

**WHAT IS REGULAR COMPENSATION?
WHAT IS THE IMPACT OF THE AMENDMENTS
TO 840 CMR 15.03?**

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What lead to the amendment of 840 CMR 15.00?

In 1981, the Supreme Judicial Court considered whether early retirement incentive payments made to Boston Teachers should be considered to be regular compensation for retirement purposes. [*Boston Association of School Administrators and Supervisors v. Boston Retirement Board*, 383 Mass. 336]. While the case was pending, G.L. c. 32, § 1 was amended to specifically exclude such payments from the definition of regular compensation. The Court held that the payments to the Boston Teachers were not regular compensation, ruling that regular compensation includes payments that are recurrent and repeated and geared to the service of the employee, not inflated by extraordinary *ad hoc* payments. The Court recognized that bonuses and other adventitious payments to members could place untoward, massive continuing burdens on the retirement systems.

In 1997, the Court of Appeals ruled in *Christensen v. CRAB*, 42 Mass. App. Ct. 544 that payments made to Lexington teachers with at least 15 years of service for a three year period of their choice were regular compensation because they were based exclusively on the members' longevity and not contingent upon retirement. The Court found that it had not been established that the contract provision would create untoward, massive continuing burdens on the retirement systems. This type of plan became known as the "Lexington Plan".

Several PERAC audits revealed calculations or retirement deductions made pursuant to collective bargaining agreements or contracts that appeared to be inconsistent with the definition of regular compensation. These included payments pursuant to a salary augmentation plan or salary enhancement programs. A number of cases, primarily involving public school personnel, also highlighted these programs or plans. The provisions varied widely, resulting in the likelihood of disparate treatment between members of systems. While the parties to the agreements believed they were patterned upon the Lexington Plan, some included a requirement that the member terminate or retire at the end of the enhancement period. The amounts of the salary increases were often greater than those discussed in the Lexington Plan.

PERAC drafted regulations, held a number of public hearings, and solicited public comment. The hearings were very well attended and after considering the input, the Commission modified its proposal. The regulations were filed with the General Court as required, and the Joint Committee on Public Service made a further recommendation that was adopted by the Commission. Finally, the regulations were filed with the Secretary of State and became effective on April 7, 2006.

What are the characteristics of payments that are “regular compensation” under the statute, the regulations and the cases?

- Actually paid to or on behalf of a member;
- For services actually rendered;
- Recurring payments for accrued sick leave or G.L. c. 41, § 111F;
- Ordinary, normal, recurrent, repeated, and of indefinite duration;
- Pursuant to an employer’s official written policy or a collective bargaining agreement;
- Non-discriminatory and generally available for employees who are similarly situated relative to the purpose of the payment;
- Compensation from federal grants satisfying the criteria, unless the member participated in the US Civil Service Retirement System.
- Lump-sum or retroactive payments that satisfy the criteria are attributed to the period in which the services were actually rendered, not the time of receipt.

Provided the criteria outlined above is met, “regular compensation” will generally include:

- The annual rate of compensation in an approved salary schedule;
- Non-cash maintenance allowances in the form of full or partial boarding and housing;
- Premiums paid by a governmental unit to purchase an individual or group annuity contract in limited circumstances;
- Educational incentives;
- Payments for length of service (longevity);
- Premiums for shift differentials; and
- Cost-of-living bonuses or cost-of-living pay adjustments.

What payments are excluded from “regular compensation”?

Extraordinary or ad hoc payments shall be excluded from regular compensation. These include, but are not limited to:

- Amounts paid for hours worked beyond the member's normal work schedule (overtime);
- Amounts paid as premiums for working holidays, except as authorized by law;
- Amounts paid as bonuses other than cost-of-living bonuses. Payments to an employee or group of employees which will not recur or which will recur for only a limited or definite term will be considered a bonus;
- Amounts paid in lieu of or for unused vacation, sick leave, or other leave;
- Severance pay;
- Amounts paid as early retirement incentives; and
- Any other payments made as a result of the member giving notice of retirement.

Under certain limited circumstances, payments made as part of a salary augmentation plan or salary enhancement program under an individual contract or collective bargaining agreement may be considered regular compensation.

What is a salary augmentation plan or salary enhancement program?

Usually a salary augmentation plan or a salary enhancement program is a temporary increase in salary that is made available to employees who meet eligibility criteria, for example, having attained a certain number of years of service. Some plans require the member to have accumulated a specified amount of sick leave. Some plans limit the number of members who can elect to participate each year.

The salary increase is often a percent of the member's total salary, and is usually granted for a three-year period. The increase is not as the result of performance of additional duties. Some of the plans required a notice of retirement or an agreement to go off the payroll at the end of the three-year period.

The amount of the payments vary greatly, from a set dollar amount to a per cent of salary in addition to the usual step increases to which a member is entitled.

Employers and employees are not precluded from including a salary augmentation plan or a salary enhancement program in a contract/agreement, but the treatment as regular compensation is to be determined by the Retirement Board in a manner consistent with the statutes, regulations and relevant cases.

Under 840 CMR 15.03, as amended, how are payments made pursuant to a salary augmentation plan or a salary enhancement program to be treated?

Payments made to a member under a salary enhancement or salary augmentation plan may be included as regular compensation for retirement purposes under the following circumstances:

1. The member must be covered by a salary augmentation plan or salary enhancement program provided for in an individual contract or collective bargaining agreement in effect on or before January 25, 2006; and
2. The member must begin to receive benefits and make retirement contributions pursuant such plan or program, at any time during the life of an agreement/contract in effect on or before January 25, 2006.
3. If the criteria in 1 and 2 are both met, the member may complete the plan or program under that agreement/contract and under a successor agreement/contract that contains a salary augmentation plan or salary enhancement program. The amount of the salary augmentation plan or salary enhancement program in the successor agreement/contract shall not exceed the amount of the salary augmentation plan or salary enhancement program that was contained in the agreement/contract that was in effect on or before January 25, 2006.
4. Any member who has previously retired and is receiving benefits as of April 7, 2006 and whose regular compensation included payments under the provisions of a salary augmentation plan or salary enhancement program shall have that plan deemed in compliance with the provisions of G.L. c. 32.

How are payments made pursuant to a salary augmentation plan or a salary enhancement program to be treated under 840 CMR 15.03, as amended?

Examples:

1. Contract containing a salary enhancement program was in effect on January 25, 2006, expiring on March 1, 2006. It continued in the same form and amount in the successor contract. Member became eligible and began participating in the program in December 2005 and continued for the remainder of the enhancement period in the successor contract. Is it regular compensation?
YES. The member was participating in an enhancement program that was in effect on January 25, 2006 and continued in the same amount in a successor contract.
2. Contract containing a salary enhancement program was in effect on January 25, 2006, expiring on March 1, 2006. It did not continue in the successor contract. Member became eligible and began participating in the program in April 1, 2004 and continued for contract period (until March 1, 2006). Is it regular compensation?
YES. The payments made pursuant to the enhancement program from April 1, 2004 through February 28, 2006 (the end of the contract) are regular compensation.
3. Contract containing a salary enhancement program was in effect on January 25, 2006, expiring on March 1, 2006. It continued in the same form and amount in the successor contract. Member became eligible and began participating in the program in May 2006 and continued for the remainder of the enhancement period in the successor contract. Is it regular compensation?
NO. Member was not participating during the life of a contract in effect on January 25, 2006.
4. Contract containing a salary enhancement program was not in effect on January 25, 2006 but was added in a successor contract that went into effect on June 1, 2006. Member became eligible and began participating in the program in September 2006 and continued for the remainder of the enhancement period in the successor contract. Is it regular compensation?
NO. Member was not participating during the life of a contract in effect on January 25, 2006.
5. Contract containing a salary enhancement program was in effect on January 25, 2006, expiring on March 1, 2006. It continued in the same form in the successor contract. Member became eligible to participate in November 2005, but chose not to do so. The member remained eligible to participate and chose to do so beginning in June 2006 and continued for the remainder of the enhancement period in the successor contract. Is it regular compensation?
NO. Member was not participating during the life of a contract in effect on January 25, 2006.

840 CMR 15.03: Regular Compensation

(Effective April 7, 2006)

(1) During any period of active service subsequent to the effective date of 840 CMR 15.03(1) the term "regular compensation" as defined by M.G.L. c. 32, § 1, shall be determined subject to the following:

- (a) To be considered regular compensation, any compensation to an employee must:
 - i) have been actually paid to or on behalf of a member;
 - ii) be made as remuneration for services actually rendered, for recurring payments for accrued sick leave, or for payments made pursuant to G.L. c. 41, § 111F in the year or part of a year to which the compensation is attributed;
 - iii) be ordinary, normal, recurrent, repeated, and of indefinite duration;
 - iv) be made pursuant to an official written policy of the employer or to a collective bargaining agreement;
 - v) be made on a non-discriminatory basis and be generally available for employees who are similarly situated relative to the purpose of the payment (e.g. a longevity payment made recurrently to all employees in a bargaining unit having attained a specific length of service) provided that the ability of a payment to be denied due to merit shall not exclude it for that reason from regular compensation.

- (b) Regular compensation shall include any part of such salary, wages, or other compensation derived from federal grants, except as otherwise provided in M.G.L. c. 32, § 3(2)(a)(xi);

- (c) Lump-sum or retroactive payments which would have been regular compensation if paid in the periods in which the services remunerated thereby were actually rendered will be allocated to said periods rather than being entirely attributed to the time of receipt for the purpose of determining a member's regular compensation.

- (d) Provided they meet the general criteria in 840 CMR 15.03(1)(a)-(c), payments to be considered regular compensation shall include:
 - i) a member's annual rate of compensation as provided in an approved salary schedule;
 - ii) any non-cash maintenance allowances in the form of full or partial boarding and housing, as provided in M. G.L. c. 32, § 22(1)(c);
 - iii) any premiums paid by any governmental unit for the purchase of an individual or group annuity contract as authorized by M.G.L. c. 15, § 18A or by M.G.L. c. 71, § 37B;
 - iv) any amounts paid as educational incentives;
 - v) any amounts paid for length of service;
 - vi) any amounts paid as premiums for shift differentials; and
 - vii) any amounts paid as cost-of-living bonuses or cost-of-living pay adjustments.

(2) Any extraordinary or ad hoc payment amount shall be excluded from regular compensation. Exclusions shall include, but not be limited to:

- (a) any amounts paid for hours worked beyond the member's normal work schedule;
- (b) any amounts paid as premiums for working holidays, except as authorized by law;
- (c) any amounts paid as bonuses other than cost-of-living bonuses, provided that any payment to an employee or group of employees which will not recur or which will recur for only a limited or definite term will be considered a bonus, and further provided that any payments to an employee or group of employees as part of a salary augmentation plan or salary enhancement program which is provided for in an individual contract in effect on or before January 25, 2006 or in a collective bargaining agreement in effect on or before January 25, 2006, including payments under such a plan or program which will not recur or which will recur for only a limited or definite term, shall be treated as regular compensation; and further provided, that any employee who is covered by such an agreement or contract on January 25, 2006 and who begins, at any time during the life of a collective bargaining agreement or individual employment contract in effect on or before January 25, 2006, to receive benefits and make retirement contributions pursuant to a salary augmentation plan or salary enhancement program under such a collective bargaining agreement or individual employment contract, may complete the plan or program under that agreement or contract or under a successor collective bargaining agreement or individual employment contract, provided that the successor collective bargaining agreement or individual employment contract contains a salary augmentation plan or salary enhancement program; and further provided that the amount of the salary augmentation plan or salary enhancement program under a successor collective bargaining agreement or individual employment contract which shall be treated as regular compensation shall not exceed the amount of the salary augmentation plan or salary enhancement program provided under the collective bargaining agreement or individual employment contract in effect on or before January 25, 2006, and further provided that any member who has previously retired and is receiving benefits as of April 7, 2006 under the provisions of a salary augmentation plan or salary enhancement program shall have that plan deemed in compliance with the provisions of G.L. c. 32.
- (d) any amounts paid in lieu of or for unused vacation, sick leave, or other leave;
- (e) severance pay;
- (f) any amounts paid as early retirement incentives; and
- (g) Any other payments made as a result of the member giving notice of retirement.