

TO: All Retirement Boards

FROM: John W. Parsons, Esq., Executive Director

RE: Vacation Buybacks as Regular Compensation

DATE: September 12, 2022

I. INTRODUCTION

This memorandum addresses the regular compensation status of vacation buyback payments in the wake of a recent legislative enactment and an even more recent decision of the Supreme Judicial Court (“SJC”) of Massachusetts, which was written by Chief Justice Kimberly S. Budd (“the Chief Justice”).

On August 4, 2022, Governor Charles D. Baker signed Chapter 147 of the Acts of 2022 into law, which adds a new Section 106¹ to Chapter 32. On August 11, 2022, the SJC issued its decision in the matter of *Joseph O’Leary v. CRAB & others*², 490 Mass. 480 (8/11/2022), (“*O’Leary*”). Both Section 106 and *O’Leary* address the issue of whether payments received in lieu of taking vacation time should be considered regular compensation.

Retirement Boards which did not accept deductions for such a vacation buyback program as of May 1, 2018 do not need to take any further action, and participation in a vacation buyback program in such systems will not be considered regular compensation under this new law.

II. STATEMENT REGARDING PREVIOUS MEMORANDA

PERAC has issued prior memoranda regarding the regular compensation status of payments for unused vacation time. None of these prior memoranda (Memorandum No. 25 of 2000, Memorandum No. 26 of 2000, Memorandum No. 39 of 2012, Memorandum No. 26 of 2018, and Memorandum No. 33 of 2018) should hereafter be consulted, and, to avoid confusion, each of

¹ Massachusetts General Laws, Chapter 32, § 106 is included in its entirety in the addendum to this memorandum but will also be excerpted throughout.

² *Retirement Board of Lexington and Public Employee Retirement Administration Commission.*



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them should be considered superseded in their entirety. This Memorandum reflects the current treatment of this subject matter and is intended to be comprehensive.

III. OVERVIEW OF SECTION 106, SUBSECTION BY SUBSECTION

Section 106, Subsection (a): RETIREEES

This new law holds retirees harmless and mandates that their retirement allowances, although calculated with payments made in lieu of taking vacation time, are not to be disturbed. Subsection (a) of Section 106 provides as follows:

(a) Notwithstanding any general or special law to the contrary, a retirement allowance, as defined in section 1, to a member inactive, as defined in section 3, that included in its calculation the annual amounts paid in lieu of vacation leave upon which contributions or deductions were made to the applicable retirement system shall not be reduced, modified or changed because of the inclusion of such contributions or deductions.

Retirement boards should take no action regarding previously awarded retirement allowances for retirees who had these benefits included in their allowances.

Action will need to be taken regarding those retirees entitled to participate in a vacation buyback program under the terms of G.L. c. 32, § 106, who retired without the inclusion of these benefits. The benefits were not included in their retirement allowance calculations because of the Order issued by the Contributory Retirement Appeal Board (“CRAB”) on November 6, 2018 in the *O’Leary* matter.

Section 106, Subsection (b)³: LEGACY CLAUSE

This new law contains a legacy clause, which provides for a limited number of active members to continue to participate in vacation buyback programs, and continue to have such payments included in regular compensation, only if certain conditions are met:

1. Member had to be an active member of a retirement system as of May 1, 2018.

³ Subsection (b) of Section 106 contains two distinct parts as well as one proviso, each of which will be addressed separately.

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2. Member had to be participating and making contributions in a vacation buyback program as of May 1, 2018.
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.
4. The applicable retirement system had to be accepting regular contributions or deductions as of May 1, 2018 on the vacation buyback program.

All four of these conditions must be met for an active member to have these payments counted as regular compensation.

Retirement boards which accepted regular contributions or deductions on vacation buyback programs as of May 1, 2018, and who have active members who fit the criteria set out in conditions 1 to 4 above, will need to take further action as outlined in Section VI of this memorandum.

**Section 106 Subsection (b): CONTINUED REGULAR COMPENSATION
STATUS OF SUCH PAYMENTS**

Pursuant to G.L. c. 32, § 106, these payments in lieu of taking vacation time may continue to be included in regular compensation going forward only for members who were in service as of May 1, 2018, as noted above, and only if the following conditions are 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.

**Section 106 Subsection (b) proviso:
LOSS OF REGULAR COMPENSATION STATUS**

Even if Numbers 1 and 2 above are satisfied, these payments in lieu of taking vacation time shall not be considered regular compensation if:

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1. The payments are made only in the final 3 years of employment for a member who joined the retirement system prior to April 2, 2012; or
2. The payments are made only in the final 5 years of employment for a member who joined the retirement system on or after April 2, 2012; or
3. The payments are made as a result of the member giving notice of retirement.

**Section 106 Subsection (c): RETIREMENT SYSTEMS MUST RECOGNIZE
THE REGULAR COMPENSATION STATUS OF THESE PAYMENTS,
AND IMPLEMENT THIS LAW.**

Subsection(c) of Section 106 provides in its entirety as follows:

Notwithstanding any general or special law to the contrary, a retirement system subject to the requirements of subsections (a) and (b) shall regard as regular compensation any payment in lieu of vacation leave made subsequent to May 1, 2018 to a member who was in service as of May 1, 2018 and the systems shall take appropriate measures to effectuate this section.

When a member and a program meet the criteria set out in Subsections (a) and (b) of Section 106, the retirement board must treat as regular compensation such payments and take action to implement this law. **This does not apply to retirement systems who did not accept payments on such vacation buyback plans as of May 1, 2018, as noted above.**

Section 106 Subsection (d): SIGNIFICANCE OF MAY 1, 2018.

Paragraph (d) of Section 106 provides in its entirety as follows:

Subsections (b) and (c) shall apply only to members who: (i) were in service as of May 1, 2018; and (ii) began receiving payment in lieu of vacation leave prior to May 1, 2018. (Emphasis supplied).

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IV. O'LEARY SJC CASE

One week after the Governor signed the new Section 106 into law, the SJC issued its decision in *O'Leary*, which answered the question of whether vacation buybacks could be considered regular compensation in the negative. The SJC found that vacation buybacks, and any such payments which may be elected by the member annually are not recurrent or repeated as they depend upon an election by a specific employee. Additionally, the SJC also found that the vacation buybacks are prohibited from regular compensation status by being "amounts derived from salary enhancement programs or salary augmentation plans which will recur for a limited or definite term..." (*O'Leary* page 8 of original decision.) The Chief Justice concludes:

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." *O'Leary* at pages 8-9 of the original decision.

Thus, it is only due to Section 106 and its language preserving previous benefit programs that such payment could be considered regular compensation.

V. CRAB's ORDER OF NOVEMBER 6, 2018

On November 6, 2018, CRAB issued an Order of Partial Stay in the *O'Leary* case, noting both that this Order would be binding on all retirement boards and would remain in effect until the completion of judicial review in *O'Leary*, unless modified by a court of competent jurisdiction. CRAB's Order of Partial Stay was important and allowed the *O'Leary* case to proceed with as little impact on the affected retirement systems as possible. CRAB's Order preserved the benefits of affected retirees, as has happened with Section 106, and CRAB's directives make possible the implementation of this new law for the limited number of people who are allowed to continue to participate in these programs in those retirement systems which had accepted payments under these programs as of May 1, 2018.

CRAB's Order of November 6, 2018 is no longer in effect as of August 11, 2022, the date of the SJC decision in *O'Leary*.

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VI. IMPLEMENTATION OF SECTION 106

Retirement boards are instructed to implement G.L. c. 32, Section 106 in the following manner:

Members/Retirees:	Action to be taken:
Members and Retirees in systems in which such vacation buyback programs were not in effect as of May 1, 2018.	No action needs to be taken. In those retirement systems which did not treat vacation buyback programs as regular compensation and did not accept contributions or deductions on the same as of May 1, 2018, these payments will never be considered regular compensation.
Retirees who retired with vacation buyback payments included in their retirement allowance prior to November 6, 2018.	No action needs to be taken. These retirement allowances should not be altered or reduced.
Members who were having deductions taken from payments made in lieu of taking vacation time prior to November 6, 2018, and who subsequently retired without vacation buyback payments included in their allowances.	<p>Retirement boards must collect the amount of deductions which would have been withheld, but for the November 6, 2018 Order, from payments made to the member. The payment of these deductions shall be without interest. (See PERAC Memorandum No. 14 of 2018.) The payments shall be collected for the period from November 7, 2018 to the date of the member's retirement.</p> <p>Additionally, since the November 6, 2018 Order required the retirement systems to refund any deductions made on such payments at the time of retirement, the member will need to redeposit all deductions previously refunded to him/her, again, without interest. The entire amount refunded to the member pursuant to CRAB's Order must be redeposited in the retirement system before any adjustments are made to a member's retirement allowance.</p> <p>Upon receipt of all deductions and contributions on all eligible payments, the retirement allowance shall be recalculated to reflect the inclusion of these amounts in a member's regular compensation</p>

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Members/Retirees:	Action to be taken:
	<p>This should result, in all cases, in an increased retirement allowance, and money owed to the member by the board. The board may wish to consider offsetting the amount it will owe the member against amounts which the member owes to the board.</p> <p>If retirees are unable to make this lump sum payment, even with the offset suggested above, the Board has the discretion to implement the so-called “<i>Vatalaro</i> formula.” In essence, the member would receive a reduced allowance until such time as all repayment has been made. See <i>Vatalaro v. State Retirement Board</i>, CR-9962 (CRAB, 3/16/87).</p>
Active members in a program who are entitled to continue in such a program by virtue of Paragraph (b) of Section 106, who have not made contributions from November 6, 2018 to the present.	<p>Those members eligible to participate in such a program must pay to the retirement system in question the deductions or contributions which should have been paid on such payments from November 6, 2018 to the present. These payments shall be made without interest. (See PERAC Memorandum No. 14 of 2018).</p> <p>For so long as these members continue to be eligible to participate in such a program, as outlined in Section (c) of the Section 106, deductions should be taken on all such payments.</p>

VII. PAYMENT IN LIEU OF OTHER FORMS OF LEAVE

The newly enacted G.L. c. 32, § 106 only addresses programs which provide for payments in lieu of vacation leave. However, in the *O’Leary* decision, the SJC has decided that regular compensation status for payments for other forms of leave are not available for such “payment in lieu of” programs. The Chief Justice writes:

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Thus, we conclude that "regular compensation" does not encompass payments, such as those at issue here, that an employee chooses to receive annually or at some other interval, even if the employee consistently elects to receive such payments. Such payments are not by their nature "recurrent" or "repeated," but rather repeat only upon specific election by the employee during the election period. *See Vernava*, 478 Mass. at 835. The employer cannot predict year to year whether an eligible employee will opt to receive these buyback payments, or how many hours of compensation an employee will elect to buy back.

Thus, although O'Leary addresses vacation buyback programs, it is apparent from the SJC's reasoning that payments made in lieu of taking any form of leave would also not pass the regular compensation test.

VIII. CONCLUSION

If you have any questions about this, please contact PERAC General Counsel Judith Corrigan at (617) 591-8904 or at judith.a.corrigan@mass.gov.

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Addendum

Complete Text of G.L. c. 32, Section 106, as inserted by Chapter 147 of the Acts of 2022:

- (a) Notwithstanding any general or special law to the contrary, a retirement allowance, as defined in section 1, to a member inactive, as defined in section 3, that included in its calculation the annual amounts paid in lieu of vacation leave upon which contributions or deductions were made to the applicable retirement system shall not be reduced, modified or changed because of the inclusion of such contributions or deductions.
- (b) Notwithstanding any general or special law to the contrary, any amount paid annually in lieu of vacation leave to a member in service as of May 1, 2018 pursuant to any applicable collective bargaining agreement, individual contract for employment, written benefits or personnel policy or municipal plan or ordinance in effect on May 1, 2018 and for which the applicable retirement system was accepting regular contributions or deductions as of May 1, 2018 shall be considered regular compensation as defined in said section 1. Any such annual payment in lieu of vacation leave subsequent to May 1, 2018 shall continue to qualify as regular compensation only for members who were in service as of May 1, 2018, as long as the payment in lieu of vacation leave is permitted under an applicable collective bargaining agreement, individual contract for employment, written benefits or personnel policy or municipal plan or ordinance; provided, however, that such an annual payment in lieu of vacation leave shall be to a member who consistently participates in a program that is available to all similarly situated employees and shall not have been made: (i) only in the final 3 years of employment for a member who joined the retirement system prior to April 2, 2012; (ii) only in the final 5 years of employment for a member who joined the retirement system on or after April 2, 2012; or (iii) as a result of providing retirement notice.
- (c) Notwithstanding any general or special law to the contrary, a retirement system subject to the requirements of subsections (a) and (b) shall regard as regular compensation any payment in lieu of vacation leave made subsequent to May 1, 2018 to a member who was in service as of May 1, 2018 and the systems shall take appropriate measures to effectuate this section.
- (d) Subsections (b) and (c) shall apply only to members who: (i) were in service as of May 1, 2018; and (ii) began receiving payment in lieu of vacation leave prior to May 1, 2018.

#End of Addendum#