

# MEMORANDUM #08, 2012

Commonwealth of Massachusetts | Public Employee Retirement Administration Commission

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## MEMORANDUM

TO: All Retirement Boards

FROM: Joseph E. Connarton, Executive Director

RE: Evergreen Clause Legislation

DATE: January 13, 2012

On November 22, 2011, Governor Patrick signed Chapter 198 of the Acts of 2011, “An Act Relative to the Terms of Collective Bargaining Agreements” into law. A copy of the law is attached to this memorandum. Chapter 198 amends Chapter 150E, Section 7, Subsection (a). This memorandum is only concerned with the impact of this amendment upon the retirement laws.

On March 1, 2011, the Commission issued PERAC Memorandum #14/2011, advising the retirement boards that the Supreme Judicial Court of Massachusetts had determined that an “Evergreen Clause” appearing in a collective bargaining agreement could not extend that agreement and its terms beyond three years. A court case and proposed legislation regarding this issue made it unclear at that time whether or not certain payments could continue to be included in “regular compensation” pursuant to Section 23 of Chapter 21 of the Acts of 2009.

Chapter 198 of the Acts of 2011 provides that, although a collective bargaining agreement can only be entered into for a maximum of three years, the parties “may agree to include a provision in a collective bargaining agreement stating that the agreement’s terms shall remain in full force and effect beyond the 3 years until a successor agreement is voluntarily negotiated by the parties.” By its terms, the change in the law applies to any contract, which contained an Evergreen Clause “and expired before the effective date of this act.” The law does not apply, however, to any specific matters pending in court of competent jurisdiction “between October 22, 2010 and the date of this act.”

Chapter 21 of the Acts of 2009 excluded certain payments from the definition of “regular compensation,” but Section 23 of that Act provided a grandfather clause, and stated:

[n]otwithstanding any special or general law to the contrary, any amount, benefit or payment included in the definition of “regular compensation” by law or by regulation prior to the effective date of this act 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 June 30, 2012 shall not be considered regular compensation.

Now that Chapter 198 of the Acts of 2011 became law on November 22, 2011, any benefit or payment which was regular compensation prior to July 1, 2009, and was included in a contract in effect on May 1, 2009, may continue to be considered regular compensation if certain conditions are met.

If a payment no longer considered to be regular compensation was in a contract in effect on May 1, 2009, the payment could possibly continue to be included in regular compensation if the contract remains in effect either by its length of term or pursuant to an Evergreen Clause. An inquiry must be made, however, as to whether such payment is for “services” or for a “tool” in light of an Appeals Court case rendered after the enactment of Chapter 21 of the Acts of 2009. Payments for “tools” are not to be included in regular compensation after the date of the court case, which was February 18, 2010.

Of note, clothing allowances should continue to be included as regular compensation if they were in a contract in effect on May 1, 2009, if deductions were being taken on them, and if that contract remains in effect. As noted above, the Appeals Court case of O’Brien v. Contributory Retirement Appeal Board & Another, 76 Mass. App. Ct. 901 (Mass. App. Ct. 2010), which was rendered on February 18, 2010, eliminated from regular compensation payments for ‘tools’ as opposed to ‘services.’ However, Section 116 of Chapter 131 of the Acts of 2010, enacted June 30, 2010, permits clothing allowances to be included as regular compensation through June 30, 2012 if such allowances were in a contract in effect on May 1, 2009 and if retirement contributions were being taken upon such allowances.

It is important to note that in no event shall any item or payment no longer included in the definition of regular compensation pursuant to Chapter 21 of the Acts of 2009 be included in regular compensation after June 30, 2012. That is the latest possible date provided for in that Act’s grandfather clause.

We trust the foregoing will be of some assistance to you.

Attachment