



Regular Compensation

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Pension reform and Chapter 21 of the Acts of 2009

- ✓ Why did the Legislature act to change the definition of regular compensation?
- ✓ Perhaps in response to:
 - The William Bulger case
 - The Pelonzi case

The cases

- ✓ Bulger – involved the housing allowance to which the president of UMass was entitled
- ✓ Pelonzi - involved specifically the personal use of an employer supplied vehicle, and more universally the notion of “in-kind” payments being pensionable.

The result

- ✓ The Legislature enacted Chapter 21 of the Acts of 2009, “An Act Providing Responsible Reforms in the Pension System”
- ✓ Among other things, it changed the definition of regular compensation.

How do we know if something is regular compensation, or not?

- ✓ Chapter 21 of the Acts of 2009
- ✓ 840 CMR 15.03
- ✓ Grandfather clauses
- ✓ O'Brien case
- ✓ Section 116 of Chapter 31 of the Acts of 2010

Chapter 21 of the Acts of 2009

- ✓ compensation received exclusively as wages by an employee for services performed in the course of employment for his employer.

Wages, defined

- ✓ the base salary or other base compensation of an employee paid to that employee for employment by an employer;

A question arises

- ✓ What exactly is “other base compensation?”

What is NOT included in the statutory definition of “wages”

- ✓ 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,

What is NOT included in the statutory definition of “wages”

- ✓ 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,

What is NOT included in the statutory definition of “wages”

- ✓ 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 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,

What is NOT included in the statutory definition of “wages”

- ✓ 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,

PERAC'S New Regulations

- ✓ In the wake of Chapter 21 of the Acts of 2009, PERAC promulgated new regulations regarding regular compensation to offer the retirement boards and others guidance.
- ✓ New regulations took effect May 28, 2010.
- ✓ Purpose: to help implement Chapter 21 of the Acts of 2009

840 CMR 15.03(3)(a)

- ✓ (a) to be considered regular compensation, any compensation to an employee must be compensation received exclusively as wages by an employee for services performed in the course of employment for his employer.

840 CMR 15.03(3)(b)

- ✓ (b) “wages” shall mean the base salary or other base compensation of an employee paid to that employee for employment by an employer including pre-determined, non-discretionary, guaranteed payments paid by the employer to similarly situated employees,

840 CMR 15.03(3)(b)

- ✓ provided, that "wages" shall 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;

840 CMR 15.03(3)(b)

- ✓ provided, that "wages" shall include payments made by the employer to the employee ...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;

Grandfather clause, Chapter 21 of the Acts of 2009

- ✓ SECTION 23. Notwithstanding any special or general law to the contrary, any amount, benefit or payment included in the definition of “regular compensation” by law or by regulation prior to the effective date of this act and included in any applicable collective bargaining agreement or individual contract for employment in effect on May 1, 2009, shall continue to be included in the definition of “regular compensation” during the term of that collective bargaining agreement or contract; provided, however, that any such amount, benefit or payment received after June 30, 2012 shall not be considered regular compensation.

Grandfather Clause, PERAC's new regulations

- ✓ (c) Any amount, benefit or payment included in the definition of “regular compensation” by law or by regulation prior to July 1, 2009 and included in any applicable collective bargaining agreement or individual contract for employment in effect on May 1, 2009, shall continue to be included in the definition of “regular compensation” during the term of that collective bargaining agreement or contract; provided, however, that any such amount, benefit or payment received after the term of said collective bargaining agreement or contract ends or after June 30, 2012, as the case may be, shall continue to be considered regular compensation unless such payment does not meet the criteria set forth in 840 CMR 15.03 (3) (b) or is excluded by the provision of 840 CMR 15.03 (3) (f);

O'Brien v. CRAB & another
76 Mass. App. Ct. 901 (2010)

- ✓ Background:
- ✓ Robert O'Brien, a correction officer for the Suffolk County sheriff's office, was injured as a result of and while in the performance of his duties, and awarded accidental disability retirement on that basis.

O'Brien v. CRAB & another
76 Mass. App. Ct. 901 (2010)

- ✓ When calculating the amount of his allowance, the issue of what to include in his regular compensation for the period in question naturally arose.

O'Brien v. CRAB & another
76 Mass. App. Ct. 901 (2010)

✓ O'Brien sought to include:

✓ holiday pay

✓ a fitness bonus,

✓ a uniform allowance,

✓ longevity pay

✓ an educational differential.

(No retirement deductions were taken from these items, as the court noted at Footnote 5.)

O'Brien v. CRAB & another
76 Mass. App. Ct. 901 (2010)

The Appeals Court held that the educational differential and longevity pay are includable, but that the holiday pay, fitness bonus and uniform allowance are not to be included in O'Brien's regular compensation.

O'Brien v. CRAB & another
76 Mass. App. Ct. 901 (2010)

- ✓ The retiree's uniform allowance does not denote 'recurring payments for an employee's services.' (citations omitted) A uniform allowance is not a form of payment, or 'other compensation,' for the services rendered by the employee; rather, it is a benefit offered by the public employer as a matter of convenience so that its employees will be attired in standard and identifiable clothing on the job, especially in light of the potentially dangerous setting in which the employees work. The uniform is a '*tool*' required to be used by the employees in the sheriff's office. O'Brien at 903. (Emphasis supplied.)

The O'Brien Court distinguishes between:

- ✓ allowances which are paid for services rendered by an employee and
- ✓ payments which are a benefit offered by an employer as a matter of convenience, or to provide a “tool” required by the job

O'Brien v. CRAB & another
76 Mass. App. Ct. 901 (2010)

- ✓ The Court focuses necessarily on the uniform allowance at issue, but many other payments will also be impacted and no longer considered regular compensation.

O'Brien v. CRAB & another
76 Mass. App. Ct. 901 (2010)

- ✓ These payments include but are not limited to:
- ✓ clothing allowances
- ✓ uniform allowances
- ✓ boot allowances
- ✓ cleaning allowances
- ✓ name tag allowances

(This list is intended to be illustrative and not exhaustive.)

Section 116 of Chapter 131 of the Acts of 2010

- ✓ The retirement allowance of any retired member which included in the calculation of such allowance amounts paid as clothing allowance upon which contributions were made shall not be reduced, modified or changed because of the inclusion of such clothing allowance payments. Notwithstanding any special or general law to the contrary, any amount paid to an active member for clothing allowance upon which contributions were made and included in any applicable collective bargaining agreement or individual contract for employment in effect on May 1, 2009, shall continue to be included in the definition of "regular compensation" during the term of that collective bargaining agreement or contract; provided, however, that any such amount, benefit or payment received after June 30, 2012, shall not be considered regular compensation.

Section 116 of Chapter 131 of the Acts of 2010

- ✓ Allows clothing allowances upon which contributions have been made to be considered regular compensation temporarily.
- ✓ No action required with respect to retirees whose allowances were calculated including amounts paid for clothing allowances.

Section 116 of Chapter 131 of the Acts of 2010

- ✓ For active members, clothing allowances upon which contributions are paid will continue to be considered regular compensation if:
 - They are contained in a collective bargaining agreement in effect 5/1/09.
 - Will be regular compensation through life of contract, but no later than 6/30/2012.