

**TO:** All Unit Treasurers  
**FROM:** Michael Sacco, Esquire, Chief Executive Officer  
**DATE:** December 7, 2020  
**RE:** Regular Compensation

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As part of our continuing outreach effort to provide you with the most up-to-date and accurate information, attached please find our recently revised *Regular Compensation Checklist* to assist you and your payroll clerks in determining whether a particular form of compensation is regular compensation and subject to retirement deductions. What appears on the *Checklist* are payments that are specifically included or excluded either by statute, regulation or case law, or the payments are similar in nature to be included or excluded. **This new *Checklist* has some changes so if you have a previous *Checklist* please replace it with this one.** A few highlights of note: working out of grade, coaching and any per diem compensation, including call firefighter pay, are not pensionable. With respect to the working out of grade, retirement deductions should be withheld from the base pay or base compensation, but not from the additional compensation paid for working out of grade.

I also thought it might be instructive to provide you with the statutory, regulatory and case law upon which the *Checklist* is based. It has now been more than a decade since the Legislature amended the definition of regular compensation on July 1, 2009 to be "wages," which is defined in M.G.L. c. 32, § 1 as "the base salary or other base compensation of an employee paid to that employee for employment by an employer; provided, however, that "wages" shall not include, without limitation, overtime, commissions, bonuses other than cost-of-living bonuses, amounts derived from salary enhancements or salary augmentation plans which will recur for a limited or definite term, indirect, in-kind or other payments for such items as housing, lodging, travel, clothing allowances, annuities, welfare benefits, lump sum buyouts for workers' compensation, job-related expense payments, automobile usage, insurance premiums, dependent care assistance, 1-time lump sum payments in lieu of or for unused vacation or sick leave or the payment for termination, severance, dismissal or any amounts paid as premiums for working holidays, except in the case of police officers, firefighters, correctional officers and employees of a municipal department who are employed as fire alarm signal operators or signal maintenance repairmen money paid for holidays shall be regarded as regular compensation, amounts paid as early retirement incentives or any other payment made as a result of the employer having knowledge of the member's retirement, tuition, payments in kind and all payments other than payment received by an individual from his employing unit for services rendered to such employing unit, regardless of federal taxability; provided further, that notwithstanding the foregoing, in the case of a teacher employed in a public day school who is a member of the teachers' retirement system, salary payable under the terms of an annual contract for additional services in such school and compensation for services rendered by a teacher in connection with a school lunch program or for, services in connection with a program of instruction of physical education and athletic contests as authorized by section 47 of chapter 71 shall be regarded as "regular compensation" rather than as bonus or overtime and shall be included in the salary on which deductions are to be paid to the annuity savings fund of the teachers' retirement system."

The regulatory and oversight authority of the 104 public retirement systems is the Public Employee Retirement Administration Commission ("PERAC"), which has promulgated a regulation that further defines "wages" to "include payments made by the employer to the employee because of the character of the work, because of the employee's length of service, because of the time at which the work takes place as a condition of employment in a particular position, because of educational incentives, and

payments for holding the training, certification, licensing or other educational incentives approved by the employer for the performance of services related to the position the employee holds and payments made by the employer to the employee calculated as a percentage of base pay.”

Remarkably, although the definition of what constitutes regular compensation is the most highly litigated area in retirement law, there has only been two (2) appellate decisions that have addressed the issue, and only one (1) that is applicable to municipal, county and regional retirement boards.<sup>1</sup> In Public Employee Retirement Administration Commission v. Public Employee Retirement Administration Commission, 478 Mass. 832 (2018), the Supreme Judicial Court affirmed a CRAB decision that found the supplemental pay paid to employees who are receiving worker’s compensation is not regular compensation. The basis of this determination was that since “wages” must be geared to “services” provided, and an individual who is receiving worker’s compensation cannot provide services to the employer, the supplemental pay cannot be regular compensation. The SJC also stated, “As we have held, the ‘straightforward and unambiguous’ language of § 1 indicates that ‘regular compensation’ is “ordinary, recurrent, or repeated payments not inflated by any ‘extraordinary’ ad hoc’ amounts such as bonuses or overtime pay (citation omitted).” See Hallett v. Contributory Retirement Appeal Bd., 431 Mass. 66, 70 (2000) (“the statutory intent [behind the definition of ‘regular compensation’] is clearly to exempt irregular payments of compensation from the retirement base”). For payments to constitute ‘regular compensation’ they must also be ‘ordinary remuneration’ for the work performed. Rotondi v. Contributory Retirement Appeal Bd., 463 Mass. 644, 653 (2012).

There is a substantial body of administrative case law that also guides us as to what is not considered regular compensation:

Stipend for Drug Testing – Michael Perreira v. Fall River Retirement Board, CR-17-015 (May 29, 2020)

Hours worked beyond normal work schedule – Matthew Gutwill v. Framingham Retirement Board and PERAC – CR-18-0400 (May 3, 2019)

Training Incentive pay (arriving early for work for voluntary training) – Cheryl Binder v. State Board of Retirement, CR-16-185 (May 3, 2019)

Fees for part-time building inspector as percentage of permits – Lance Trevallion v. Hampden County Retirement Board, CR-17-282 (March 8, 2019)

Payments in lieu of health insurance premiums – Carter Terenzini v. WRRB, CR-16-56 (December 7, 2018)

Payments while on administrative leave as settlement – Charles Dodge v. Montague Retirement Board and PERAC, CR-18-288 (December 7, 2018)

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<sup>1</sup> The other case, Young v. Contributory Retirement Appeal Board, 486 Mass. 1 (2020), affirmed a CRAB decision that found a state employee who had purchased service as an 03 contract employee had not received regular compensation covered by the service purchase.

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Cashing in unused vacation time – Joseph O’Leary v. Lexington Retirement Board and PERAC, CR-15-30 (July 23, 2018)

Stand-by or beeper pay not equally assigned – Lilya Foksha, et al. v. West Springfield Retirement Board, CR-17-857 / 858 / 859 / 860 / 864 (July 20, 2018)

Working out of grade - Jeffrey Dudley v. Leominster Board of Retirement, CR-16-39 (October 5, 2018)

Compensation for voluntary training or holding a certification not as a mandatory condition of employment – Robert Kelleher v. Barnstable County Retirement Board and PERAC, CR-10-794 (February 26, 2016)

I hesitated to get too much into the weeds here, but I wanted you all to know that there is a method to the madness, and while we all wish that the retirement law was more clear-cut at times, we are required to follow the decisions that are issued, and in certain circumstances in which there is no case exactly on point, we must use our best experience and judgment to provide you with the best advice.

I hope you found this instructive - as noted on the *Checklist*, if you have any questions, don’t hesitate to call or email us – we are here to provide you with the assistance you need.

## REGULAR COMPENSATION CHECKLIST

| PENSIONABLE EARNINGS   | DEDUCTIONS | NO DEDUCTIONS |
|--|------------|---------------|
| BEFORE & AFTER SCHOOL PROGRAMS if regular and                              | X          |               |
| BEREAVEMENT  | X          |               |
| COMPENSATION TIME - Time used to fill REG hours                            | X          |               |
| COURT TIME - (During regular working hours only)                           | X          |               |
| DETECTIVE STIPEND  | X          |               |
| EDUCATION INCENTIVE  | X          |               |
| FITNESS STIPEND (If it is mandatory for department)                        | X          |               |
| HAZARDOUS PAY  | X          |               |
| HOLIDAY PAY  | X          |               |
| HOLIDAY PREMIUM POLICE & FIRE HOLIDAY ONLY                                 | X          |               |
| I.O.D 111F POLICE AND FIRE   | X          |               |
| JURY DUTY  | X          |               |
| LONGEVITY  | X          |               |
| PAID ADMINISTRATIVE LEAVE (IN ABSENCE OF A SEPARATION AGREEMENT)           | X          |               |
| PERSONAL DAYS (IF NOT A PAYOUT)  | X          |               |
| QUINN  | X          |               |
| RETRO PAY  | X          |               |
| SHIFT DIFFERENTIAL-2/3   | X          |               |
| SICK (UNLESS BUYOUT)   | X          |               |
| STIPEND SEE PAGE 2   | X          |               |
| TRAINING (Must be mandatory, during regular working hours)                 | X          |               |
| VACATION (IF NOT PAYOUT OR BUYBACK)  | X          |               |
| **COURT TIME IF DURING REGULAR HOURS                                       | X          |               |
| *STANDBY PAY (IF MANDATORY, REGULAR RE-OCCURRING NOT FOR SPECIAL PROJECTS) | X          |               |
| NON PENSIONABLE EARNINGS   |            |               |
| ALL FEES   |            | X             |
| BONUSES  |            | X             |
| CAR ALLOWANCE  |            | X             |
| CLOTHING ALLOWANCE   |            | X             |
| COACHING   |            | X             |
| CONSTABLE  |            | X             |
| DETAIL PAY   |            | X             |
| EXPENSE ALLOWANCE  |            | X             |
| INCENTIVES - Opt out insurance - sick payouts, etc.                        |            | X             |
| INSURANCE ALLOWANCE OR PREMIUMS  |            | X             |
| MILEAGE  |            | X             |
| OVERTIME   |            | X             |
| PAYOUT OF COMPENSATION TIME  |            | X             |
| PAYMENT FOR GIVING NOTICE TO RETIRE  |            | X             |

## REGULAR COMPENSATION CHECKLIST

| NON PENSIONABLE EARNINGS  | DEDUCTIONS | NO DEDUCTIONS |
|---|------------|---------------|
| PER DIEM  |            | X             |
| REIMBURSEMENTS  |            | X             |
| SEVERANCE PAY   |            | X             |
| STATE OF EMERGENCY - OVERTIME   |            | X             |
| SUBSTITUTE TEACHERS PER DIEM  |            | X             |
| SUPPLEMENTAL PAY WHILE RECEIVING WORKERS' COMPENSATION  |            | X             |
| TUITION   |            | X             |
| UNUSED VACATION LUMP SUM  |            | X             |
| UNUSED SICK TIME LUMP SUM   |            | X             |
| WORKERS' COMPENSATION   |            | X             |
| WORKING OUT OF GRADE  |            | X             |
|   |            |               |
| <b>STIPENDS</b>   |            |               |
| MUST BE REGULAR AND REOCCURRING SUCH AS:  |            |               |
| CERTIFICATION   |            |               |
| LICENSE TO HOLD   |            |               |
| EDUCATION   |            |               |
| BEEPER - IF MANDATORY /NON DISCRETIONARY  |            |               |
|   |            |               |
| <b>SUBSTITUTES</b>  |            |               |
|   |            |               |
| PER DIEM -PAY FOR ANY POSITION IS NOT PENSIONABLE   |            |               |
|   |            |               |
| IF YOU ARE STILL UNSURE WHETHER SOMETHING IS PENSIONABLE OR NOT, PLEASE E-MAIL YOUR INQUIRIES TO <a href="mailto:INFO@WRRBOARD.ORG">INFO@WRRBOARD.ORG</a> |            |               |