




# PERAC'S EMERGING ISSUES FORUM PENSION REFORM

Overview of Chapter 21 of the  
Acts of 2009 &  
the Proposed Regulations



## Presenters

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## Internal Revenue Code Compliance Update

- **Voluntary Correction Program**
- PERAC, State Board, Teachers' Board, and tax counsel identified areas of concern needing possible corrective action.
  - Statute needed to mandate 70½ distribution (G.L. c. 32, §12D enacted in Chapter 21 of the Acts of 2009).
  - Several regulations needed to assure compliance (840 CMR 3.00).  
Hearings during week of September 7, 2009.  
Public comment period ends September 11, 2009.  
Consideration by full Commission September 15, 2009.  
Legislative review period (45 days).  
Publication and effective date is December 12, 2009.

## Mandatory Distribution After Age 70 ½

- IRC § 401(a)(9) requires distributions to members not active after age 70 ½.
  - G.L. c. 32, § 12D will be implemented in accord with 840 CMR 3.04.
  - Distribution requirement has been in effect for other retirement vehicles for years.
- What do Boards need to do?
  - Identify all inactive members who attained age 70½ during 2009 or who terminated after attaining age 70½.
  - Prepare to send notices requiring action by members by April 1, 2010.
  - Notices will be issued to members in December each year.
  - Establish procedure to identify and notify each year.

## Other Corrective Regulations

Most expand on or further recognize requirements contained in G.L. c. 32. The age 70 ½ mandatory distribution requirement is the major new requirement.

- 840 CMR 3.02 recognizes requirement that retirement funds can't be used for purposes other than retirement.
- 840 CMR 3.03 recognizes that G.L. c. 32 does not allow funds that are forfeited by a member to increase benefits of any other member.
- 840 CMR 3.04 age 70½ distribution discussed above.
- 840 CMR 3.05 implements compensation limitation contained in G.L. c. 32, § 1 and 5(3)(f). (See PERAC's annual memoranda on compensation and benefit limitations).
- 840 CMR 3.06 recognizes that the employer does not set plan assumptions.

## Other Corrective Regulations

- 840 CMR 3.07 expands discussion on implementing eligible rollovers.
- 840 CMR 3.08 further implements benefit limitations contained in G.L. c. 32, § §1 and 5(3)(f).
- 840 CMR 3.09 references prohibited transactions that are contained in the Internal Revenue Code. These are generally transactions between plan principals and related entities or persons.
- 840 CMR 3.10 references USERRA and coordinates with the veterans provisions contained in G.L. c. 32, § 4(1)(h).
- 840 CMR 3.11 recognizes that a member's rights are vested.
- 840 CMR 3.12 allows, though doesn't require, Boards to use alternate forms of election or consent unless otherwise required by statute or regulation.

## Direct Deposit Requirement The New Section 13(1)(c) of Chapter 32

- A Retirement Board may require a member entitled to receive a retirement allowance to designate a financial institution to which shall be directly deposited any payments under any annuity, pension, or retirement allowance.
- This section of the statute applies to all members of retirement systems who retire after July 1, 2009.
- This section clearly specifies only "members entitled to receive a retirement allowance." There is no applicability to beneficiaries.

## What if a Retiree Refuses to Fill Out a Direct Deposit Form?

- Hold on to his check until he fills out the form.
- The statute gives the Boards the authority to require the direct deposit of a retirement allowance check as a prerequisite of payment.
- A Board may exempt individuals should a Board choose to do so.

## Return of Accumulated Total Deductions: A New Hurdle

- Section 14 of Chapter 21 of the Acts of 2009 provides as follows:
- Subdivision (1) of section 11 of said chapter 32, as so appearing, is hereby amended by adding the following paragraph:-  
(d) If a member is entitled to a return of his accumulated total deductions and requests such a return from the board on the prescribed form, then prior to the return of such accumulated total deductions, the board shall contact the member's employer to determine whether the member owes an obligation to the employer under an employee benefit plan, including a cafeteria plan established pursuant to 26 U.S.C. section 125. If it is determined that the member owes the employer under any such plan, the board shall not return the accumulated total deductions until it has received notice from the employer that the obligation has been satisfied.

### Example: How an Employee May End Up Owning Money to an Employer for an Employee Benefit Plan.

- The employee is paid twice a month.
- He receives the first paycheck of the month. He is now on the employer's health insurance policy for the entire month.
- He quits his job before he earns his second check.
- He owes the employer for his portion of the remainder of health insurance for the month.
- The employer is entitled to have the obligation settled before payout of total accumulated deductions under the new law.

### PERAC's Revised "Application for Withdrawal of Accumulated Total Deductions" Form.

- Section B, the section which the employer has filled out, has been expanded.
- The language regarding employee benefit plans has been added.
- The new form is effective now, and is included in your materials.

## Changes in Section 19A

- Expands the ability to retirees of cities, towns, districts, or other member units of a retirement system to have withholdings for health insurance premiums taken out of their retirement allowance.
- Mandates the assignment when the retiring authority requests.
- Provides mechanism for billing retirees for their share of the premiums should the pension check not cover it.

## Dual Members New Subsection 5(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...

## Grandfather Clause

Subsection 5(e) does not apply to any member who has vested in 2 or more systems as of January 1, 2010.

## Example

- Member A
- On Dec. 31, 2009, has 12 years with System X, and 20 years with System Y
- Section 5(e) does not apply to Member A.
- Calculation of allowance under formula previously in effect.

## Another Example

- Member B
- On December 31, 2009, has 15 years of service in System J, and 4 years of service in System K.
- Section 5(e) applies to Member B.
- Calculation in accord with new provision.

## Elected Officials

- Their ability to vest with only 6 years of service – gone.
- Their ability to get one year of creditable service for a year in which they served as little as one day – gone.
- Their ability to avail themselves of a termination retirement allowance if they fail of nomination or re-election, or fail to become a candidate for re-election – gone.

## Uncompensated Elected Officials and Library Trustees: That Time Can No Longer Be Purchased

- The old Section 4(1)(o) and Section 4(1)(o)(1/2) are gone. No one can buy back that time now. This is because of...

## Section 26 of Chapter 21 of the Acts of 2009

- Chapter 21 of the Acts of 2009 concludes with Section 26, which provides:

Notwithstanding any general or special law to the contrary and except as expressly provided otherwise, this act shall apply to all members of retirement systems who retire after July 1, 2009.

## Therefore, If You Failed to Retire on or Before July 1, 2009...

- Any time which was credited under “year for a day” – gone. (Service for actual time only, i.e., if you worked from January through March, you would get 3 months of creditable service.)
- Any time for uncompensated elected officials under the old 4(1)(o) not purchased prior to July 1, 2009 – gone.
- Any time for uncompensated library trustees under 4(1)(o)(1/2) not purchased prior to July 1, 2009 – gone.
- Elected Officials with 6 to 9.99 years of creditable service are no longer eligible to retire.

## The New Section 4(1)(o) a/k/a “The Under \$5,000 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 purposes of this chapter.

This section only deals with **creditable service**.

## The Under \$5,000 Rule

- Changes traditional understanding of how creditable service is accrued.
- Tests the axiom “once a member, always a member.”
- Challenges the notion that, with a few limited exceptions, all service as a public employee may be utilized/bought back to use toward a pension.

## The Accrual of Creditable Service Before and After The Under \$5,000 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.

## The Under \$5,000 Rule and “Once a Member, Always a Member”

- Under the plain reading of G.L. c. 32, Section 3, a person making under \$5,000 per year who was a member in service based upon their service on or before July 1, 2009, would continue as a member even though they are no longer accruing creditable service for this time.
- Rationale: They are still in service to the employer, and have not died, retired, or resigned.
- But: No contributions may be taken.

## Denying Membership to the Under \$5,000 Crowd

- Presumably, every person making under \$5,000 per year is a part-time employee.
- The new Section 5(e) would certainly appear to give Retirement Boards the right, going forward, to exclude from membership new employees making under \$5,000 per year.
- Important: Distinguish between membership and creditable service.

## The Under \$5,000 Rule and Buying Back Time

- Uncompensated service is not service as an employee and cannot, therefore, be purchased.
- But now, although service compensated under \$5,000 is service as an employee, it also cannot be purchased.

## The Under \$5,000 Grandfather Clause

- SECTION 25. Section 5 of this act shall take effect July 1, 2009; provided, however, that creditable service shall be granted for the service of any state, county or municipal employee serving in a paid position earning less than \$5,000 after July 1, 2009, if such service is subject to a specified term as a result of an election, appointment or contract and the election, appointment or contract occurred or was executed prior to July 1, 2009, and if the service is otherwise eligible for creditable service under chapter 32 of the General Laws; and provided further, that such creditable service shall be granted until the expiration of the term, appointment or contract or July 1, 2012, whichever first occurs.

Chapter 21 of the Acts of 2009

## The Under \$5,000 Grandfather Clause

- Elected or appointed to a term or in the midst of a contract, the remainder of the term/contract will count as creditable service.
- Deductions shall continue to be taken, no opting out of paying.
- Extends no later than the end of the term or contract, or July 1, 2012, whichever occurs first.

## Questions Naturally Arise

- Member X makes \$3,750 a year.  
Deductions taken? No.
- Member Y makes \$2,500 a year. But, also works in the same system and makes \$40,000 a year at another position.  
Deductions taken from the \$2,500? Yes.
- Same scenario, except Member Y makes \$40,000 in a separate system. Deductions taken from the \$2,500? No.

## G.L. c. 32, § 91 & Chapter 21 of the Acts of 2009

- Section of Chapter 21 of the Acts of 2009 adds “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” to the earnings limitations of retiree under G.L. c. 32, § 91.

## G.L. c. 32, § 91 & Chapter 21 of the Acts of 2009

- Earnings limitations are now more encompassing by including any person who is a consultant or independent contractor performing services for the commonwealth.

## G.L. c. 32, § 91 & Chapter 21 of the Acts of 2009

- Does Section 21 apply to all retirees?
- No, as Section 26 of Chapter 21 of the Acts of 2009 states: “Notwithstanding any general or special law to the contrary and except as expressly provided otherwise, this act shall apply to all members of retirement systems who retire after July 1, 2009.”
- Any person retired prior to July 1, 2009, can be an independent contractor or consultant without hours or earnings limitations pursuant to G.L. c. 32, § 91.

## G.L. c. 32, § 91

- Scenario: DPW Director retires and his regular compensation was \$98,000. Starting pay for the position is \$75,000. The new retiree has a pension of \$78,000.
- Can this retiree work for a public entity under G.L. c. 32, § 91?
- Yes, his allowable earnings would be \$20,000. Why?

## G.L. c. 32, § 91

- The salary used in G.L. c. 32, § 91 calculation is the salary that best reflects the member's salary of the position "from which he retired" with present day increases had the member remained in active service.
- Why? The retiree must be allowed his salary, \$98,000 in the calculation of his allowable earnings under G.L. c. 32, § 91 or it would be considered an undue burden on the retiree to use a salary that was not reflective of his salary upon which the resulting retirement allowance was based.

## G.L. c. 32, § 7 & Chapter 21 of the Acts of 2009

- Section 8 of Chapter 21 of the Acts of 2009 removes the following language from G.L. c. 32, § 7 (2)(a)(ii): "or equal to seventy-two per cent of the average annual rate of his regular compensation for the twelve-month period for which he last received regular compensation immediately preceding the date his retirement allowance becomes effective, whichever is greater."

## G.L. c. 32, § 7 & Chapter 21 of the Acts of 2009

- G.L. c. 32, § 7(2)(a)(ii) now only allows the yearly amount of pension to be equal to 72% of the annual rate of regular compensation on the injury date.

## G.L. c. 32, § 7 & Chapter 21 of the Acts of 2009 for Acting Positions

- Section 8 of Chapter 21 of the Acts of 2009 adds the following language to G.L. c. 32, 7(2)(a)(ii) :  
“if an individual was in a temporary or acting position on the date such injury was sustained ... the amount ... shall be based on the average annual rate of the individual's regular compensation during the previous 12-month period for which he last received regular compensation immediately preceding the date such injury was sustained ... ”

## G.L. c. 32, § 7 & Chapter 21 of the Acts of 2009 for Acting Positions

- Section 8 of Chapter 21 of the Acts of 2009 changes the regular compensation of a accidental disability retiree in an acting position from the annual rate to the actual regular compensation earned in the 12-month period preceding the injury date.

## Call Firefighters & Chapter 21 of the Acts of 2009

- Section 5 of Chapter 21 of the Acts of 2009 states: “the service of a state, county or municipal employee employed or elected in a position receiving regular compensation of less than \$5,000 annually, which service occurs on or after July 1, 2009, shall not constitute creditable service ... ”

## Call Firefighters & Chapter 21 of the Acts of 2009

- A call firefighter and reserve or permanent-intermittent police officer making less than \$5,000 as of July 1, 2009 will no longer earn creditable service in a retirement system. If the retirement board is collecting contributions on such service it should cease to do so as of July 1, 2009. A call firefighter and reserve or permanent-intermittent police officer will have the same rights as any person not making regular contributions to a Chapter 32 retirement system beginning on July 1, 2009.

## Call Firefighters & Chapter 21 of the Acts of 2009

- Exception: the provisions of G.L. c. 32, § 4(2)(b),(b1/2) allow a call firefighter and reserve or permanent-intermittent police officer to receive creditable service if such person meets the requirements of that section therein.

## *Boston Police Superior Officers Fed'n, et. al. v. Commonwealth of Mass., et al.*

- *Boston Police Superior Officers Fed'n, et. al. v. Commonwealth of Mass., et al.* is a class action filed in the U.S. District Court challenging the application of the new definition of “regular compensation” to current members of retirement systems.
- The plaintiffs allege that the application of the new language to them violates their vested pension rights and seek a permanent injunction prohibiting the application of the new language to them and all other similarly situated persons. They claim that applying the statute to persons who are participants in a retirement system but not retired as on July 1, 2009 violates the Contract Clause of the US Constitution and impairs contract rights in violation of several articles of the Massachusetts Constitution.

## *PFFM, et. al. v. Patrick, et al.*

- *PFFM, et. al. v. Patrick, et al.* is a class action filed in Suffolk Superior Court challenging the new calculation formula for accidental disability retirees.
- The plaintiffs allege that the application of the new formula discriminates against them based on their handicap because they are penalized for the years they were not able to work prior to retirement for accidental disability. They also assert that the new formula impairs contract rights in violation of several articles of the Massachusetts Constitution.