If a member violates both sections 14 and 18 of Chapter 176, then the benefit would be based on the last five years of creditable service as provided for in Section 14 and the regular compensation would need to be adjusted as provided for in Section 18.

PENSION FORFEITURE DATE

- Section 15(6): If a member's final conviction of an offense results in a forfeiture of rights under this chapter, the member shall forfeit, and the board shall require the member to repay, all benefits received *after the date of the offense* of which the member was convicted. (Emphasis supplied)

SECTION 15(6) AMENDS SECTION 15(4)

- Section 15(4) provides:
  - (4) *Forfeiture of pension upon misconduct.* — In no event shall any member *after final conviction of a criminal offense* involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of section one to twenty-eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions; provided, however, that the rate of regular interest for the purpose of calculating accumulated total deductions shall be zero. (Emphasis supplied)

THE TIME OF THE FORFEITURE IS SET IN STONE (IN THE STATUTE)

- A pension forfeiture happens by operation of law.
- For those *retiring* on or after April 2, 2012, a pension will be forfeited as of the date of the criminal offense from which the conviction results.
- The system will have to recoup any retirement allowance paid between the date of the offense and the date of the conviction.

REGULAR COMPENSATION

- Definition of Regular Compensation as now appearing in G.L. c. 32, Section 1, "during any period subsequent to June 30, 2009, shall be compensation received exclusively as wages by an employee for *services* performed in the course of employment for his employer." (Emphasis added)

"WAGES" SHALL MEAN…

- Base salary or other base compensation
- There is a difference between "base salary" or "other base compensation"

DISTINGUISH

SERVICES	TOOLS
• Regular Compensation	• Not regular compensation

A PAYMENT IS REGULAR COMPENSATION IF….

- It is payment for services provided to the employer by the employee.
- It is received exclusively as wages by an employee for services provided for the employer.
- And it is NOT excluded as regular compensation by either the statute or the regulations.

"WAGES" SHALL MEAN THE BASE SALARY OR OTHER BASE COMPENSATION OF AN EMPLOYEE INCLUDING PAYMENTS MADE BECAUSE OF:

- The character of the work
- The employee's length of service
- The time at which the work takes place as a condition of employment
- Educational incentives approved by the employer for the performance of services related to the position the employee holds
- Payments made by the employer to the employee calculated as a percentage of base pay

OTHER CHARACTERISTICS OF WAGES

- Pre-determined
- Non-discretionary
- Guaranteed
- Paid by the employer to similarly situated employees

WHAT IS EXCLUDED FROM PAYMENTS WHICH WILL BE CONSIDERED REGULAR COMPENSATION?

- Overtime
- Commissions
- Bonuses other than cost-of-living bonuses
- Amounts derived from salary enhancements or salary augmentation plans

ELECTED OFFICIALS RETIRING ON OR AFTER APRIL 2, 2012

- Elected officials may not return to an elected office after retirement and avoid the earnings limitations of Section 91 if:
  1) They retired from an elected office, and
  2) Less than a year has passed since they last held said elective office.
- The statute refers to "said" public elected office, meaning that this prohibition on returning to an elected office goes only to the elected office from which a person actually retired.

BUYBACKS OF REFUNDED TIME

- Member in service has 12 years of service
- Leaves employment, and withdraws funds from retirement system
- Returns 7 years later
- Has 1 year from the date of re-entry or re-instatement to buy back refunded time using buyback interest
- If more than a year lapses, must make the buyback using actuarial assumed interest

BUYBACKS OF NON-MEMBERSHIP TIME

- People buying back non-membership time between April 2, 2012 and April 2, 2013, or entering into a contract to buy it back in that time frame, were able to use buyback interest to make the purchase.
- After April 2, 2013 all prior non-membership purchases bought back under *Section 3* will have to be made at the actuarial assumed interest rate.

WHAT HAS BEEN GAINED BY EXISTING MEMBERS UNDER PENSION REFORM?

- Discretionary pro-ration of group classification upon retirement
- The ability of superannuation retirees to earn more in the public sector post-retirement (also applicable to the on or after April 2, 2012 crowd)

GROUP CLASSIFICATION

- Those who were members prior to April 2, 2012 may also **voluntarily** choose to have their retirement allowance which is calculated under Section 5 based on their service in different groups pro-rated "in a manner prescribed by the commission."
- For those becoming members on April 2, 2012 and thereafter, such proration is mandatory.

INCREASE IN RETIREE'S ABILITY TO EARN IN THE PUBLIC SECTOR POST-RETIREMENT

- A retiree working in the public sector post-retirement may now earn $15,000 a year in addition to the difference between the salary from which he retired and the pension being paid.
  - **Exception:** This extra $15,000 may not be earned in the first 12 months following retirement.
  - **Exception:** Disability retirees will be able to earn only an additional $5,000 per year in accord with G.L. c. 32, Section 91A when they work in the public sector post-retirement, the same amount that they may earn in the private sector.
- A superannuation retiree's earnings in the private sector, or in the public sector of a state other than Massachusetts are not subject to any restrictions.

A FATEFUL DECISION

- Ben has been an employee of the Town of Quabbin for over 15 years, with a date of membership of October 1, 1998.
- He decides to take a great job in the private sector, and bids Quabbin goodbye.
- Ben presents himself at the Quabbin Retirement Board offices demanding to "take his money out."
- Good idea or bad idea?

A VERY BAD IDEA

- If Ben's new job doesn't work out and he ever again becomes a public employee, when he returns to public service he will be subject to the plan in effect for members with a membership date of April 2, 2012 or thereafter.

BEN WILL BE SUBJECT TO, AMONG OTHER THINGS:

- Increase in Retirement Age eligibility
- Increase Average Annual Compensation period from 3 to 5 years
- Increase Normal Retirement Age by 2 years
- No Section 10 termination allowance available to him

LIMITS ON POST-RETIREMENT EARNINGS

WHY ARE POST-RETIREMENT EARNINGS MONITORED?

- Its been a public policy since 1913, Chapter 657 of the Acts and Resolves.
- Prohibited any public employment by a public retiree, except to serve as juror.
- Remained an absolute restriction until 1938, when only lower-pensioned teachers, jurors and elected officials were excepted.
- Some 75 years later and approximately 50 subsequent legislative Acts, Section 91 is what it is today. Its all based on public perception.

CHAPTER 657 OF THE ACTS OF 1913

Chap. 657 AN ACT RELATIVE TO SERVICES RENDERED BY PENSIONERS OR ANNUITANTS TO A MUNICIPALITY OR COUNTY.

Be it enacted, etc., as follows:

Pensioners of cities, etc., not to be paid for services rendered.

SECTION 1. No person who now or hereafter receives a pension or an annuity from any city or town or any county shall be paid for any service, except service as a juror, rendered by him to said city, town or county after the date of the first payment of such pension or annuity.

SECTION 2. This act shall take effect upon its passage.

Approved May 16, 1913.

POST-RETIREMENT EARNINGS LIMITS

- Limits on public post-retirement employment for all retirees
- Limits for disability retirees
- Monitoring retiree earnings

PUBLIC RELATIONS NIGHTMARE!

- Boston member, who retired in 2005 after 40+ years at the Boston Redevelopment Authority, was serving as a consultant to the Authority.
- After a Boston Globe article by an investigative reporter, PERAC was asked to make a determination on overearnings.
- Retiree served as a consultant for years 2006-2008. He had overearnings from compensation paid totaling $318,483 to be collected by the employer.
- However, the employer chose not to collect this compensation. The board is in the process of collecting $123,554 of overearnings for 2006 & 2008, and the total pension allowance of $96,291 paid in 2007.

IT'S PUBLIC PERCEPTION!

- Retired Executive Director of the Lynn Economic Development Corporation - her name appeared in a Boston Herald article about retirees working in public sector. She retired from Lynn Retirement System in 1998 and went back to work for the Boston's Redevelopment Authority (BRA), EDIC for the years 1998-2008. An anonymous call about such employment was received from the City of Lynn.
- She was allowed significant earnings due to her low pension benefit compared to the current salary level. No excess earnings for years 1998 – 2006. Slight excess earnings for year for 2007 ($852), and 2008 ($2,179).
- However, from years 2000 through 2008, based on BRA payroll records, her hours exceeded the 960 limit and overearnings totaled $151,473.
- The BRA did not pursue such overearnings and the Lynn Retirement Board negotiated a repayment schedule.

IT'S PUBLIC PERCEPTION!

- A retired treasurer – PERAC received an anonymous letter concerning her employment after retirement in 2002. She continued to work for her employer part-time and also worked part-time for 3 other public employers.
- Her public employment yielded overearnings of $100,802 for 2006-2008.
- No overearnings were due to excessive hours as the retiree was not paid at an hourly rate.
- Due to the type of positions held, it would be a conflict of interest for employer to collect.

CHAPTER 32, SECTION 91(b)

Limits on Public Employment

- (b) In addition to and notwithstanding the foregoing provisions of this section or similar provisions of any special law, *any person who has been retired and who is receiving a pension or retirement allowance, under the provisions of this chapter or any other general or special law, from the commonwealth, county, city, town, district or authority, or any person whose employment, in the service of the commonwealth, county, city, town, district or authority,* has been terminated, under the provisions of this chapter or any other general or special law, by reason of having attained an age specified in said general or special law or by the rules and regulations of any department or agency of the commonwealth, county, city, town, district or authority without being entitled to any pension or retirement allowance, *may*, subject to all laws, rules and regulations, governing the employment of persons in the commonwealth, county, city, town, district or authority, *be employed in the service of the commonwealth, county, city, town, district or authority, including as a consultant or independent contractor or as a person whose regular duties require that his time be devoted to the service of the commonwealth, county, city, town, district or authority during regular business hours for not more than nine hundred and sixty hours in the aggregate*, *in any calendar year*; provided that the *earnings* therefrom when added to any pension or retirement allowance he is receiving *do not exceed the salary that is being paid for the position from which he was retired or in which his employment was terminated plus $15,000; provided however that in the first 12 months immediately following the effective date of retirement, the earnings received by any person when added to any pension or retirement allowance the person is receiving shall not exceed the salary that is being paid for the position from which the person was retired or in which the person's employment was terminated.*

WHAT DOES THAT MEAN?

- Employment of any public sector retiree in a governmental unit is limited.
- Such employment is limited by hours and compensation.
- No public retiree may work more than 960 hours for a governmental unit in a calendar year.
- Compensation when added to the retirement benefit cannot exceed the salary being paid for the position from which he/she retired, plus $15,000.
- Employer should recoup such excess earnings, if not, the Board has implicit authority to recoup (Flanagan v. CRAB and SRB,51 Mass App. Ct.,862 (2001).

CALCULATION FOR ALLOWABLE EARNINGS

- Retirement benefit + earnings is less than or equal to current salary of position retired or employment terminated (plus $15,000); and,
- If earnings are derived by hourly salary, such hours cannot exceed 960 in calendar year.
- These are concurrent limits and apply to all public employment in a calendar year.

RECENT LIMIT CHANGE

- Beginning in calendar year 2012, retirees who retired before April 2, 2011 may earn an additional $15,000 beyond the current limit.
- In calendar year 2013 and beyond, such increase applies to retirees who retired before January 1 of the PRIOR calendar year.
- Example: For 2013 earnings, a retiree must have been retired before January 1, 2012

2009 AMENDMENT REGARDING CONSULTANTS & INDEPENDENT CONTRACTORS

Broadened definition of a public employee under 91(b)

- Focus on who receives the service, not just who cuts the check
- New law still being "defined"
- Ex-U-Mass, MBTA

TOOL AND REFERENCE FOR POST RETIREMENT EARNINGS

- PERAC Home Page – Retirement Earnings Worksheet with Instructions
- Automatically calculates potential earnings, with additional $15k, based on retirement date.
- PERAC Memo #28/2012 (Superannuation and Section 10 retirees only).

LIMITS ON DISABLED RETIREES

- In addition to limits on public employment, disabled retirees are limited on total earnings in a calendar year.
- Beginning in calendar year 2012, total earnings in either public or private sector employment cannot exceed the regular compensation payable to such member had he/she continued in service in the grade held at retirement PLUS $5,000.
- Earnings of a disabled retiree derived from public sector employment will be limited to this "PLUS $5,000" and not the additional $15k afforded to other retirees.
- The determination of overearnings is a product of the 91A process we will discuss later.