

MACRS

Fall 2022

O'Leary, Vacation Buybacks and Related Legislation



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MACRS FALL 2022
October 3, 2022

- **O'Leary, Vacation Buybacks and Related Legislation**
- **Vernava I, Vernava II, and Related Legislation**

Timeline

- Legislature passes Chapter 147 of the Acts of 2022, inserting new Section 106 into Chapter 32, on 8/4/22.
- Supreme Judicial Court issues its decision in *O’Leary* on 8/11/22.
- PERAC issues Memorandum No. 23 of 2022 on 9/12/22.

2

***O’Leary* in a Nutshell – The Supreme Judicial Court Decision**

Joseph O’Leary v. CRAB, Retirement Board of Lexington and PERAC, 490 Mass. 480 (8/11/2022)

“For all of these reasons, payment in lieu of vacation time that requires an employee to select payment annually or at some other interval is not "regular compensation." The 2012 PERAC memorandum [No. 39 of 2012] is invalid to the extent it directs otherwise because no elective, periodic vacation buyback scheme, such as the one at issue here, could pass the first threshold requirement [of Memorandum No. 39 of 2012] and be considered part of an employee's 'base compensation.'”

- Vacation buyback payments are not regular compensation.

3

NOTES:

Chapter 147 of the Acts of 2022 in a Nutshell

- Retirees who retired with vacation buyback payments included in their retirement allowances will have no adjustments to their allowances.
- Some active members who were participating (contributing) to such a vacation buyback plan as of May 1, 2018 will be able to continue to have these payments count as regular compensation if certain conditions are met.
- This will apply to very few of the 104 retirement systems.

4

CRAB's Partial Stay in *O'Leary*

- Effective date of 11/6/18, it expired upon the SJC publishing its *O'Leary* decision on 8/11/22.
- Allowed those already retired to maintain their current retirement allowances pending the outcome in *O'Leary*.
- Did not permit active members to make retirement contributions on vacation buyback payments pending the outcome in *O'Leary*.

5

NOTES:

The Legacy Clause of Chapter 147

To continue having these payments considered regular compensation, four conditions must be met:

1. Member had to be an active member of a retirement system as of May 1, 2018 **and**
2. Member had to be participating and making contributions in a vacation buyback program as of May 1, 2018 **and**

—Continued—

6

The Legacy Clause of Chapter 147 (Cont'd)

3. The vacation buyback program in which the member was participating had to be established pursuant to an applicable collective bargaining agreement, an individual contract for employment, or a written benefits or personnel policy or municipal plan or ordinance in effect on May 1, 2018 **and**
4. The applicable retirement system had to be accepting regular contributions or deductions as of May 1, 2018 on the vacation buyback program.

7

NOTES:

Continued Participation

If a member meets the 4 criteria for having these payments continue with regular compensation status, the following 2 conditions must be met:

1. The payment in lieu of vacation leave is permitted under an applicable collective bargaining agreement, an individual contract for employment, a written benefits or personnel policy or municipal plan or ordinance, **and**
2. The member consistently participates in the program that is available to all similarly situated employees.

8

Possible Loss of Regular Compensation Status

- Payments occur only in the three years prior to retirement (Pre 4/2/12 members)
- Payments occur only in the five years prior to retirement (4/2/12 or later members)
- The payments are made as a result of the member giving notice of retirement.

9

NOTES:

Questions about O'Leary and Section 106 Which Have Arisen

- Will any retirees have their allowances recalculated?
- What if you didn't participate in a program after CRAB's Partial Stay of 11/6/18 did not allow retirement deductions to be taken on vacation buybacks?
- What about personal time and other types of time?

10

Questions about O'Leary and Section 106 Which Have Arisen (Cont'd)

- How can a member inform his or her retirement board he or she is retiring without losing the ability to keep participating in the program?
- How can a retiree pay back money to a system after retirement?
- What does “consistently participate” mean?*

*Denotes the most frequently asked question.

11

NOTES:

Conclusion

- The implementation of *O'Leary* is difficult, because some members expectations have been impacted.
- Due to the language of the decision and the new Section 106, this will implicate only a small number of retirement boards.
- Please see PERAC Memorandum No. 23 of 2022 for more details.

12



**Any further questions on O'Leary
or Chapter 32,
Section 106 at this time?**

If you think of one later: judith.a.corrigan@mass.gov

13

NOTES:

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Vernava in a Nutshell

- If a member of a system is receiving Workers' Compensation benefits, and concurrently receiving supplemental sick, vacation or other leave, that supplemental leave is not regular compensation and retirement deductions will not be taken from that pay.

2

The Supreme Judicial Court Cases

- *PERAC v. CRAB, Retirement Board of Swampscott and Robert Vernava*, 478 Mass. 832 (February 13, 2018) ("Vernava I")
- *Worcester Regional Retirement Board, Essex Regional Retirement Board, Franklin Regional Retirement Board, Peabody Retirement Board and Stoneham Retirement Board v. PERAC*, 489 Mass. 94 (February 4, 2022) ("Vernava II")

3

NOTES:

Legislation and PERAC Memoranda

- PERAC Memo No. 14 of 2022
- Section 149 of Chapter 126 of the Acts of 2022
- PERAC Memo No. 21 of 2022

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Active Members and Inactive Members Who Have Not Retired

- No deductions should be taken on any supplemental payment of any kind which a member receives while also receiving Workers' Compensation.
- Return, without interest, all retirement deductions taken on supplemental payments of any kind received in conjunction with any payment under Workers' Compensation.
- Remove all regular compensation and creditable service which had previously been awarded as a result of these payments.
- Notify the member you have done this.

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NOTES:

All Workers' Compensation Sections Count

- The steps to be taken in regard to an active member, or an inactive member who has not yet retired, are the same.
- Retirement Boards should also be identifying Section 34 (Total Incapacity) time.
- The situation of those who received Section 35 (Temporary Partial Incapacity) Workers' Compensation benefits is more dire than those who received Workers' Compensation under any other section, but any time a Workers' Compensation payment of any kind is made with the concurrent receipt of supplemental pay, the *Vernava* analysis must be undertaken.

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Creditable Service in a Nutshell

Chapter 152, Section 34, et al.

- Total Incapacity
- Creditable service awarded at end of career if such service will increase member's retirement allowance. (i.e., superannuation or ordinary retirement allowances)

Chapter 152, Section 35

- Temporary Partial Incapacity
- No creditable service **unless**
 - Member also working part-time for his or her public employer.

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NOTES:

Retirees

Section 149 of Chapter 126 of the Acts of 2022:

Notwithstanding any general or special law to the contrary, the retirement allowance of any member who retired pursuant to chapter 32 of the General Laws prior to July 1, 2022, which included in the calculation of such allowance supplemental payments of any kind upon which retirement contributions were made, which supplemental payments were received while the member was simultaneously receiving workers' compensation payments pursuant to chapter 152 of the General Laws shall not be reduced, modified or changed as a result of the inclusion of such supplemental payments. Such prohibition shall also apply to retirement allowances paid to surviving spouses and beneficiaries of such members.

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Retiree Rescue Legislation

- Enacted after PERAC Memorandum No. 14 of 2022
- Prompted PERAC Memorandum No. 21 of 2022
- Means retirees who retired prior to July 1, 2022 with supplemental payments included in their calculations will not have their retirement allowances disturbed.

9

NOTES:

Questions About *Vernava* Which Have Arisen

- Does *Vernava* only apply to Section 35 payments?*

NO

- Are payments which are not sick or vacation leave payments still regular compensation when taken in conjunction with Workers' Compensation?

NO

*Denotes the most frequently asked question.

10

Questions About *Vernava* Which Have Arisen (Cont'd)

- Do retirement boards now need to do a full-scale recalculation of all retirement allowances granted between February of 2018 (*Vernava I*) and February of 2022 (*Vernava II*)? **NO**
- In fairness, shouldn't accidental disability retirees who retired after *Vernava I* and before July 1, 2022 be recalculated to include those supplemental payments? **NO**
- Will there be any accidental disability retirement allowances which need to be recalculated in the wake of *Vernava II*? **VERY FEW, if any**

11

NOTES:

Conclusion

- Implementing the *Vernava* cases involves all 104 retirement boards and many members.
- The *Vernava* recalculations have been difficult on members and retirement boards alike.

12



**Any further questions on
Vernava at this time?**

If you think of one later: judith.a.corrigan@mass.gov

13

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COMMONWEALTH OF MASSACHUSETTS

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