

Chapter 21 of the Acts of 2009 and Regular Compensation

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Commonwealth of Massachusetts
Public Employee Retirement Administration Commission

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Commonwealth of Massachusetts

Public Employee Retirement Administration Commission

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Regular Compensation After July 1, 2009

Chapter 21 of the Acts of 2009 amended the definition of regular compensation in a major way. The new definition includes the concept of “wages” and, with a few exceptions, defines wages as “base salary”. Payments that are permanent increases to base pay will continue to be regular compensation for retirement purposes. Incidental or one-time payments that are not regular and recurring are not regular compensation. Other payments specifically enumerated in the statute will not be considered to be regular compensation. These include “...overtime, commissions, bonuses other than cost of living bonuses, amounts derived from salary enhancements or salary augmentation plans which will recur for a limited or definite term, indirect, in-kind or other payments for such items as housing, lodging, travel, clothing allowances, annuities, welfare benefits, lump sum buyouts for workers’ compensation, job-related expense payments, automobile usage, insurance premiums, dependent care assistance, one-time lump sum payments in lieu of unused vacation or sick leave or the payment for termination, severance, dismissal, or any amounts paid as premiums for working holidays...” There are two exceptions to these exclusions from regular compensation, (1) premiums for working holidays for police officers, firefighters and municipal employees employed as fire alarm signal operators and maintenance repairmen and (2) payments to teachers for additional services under the terms of an annual contract in connection with a school lunch program or for services in connection with physical education and athletic contests.

The new definition applies to payments that are received after July 1, 2009. However, Chapter 21 allowed for payments that otherwise would not be regular compensation under the new definition to continue to be considered as regular compensation if they were included in a collective bargaining agreement or employment contract in effect on May 1, 2009. These payments will continue to be considered to be regular compensation during the term of the agreement or contract if they meet the previous definition of regular compensation. In any event, regardless of the length of the contract, all payments made after June 30, 2012 will be assessed under the new definition of regular compensation.

Commission’s Actions Regarding the New Definition

As soon as the new definition was enacted, the Commission began drafting regulations to implement it. This process included consideration by Commission Sub-Committees and the full Commission. Though not by a unanimous vote, on October 27, 2009, the Commission directed the staff to proceed with the promulgation of an amendment to 840 CMR 15.03.

The process that the Commission must follow to enact a regulation is complicated and time consuming. A memorandum (PERAC Memo #42/2009) was issued directing the Boards to essentially continue to use the earlier definition of regular compensation while the hearing process went forward. Notices were issued, filings with the Secretary of State were required, public hearings were held and a public comment period was established. The Commission reviewed the comments from the hearings and the written comments submitted. The regulation was modified and sent to the Legislature for consideration. The Legislature did not hold hearings or recommend further modification. The last step in the process is publication by the Secretary of State in the Register. The new regulation became effective on May 28, 2010.

A copy of the promulgation schedule is included in these materials to illustrate the process that PERAC regulations must complete. A copy of the final regulation is also included.

Judicial Action Regarding Regular Compensation

As the PERAC regulation process went forward, the Court of Appeals issued a decision dealing with the definition of regular compensation, *O'Brien v. CRAB & another*, 76 Mass. App. Ct. 901 (2010). The decision dealt specifically with clothing allowances, but actually has applicability to a wider range of payments which may have been considered regular compensation in the past. The Commission discussed the impact of this case at its April 28, 2010 meeting, and due to possible legislative action, referred the matter to the Commission's Legislative Sub-Committee for further review and analysis.

Regulation Process Regular Compensation Regulation

ACTION	DATE
Comm'n approves draft	10/27/09
File with A&F for 10 day review	10/30/09
Ten day A&F review period complete	11/09/09
Notice to LGAC & MMA (35 days pre-hearing)	11/10/09
Newspapers (at least 21 days pre-hearing)	12/14/09
Notice to Secretary of State for register 7 days pre publication	12/10/09
Register publication	12/25/09
Available to Public (Memo to Boards)	12/14/09
Public hearings	01/05/10 01/06/10 01/08/10 1/11/10 1/13/10 1/14/10
Public Comment Period ends	1/19/10
Comm'n reviews for promulgation	1/26/10
Sends to Sub-Committee and reviewed	2/10/10
Comm'n reviews for promulgation	2/23/10
File with legislature	03/01/10
Assigned to Joint Committee on Public Service	03/04/10
Legislative review (45 days) House Bill 4545	
Discuss final regulations at Comm'n meeting	04/28/10
File with Sec of State	05/10/10
Publication in register and effective date	05/28/10

**PERAC regulations are referred by the appropriate Clerks to the appropriate standing committee of the general court (usually the Joint Committee on Public Service). Within fifteen days of receipt of the regulations, the Committee can transmit its suggestions for modifications in the recommended regulations to PERAC. Within fifteen days of receipt of such suggestions, PERAC shall resubmit the recommended regulations to the committee, together with any modifications made to them.

Final Regulation filed with Secretary of State for Publication on May 28, 2010

15.03: Regular Compensation

- (1) During any period of active service prior to July 1, 2009 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) During any period of active service prior to July 1, 2009, 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 the effective date of this regulation 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.

(3) During any period of active service subsequent to July 1, 2009 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 be compensation received exclusively as wages by an employee for services performed in the course of employment for his employer.
- (b) “wages” shall mean the base salary or other base compensation of an employee paid to that employee for employment by an employer including pre-determined, non-discretionary, guaranteed payments paid by the employer to similarly situated employees, provided, that “wages” shall include payments made by the employer to the employee because of the character of the work, because of the employee’s length of service, because of the time at which the work takes place as a condition of employment in a particular position, because of educational incentives, and payments for holding the training, certification, licensing or other educational incentives approved by the employer for the performance of services related to the position the employee holds and payments made by the employer to the employee calculated as a percentage of base pay;
- (c) Any amount, benefit or payment included in the definition of “regular compensation” by law or by regulation prior to July 1, 2009 and included in any applicable collective bargaining agreement or individual contract for employment in effect on May 1, 2009, shall continue to be included in the definition of “regular compensation” during the term of that collective bargaining agreement or contract; provided, however, that any such amount, benefit or payment received after the term of said collective bargaining agreement or contract ends or after June 30, 2012, as the case may be, shall continue to be considered regular compensation unless such payment does not meet the criteria set forth in 840 CMR 15.03 (3) (b) or is excluded by the provision of 840 CMR 15.03 (3) (f);

- (d) Regular compensation shall include any part of the wages derived from federal grants except as provided in M.G.L. c. 32 § 3(2)(a)(xi);
- (e) Lump-sum retroactive payments which would have been wages 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;
- (f) "wages" shall not include, without limitation, overtime, commissions, bonuses other than cost-of-living bonuses, amounts derived from salary enhancements or salary augmentation plans which will recur for a limited or definite term, indirect, in-kind or other payments for such items as housing, lodging, travel, clothing allowances, annuities, welfare benefits, lump sum buyouts for workers' compensation, job-related expense payments, automobile usage, insurance premiums, dependent care assistance, 1-time lump sum payments in lieu of or for unused vacation or sick leave or the payment for termination, severance, dismissal or any amounts paid as premiums for working holidays, except in the case of police officers, fire-fighters and employees of a municipal department who are employed as fire alarm signal operators or signal maintenance repairmen money paid for holidays shall be regarded as regular compensation, amounts paid as early retirement incentives or any other payment made as a result of the employer having knowledge of the member's retirement, tuition, payments in kind and all payments other than payment received by an individual from his employing unit for services rendered to such employing unit, regardless of federal taxability; provided further, that notwithstanding the foregoing, in the case of a teacher employed in a public day school who is a member of the teachers' retirement system, salary payable under the terms of an annual contract for additional services in such school and compensation for services rendered by a teacher in connection with a school lunch program or for services in connection with a program of instruction of physical education and athletic contests as authorized by section 47 of chapter 71 shall be regarded as "regular compensation" rather than as bonus or overtime and shall be included in the salary on which deductions are to be paid to the annuity savings fund of the teachers' retirement system.