



**OFFICE OF THE
INSPECTOR GENERAL**
MASSACHUSETTS

Post-Retirement Earnings Limits for Massachusetts Public Employees



A Review of a Flawed System

March 26, 2024

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Re: Post-Retirement Earnings Limits for Massachusetts Public Employees

Dear Governor Healey and Commonwealth Leaders:

Pursuant to Chapter 12A of the Massachusetts General Laws, the Office of the Inspector General (OIG) reviewed the oversight of post-retirement earnings limits imposed by the “return-to-work statute,” Section 91 of Chapter 32 of the Massachusetts General Laws (Section 91).

Section 91 limits the amount that public retirees collecting a pension governed by Chapter 32 of the Massachusetts General Laws can earn in post-retirement employment with the Commonwealth or one of its political subdivisions. It does not apply to federal retirees or retirees from other states who work for a public entity in the Commonwealth. Nor does it apply to Massachusetts public retirees who work for the federal government or another state.

The purpose of the earnings limit is to prevent retirees from working full-time for the Commonwealth or one of its political subdivisions while simultaneously receiving a Massachusetts public pension. Consistent with that public policy, public retirees who return to public work are statutorily limited in the number of hours they can work and the amount of money they can earn.

There is no question that retirees make critical contributions at all levels of government in the Commonwealth. Their experience, expertise and perspective are invaluable, and this report is not suggesting or recommending that the Commonwealth and its localities eliminate hiring public retirees. It does find that controls are needed to ensure compliance with the limits set by Section 91. The “system” that oversees the earnings limits is deeply flawed, in that there is no central agency or process to monitor compliance. Nor is there an easy way for public retirees, public employers or pension boards to calculate earnings limits, which are unique to each retiree.

The OIG found that the Commonwealth’s post-retirement earnings caps are primarily enforced through a self-monitored honor system. No single agency tracks post-retirement earnings of public retirees. Earnings cap calculations are complicated and individual to each retiree. Oversight is inconsistent, and in some cases, non-existent. Enforcement is reactive, mostly directed at the most egregious cases. Penalties for exceeding the earnings cap are minimal. This should not be the case for the Commonwealth’s retirement system, which is a billion-dollar enterprise.

As such, the OIG recommends that the Legislature consider statutory changes that would make the system more accountable, transparent, fair and equitable. For example:

- Fund enforcement of post-retirement earnings limits, either by enhancing the authority of the Public Employee Retirement Administration Commission (PERAC) or establishing a new enforcement entity.
- Simplify the formula used to calculate the cap on post-retirement earnings so that a public retiree can determine their cap with an online calculator.
- Establish a financial penalty – in addition to returning overearnings – for public retirees who exceed their post-retirement earnings cap.

The lack of oversight and enforcement of the earnings cap essentially relegates the statutory requirement to a recommendation. That fact not only constitutes poor public and financial policy, but also leaves too much room for an inequitable and unfair application of the law. It of course also creates the opportunity for fraud, waste and abuse.

I welcome the opportunity to discuss this report, its findings and possible legislative solutions should such a conversation be of interest to you.

Sincerely,



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The OIG found that no single state agency tracks the pensions or post-retirement earnings of all public retirees. Further, oversight is inconsistent across the Commonwealth's public employers and in some cases may be minimal, weak and ineffective.

EXECUTIVE SUMMARY

The Massachusetts Office of the Inspector General (OIG) reviewed the earnings limitations the Commonwealth imposes on public retirees through the “return-to-work statute,” Section 91 of Chapter 32 of the Massachusetts General Laws (Section 91).¹ This review is an outgrowth of the OIG’s previous findings that in some cases public retirees return to work for a public entity and earn substantial income (at times exceeding their pre-retirement salary) while simultaneously collecting their pensions. Section 91 caps the amount that public retirees may earn from public employers after their retirement.² Exceeding that cap not only violates the letter of the law, it is also contrary to the purpose of a public pension.

The Massachusetts return-to-work statute is based on the long-held policy that a public employee may not concurrently receive a salary and a pension from public bodies. A public pension is not meant to be an employment benefit for individuals who remain in the workforce. Rather, “[p]ublicly administered and financed pension benefits are intended to support those who are retired from public service.”³ The Commonwealth therefore places earnings limits on public retirees who return to work for a public employer.

The OIG found that no single state agency tracks the pensions or post-retirement earnings of all public retirees. Further, oversight is inconsistent across the Commonwealth’s public employers and in some cases may be minimal, weak and ineffective. Public employers that do examine earnings limits must perform separate calculations for each retiree and at multiple points in time. Due to the complex process of determining individual earnings caps, enforcement is generally limited to the most egregious cases and more frequently initiated only after a particular situation is brought to the attention of a retirement board or oversight agency. The law requires public retirees who exceed their limits to return the excess earnings. Public employers who pay in excess of the limits incur no penalties.

To strengthen enforcement of the statutory post-retirement earnings limits, the OIG recommends that the Legislature consider:

1. Mandating and funding enforcement of post-retirement earnings limits, either by enhancing the authority of the Public Employee Retirement Administration Commission (PERAC) or by creating a new enforcement agency to work with the Legislature in considering actions such as:⁴

¹ This report concerns public pensions and retirement allowances governed by Chapter 32, which specifies the pension contributions and retirement benefits for all full-time public employees in Massachusetts except those who work for the Massachusetts Bay Transportation Authority. MBTA employees are enrolled in a publicly funded private pension plan that is not subject to Chapter 32. For purposes of this report, the OIG uses “pension” to refer to both pensions and retirement allowances.

² Under current law, a public retiree is permitted to work for a public entity post-retirement provided the retiree follows the conditions specified in Section 91, including (1) a 1,200-hour cap on hours worked per year; (2) a salary limit based on their pre-retirement earnings as a public employee; and (3) an obligation to track and report earnings limits to their current employer.

³ *Flanagan v. Contributory Ret. Appeal Bd.*, 51 Mass. App. Ct. 862, 868 (2001).

⁴ PERAC is the regulator for the Commonwealth’s 104 public retirement systems.

- a. Establishing clear statutory language requiring a public entity to determine if a job candidate is collecting a public pension. If a public retiree is hired, the hiring entity would be required to classify them as a “post-retiree” in their payroll system, add measures to track their post-retirement earnings cap, and report that information to PERAC or the oversight agency;
 - b. Simplifying the earnings cap by basing it on the “calculated retirement salary average” (CRSA) used by a specific retirement board to calculate a public retiree’s pension, and creating a central annual adjustment process managed by PERAC or the new oversight agency, so that each retiree’s cap can be easily calculated, maintained and updated with any applicable increases;⁵
 - c. Requiring PERAC or the new oversight agency to annually report such caps to each public retiree who performed post-retirement work during the prior calendar year;
 - d. Enacting disclosure and reporting requirements, which include:
 - i. Requiring public employers to report any public retiree’s employment to PERAC or a new enforcement agency;
 - ii. Requiring public retirees to annually report their employment status to PERAC or a new enforcement agency and authorizing an administrative hold on the pensions of retirees failing to report; and
 - iii. Requiring public retirement boards to include an acknowledgment of post-retirement earnings limits on retirement applications;
 - e. Prohibiting a public retiree from concealing their status by working for a public entity as a contractor, part-time regular employee or staff augmentation resource;
2. Simplifying the current system so that any public retiree can determine their post-retirement earnings limit by entering their CRSA and current pay rate into an online calculator;
 3. Requiring the Department of Revenue to facilitate an annual earnings match for all public retirees;
 4. Establishing a financial penalty – in addition to returning overearnings – for public retirees who knowingly and willfully exceed their post-retirement earnings cap; and
 5. Establishing a task force to examine the current public retirement system and to identify better ways to track earnings and hours rather than relying on self-calculation and self-reporting.

⁵ The CRSA is already calculated for each public retiree by their retirement system based on the rules applicable on their hire date.

BACKGROUND

I. The Office of the Inspector General

The Office of the Inspector General for the Commonwealth of Massachusetts (OIG) is an independent state agency charged with preventing and detecting fraud, waste and abuse in the use of public funds and assets. The OIG investigates allegations of fraud and waste at all levels of government, reviewing programs and practices in state agencies and municipalities to prevent the misuse of public funds and to identify systemic vulnerabilities and opportunities for improvement.

The Legislature established the OIG in 1980 as the first state-level inspector general's office in the country.⁶ Today, the OIG oversees more than \$120 billion in spending and the work of over 300,000 public employees across all state and local public entities throughout the Commonwealth.

II. Massachusetts Public Pensions

Full-time Massachusetts public employees contribute a portion of their salaries to a network of retirement systems governed by Chapter 32 of the Massachusetts General Laws (Chapter 32).^{7,8} The Public Employee Retirement Administration Commission (PERAC) regulates this network, which is comprised of 104 retirement systems, each governed by its own board.⁹ In 2022, nearly 238,700 Massachusetts public retirees and their surviving beneficiaries received monthly pension payments governed by Chapter 32.^{10,11}

The two largest retirement systems – the Massachusetts State Employees' Retirement System (MSERS) and the Massachusetts Teachers Retirement System (MTRS) – together account for more than half of those retirees.¹² The MSERS is responsible for the pensions of most employees of state

⁶ The Legislature created the OIG pursuant to the recommendation of the Special Commission on State and County Buildings, a legislative commission that spent two years probing corruption in the construction of public buildings in Massachusetts.

⁷ Employees contribute between five and twelve percent of their gross wages to the state's pension system. Each employee's contribution is based on their start date and job classification. See M.G.L. c. 32, §§ 5, 22. Each retirement board determines the eligibility of part-time, provisional, temporary, seasonal or intermittent employees. See M.G.L. c. 32, § 3(d).

⁸ The contribution rate for the Commonwealth's trial and appellate court judges are calculated under different formulas than those applicable to most state retirees. See M.G.L. c. 32, §§ 65A-65J.

⁹ See Appendix A for a listing of the Commonwealth's 104 public retirement boards.

¹⁰ See PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION (PERAC), 2022 PERAC ANNUAL REPORT 14-117 (Oct. 2023).

¹¹ Under Section 12 of Chapter 32, each state employee, prior to retirement, may choose to take a reduced benefit during their lifetime in exchange for providing two-thirds of that reduced benefit to a survivor following the retiree's death. Survivors are not subject to the earnings limits that are the focus of this report.

¹² As of January 1, 2023, MSERS was paying 69,167 individuals, including 6,575 survivors; MTRS was paying 70,769 individuals, including 4,017 survivors. See PERAC, COMMONWEALTH ACTUARIAL VALUATION REPORT, 25, 30 (Jan. 2023).

government. The MTRS is responsible for teachers and other licensed educators who work at public, charter or collaborative schools outside of the city of Boston.¹³

The other 102 retirement boards governed by Chapter 32 manage the pensions of smaller groups, such as employees of a single municipality or a public authority, such as the Massachusetts Port Authority.

Under Chapter 32, a public employee's pension is calculated based on their salary, their age at retirement and their years of public service.¹⁴ However, the specifics of the formula differ by job category.¹⁵ Most public employees are eligible to collect a pension of up to 80% of their annual salary.¹⁶ The 80% figure represents a maximum, attained by employees who meet both length-of-service and age-at-retirement requirements. The average annual public pension benefit in Massachusetts is approximately \$41,000.¹⁷

Combined, the Commonwealth's 104 public retirement boards pay approximately \$9.3 billion to public retirees and their survivors annually.¹⁸

The Commonwealth's pension system has an unfunded liability, which combines the obligations of MSERS, the MTRS, the pensions of Boston teachers (which are paid through the Boston Retirement Board), and the state's reimbursements of cost-of-living allowances paid by local pension systems. The unfunded liability as of January 1, 2023, the date of the most recent calculation available, amounted to \$42.3 billion.¹⁹ In Fiscal Year 2024, the state budget included a \$4.1 billion pension transfer to the MSERS and the MTRS to aid in covering current pension obligations and paying down the unfunded liability.²⁰

¹³ The Boston Retirement Board covers both Boston municipal employees and Boston teachers, including licensed educators such as superintendents who serve in administrative posts. It is the only municipal retirement board to provide benefits to licensed educators.

¹⁴ For most employees hired before April 2, 2012, the calculation uses an average of their salary for their three highest-paid consecutive years. For most employees hired after April 2, 2012, the calculation uses a five-year salary average. See M.G.L. c. 32, § 5.

¹⁵ For example, police officers, firefighters and teachers reach their maximum benefit faster than other public employees.

¹⁶ The percentage varies for some specific positions. For example, the public pension benefits for the Commonwealth's trial and appellate court judges are calculated under different formulas than those applicable to most state retirees. The maximum pension benefit for judges is 75% of their salary on the day they retire. See M.G.L. c. 32, §§ 65A-65J.

¹⁷ See PERAC, COMMONWEALTH ACTUARIAL VALUATION REPORT (Jan. 2023).

¹⁸ See PERAC, 2022 PERAC ANNUAL REPORT 14-117 (Oct. 2023).

¹⁹ See PERAC, COMMONWEALTH ACTUARIAL VALUATION REPORT (Jan. 2023).

²⁰ Each local pension board has its own unfunded liability. A report from the Pioneer Institute pegged the 2018 unfunded liability for all pension systems for Massachusetts public employees at \$57 billion. PIONEER INSTITUTE, MASSPENSIONS: UNDERSTANDING RETIREMENT BENEFITS, <https://masspensions.com> (last visited March 22, 2024).

III. Post-Retirement Earnings Cap

A. Public Policy and Statutory Overview

Massachusetts was among the first states to create a retirement system for public employees.²¹ The Legislature established a system applicable to employees of cities and towns in 1910 and systems for employees of the state and its counties in 1911.²² The role of public retirement systems became more pronounced with the passage of the Social Security Act (Act) in 1935, which originally excluded state and local government employees from participating in Social Security.²³ Even though the Act was eventually amended to allow public employees to take part in both programs, most Massachusetts public employees do not pay into the Social Security program and do not accrue federal benefits. The Commonwealth's defined-benefit pension plans are therefore an important source of retirement income for public employees.²⁴

Section 91(b) of Chapter 32 of the Massachusetts General Laws allows a public retiree to work up to 1,200 hours per year for a public entity, but limits the retiree's annual compensation from that source to the difference between their pension and the current "salary that is being paid" to the person holding their former job.

The public policy underlying state pensions encompasses the principle that a retiree should not receive a pension while simultaneously working full time in a public position.²⁵ In that vein, Chapter 32 limits the amount that state employees can earn from a public entity after they retire. The earnings cap is designed to prohibit retirees from receiving more in public funds (through their pension and post-retirement earnings) than they would have earned had they continued to work in the public role from which they retired.²⁶ The cap is also designed to prevent a Chapter 32 public pension from becoming an employment benefit for individuals who continue to work for the Commonwealth or

its subdivisions, since public pension benefits "are intended to support those who are retired from public

²¹ National Public Pension Coalition, *A Look at the History of Public Pensions*, <https://protectpensions.org/2020/08/19/look-history-public-pensions/> (last visited Mar. 22, 2024).

²² See *Davis v. School Committee of Somerville*, 307 Mass. 354, 356 (1940). The Legislature created retirement systems for employees of cities and towns in 1910 (1910 Mass. Acts c. 619), employees of the state and counties in 1911 (1911 Mass. Acts c. 532 and c. 634, respectively) and teachers in 1913 (1913 Mass. Acts c. 832). *Id.* The 1921 edition of the Massachusetts General Laws codified the statutes regarding the four retirement systems into Chapter 32, which in turn was substantially revised by 1945 legislation.

²³ National Public Pension Coalition, *A Look at the History of Public Pensions*, <https://protectpensions.org/2020/08/19/look-history-public-pensions/> (last visited Mar. 22, 2024).

²⁴ *Id.*

²⁵ See *Flanagan*, 51 Mass. App. Ct. at 868 (2001).

²⁶ See *Bristol County Ret. Bd. v. Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 443, 447 (2006).

service.”²⁷ The limit is often referred to as the “post-retirement earnings cap” or, more simply, as the “earnings cap.”

Section 91(a) of Chapter 32 (Section 91(a)) generally prohibits most public retirees from simultaneously collecting their pension and being “paid for any service rendered” to a Massachusetts public entity. Notwithstanding that general prohibition, Section 91(b) of Chapter 32 (Section 91(b)) allows a public retiree to work up to 1,200 hours per year for a public entity, but limits the retiree’s annual compensation from that source to the difference between their pension and the current “salary that is being paid” to the person holding their former job.²⁸

Chapter 32 requires that public retirees returning to public service track their hours and earnings and inform their employer if they exceed either limit. If the retiree has worked more than 1,200 hours, the law requires them to stop working.²⁹ Retirees who exceed their earnings cap are required to return the overearnings to their current public employer.³⁰ If the retiree does not voluntarily return the excess earnings, Chapter 32 allows the employer to sue the retiree to recover the public funds.³¹

Public retirees returning to public service while continuing to collect their pensions do not pay into the state’s retirement system and are not eligible for an additional pension. The hours and earnings caps do not apply to public retirees who temporarily suspend their pensions while working for a public employer. Public retirees accrue no additional benefits during the suspension.

Public retirees returning to public work also have the option of “un-retiring” by repaying all the pension benefits they have received up to that point, plus interest, and contributing to the pension system again.³²

Most public retirees are not restricted from working for private employers, but a public retiree who is being paid by a private employer to provide services to a public entity is subject to the Section 91(b) limits.³³ While the limits apply to state retirees who later work for municipalities and municipal

²⁷ *Flanagan*, 51 Mass. App. Ct. at 868 (2001).

²⁸ The 1,200-hour limit means that retirees can work an average of 25 hours per week.

²⁹ The law does not impose a financial penalty for failure to track post-retirement hours and earnings. It also does not require the retiree to report their hours and earnings to their retirement board.

³⁰ The process of returning excess earnings can be difficult and time-consuming, given complexities such as calculating the overearnings and potential tax implications.

³¹ See M.G.L. c. 32, § 91(c). In 2001, the Massachusetts Appeals Court recognized in *Flanagan v. Contributory Retirement Appeal Board* that an employer was not the aggrieved party and allowed a pensioner’s retirement board to offset the overpayments from subsequent retirement payments. *Flanagan*, 51 Mass. App. Ct. at 868.

³² See M.G.L. c. 32, § 105.

³³ See *Pellegrino v. Springfield Parking Authority*, 69 Mass. App. Ct. 94, 99 (2007); see also 2009 Mass. Acts, c. 21, § 21 (codifying *Pellegrino* by amending M.G.L. c. 32, § 91(b) to apply post-retirement earnings limits to work performed “as a 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”).

retirees who later work for the state, they do not apply to those working for the federal government or for a public employer in another state, and vice versa.³⁴

Although public retirees returning to work in the public sector as contractors, part-time regular employees or staff augmentation resources are subject to the limits, these working arrangements make it difficult to track hours and earnings information for purposes of the statute.

The Commonwealth temporarily waived the hours and earnings limits for all public retirees during the COVID-19 public health emergency. This waiver has expired.³⁵

Chapter 32 carves out several exceptions to the post-retirement earnings cap. For instance, Section 91(a) exempts certain positions, including judges, most elected officials and some appointed officials from the requirements. Section 91(e) allows the Massachusetts Department of Elementary and Secondary Education to use time-limited “critical shortage waivers” of the statutory limits to assist school districts that are unable to hire qualified non-retired educators for particular positions. All licensed primary or secondary school educators – including classroom teachers, building principals and district superintendents – are eligible for the critical shortage waiver program.³⁶

Chapter 32 carves out several exceptions to the post-retirement earnings cap. ... The OIG has consistently opposed recent legislative proposals to create more exceptions.

The OIG has consistently opposed recent legislative proposals to create new exceptions. For example, House Bill 2488, *An Act Relative to Public Safety Personnel*, would create an exemption for municipal police and fire retirees, allowing them to “provide consulting services” to municipalities without adhering to Chapter 32’s hours and earnings caps. Such a blanket exemption is problematic not only because it would allow certain retirees to collect a full public salary and a full public pension, but because it also relies on the broad and undefined term “consulting services” and does not include safeguards or controls.³⁷ Further, the proposed exemption conflicts with the public policy underlying the Group IV classification for those in public safety positions.³⁸

³⁴ Post-retirement service to the MBTA, which has its own private pension fund, is not subject to the Section 91(b) restriction. See 1964 Mass. Acts c. 563, § 19 (stating that M.G.L. c. 32 does not apply to the MBTA retirement system).

³⁵ Section 14 of Chapter 53 of the Acts of 2020 waived both the hours and earnings limitations from the start of the governor’s declared state of emergency on March 10, 2020, through December 31, 2020. Section 68 of Chapter 227 of the Acts of 2020 extended the waiver through the end of calendar year 2021. Chapter 80 of the Acts of 2022 waived the caps for calendar year 2022 due to the declared public health emergency in effect at that time. The Commonwealth’s public health emergency ended on May 11, 2023. Exec. Order No. 607: Rescinding Executive Order No. 595, 1492 Mass. Reg. 3 (Mar. 31, 2023).

³⁶ See M.G.L. c. 32, § 1 (defining “teacher” to include principals and superintendents), § 91(e) (establishing critical shortage waivers for teachers); see also 603 CMR 7.15(13)(b).

³⁷ The OIG understands that public safety retirees have specialized expertise and could fill knowledge gaps that may exist in the Commonwealth’s cities and towns. However, they should focus on developing needed expertise, not creating other avenues that skirt Section 91(b)’s restrictions.

³⁸ Recognizing the dangers associated with public safety positions, Section 3(g) of Chapter 32 of the Massachusetts General Laws classifies public safety officers as Group IV retirees, who, if meeting years-of-service requirements, are eligible to retire at age 55

The OIG also opposes House Bill 2546, *An Act to Exempt the Executive Director of the Municipal Police Training Committee from Earnings Limitations*, which would create an exception to the return-to-work law not for a class of jobs, but for one specific full-time job.

The OIG opposes a provision in the recently filed Senate Bill 2571, *An Act Empowering Municipalities and Local Governments*, that would allow a waiver of hour and earnings caps for “any period during which there is a critical shortage of qualified applicants for a specific [governmental] job title or class of job titles.” The Legislature should be paring down exemptions to the earnings cap, rather than creating new ones.

B. ‘Salary That Is Being Paid’

Section 91(b) states that each retiree’s post-retirement earnings cap is based on the “salary that is being paid” for their former position. But even though the statutory language seems plain on its face, determining that salary can be complicated. For example, PERAC advises retirees who are considering returning to work to “contact your former employer (where you retired from) to find out what your salary would be had you remained in service.”³⁹ This advice seems to focus on what the retiree would have been paid, not what “is being paid” to the person currently holding the position. And a public retiree whose former position has eliminated because of a reorganization will find that no salary “is being paid” for their former position.⁴⁰

In contrast, for positions covered by a collective bargaining agreement (CBA), the two largest systems, MSERS and the MTRS, use CBA salary schedules to determine the salary for a retiree’s former position. Both determine the “salary that is being paid” based on the amount specified in the current CBA salary schedule for the retiree’s position at the experience and education level the retiree held upon retirement. This approach is the closest to the plain language of the statute.

C. Calculating the Cap

Each of the Commonwealth’s public retirees has a unique post-retirement annual salary cap determined by their personal work history. As explained above, Section 91(b) caps what a public retiree receiving a pension can earn from a public employer to the difference between their pension and the

with the maximum 80% pension benefit. Other public employees typically do not reach that benchmark until age 65. Group IV retirees who pause or defer their retirement in order to continue working in a state or municipal position give up the full financial benefit of an early retirement that the law provides, with those additional years not increasing their maximum benefit percentage.

³⁹ PERAC, *Frequently Asked Questions, Post Retirement Earnings*, <https://www.mass.gov/doc/post-retirement-earnings-frequently-asked-questions/download> (last visited March 22, 2024).

⁴⁰ MTRS currently uses the retiree’s actual last salary indexed for inflation. Mass. Teachers’ Ret. Sys., *Working after Retirement FAQs*, <https://mtrs.state.ma.us/retirees/#working-after-retirement> (last visited March 22, 2024). The MTRS adjusts for inflation using the Social Security Administration’s Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W), the same index the federal government uses to adjust Social Security benefits.

“salary that is being paid” for their last pre-retirement position. To calculate the earnings cap, a public retiree, post-retirement employer or retirement board must know (1) the retiree’s pension and (2) the salary “that is being paid” for the retiree’s last pre-retirement position. To order to determine if a public retiree has exceeded their earnings cap, a retirement board must know the employee’s post-retirement salary.

State regulations allow – but do not require – retirement boards to ask public retirees to provide annual wage statements.⁴¹ Not all retirement boards ask for this information, which, in any event, can change over time. And public employers, who also have responsibility for enforcing the law, do not have the benefit of a centralized database to assist them in calculating a current or prospective post-retiree employee’s cap.

The following hypothetical example illustrates the complicated and impractical process necessary to determine post-retirement earnings caps under the current system.

John, a longtime state employee, retires from a position with a \$50,000 annual salary and begins drawing a \$40,000 annual pension from the MSERS on August 1, 2014. John’s pre-retirement employer hires Mary to replace him, paying her \$51,000 annually. Since John’s earnings cap is equal to the “salary that is being paid” to Mary, his initial post-retirement earnings cap is \$51,000, allowing him to earn \$11,000 from a post-retirement public employer.

On May 1, 2015, Mary receives a 3% raise, bringing her salary – and John’s earnings cap – to \$52,530. As long as John’s annual pension remains at \$40,000, Mary’s raise allows John to increase his earnings from a post-retirement job to \$12,530 during 2015.

Then, as it does most years, the state approves a cost-of-living adjustment (COLA) that increases the pensions of MSERS retirees on July 1, 2015. The COLA increases John’s pension to \$40,900, but his cap remains at \$52,530, reducing the amount he can legally earn from a post-retirement public job to \$11,630.

On January 1, 2016, pursuant to a state law that adds \$15,000 to each public retiree’s earnings cap once they have been retired for a full calendar year, John’s cap increases to \$67,530 (Mary’s salary plus \$15,000), allowing him to earn \$26,630 from a post-retirement position.⁴²

⁴¹ See 840 CMR 15.01, promulgated by PERAC, which requires all retirees to verify their eligibility to continue receiving a pension at least every other year. The Town of Plymouth Retirement Board, which has been aggressive in its enforcement of post-retirement earnings limits, requires its retirees to verify their eligibility annually and to disclose whether they have worked for a Massachusetts public entity during the past year. Neither the MTRS nor the MSERS asks their retirees about public employment on their biennial verification forms.

⁴² See 2011 Mass. Acts c. 176, § 50.

This example demonstrates that recalculations make it difficult for a public retiree, a post-retirement employer or a retirement board to accurately assess the retiree’s earnings cap, even starting with seemingly straightforward pension and “salary being paid” amounts.

D. Enforcing the Cap

With John’s changing earnings cap, his retirement board faces related challenges in determining whether he exceeded his allowable earnings and by how much.

Consider a scenario in which John takes a part-time job with his local town hall on January 1, 2015 at an annual salary of \$20,000. With a pension of \$40,000 and an earnings cap on January 1 of \$51,000, John would *have exceeded his earnings cap by \$9,000* by the end of 2015 if nothing changed.

But Mary’s 3% raise on May 1, which increased John’s cap to \$52,530, means that John’s 2015 overearnings would be \$7,470, not \$9,000.

John’s July 1 COLA necessitates another recalculation. By increasing his pension, the COLA reduces the amount he can earn in a post-retirement job to \$11,630 (\$52,530 cap less \$40,900 pension). John’s \$20,000 post-retirement earnings at town hall means that he would have exceeded his earnings cap instead by \$8,370 at the end of 2015.

The one-time \$15,000 earnings cap adjustment on January 1, 2016, increases John’s annual cap to \$67,530 (Mary’s salary plus \$15,000), meaning that John’s then-post-retirement public employment would not push him past the earnings cap in 2016.

The current system is largely self-policed, with routine enforcement of Section 91(b) challenging.

John’s example, summarized in Figure 1, demonstrates the complexities faced by many retirees, public employers and retirement boards. John’s allowable earnings (the difference between his cap and his pension) changed four times in fourteen months. In the future, John’s post-retirement earnings cap will increase every time Mary gets a raise. In contrast, his allowable earnings will decrease every time the state approves a COLA that increases John’s pension. Neither Chapter 32 nor case law addresses what John’s post-retirement earnings limit would be if Mary’s salary had been less than John’s last salary or his pension. In general, retirement boards (including the MTRS and the MSERS) do not penalize retirees for having a lower-paid replacement.

John’s Pension	John’s Post-Retirement Salary	Earnings Cap	Start Date	Allowable Annual Earnings	Annualized Excess Earnings
\$40,000	\$20,000	\$51,000	Jan 2015	\$11,000	\$9,000
\$40,000	\$20,000	\$52,530	May 2015	\$12,530	\$7,470
\$40,900	\$20,000	\$52,530	July 2015	\$11,630	\$8,370
\$40,900	\$20,000	\$67,530	Jan 2016	\$26,630	\$0

Figure 1. Hypothetical Retiree’s Changing Earnings Limits and Excess Earnings.

As John's example illustrates, monitoring compliance with the hour and wage limitations set forth in Chapter 32 is difficult. The current system is largely self-policed, with routine enforcement of Section 91(b) challenging. Retirement boards typically enforce the caps based on complaints and subsequent reviews or investigations, and then only if the board has the staff capacity and interest to enforce them at all.

When a retirement board substantiates a complaint, it notifies the public retiree of its finding and requests repayment. If the retiree disputes the board's finding, they are entitled to a hearing before the board or a designated hearing officer. The retiree may then appeal the retirement board's decision to the Contributory Retirement Appeal Board (CRAB) under Section 16(4) of Chapter 32 (Section 16(4)). CRAB typically assigns these appeals to the Division of Administrative Law Appeals (DALA) for a preliminary decision, limiting its role to hearing DALA appeals.

Massachusetts case law currently allows retirement boards to recover all excess earnings, even if that recovery would exceed the amount paid out by the pension system during the period of excess earnings.⁴³ In other words, if John's post-retirement salary had been \$150,000 (when his cap was \$67,530), MSERS would have been entitled to \$82,470, even though the retirement board only paid out \$40,000. For the past several years, PERAC has proposed legislation that would limit excess earnings recoveries to the amount paid out annually by the board. The OIG believes this proposal is worth exploring.

⁴³ See *Barranco v. Mass. Teachers' Ret. Sys.*, Docket No. CR-10-796 and CR-11-622 at 36-37 (Contributory Ret. Appeal Bd., Dec. 18, 2015) ("Thus, the entire amount in excess of the allowable amount may be forfeited, regardless of its relationship to the amount of pension paid, because the pensioner was simply not permitted to earn it.").

FINDINGS

I. Current Law Supports Post-Retirement Hour and Wage Limitations, but Lacks Adequate Controls

The Massachusetts return-to-work statute is based on the long-held principle that a public employee may not receive both a salary and a pension from public bodies.

As stated by the Massachusetts Appeals Court in 2001's *Flanagan v. Contributory Retirement Appeal Board*, "Persons receiving a pension from a governmental unit in the Commonwealth have been prohibited from collecting a salary from the same entity since at least 1913."⁴⁴ The Court continued to explain that "[a]mendments [to § 91] in 1941 expanded the prohibition to preclude the simultaneous receipt of pension benefits and payments for services from governmental entities generally."⁴⁵ The *Flanagan* court explicitly stated that "[p]ublicly administered and financed pension benefits are intended to support those who are retired from public service."⁴⁶

The current law operates largely under a self-monitoring honor system without adequate controls.⁴⁷ As previously noted, only a handful of retirement boards require their retirees to report whether they are working. Section 91(c) requires each public retiree to know their earnings cap, track their hours, inform their post-retirement employer and stop working if they exceed either limit. Public retirees have little incentive to meet any of these obligations. The only penalty is a requirement to return excess earnings.

Other aspects of the current system reflect a lack of controls: (1) retirement boards are not automatically notified when their retirees return to work as a public employee of the Commonwealth or any of its political subdivisions, and (2) post-retirement public employers cannot easily set a salary that follows the law because every retiree has their own individual cap that is tied to the current salary of their last pre-retirement position.

II. Enforcing the Current Law Is Time and Resource Intensive

The complicated process of making calculations under the current system demands too much time and too many resources to practically serve as a means for retirement boards to (1) determine a public retiree's earnings cap, and (2) recover overpayments from public retirees who may have exceeded their cap, at least for all but the most egregious cases.

⁴⁴ *Flanagan*, 51 Mass. App. Ct. at 865 (2001).

⁴⁵ *Id.*

⁴⁶ *Id.* at 868.

⁴⁷ In confirming a local retirement board's authority to recover overpayments to a retiree, the *Flanagan* court observed, "It is unlikely the Legislature intended that retirees comply with § 91 under an honor system." *Id.*

The OIG decided to test the viability of using data collected in existing systems to enforce the post-retirement earnings limits in Section 91(b). The OIG’s data match looked at education retirees who were receiving pensions and working between 2013 and 2017. The OIG designed a system to match pension data from the MTRS, wage data reported to the Department of Unemployment Assistance (DUA), and critical shortage waiver data from the Massachusetts Department of Elementary and Secondary Education. The OIG found that a number of factors, including the lack of a centralized repository for the “salary that is being paid” for each retiree’s last position, made fully automating the process impossible. The OIG spent significant time attempting to clean and validate the data provided by MTRS and DUA before ultimately concluding the results were unreliable and that, under the current system, a data match could not be used for routine enforcement.

However, the OIG used further available data to identify 259 retired educators who appeared to be overearning during the period under review. Together, these individuals retired from 158 different school districts and worked in post-retirement jobs for 224 government entities.

The data match could only serve as a means to identify potential cases of overearning. To determine if any of these retirees in fact had earned in excess of the Section 91(b) earnings cap, the MTRS would have to conduct an individualized investigation for each. Such an investigation would involve requesting salary information from the post-retirement employer(s) as well as the retiree’s last employer to determine the “salary that is being paid” for their last pre-retirement positions.⁴⁸ Any retiree who disputed the MTRS’s investigatory findings would be entitled to a hearing on the matter. As noted above, Section 16(4) allows retirees to appeal overearnings decisions to CRAB.

In May 2019 and August 2020, based on information from the OIG’s research, the MTRS initiated investigations into the 25 retirees who appeared to have the highest post-retirement earnings:

1. The MTRS recovered overearnings, totaling \$203,534.36, from six retirees.
2. The MTRS initiated monthly collection of overearnings from four other retirees. This group of four retirees originally owed a total of \$490,378.59 in overearnings. As of January 24, 2024, this group has repaid a total of \$281,139.43. The group as a whole still owes \$209,239.16.
3. One retiree, who owes \$83,608.34, was scheduled to begin repaying the MTRS in February 2024.
4. One retiree was overpaid by more than \$365,000. She decided to waive her approximately \$20,000 pension rather than have MTRS garnish it.
5. The MTRS is still calculating the overpayment for a retiree who waived his pension during some of the years he worked post-retirement.

⁴⁸ Under Section 20(5)(b) of Chapter 32, retirement boards have the authority to “take evidence, subpoena witnesses [and] administer oaths” in order to recover excess pension payments.

6. The MTRS is still awaiting employment and payment records for three retirees.
7. Nine of the retirees did not, in fact, exceed their earnings caps.

While the pace of these investigations may have been slowed by the COVID-19 state of emergency, it is not unusual for investigations and disputes about overearnings to take years to resolve, especially if the parties litigate.

In another example, the MTRS received a tip in early 2009 that a retired school administrator, John Barranco, was working for a public educational collaborative and might be exceeding his post-retirement earnings limit. Barranco, who was technically employed by a private nonprofit organization that provided services to the educational collaborative, disputed the allegation and refused to provide relevant documents.

The MTRS spent almost two years investigating, and in November 2010 found that Barranco had exceeded his earnings limit and owed the MTRS \$51,242. The MTRS immediately began withholding Barranco's pension to offset the overpayment. This initial finding was based on publicly available documents related to the nonprofit organization, as well as a limited number of documents provided to the MTRS by the educational collaborative in response to a public records request. In April 2011, the OIG wrote to the MTRS providing additional information about Barranco's work for the educational collaborative.⁴⁹ In October 2011, the MTRS issued a new report finding that Barranco had, in fact, exceeded his earnings limit by \$815,747, and again began withholding his monthly pension benefit.

Barranco appealed the MTRS's decision to CRAB. In December 2015, DALA ruled in the MTRS's favor. Barranco made his final appeal to CRAB, which upheld DALA's ruling in January 2020, more than a decade after the MTRS initiated its investigation.⁵⁰ By the time CRAB ruled, the MTRS had recouped Barranco's \$815,747 in overearnings and resumed his pension payments.

III. The Commonwealth Needs a Uniform Way to Calculate and Enforce Post-Retirement Hour and Wage Limitations

Section 91(b) of Chapter 32 limits a public retiree's annual compensation from a public source to the difference between their pension and the current "salary that is being paid" to the person holding their former job. That imprecise statutory comparator creates a problem in that it only aligns with static positions. In other words, in many instances current comparable positions cannot be used to calculate the wage limitation. That difficulty arises with non-collective bargaining positions, in situations where job titles have changed and in instances in which positions have been outsourced or eliminated. Even when the job title still exists, determining the cap still requires multi-step research.

⁴⁹ See Letter from Inspector General Gregory W. Sullivan to James H. Salvie (Apr. 20, 2011) available at <https://www.mass.gov/lists/oig-2011-reports-and-recommendations>.

⁵⁰ See *Barranco v. Mass. Teachers' Ret. Sys.*, CR-10-796 and CR-11-622 (Contributory Ret. Appeal Bd. Jan. 8, 2020).

To improve its enforcement of post-retirement hour and wage limitations, the Commonwealth should work toward simplifying the earnings cap by basing it on the “calculated retirement salary average” used by a specific retirement board to calculate a public retiree’s pension, and creating a central annual adjustment process managed by PERAC or a new oversight agency so that each retiree’s cap can be easily calculated, maintained and updated with any applicable increases.

IV. Creating Exceptions to Hour and Wage Limitations Should Not Be the Rule

Notwithstanding Chapter 32’s limitations, the Legislature continues to weigh proposals that create exemptions allowing individuals, or classes of individuals, to collect a state or municipal pension while also earning a full-time salary from the Commonwealth or one of its subdivisions.

For example, Senate Bill 2571, *An Act Empowering Municipalities and Local Governments*, includes language that would allow public employers to apply to the Executive Office for Administration and Finance to exempt specific job titles or classes of jobs from Section 91’s post-retirement earnings and hour caps when a “critical shortage” of qualified applicants exists.⁵¹ The exemption would be active for two years, with the possibility of being extended. Retirees filling such positions would remain subject to the earnings cap for the first six months immediately following their retirement. This proposal creates a new critical shortage waiver in addition to that currently in place under Section 91(e) for educators.⁵² Under Section 91(e), the Department of Elementary and Secondary Education (DESE) grants a district a critical shortage waiver when the district shows a critical shortage of certified teachers or licensed professionals available for employment.⁵³ DESE grants the waiver for an initial period of one year.⁵⁴ A district may renew the waiver based on a new showing of good faith effort to hire non-retired personnel.⁵⁵ Retired educators who return to public education under a critical shortage waiver remain subject to the post-retirement earnings cap for the first two year of their post-retirement employment, after which they may earn more if they are filling a critical shortage position.⁵⁶

Both House Bill 2546, *An Act to Exempt the Executive Director of the Municipal Police Training Committee from Earnings Limitations*, and Section 37 of House Bill 2, the Governor’s Fiscal Year 2025 budget filing, contain language that would exempt a specific position, the Executive Director of the Municipal Police Training Committee, from retiree earnings limitations.⁵⁷ And House Bill 2488, *An Act Relative to Public Safety Personnel*, would allow retired municipal police and firefighters to provide

⁵¹ S.B. 2571, § 16, 193rd Gen. Ct. (Mass. 2024).

⁵² M.G.L. c. 32, § 91(e).

⁵³ See 603 CMR 7.15(13)(b).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ M.G.L. c. 32, § 91(e).

⁵⁷ H.B. 2546, 193rd Gen. Ct. (Mass. 2023); H.B. 2, § 37, 193rd Gen. Ct. (Mass. 2024).

“consulting services” to municipalities without adhering to earnings requirements.⁵⁸ The same bill would also allow the Secretary and Undersecretary of Public Safety, as well as personnel of the Municipal Police Training Committee or the Division of Fire Services, to earn both a full salary and a full pension.

Continuing to enact exemptions makes it more, not less, complicated for the Commonwealth to enforce the return-to-work rules. Further, carveouts created because “there is no one else for the job,” because “the work is unique,” or due to recruiting difficulties do not address the actual underlying reasons an exemption is sought: the failure to implement basic practices of succession planning and knowledge transfer, which are essential elements for the continuity of operations of any business.

These exemptions are also inequitable, with most appearing to benefit highly compensated employees. Creating exemptions, rather than addressing the root problem, creates different rules for different people – most often, those who earn the most money or those with the know-how to seek an exception to the rules. Instead of creating exemptions, government employers need to understand why retirees fill many of these positions.

The Commonwealth must take immediate action to develop and implement a more equitable public post-retirement system that allows earnings limits to be easily calculated, monitored and enforced. Moreover, the Commonwealth should work to eliminate or significantly reduce exceptions to post-retirement work rules that tend to favor higher-paid employees over lower-paid workers.

The Commonwealth needs to establish a task force to examine the purpose of a public pension and the idea of retirees being re-employed by the same or other public entities. The task force should review the current public retirement system and consider ways to attract individuals to a position, short of allowing them to simultaneously earn a full public pension and full public salary. The task force should also identify a better system of tracking earnings and hours instead of relying on self-calculation and self-reporting.

⁵⁸ H.B. 2488, 193rd Gen. Ct. (Mass. 2023).

CONCLUSIONS AND RECOMMENDATIONS

The OIG's review of the Commonwealth's statutory cap on earnings for public retirees revealed a lack of oversight and enforcement. The current system's overly complicated and time-consuming process of calculating earnings limits makes their enforcement impractical.

The OIG found that no single state agency tracks the pensions or post-retirement earnings of all public retirees. Due to the complex process of calculating earnings caps, oversight is inconsistent across the Commonwealth's departments and in some cases may be minimal, weak and ineffective. Departments that do examine earnings limits must perform a separate calculation for each individual retiree. Those calculations may require frequent recalculations. Enforcement is generally limited to the most egregious cases and more frequently initiated only after a particular situation is brought to the attention of a pension plan administrator or oversight agency. The law requires public retirees who exceed their limits to return the excess earnings. Public employers who pay in excess of the limits incur no penalties.

The Commonwealth should initiate two sets of reforms and controls on post-retiree earnings:

1. For the majority of public retirees who work on a limited basis, the systems of reporting, control and management of post-retiree work should be improved. This would benefit the Commonwealth, its subdivisions, and retirees themselves; and
2. In situations where relatively highly paid individuals are making truly substantial post-retirement earnings while drawing a pension, the Commonwealth should reject waivers and implement an effective system of monitoring, reporting and enforcement.

Specifically, to strengthen enforcement of the statutory post-retirement earnings limits, the OIG recommends that the Legislature consider:

1. Mandating and funding enforcement of post-retirement earnings limits, either by enhancing the authority of the Public Employee Retirement Administration Commission (PERAC) or by creating a new enforcement agency to work with the Legislature in considering actions such as:
 - a. Establishing clear statutory language requiring a public entity to determine if a job candidate is collecting a public pension. If a public retiree is hired, the hiring entity would be required to classify them as a "post-retiree" in their payroll system, add measures to track their post-retirement earnings cap, and report that information to PERAC or the oversight agency;
 - b. Simplifying the earnings cap by basing it on the "calculated retirement salary average" (CRSA) used by a specific retirement board to calculate a public retiree's pension, and creating a central annual adjustment process managed by PERAC or the new oversight agency, so that each retiree's cap can be easily calculated, maintained and updated with any applicable increases;

- c. Requiring PERAC or the new oversight agency to annually report such caps to each public retiree who performed post-retirement work during the prior calendar year;
 - d. Enacting disclosure and reporting requirements, which include:
 - i. Requiring public employers to report any public retiree’s employment to PERAC or a new enforcement agency;
 - ii. Requiring public retirees to annually report their employment status to PERAC or a new enforcement agency and authorizing an administrative hold on the pensions of retirees failing to report; and
 - iii. Requiring public retirement boards to include an acknowledgment of post-retirement earnings limits on retirement applications;
 - e. Prohibiting a public retiree from concealing their status by working for a public entity as a contractor, part-time regular employee or staff augmentation resource;
2. Simplifying the current system so that any public retiree can determine their post-retirement earnings limit by entering their CRSA and current pay rate into an online calculator;
 3. Requiring the Department of Revenue to facilitate an annual earnings match for all public retirees;
 4. Establishing a financial penalty – in addition to returning overearnings – for public retirees who knowingly and willfully exceed their post-retirement earnings cap; and
 5. Establishing a task force to examine the current public retirement system and to identify better ways to track earnings and hours rather than relying on self-calculation and self-reporting.

The Commonwealth must take immediate actions to develop and implement a more equitable public post-retirement system.

APPENDIX A: MASSACHUSETTS PUBLIC RETIREMENT BOARDS

The Commonwealth has 104 public retirement boards:

1. Adams Retirement Board
2. Amesbury Retirement Board
3. Andover Retirement Board
4. Arlington Retirement Board
5. Attleboro Retirement Board
6. Barnstable County Retirement Board
7. Belmont Retirement Board
8. Berkshire County Retirement Board
9. Beverly Retirement Board
10. Blue Hills Regional Retirement Board
11. Boston Retirement Board
12. Braintree Contributory Retirement Board
13. Bristol County Retirement Board
14. Brockton Retirement Board
15. Brookline Retirement Board
16. Cambridge Retirement Board
17. Chelsea Retirement Board
18. Chicopee Retirement Board
19. Clinton Retirement Board
20. Concord Retirement Board
21. Danvers Retirement Board
22. Dedham Retirement Board
23. Dukes County Retirement Board
24. Easthampton Retirement Board
25. Essex Regional Retirement Board
26. Everett Retirement Board
27. Fairhaven Retirement Board

28. Fall River Retirement Board
29. Falmouth Retirement Board
30. Fitchburg Retirement Board
31. Framingham Retirement Board
32. Franklin Regional Retirement Board
33. Gardner Retirement Board
34. Gloucester Retirement Board
35. Greater Lawrence Sanitary District Retirement Board
36. Greenfield Retirement Board
37. Hampden County Regional Retirement Board
38. Hampshire County Retirement Board
39. Haverhill Retirement Board
40. Hingham Retirement Board
41. Holyoke Retirement Board
42. Hull Retirement Board
43. Lawrence Retirement Board
44. Leominster Retirement Board
45. Lexington Retirement Board
46. Lowell Retirement Board
47. Lynn Retirement Board
48. Malden Retirement Board
49. Marblehead Retirement Board
50. Marlborough Retirement Board
51. Massachusetts Housing Finance Agency Retirement Board
52. Massport Authority Retirement Board
53. Massachusetts Teachers' Retirement Board, also known as the MTRS
54. Massachusetts Water Resources Authority Retirement Board
55. Maynard Retirement Board
56. Medford Retirement Board

57. Melrose Retirement Board
58. Methuen Retirement Board
59. Middlesex County Retirement Board
60. Milford Retirement Board
61. Milton Retirement Board
62. Minuteman Regional School District Retirement Board
63. Montague Retirement Board
64. Natick Retirement Board
65. Needham Retirement Board
66. New Bedford Retirement Board
67. Newburyport Retirement Board
68. Newton Retirement Board
69. Norfolk County Retirement Board
70. North Adams Retirement Board
71. North Attleborough Retirement Board
72. Northampton Retirement Board
73. Northbridge Retirement Board
74. Norwood Retirement Board
75. Peabody Retirement Board
76. Pittsfield Retirement Board
77. Plymouth County Retirement Board
78. Plymouth Retirement Board
79. Quincy Retirement Board
80. Reading Retirement Board
81. Revere Retirement Board
82. Salem Retirement Board
83. Saugus Retirement Board
84. Shrewsbury Retirement Board
85. Somerville Retirement Board

86. Southbridge Retirement Board
87. Springfield Retirement Board
88. State Employees' Retirement Board, also known as the MSERS
89. Stoneham Retirement Board
90. Swampscott Retirement Board
91. Taunton Retirement Board
92. Wakefield Retirement Board
93. Waltham Retirement Board
94. Watertown Retirement Board
95. Webster Retirement Board
96. Wellesley Retirement Board
97. West Springfield Retirement Board
98. Westfield Retirement Board
99. Weymouth Retirement Board
100. Winchester Retirement Board
101. Winthrop Retirement Board
102. Woburn Retirement Board
103. Worcester Regional Retirement Board
104. Worcester Retirement Board