

MACRS

Fall 2024

12 Most Interesting Recent Questions



Judith A. Corrigan, General Counsel | PERAC
Felicia McGinniss, Senior Associate General Counsel | PERAC

FALL MACRS CONFERENCE | DECEMBER 11, 2024

Top 12 Most Interesting Recent Questions

- Gleaned from:
 - Phone calls to PERAC,
 - Opinion letter requests to PERAC,
 - Emailed questions to PERAC,
 - Questions arising from Disability Transmittals, and
 - Questions arising from the Fraud Prevention Unit.

1. What Type of Plan is Chapter 32 Under the IRS Code?

- My member wants to roll over funds and we are stymied by the financial institutions question regarding what kind of plan Chapter 32 actually is. Can you help us?

Chapter 32 – The Basics

- There are 104 retirement systems in Massachusetts.
- Each is a defined benefit plan.
- Each is a “qualified plan” operating under Section 401(a) of the Internal Revenue Code.
- For purposes of accepting or initiating a rollover, members should inform their banking institutions that we are a **tax-qualified 401(a) plan**.

Chapter 32, Section 12D

- A retirement system subject to this chapter shall pay all benefits in accordance with the requirements of section 401(a)(9) of the Internal Revenue Code and the regulations in effect under that section, as applicable to a governmental plan as defined in section 414(d) of the Internal Revenue Code.

Chapter 32 is a Qualified Plan

- IRS Determination letters for the 104 plans most recently issued between August 12 and August 15, 2014.
- The “determination” is that the plans are in compliance with the IRS code.
- Though they bear an expiration date of January 31, 2019, the expiration date on determination letters is no longer operative.
- See PERAC Memorandum No. 12 of 2020 for more information.

2. Can The Federal Government Garnish a Pension?

- Our retirement board has just received a “Writ of Continuing Garnishment” regarding a retiree who has been ordered to make restitution regarding a federal crime.
- Given the anti-alienation provision in Section 19 of Chapter 32, do we have to honor this Writ?

Section 19: Chapter 32's Anti-Alienation Provision

- Chapter 32, Section 19 generally prohibits the attachment of a member's annuity, pension, retirement allowance or rights in the funds of the system annuity.
- **Exceptions:**
 - Making restitution in the case of dereliction of duty by any member as set forth in G.L. c. 32, § 15.
 - Child support orders.
 - Spousal support orders.

Yes, Virginia, a Massachusetts Retirement Allowance May be Subject to a Federal Garnishment.

- One response: “...[T]his is likely a lien filed pursuant 18 USC 3613 <https://www.law.cornell.edu/uscode/text/18/3613> enforcing victims restitution remedies under several federal criminal statutes as listed in subsection (c) thereof. There is a Fifth Circuit case that holds that these provisions supersede the anti-alienation provisions of Code Section 401(a)(13) [*United States v Cay*, No. 09-30218 (5th Cir. 2010)].”
- Many other respondents echoed this sentiment and cited this Fifth Circuit case.

In a Nutshell

- This exception to normal preemption rules only applies to garnishment orders issued in connection with Federal **CRIMINAL** restitution awards.
- The plan must still refuse to honor most garnishment orders issued in connection with a Federal **CIVIL** restitution or damages award and state law claims.
- This all came about in 1990, when the United States Congress enacted the Federal Debt Collection and Procedures Act.

3. If I Work for a Private Company as a Retiree, Do I Have to Monitor My Hours and Earnings?

- G.L. c. 32, s. 91(b) governs post-retirement work in the public sector for all retirees.
- Retirees receiving a retirement allowance may be employed “in the service of” a Massachusetts governmental unit.
 - This means a person whose regular duties require that their time be devoted “to the service” of a Massachusetts governmental unit.

Employment Outside of a Chapter 32 System

- “In the service of” includes work such as:
 - A W2 employee of the Commonwealth, a municipality, city, town, etc.
 - A consultant or independent contractor hired by the Commonwealth, a city, town, municipality, etc.
 - An employee of a private company working on projects for a municipality, city, town, etc.

Employment Outside of a Chapter 32 System *(Cont'd)*

- The fact that the employer is not a member of a Chapter 32 system does not matter.
 - *Kahn v. State Bd. of Ret.*, CR-14-524 (DALA Feb. 28, 2019) (appealed to CRAB)
 - *Pellegrino v. Springfield Pkg. Auth.*, 69 Mass. App. Ct. 94 (2007)
- Focus on who **receives** the service, not who cuts the check.

4. Are the Stipends Received By Retirement Board Members Regular Compensation?

- All retirement board stipends are under \$5,000 per year, bringing them under the “Under \$5,000 Rule” established with Chapter 21 of the Acts of 2009, and the amended Section 4(1)(o).
- So, the answer is **“no”** to a stand-alone stipend.
- But the answer is **“yes”** if a retirement board member is an active member of the retirement system on which he/she serves, because this would be a second position in the same system.

Not Regular Compensation, but Contributions on the Stipend May Continue

- If a retirement board member was already a contributing member of the system prior to Chapter 21 of the Acts of 2009, based upon his/her retirement board stipend, contributions should continue to be made on that stipend, though no creditable service will be granted after a certain date.
- See PERAC Memorandum No. 10 of 2010 for more information.

Second Position in the Same System

- If the retirement board member has another position in the same system, the stipend received by him/her would be considered regular compensation.

To Sum Up

Stipend is Stand-Alone:

- No to regular compensation and creditable service, due to the “Under \$5,000 Rule.”
- Contributions to the retirement system could continue under certain circumstances.

Member has Another Position:

- The retirement board stipend would be pensionable.
- The amount would be added to the calculation of the member’s retirement allowance at the end of his/her career, if in the 3 or 5 years used in the calculation.

5. Can “On Call” Pay Be Considered Regular Compensation?

- We have a housing authority which has three custodians. All three of them are required to be “on call” at certain times. All three of them receive payment for being “on call.”
- Could this payment possibly be considered regular compensation?

Characteristics of Regular Compensation

- Whether a payment is or is not included as regular compensation is determined by Chapter 32, § 1 and 840 CMR 15.03(3).
- The **enduring characteristics** of regular compensation are whether the payments are predictable, pre-determined, non-discretionary, and guaranteed.
- Since the amendment of the definition of regular compensation by Chapter 21 of the Acts of 2009, for a payment to be considered regular compensation it must be **compensation received for services performed**.

840 CMR 15.03(3)(a) (in pertinent part)

- (3) During any period of active service subsequent to July 1, 2009 the term “Regular Compensation”, as defined by M.G.L. c. 32, § 1, shall be determined subject to the following:
- (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.

Case by Case Basis

- PERAC regulations specifically require that regular compensation must be received as wages and for services performed in the course of employment.
- The “on call” pay to employees of the housing authority appears to be non-discretionary and regular. The payments are also for services rendered to the housing authority.
- Therefore, these payments **appear to be** regular compensation.

6. Should Cost-of-living Adjustments (COLAs) be Paid on a Section 100 Benefit?

- G.L. c. 32, s. 103(c) permits retirement boards to vote for a COLA each year but does **not** require that one be granted every year.
- If granted, Section 103(c) specifically provides that a COLA is to be applied to each **“retirement allowance, pension, or annuity”** paid to any former employee, or spouse, or other beneficiary of a former employee.

COLAs and Section 100 Benefits

- G.L. c. 32, s. 100 provides benefits to beneficiaries of members who are killed in the line of duty.
- Specifically, Section 100 provides that the beneficiary receives “an annual amount of **pension** which shall be equal to the amount of salary which would have been paid....”
- As the Section 100 beneficiary is receiving a pension, they should also receive a COLA.

Bonus COLA Question

- If I waive my pension pursuant to G.L. c. 32, s. 90B will I get any COLAs included in my retirement allowance once I restart it?
 - **Yes!**
 - As noted in the earlier slide, Section 103(c) specifically provides that a COLA is to be applied to each “**retirement allowance, pension, or annuity**” paid to any former employee, or spouse, or other beneficiary of a former employee.
- Once the retirement allowance is restarted, all COLAs awarded during the period of waiver should be applied.

7. Do Members Need to be Vested in Order to Complete a Military Service Purchase?

- **NO.**
- G.L. c. 32, s. 4(1)(h) provides, in relevant part:
 - ... a member in service of a retirement system as defined in section 1 shall be provided written notice by the retirement board upon entry into service that if they qualify as a veteran who served in the armed forces of the United States, they shall be entitled to credit for active service in the armed services of the United States; provided, however, that such active service shall not be credited until such member, **prior to or within 1 year of vesting** pursuant to this chapter, has paid into the annuity savings fund of such system....

8. Can a Member be Eligible For a Disability Retirement if They are Still Working?

- An application came to PERAC recently for its Section 21(1)(d) review.
- All application materials clearly stated that the member was still working.
- PERAC had no choice but to remand, while the retirement board said it had no choice but to process.

If a Member is Still Working, They are Not Entitled to a Disability Benefit.

- The first statutory question to be answered by a medical panel doctor is “Is the member incapacitated from performing the essential duties of their job?”
- If a person is still working when they apply for disability retirement, then the application should not be processed.
- This is one of the few reasons PERAC would remand an ordinary disability application.

Realities of the Situation

- Difficult not to process a tendered application.
- However, rejection of an application on this very specific basis may cause a member to come to their senses, so to speak, and stop working.
- Members seeking ordinary are caught between a rock and a hard place, but the law requires you be incapacitated from performing the duties of your position as a first hurdle in the process.

9. What if a Non-Spouse Receives an Option D Benefit and the Member Had Minor Children. Do the Children Receive any Benefit?

- G.L. c. 32, s. 12(2)(d) provides a death benefit for the beneficiary of an individual who passes away while a member of a retirement system.
- Section 12(2)(d) benefits are payable to one of the following: spouse, ex-spouse who has not remarried, parent, child, or sibling.
- Any eligible individual who is **nominated** as an Option D beneficiary **must** take the Option D allowance.

Minor Child Payments Under Option D

- G.L. c. 32, s. 12B provides benefits for minor children in this instance:
 - ...if there are any surviving children of said deceased member who are under age eighteen or over said age and physically or mentally incapacitated from earning on the date of death of the member, or under age twenty-two if a full-time student, there shall be paid to such spouse for the benefit of all such children **an additional allowance of one hundred and twenty dollars a month for one child plus an allowance of ninety dollars a month for each additional child** subject to the provisions of paragraph (e) of section one hundred and two.
- The guardian of the minor children would receive the above amounts even though the spouse is not the nominated Option D beneficiary.

Caveat: Member in Service v. Member Inactive

- If an individual passes away as an inactive member, a spouse is eligible to elect the Option D benefit but is **not** eligible for the “minimum allowance.”
- If there is a nominated Option D beneficiary, then they must take the Option D allowance.
- **HOWEVER, no benefit** would be available for the children of an inactive member under Section 12B because that section specifically highlights the benefits for “members in service.”

10. What is the Definition of a “Licensed Healthcare Professional” Under Section 3 of the Violent Act Injury?

- Our retirement system has nurses and nurses’ aides. Would they be eligible for this special benefit under the Violent Act Injury?

To Whom Does the Violent Act Injury Apply?

- Firefighters
- Emergency medical technicians
- Licensed health care professionals and
- Certain police officers**

** State Police retire under Section 26 of Chapter 32 and are thus not eligible for benefits under the Violent Injury Act provision provided for in Section 7.

What is a Licensed Health Care Professional?

- “Health care professional” is extremely broad.
- The requirement of licensing may rein this in a bit, but in Massachusetts, for example, certified nursing assistants must be licensed.
- This will be addressed by PERAC through the regulatory process.
- For now, an analysis on a case by case must be undertaken, including whether someone is a health care professional and is licensed.

11. If I Voluntarily Terminated Service, But Left My Accumulated Deductions on Account, Would I be Subject to the Two-Year Rule of G.L, c. 32, s. 3(6)(e) if I Return to a Different System?

- An individual contacted PERAC and explained that she was originally a member of the Rose Red Retirement System, where she had worked for 7 years and 8 months.
- She is currently 63 years old and is contemplating taking a position with the Blue Bird Retirement System and wanted to know whether she would be subject to the two-year rule Section 3(6)(e).

Section 3(6)(e): Leave of Absence and Reinstatement to or Re-entry Into Active Service (1)

- (e) ...no person who becomes a member under subdivision (3) of this section, and no member who is reinstated to or who re-enters active service as provided for in paragraph (b), (c) or (d) of this subdivision, or who transfers or re-establishes his membership as provided for in subdivision (8) of this section, shall be eligible to receive a superannuation retirement allowance, an ordinary disability retirement allowance or a termination retirement allowance **unless and until he shall have been in active service for at least two consecutive years....**

Section 3(6)(e): Leave of Absence and Reinstatement to or Re-entry Into Active Service (2)

- However, Section 3(6)(e) also provides:
 - ... provided that, in the case of a member whose account is transferred under said paragraph (8) (a), this paragraph shall not apply after the member has rendered service or attained an age so that he would have been eligible to retire if he had continued to be a member of the retirement system from which his account was transferred.
- Here, the individual is transferring between systems, and so she would be exempt from the two-year limitation Section 3(6)(e) once she reaches her 10 years of creditable.

Section 3(6)(e): Leave of Absence and Reinstatement to or Re-entry into Active Service (3)

- Members need to meet **both** the age and years of service requirement.
- Section 3(6)(e) provides that the two-year limitation does not apply “...after the member has rendered service or attained an age so that **he would have been eligible to retire** if he had continued to be a member of the retirement system from which his account was transferred.”

12. Should People Contact PERAC About Everything Involving Retirement Systems?

- This is gleaned from “appeals” PERAC receives from certain entities.
- PERAC is generally not an appropriate entity to which to appeal determinations of a retirement board.
- The statute says to appeal a determination of a retirement board or PERAC to the Contributory Retirement Appeal Board (Chapter 32, Section 16(4)), or, in some cases, the District Court (Chapter 32, Section 16(3)).
- What are examples of issues beyond PERAC’s expertise or jurisdiction?

Issues Which Should Not Be Directed to PERAC

■ HR Complaints

- If it concerns a retirement board staff member, a complaint should be sent to the retirement board chair.

■ Open Meeting Law Complaints

- This should be directed to the Secretary of the Commonwealth's Open Meeting Law Division.

Also Outside of PERAC's Area of Expertise

- **Retirement Board Election Complaints**
 - This should be sent to the retirement board's election officer.
- **Questions on Retention Schedules**
 - This should be sent to the Secretary of the Commonwealth's Records Retention Division.
- **Questions on Social Security Benefits**
 - These should be directed to the local Social Security Administration Office.

Questions Concerning Health Insurance Coverage and Deductibles

- PERAC has no expertise about health insurance, which varies from municipality to municipality, and even from job to job.
- Numerous calls are received by PERAC on this issue every month.
- We refer them to the GIC, their retirement board, or their former employer on this all-important issue.

Conclusion

- Thanks for your attention!
- Lots of questions abound and we are here to help you and your members with anything that arises.
- If you have follow-up questions:
 - judith.a.corrigan@mass.gov
 - felicia.m.mcginness@mass.gov

MACRS

Fall 2024



QUESTIONS??