G.L. c. 32, § 91 Post-Retirement Employment in the Public Sector

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Introduction

- Steps Board can take to prevent retirees from running into trouble with G.L. c. 32, § 91.
- Steps which will help shield the Board from future liability, i.e. lawsuits.
- Goal is to prevent abuse not to clean up the mess.

What G.L. c. 32, § 91 does.

- any person who has been retired and who is receiving a pension or retirement allowance …may… be employed in the service of the commonwealth, county, city, town, district or authority 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.

Responsibilities of Retirement Boards

- Self-monitoring.
- Educating employers and members: on earnings and hour limits.
- Responding to the media's requests for members and/or retirees.
    - Freedom of Information Act - any and all documents in the board's possession must be released except for:
        - Social security numbers, home addresses, telephone numbers, dates of birth and any medical information of retirees, members, and their families. Black out this private information.
        - Pension and salary amounts are not protected.

Board Instructions to Members

- Counseling members about G.L. c. 32, § 91 at retirement.
- Provide members with PERAC guide entitled "Retiree's Rights & Responsibilities."
- Use of affidavit upon retirement.
- Alert PERAC when it discovers abuse.
- Provide retirement allowance and regular compensation figures to PERAC upon request.
- The board recoups excess if the employer does not pursuant to *Flanagan v. Contributory Ret. Appeal Bd. and State Bd. of Ret.,* 51 Mass. App. Ct. 862 (2001).
- Keep PERAC informed of outcome.

Employer's Role

- Terminate or suspend employment once the 960 hours or the earnings amount is reached.
- If retiree exceeds limits, recoup excess.
- Caveat: The Fair Labor Standards Act ("FLSA") of 1938.
  - FLSA is a federal law that applies to employees engaged in interstate commerce or employed by an enterprise engaged in commerce or in the production of goods for commerce unless the employer can claim an exemption from coverage.
  - FLSA established a national minimum wage, guaranteed time-and-a-half for overtime in certain jobs.
- Notify PERAC of any employer action regarding excess earnings.

Member's Role

- Know the limits on earnings and hours of employment.
- Refund excess if allowable earnings exceeded.
- Waive allowance if you determine you will have excess earnings.

PERAC's Role

- Rely on self monitoring, and tips from concerned citizens.
- Alert employer and retirement board of any abuse and ask for salary and pension information from both.
- Once information is obtained, PERAC determines excess earnings from data collected (allowance figures, regular compensation, W-2).
- Calculations performed on allowable earnings and hours to determine if they are within limits.
- If earnings or hours are exceeded, send letter to employer, copy to the retiree and the retirement board. Include instructions to notify PERAC of results, and if employer chooses not to recoup excess, then retirement board must, up to the amount of the pension owed.

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

- Section 21 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.
- Earnings limitations now more encompassing by including any person who is a consultant or independent contactor performing services to 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.

What salary to use in the calculation?

- Scenario: Fire captain 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?
- 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.

What if the retiree works for multiple public entities?

- Scenario: DPW employee retires and then works part-time in two positions, employee for the local clerk's office and as a custodian at the local public high school.
- Can this retiree work for both public entities under G.L. c. 32, § 91?
- Yes, but the retiree must not exceed the hours or earnings limitations of G.L. c. 32, § 91.
- How does the board determine if there is excess earnings?
- The board must add the retiree's pay and hours from both jobs together and make a single G.L. c. 32, § 91 calculation based on all of retiree's public employment in a single calendar year.
- Why? G.L. c. 32, § 91 does not allow the retirement board to look at each job independently. All public employment is subject G.L. c. 32, § 91 by way of a single yearly calculation including all public employment to determine if there are excess earnings.